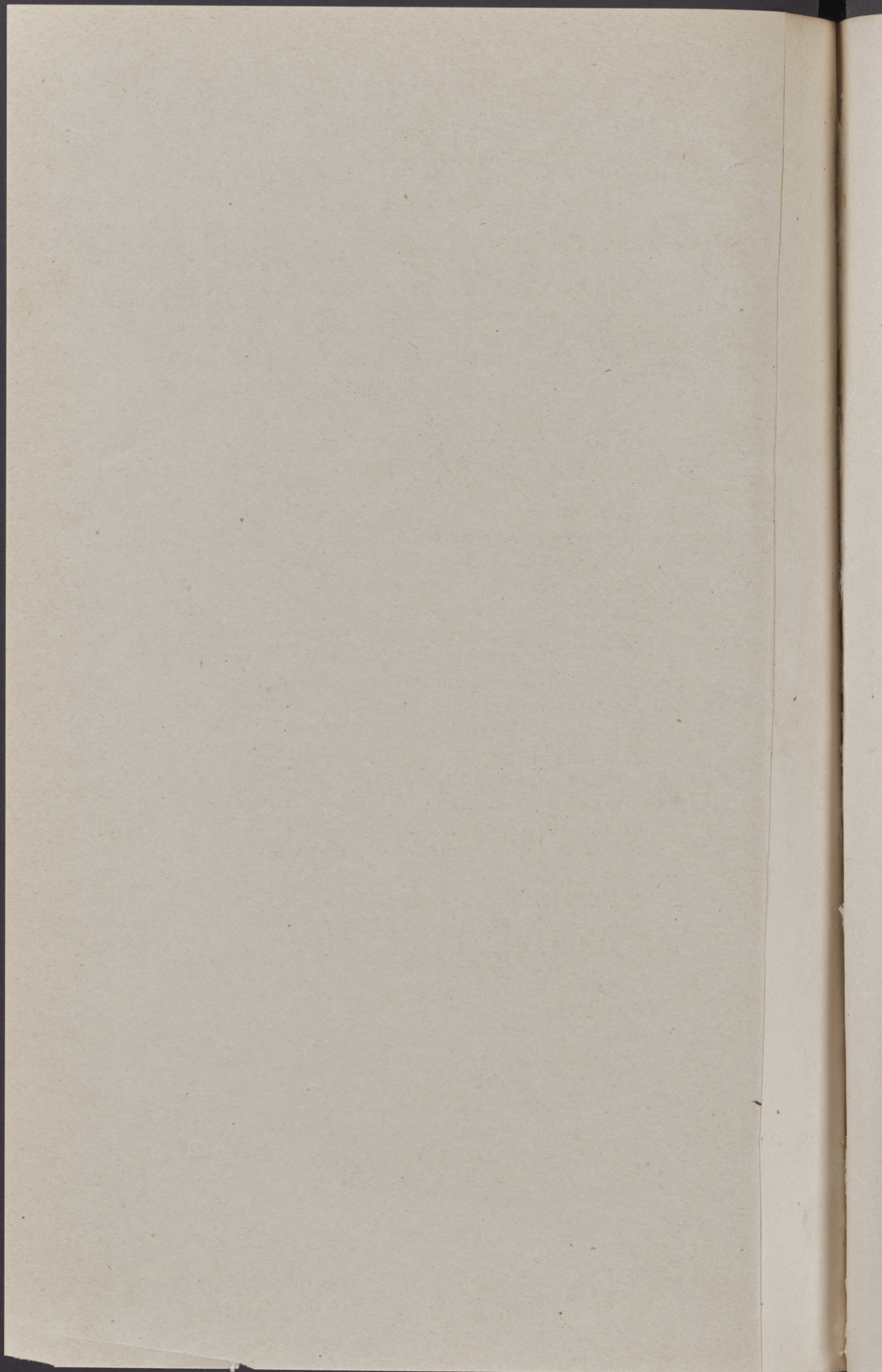


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WRIT OF CERTIORARI.

NEW JERSEY, ss.

(SEAL) THE STATE OF NEW JERSEY to Frank Smathers, Judge of the District Court of the City of Atlantic City, William L. Risley, Clerk of said Court, Jacob D. Lit, Samuel D. Lit and Charles A. Wimpfheimer,

GREETING:

10

We, being willing, for certain reasons, to be certified of the judgment, order and proceedings given and made before you in a certain action, plaint or proceeding brought against the R. C. Maxwell Company, a corporation of New Jersey, at the suit of Jacob D. Lit, Samuel D. Lit and Charles A. Wimpfheimer, to recover possession of certain premises mentioned in such proceedings, do hereby command you that you send under your seal to our Justices of the Supreme Court of Judicature of the State of New Jersey, on the first day of March, 1920, next, the judgment, order and proceedings aforesaid, with all things touching and concerning the same, as fully and entirely as they remain before you, by whatsoever names the parties may be called therein, together with this writ, that we may further cause to be done what, of right, we shall see fit to be done.

20

WITNESS William S. Gummere, Chief Justice of our Supreme Court at Trenton, this twentieth day of February, nineteen hundred and twenty.

ENOCH L. JOHNSON,
Clerk.

BABCOCK & CHAMPION,
Attorneys.

NEW JERSEY SUPREME COURT.

R. C. Maxwell Co.	}	ON CERTIORARI WRIT OF CERTIORARI
Prosecutor		
vs.		
Jacob D. Lit, Samuel D. Lit and Charles A. Wimpfheimer.	}	Writ Returnable March 1st, 1920.
Respondents.		

10

I allow the within writ to operate as a stay. Let it be sealed. Feb. 20, 1920, on condition that the Prosecutor will consent to an early hearing and accept short notice of trial.

CHAS. C. BLACK, J. S. C.

Service hereby acknowledged of a copy of within
20 writ.

Feb. 21, 1920.

HARRY CASSMAN,
Attorney for Respondents.

30

RETURN TO WRIT OF CERTIORARI.

Filed March 1, 1920.

To the Honorable, the Chief Justice and Associate
Justices of the New Jersey Supreme Court:

The judgment, order and proceedings herein, with
all things touching and concerning the same as fully
and entirely as they remain in the District Court of
the City of Atlantic City, I do hereby certify, under
the seal of the Court, in the schedule hereto annexed,
as within I am commanded. 10

FRANK SMATHERS,
Judge of the District Court of
the City of Atlantic City.

20

30

REASONS.

NEW JERSEY SUPREME COURT.

	R. C. Maxwell Company, Prosecutor,	}	ON CERTIORARI. REASONS.
	vs.		
10	Jacob D. Lit, Samuel D. Lit and Charles A. Wimpfheimer, Respondents.	}	

20 Comes now the Prosecutor, R. C. Maxwell Company, by Babcock & Champion, its Attorneys, and assigns the following reasons why the judgment for possession rendered by the Atlantic City District Court, in the above cause, in favor of the Respondents and against the Prosecutor, should be set aside and reversed:

1. The Atlantic City District Court was without jurisdiction to enter a judgment for possession in favor of the Plaintiffs below, because there was no proof establishing the relation of Landlord and tenant in that,

30 (a) The affidavit filed upon which summons was issued, alleged the owners of the premises in question to be Jacob D. Lit, Samuel D. Lit and Charles A. Wimpfheimer and there was no proof from which the Court could find, as a fact, that said Jacob D. Lit, Samuel D. Lit and Charles A. Wimpfheimer were the owners of said premises.

(b) The affidavit alleged the making of a parole agreement between said Jacob D. Lit, Samuel D. Lit and Charles A. Wimpfheimer and the Bacharach

Real Estate Company, agents for the Plaintiffs below. There was no proof to show that there was any agreement made and entered into between Jacob D. Lit, Samuel D. Lit and Charles A. Wimpfheimer and Bacharach Real Estate Company, or between any other persons for the letting of said premises for the term stated in said affidavit.

2. The District Court was without jurisdiction to render said judgment for possession in favor of the plaintiffs below, because the plaintiffs below, through their agent, Bacharach Real Estate Company, accepted rent from the defendant below, under and pursuant to the terms of the lease theretofore existing between the parties for said premises, which payment by defendant and acceptance by plaintiffs, renewed said lease for an additional term of one year, and, therefore, defendant's term in said premises had not then expired.

10

20

3. The District Court was without jurisdiction to render said judgment for possession in favor of the plaintiffs below because there was no proof of the contract of letting alleged in the affidavit.

BABCOCK & CHAMPION,
Attorneys for Prosecutor.

30

JUDGMENT RECORD

State of New Jersey, }
 County of Atlantic, } ss.

IN THE DISTRICT COURT OF THE CITY OF
 ATLANTIC CITY.

10

Jacob D. Lit, Samuel D. Lit and Charles A. Wimpfheimer, Claimant, vs. R. C. Maxwell Company, a Corporation, Defendant.	}	In an Action in Tenancy Rent — Expiration of Term. Harry Cassman, Attorney of Clmt. Babcock & Champion, Atty. of Deft. No. 33556
---	---	---

20

An affidavit was filed and a summons issued in the above stated cause, Jan. 15, A. D., 1920, which summons was returnable Jan. 21, A. D., 1920, at ten o'clock A. M., and was returned by the Sergeant-at-Arms as follows:

30

I served the within summons Jan. 16, 1920, on the defendant by reading it to M. R. Hay, Chief Clerk, and giving her a copy thereof.

Jan. 21, 1920. Adjourned to Jan. 28, 1920.

Jan. 28, 1920: The defendant appearing, and, it further appearing by the return endorsed thereon that the summons was duly served, the court proceeded to hear and determine the cause.

Mrs. E. W. Boehm, stenographer, sworn and recorded all testimony.

John Estell Evans and Solis Cohen sworn and testified on the part of the plaintiff. Lease admitted in evidence, marked exhibit P1. Lease admitted in evidence, marked exhibit P2. Letters admitted in evidence, marked exhibits P3, P4, P5.

Charles L. Maxwell and R. C. Maxwell sworn and testified on the part of the defendant. 10

Decision Reserved.

February 19, 1920, Decision Rendered.

Judgment for Possession.

Defendant's Costs, Jan. 28, 1920:

Stenographer	\$10.00	20
Summons	2.10	
Entering Judgment	1.00	

SUMMONS.

ATLANTIC COUNTY, }
 ATLANTIC CITY, } ss.

THE STATE OF NEW JERSEY to any Constable
 of ATLANTIC COUNTY:

10 You are hereby commanded to require R. C. MAX-
 WELL COMPANY, a corporation in possession of
 certain roofs of stores and premises situate at the
 Northeast corner of Illinois Avenue and the Board-
 walk, in the City of Atlantic City, forthwith to re-
 move from or surrender the same or to show cause
 before THE DISTRICT COURT OF THE CITY OF
 ATLANTIC CITY, to be held at the COURT ROOM,
 CITY HALL, THIRD FLOOR, NORTH ENTRANCE,
 in the said City, on Wednesday, the 21st day of
 January, nineteen hundred and twenty, at ten o'clock
 20 in the forenoon, why possession of said premises
 should not be delivered to Jacob D. Lit, Samuel D.
 Lit and Charles A. Wimpfheimer claiming the same.

WITNESS, FRANK SMATHERS, ESQ.,
 (SEAL) JUDGE of said Court, at Atlantic City,
 aforesaid, the 15th day of January, in the
 year of our Lord nineteen hundred and
 twenty.

30 WILLIAM L. RISLEY, Clerk.
 HARRY CASSMAN, Attorney.

ATLANTIC CITY DISTRICT COURT.

Jacob D. Lit, Samuel D. Lit and Charles A. Wimpfheimer, Plaintiffs.	}	Landlord's Affidavit. Expiration of Term.
vs.		
R. C. Maxwell Company, Defendants.	}	

10

State of New Jersey, Atlantic County,	}	ss.

John Estell Evans, of full age, being duly sworn according to law, on his oath says that he is a member of the firm of Isaac and Harry Bacharach and John Estell Evans, trading as Bacharach Real Estate Company, agents to rent, to collect rents, and to dispossess tenants of Jacob D. Lit, Samuel D. Lit and Charles A. Wimpfheimer, owners of the stores and premises situate at the Northeast corner of Illinois Avenue and the Boardwalk, in the City of Atlantic City, County of Atlantic and State of New Jersey, that R. C. Maxwell Company is now in possession of the roofs of said stores of said premises by virtue of a parol agreement made on or about the first day of December, 1919, between said R. C. Maxwell Company and said Bacharach Real Estate Company, agents, as aforesaid, whereby Bacharach Real Estate Company, agents, as aforesaid, let and rented said premises to said R. C. Maxwell Company for a period of one month from December 1st, 1919, to January 1, 1920, for the rent or sum of \$40; that on the 31st day of December, last past, said Bacharach Real Estate Company caused a notice and demand to be served upon the said R. C. Maxwell Company by serving a notice personally upon William

Bach, Jr., the manager of the said R. C. Maxwell Company at the business office of the said R. C. Maxwell Company in Atlantic County by giving him a copy thereof, requiring said R. C. Maxwell Company to deliver possession of said premises to said Bacharach Real Estate Company, agents as aforesaid, on the first day of January, 1920, a true copy of which said notice is annexed to this affidavit and made a part hereof; that the right of possession of said
10 premises of said R. C. Maxwell Company expired on the first day of January, 1920, but that nevertheless the said R. C. Maxwell Company still holds over and continues in possession of said premises up to the present time.

JOHN ESTELL EVANS.

Sworn and subscribed to before me this 15th day of January, A. D., 1920.

20

Kathryn S. Pomelear,
Notary Public for N. J.

To R. C. Maxwell Company:

You are hereby notified to quit the premises rented by you of us and now occupied by you, being a sign privilege on roofs of stores located at Illinois Avenue and the Boardwalk, Atlantic City, New Jersey, on the 1st day of January, 1920, and to surrender possession thereof to us on that day your tenancy on that day expiring according to the terms of
30 our lease with you.

Bacharach Real Estate Company,
Agents.

Dated Dec. 31, 1919, at Atlantic City, N. J.

DISTRICT COURT OF ATLANTIC CITY.

Jacob D. Lit, Samuel D. Lit and Charles A. Wimpfheimer, vs. R. C. Maxwell Company, a Corporation. } Landlord and Tenant. 10

TESTIMONY.

Before Hon. Frank Smathers, in the District Court of Atlantic City.

J. ESTELL EVANS, Sworn.

Direct Examination. 20

By MR. CASSMAN:

Q. You are a member of the firm of the Bacharach Real Estate Company?

A. I am.

Q. Are Bacharach Real Estate Company the agents to rent and collect rents and dispossess tenants of the Windsor Block property for Lit Brothers and Maustbaum Bros. & Fleisher, or the owners? 30

A. Yes.

Q. On October 25th, 1918, a lease was made for that property with Maxwell?

A. Yes, sir.

Lease offered in evidence.

(Mr. Babcock does not object that the lease was made; but it is not evidence here. The affidavit

sets forth that Mr. Evans, on December 1st, 1919, entered into a verbal agreement with the Maxwell Company, whereby Mr. Evans acted as agent for the owner, and rented the property to Maxwell and Company for one month).

(Lease withdrawn).

10 Q. Mr. Evans, on or about September 29th, 1919, did the representative of the Maxwell Company call on you respecting a new lease ?

A. Sometime prior to that.

Q. What offer did they then make?

(Objected to as being immaterial and incompetent).

(Objection sustained).

20 Q. On or about November 30th or November 29th, 1919, did the Maxwell Company send to you a check for \$40.00?

(Objected to for the same reason).

(Objection sustained).

30 Q. The Bacharach Real Estate Company acts for Mastbaum Bros. and Fleisher in all leases, do they not? They are the general agents in Philadelphia for this property ?

A. Yes.

(Objected to).

(Objection overruled).

(Exception allowed).

Q. With respect to the actual rental of the prop-

erty; the collection of rents and the dispossession of tenants, you are the agents, are you not?

A. Yes.

Q. And when leases are concluded in Philadelphia, you actually make them and carry them out. You sign them and collect the rents?

A. We do.

(Objected to).

10

(Objection sustained).

(Mr. Evans withdrawn, to be recalled later)

20

30

SOLIS COHEN, Sworn.

Direct Examination.

By MR. CASSMAN:

Q. Mr. Cohen, are you connected with the firm of Mastbaum, Brothers & Fleisher?

A. I am.

10 Q. And have you charge of the Atlantic City properties which they own?

A. Yes.

Q. Who are your agents in Atlantic City for the rental and dispossession of tenants of this particular property?

A. Bacharach Real Estate Company.

(Objected to as incompetent and irrelevant).

20 Q. On or about November 20th, 1919, did a representative of the Maxwell Company call on you respecting the renting of the advertising privilege during the month of December?

A. He did.

Q. Who was that representative?

A. Mr. Maxwell, Jr., Chester.

Q. What, if anything, did he ask of you?

A. He asked for temporary permission for his sign to be there while we were negotiating for a new
30 lease.

Q. And what did you tell him in answer to that?

A. I told him to see the Bacharach Real Estate Company; that the owners were willing to permit them to be there for another month, pending the adjustment of whether or not we would be successful in making a new lease.

Q. What rent, if any, were you charging them for that month?

A. I don't know without referring to the lease. I told Mr. Maxwell to see the Bacharach Real Estate Company for the details.

Q. At that time were the R. C. Maxwell Company negotiating for a longer lease on the premises?

(Objected to).

(Objection sustained).

10

Cross Examination.

By MR. BABCOCK:

Q. When did that conversation with Mr. Maxwell take place, as near as you can state it?

A. Sometime in November.

Q. The early or latter part of the month?

A. I cannot tell you definitely, because there were a great many interviews.

20

Q. And you are unable to say when?

A. My impression was that it was around the 20th.

Q. Where did the conversation take place?

A. At my office in Philadelphia.

Q. Who were present?

A. No one besides Mr. Maxwell and myself.

Q. And on that occasion he told you he would like to make arrangements to continue the sign?

A. Yes.

30

Q. And instead of taking it up with him, you referred him to the Bacharach Real Estate Company, who were the agents, is that correct?

A. Not quite correct. We were then negotiating for a lease for a sign to go over the whole place.

Q. Is it a fact that when he spoke to you about making arrangements for continuing the present sign, that instead of going into the details and arrang-

ing terms, you referred him to the Bacharach Real Estate Company, who were the agents in Atlantic City?

A. No, I told him they could stay there for another month, and I told him to tell the Bacharach Company and they would make arrangements.

Q. So that as far as anything happened there, there was no completed arrangement?

A. As far as a verbal arrangement could be.

10 Q. That he was to go to the Bacharach Real Estate Company?

A. No, that he could stay there for another month, pending the adjustment of the new arrangements.

Q. What was he to go to the Bacharach Real Estate Co. for?

A. The Bacharach Company collected the rents and attended to the details. This lease was a complicated one, and whatever arrangement they wanted to make for that month was agreeable to the owners.

20 Q. Was he to go to the Bacharach Company to arrange the details of the consummation?

A. Yes.

Q. That is, the ambiguity of the question has been cleared up, and you told him that he might have the property for one month, and that he should see the Bacharach Company about the details, is that correct?

A. Yes.

30 Q. Do you know what time of day it was that the conversation in question took place?

A. No, because Mr. Maxwell ran into our office when he was in Philadelphia, and I do not remember what time it was that this particular conversation took place, whether before lunch or after lunch.

J. ESTELL EVANS RE-CALLED.

Re-Direct Examination.

By MR. CASSMAN:

Q. On or about November 29th did you receive by mail a check from the Maxwell Company for \$40.00?

A. We did.

Q. What, if anything, did you do at that time respecting the matter? 10

A. I did not know just what shape things were in, and I called up Mr. Cohen.

Q. What, if anything, did you accept that check for?

(Objected to).

(Objection sustained).

20

Q. At the time of the receipt of that check, Mr. Evans, what lease, if any, had the Maxwell Company with the Bacharach Real Estate Company?

(Lease dated October 25, 1918, between the Bacharach Real Estate Company and the R. C. Maxwell Company, covering the right to use the roofs of the stores located at the corner of Illinois Avenue and the Boardwalk, offered in evidence and marked Exhibit P. No. 1.) 30

Q. Mr. Evans, on October 29th, when you received that check, was there a subsisting lease with the Maxwell Company, and is that the lease?

A. It is.

Q. What is the date of the expiration of that lease?

A. "For a term of one year from the first day of

December, 1919.

Q. Did you or did you not accept the check for \$40.00 which was sent you at that time, as a payment under the terms of that lease?

A. We did not.

(Objected to).

(Objection sustained and answer stricken out).

10

Q. On December 31st, did you cause a notice to be served on the R. C. Maxwell Company, demanding possession of that property?

A. We did.

Q. And is this a true copy of that notice?

A. Yes, sir.

Q. The Maxwell Company are still in possession of that sign space?

A. They are.

20

30

SOLIS COHEN, Re-Called.

Re-Direct Examination.

By MR. CASSMAN:

Q. Mr. Cohen, shortly after the time you had this conversation with Mr. Maxwell, was a payment made by the Maxwell Company to your knowledge, on account of some rent, to the Bacharach Real Estate Company? 10

A. There was.

Q. Did you, or did the Bacharach Real Estate Company accept that payment made by the Maxwell Company?

(Objected to).

(Objection sustained).

20

30

J. ESTELL EVANS, Re-Called.

Re-Direct Examination.

By MR. CASSMAN:

Q. Did you receive a check of \$40 from Maxwell & Company as rent for the month of December?

10 (Objected to as leading and immaterial).

(Objection sustained).

Q. Did you, or did you not receive instructions from Mastbaum Brothers & Fleishman, or the owners of this property, to rent the advertising space to the R. C. Maxwell Company for the month of December?

20 (Objected to as leading, incompetent and immaterial).

(Objection overruled).

(Exception allowed).

A. I did.

Q. When was it that you got those instructions?

A. Somewhere about December 1st.

30 Q. How did you come to get those instructions? By what means did you get them? Explain the circumstances?

A. I received a check from Maxwell & Company and called Mr. Cohen up on the 'phone—

Q. What date was it that you received this check?

A. Somewhere about the 28th or 29th of November.

Q. When you received that check, did you or did you not accept it at that time?

(Objected to).

(Objection sustained).

Q. On the receipt of that check, or shortly thereafter, what instructions, if any, did you get from Mastbaum Brothers & Fleisher, or the owners, respecting a lease with the Maxwell Co.?

(Objected to on the same grounds).

10

(Objection sustained).

Q. Did you have any conversation with the Maxwell Company or their representative, regarding the rent of that sign space for the month of December?

A. I did not.

Q. On the receipt of the check for \$40 in question, what instructions, if any, did you get from Mastbaum Brothers and Fleisher, or the owners, respecting that \$40?

20

(Objected to for the same reason).

(Objection sustained).

Q. Was there any arrangement made with you, or anyone, respecting the payment of that \$40?

(Objected to unless it be limited to the above Company).

30

Q. Was there any arrangement with the Maxwell Company?

A. Not with me.

Q. Were you instructed as to what to do with that \$40?

(Objected to).

(Objection sustained).

Q. Did you accept the \$40 as rent for that property, Mr. Evans?

A. Yes.

Q. For what period was it that you accepted the \$40?

(Objected to).

10

(Objection sustained).

Cross Examination.

By MR. BABCOCK:

Q. Was the payment which you received from the Maxwell Company made by check?

A. Yes.

20

Q. Is that the check which I show you?

A. I would imagine so.

Q. Is this the receipt you gave at the time of receiving the check?

A. Yes.

(Check and receipt marked for identification D No. 1 and D No. 2, respectively).

Q. Under the lease which has been offered in evidence, a payment of 4% of the rental was payable on December 1st?

A. Yes.

Q. And the rental consideration was \$1000?

A. Yes.

Q. And 4% of \$1000 is, of course, \$40.00?

A. Yes, sir.

Q. Did you have personal charge of the property in question, for the Bacharach Company?

A. Yes, sir.

30

Q. Did you sign, in the lease which has been offered in evidence, the name "Bacharach Real Estate Company, Agents"?

A. Yes, sir.

Q. And all the rent under that lease was paid to you?

A. Under my supervision.

(Exception allowed).

10

20

30

24

Solis Cohen, Re-direct

SOLIS COHEN, Re-Called.

By MR. CASSMAN:

Q. Did you, or did you not authorize Mr. Evans to receive that \$40 check in question?

(Objected to, as the question has been asked).

10 (Objection sustained).

20

30

J. ESTELL EVANS, Re-Called.

Re-Direct Examination.

By MR. CASSMAN:

Q. When you received that \$40 check did you call on the owners, or their representatives, for instructions regarding it?

A. I did.

10

Q. And what instructions did they give you?

A. They instructed me that I was to accept that as the December payment, pending negotiations with Maxwell for a new lease.

Q. And did you so accept it?

(Objected to).

(Objection overruled).

(Exception allowed).

20

MR. BABCOCK:

Q. When did you communicate with Mr. Cohen?

A. I received that check about November 29th, and did not deposit it until December 4th, and it was sometime between those dates.

THE COURT:

30

Q. Was that amount due at that time under the existing lease?

A. There would have been that amount due under the old lease; but we had been dickering since September for a new lease.

Q. According to the old lease they were to pay that amount up to December 1st?

A. Yes, but I had had no conversation with the

Maxwells.

Q. Does that amount pay all the rent due under the old lease?

A. That would have been paid under the new lease, the lease expired on December 1st.

Q. When was this payment made?

A. Somewhere the latter part of November; the 28th, 29th or 30th.

Q. But there was not anything due?

10 A. Pending negotiations, Mr. Cohen allowed their sign to remain.

Q. But there was nothing due under the old lease?

A. No.

Q. It was just the same kind of a payment that would have been made if the old lease had been renewed?

A. Yes.

20 By MR. CASSMAN:

Q. After that you served notice on them for possession of the property?

A. Yes.

PLAINTIFF RESTS.

The defendant moves for a non-suit:—

1. Because there has been no evidence produced before the Court to show a contract such as is alleged in the affidavit.

2. There is no evidence to show that there has been any contract made between the parties for a lease independently of the written lease, from December 1st, 1919. 10

3. It must necessarily be inferred under all the evidence, that the payment of \$40 which was made, was made consistent with the terms of the written lease, and with the intention of renewing it for another year.

4. That as a matter of law the Court must find that the old lease was in fact, renewed in law for another year. 20

5. The affidavit, as clearly as language can state anything, is that Mr. Evans, or the Bacharach Company, made the contract in question. The evidence of the plaintiff is that there was no such contract. In other words there was not only a lack of proof of the contract in the affidavit; but there was positive proof that no such contract was ever made and there has not been a prima facie case established. 30

(Motion denied).

(Exception allowed).

CHESTER L. MAXWELL, Sworn.

Direct Examination.

By MR. BABCOCK:

Q. Do you reside in Atlantic City and have charge of the Atlantic City Office of the R. C. Maxwell Company?

10 A. I do.

Q. Did you have some part in the negotiations for extended rights on the Windsor block?

A. I did.

Q. Were those arrangements, as far as you know, carried to a consummation?

A. They were not.

Q. When were they suspended, as far as you recall?

20 A. As far as I can remember, it was the middle part of November.

Q. Were they taken up by you after that time in any way?

A. No, sir.

Q. Did you have a conversation with Mr. Cohen relative to renting the property for one month?

A. I did not.

30 Q. On or about November 20th he states that he had a conversation with you in Philadelphia, in which it was stated by him that pending negotiations, the R. C. Maxwell Company might continue in the property for an additional month, and that you were to go to the Bacharach Real Estate Company in Atlantic City to arrange the details. Did you have that conversation, or any conversation of like character?

A. No, sir, I did not have any such conversation.

Q. Mr. Cohen also testified that he said to you that you would be able to stay in the property for another month. Was such a statement made to

you?

A. No, sir.

Q. Were you acquainted with the lease in evidence, dated October 25th, 1918?

A. Yes, sir.

Q. Do you also look after the office matters in Trenton in the absence of your father?

A. Yes, sir.

Q. Did you or your father have charge of the paying of the rent on November 29th, 1919? 10

A. I instructed the girl who has charge of the lease department to forward that check.

Q. And that was in payment of what?

(Objected to).

(Objection sustained).

Q. How did you pay that \$40?

A. I paid it under the old lease, as a renewal of the old lease, as the negotiations for the additional privileges had fallen through. 20

Q. I show you a check which has been marked Exhibit D-2 for identification, and ask you if that is the check used in making the payment?

A. That I do not know, for I did not sign the check when it went out.

Q. As far as you know that is the check?

A. As far as I know, it is.

Q. With the check did there go a form of receipt to be signed? 30

A. There usually does.

Q. Is that the receipt?

A. As far as I know.

Q. Mr. Maxwell, assuming that the payment represented by that check and receipt be a renewal of this lease, would it pay in advance from December 1st, 1919?

(Objected to).

A. Yes, sir.

Q. Was all the rent paid under the lease, down to December 1st, 1919?

A. Yes, sir.

Q. Mr. Maxwell I also ask you this. Did you ever call on Mr. Cohen and state to him that you would like to have temporary permission to keep the
10 sign there for a month?

A. No.

20

30

Cross Examination.

By MR. CASSMAN:

Q. Were you in charge of the negotiations for the new lease?

A. Not entirely.

Q. To some extent you were?

A. Yes, sir.

Q. Did you prepare the new leases that you 10 wanted to make with the owners?

A. I did.

Q. How much rent were they for?

(Objected to).

A. \$2400.

Q. Was there anything in those new leases that you did not have in the old ones?

A. Yes, sir. 20

Q. What was it?

A. If you will compare the new lease with the old one you will see the difference.

Q. Where is it?

A. It is right there (indicating).

Q. Is this the copy of the new lease which you prepared?

A. Yes, sir.

(Objected to as having no bearing on the case). 30

(Objection overruled).

Q. Is this a copy of the lease that you offered to take?

A. Yes, sir.

(Lease—No. P-2, offered in evidence).

(Objected to as incompetent and irrelevant).

(Lease admitted).

Q. Are you familiar with this letter?

(Objected to).

(Objection sustained).

10

Q. Under the lease as originally drawn, you had the right to use the roofs of the stores located at Illinois and the Boardwalk, Atlantic City, for the erection and maintaining of an illuminated advertising display?

A. Yes, sir.

Q. Under the lease which you offered, you had the right to use the roofs of the stores located at Illinois and the Boardwalk, Atlantic City, for the erection and maintaining of an illuminated advertising display? So far as your right to use that roof is concerned, was anyone sharing that with you?

20

A. Yes, sir.

Q. When did you say that negotiations stopped for the new lease?

A. About the 10th or middle of November.

Q. Prior to that time had you offered \$8000 for a new lease?

30

A. For additional privileges.

Q. That offer was not accepted, was it?

A. It never was consummated.

Q. And subsequent to that did you offer \$10,000 for a new lease?

A. No.

Q. When was it that you offered \$3600 for a new lease?

A. In October sometime.

Q. When was it that you offered \$5000 for a new lease?

A. I don't know that we ever did offer \$5000.

Q. However, you do know that you offered for the same roofs on which you now have your sign, \$2400 in September; that you later offered \$3600, and after that you offered \$8000?

A. That is not true.

Q. What other roofs were you to get?

A. The roof we then had was the one at the corner. 10

Q. Were you limited in your old lease?

A. Our old lease said "one display." In order to use the rest of the roofs we would have to build more than one display, which would have been a violation of the lease.

Q. Was it a violation of the lease for you to use more than one roof?

(Objected to).

20

Q. I point to the lease and ask you if the word used is not "Roofs"?

A. Yes.

Q. Mr. Maxwell, how many times did you call at Mr. Cohen's to discuss with him the matter of a new lease?

A. It may have been five or ten times, I do not know.

Q. Did you, at any of those discussions, either 30 with Mr. Cohen or Mr. Evans, representing the owner, suggest that you were to get a renewal of the old lease under the old terms?

A. No, sir, it was not discussed.

Q. You never told them that you wanted it?

A. No, sir, it was never discussed.

Q. To whom did you say that you were paying that \$40 as a renewal of the old lease?

(Objected to).

Q. Did you say to anyone that you were paying that \$40 as a renewal of the old lease?

A. No.

Q. Did you say to Mr. Cohen when you went there the last time that you had rented your sign to the party who had it, and that you were in a bad way about it, and were in a position where you wanted, if possible, to get through negotiations for a new lease?

A. I did not.

Q. Had you, in fact, rented it?

A. No, we had not.

Q. Who has that sign now?

(Objected to).

(Objection sustained).

20 Q. Did you, on November 8th, 1919, sign this letter?

A. Yes, sir, I did.

Q. And sent it to Maustbaum Brothers and Fleisher in Philadelphia?

A. Yes, sir.

(Letters admitted in evidence and marked P No. 3, 4 and 5).

30 Q. So far as the owner is concerned, or his representatives, in all of your negotiations of the five or ten times you saw Cohen and the several times you saw Mr. Evans,

A. I never saw Mr. Evans.

Q. During all your negotiations you never mentioned that you expected a renewal, and they never said they would give you one?

A. That matter was never discussed.

Q. The discussion was always about a new lease under different terms, and at an increased rental?

A. Yes, sir. Always different concessions too.

THE COURT:

Q. What made you think you would renew it?

A. I thought negotiations had fallen through.

Q. What made you think you could renew the lease without consulting them, by just sending them 10 a check?

A. They had been talking \$10,000 for that space, and this had fallen through, and I presumed that they were willing for us to continue, in as much as the other negotiations had never come to anything.

Q. You just took it for granted that you did not have to consult them about a new lease?

A. Yes, sir.

MR. CASSMAN:

20

Q. Do you recall when you asked Mr. Cohen if you would be permitted to see Mr. Lit personally?

A. I don't remember ever speaking to Mr. Cohen.

Q. Did you go to see Mr. Lit?

A. Yes.

Q. And you went to see him about a new lease, did you not?

A. Yes.

Q. What did he say?

30

A. He said he had been offered very much more money than we had paid him; but would consider any offer we made.

Q. And that was all the conversation you ever had with the owners or the agents, about a new lease, or the renewal of the old one?

A. Yes.

Q. Mr. Lit did not care to renew the lease at the

old terms?

A. It was never discussed.

Q. Mr. Maxwell, do you know whether your Company, after December 1st, made an offer to Mastbaum Bros. & Fleisher of \$10,000 for that advertising privilege?

A. I did not make it.

Q. Do you know whether your father ever made it?

10 A. I do not know.

20

30

Re-Direct Examination.

By MR. BABCOCK:

Q. Mr. Maxwell, did these negotiations for additional privileges involve structural work?

A. Yes.

Q. To what extent?

A. To the extent of \$8,000 or \$10,000.

Q. And that would give you what additional advertising space? 10

A. It would enable us to use approximately ten times as much space as we use now.

Q. How much do you use now?

A. About thirty feet.

Q. Did the negotiations for these additional privileges involve, too, a term of years?

A. Yes, sir, it was based on a ten year lease.

Q. Does the term of the lease also enter into the character of signs to be built? 20

A. Yes, on a short term lease you can only afford to put up a temporary sign. You can not put up in structural supports and embellishments that you can charge off on a short term; but these must be distributed over a longer period, in order to get back the revenue which you invest.

Q. And you never reached any agreement which gave you the right to make those structural changes?

A. No, sir. 30

Q. Was your conversation with Mr. Lit limited to these negotiations which you have referred to, for additional privileges?

A. Yes, sir, I only had one conversation with Mr. Lit.

R. C. MAXWELL, Sworn.

Direct Examination.

By MR. BABCOCK:

Q. Mr. Maxwell, are you the President of the R. C. Maxwell Company?

A. I am.

10 Q. Are you familiar with the lease which has been offered in evidence, dated October 25th, 1918?

A. I am.

Q. Did you have any agreement with Cohen & Co. or any other person, about a lease for one month from December 1st, 1919, to January 1st, 1920?

A. I did not.

Q. Did you have an arrangement with anybody about making any lease or arrangement for the property in question, outside of the lease dated October
20 25th, 1918?

A. I did not.

Q. Did you take part in the negotiations for additional privileges?

A. Yes.

Q. How many roofs are there to the houses on this property?

A. I think there are six stores.

Q. Are the roofs on a level?

A. I think so.

30 Q. How many stories high?

A. One story.

Q. The sign which you have now occupies how much?

A. One store at the corner.

Q. And the size of the sign is what?

A. 10x25 or 30.

Q. Is that a sign of a temporary character?

A. Yes, I should say so because the weight of it

rests on the wall of the building and does not require any structural supports.

Q. Did you have a part in carrying on the negotiations for what has been called the additional privileges?

A. I did.

Q. Did those negotiations involve additional privileges and advantages to you?

A. Greatly.

Q. Won't you please state fully; but in a very 10
brief way, how those negotiations were to be of advantage, and why these larger sums were mentioned.

A. Well, in the first place a long period of years enables us to build very elaborate signs, for which we can collect a greater income, and the costs, of course, divided over a period of years, enables us to make a profit, notwithstanding we pay considerable more. In the second place, under the negotiations we would have received much larger space, more 20
lineal feet, at least 200 to 250 lineal feet of illuminating space against the 25 or 30 we have now, and in addition to that an electric sign, if proper under supports were placed.

Q. Did the negotiations contemplate making these supports and structural changes?

A. They did.

Q. Do you know about when the negotiations were suspended?

A. The negotiations were quite active during 30
October and perhaps the early part of November, and then nothing resulted because at first Mr. Lit, according to Mr. Cohen, was willing to provide the structural supports under the roofs and into the sand, and Mr. Cohen asked us as a favor, to get the costs and submit them to him, which we did, and also submitted them to the Building Department. Mr. Cohen informed me over the 'phone that Mr. Lit was quite offended at these large figures, and would

not provide them; that he was "up in the air," but if we would wait awhile he would come down, and Mr. Cohen would take care of it. After waiting a while we concluded that they had permitted the matter to drop, and were satisfied with a nominal sign at a nominal rent, and when the usual monthly payment came around, we sent the check, not having heard anything from Mr. Cohen or Mr. Lit.

10

THE COURT:

Q. Were you in the habit of paying the rent from month to month?

A. Yes, monthly in advance.

MR. BABCOCK:

20

Q. Did you pay it in the way provided in the lease?

A. Yes, 4% for the month of December.

Q. Mr. Maxwell, are you acquainted with the proposed but unsigned \$2400 lease?

A. Yes.

Q. Did that give you additional advantages?

A. Yes, in the fact that it was drawn for three years.

30 Q. Was there any difference between the words "display" and "displays"?

A. We considered that the first lease was limited to one display. No other displays could be placed there unless supports were placed there, which we were not allowed to do.

Q. And the proposed lease gave you the right to displays?

A. Yes, and it was for three years, and gave us a chance to put more money in it.

Cross Examination.

By MR. CASSMAN:

Q. There was nothing in the new lease which you submitted for \$2400 which obligated the landlord to put in supports to give you any additional rights other than you had in the original lease?

A. No additional supports.

Q. I show you a letter dated September 29th, 10 1919, to the Bacharach Real Estate Company, which reads as follows: "In answer to your letter of September 27th, increasing the rent of the advertising rights on the property Illinois Avenue and Boardwalk, Atlantic City, to \$2400, and beg to advise that we will accept this, inasmuch as you have an offer for that amount." There was no suggestion in that letter that you were to get any more for that \$2400 than you had in the old lease?

A. Yes, there was. We were to get three years 20 in the new lease.

Q. Mr. Maxwell, you were familiar with the \$3600 offer, were you not?

A. Yes.

Q. You were not to have any additional structural supports put in for you, were you, under that lease?

A. We were to have three years under that lease.

Q. You then made an \$8000 offer, I understand, based on structural supports being put in, is that 30 correct?

A. Yes, we accepted every offer made by Mr. Cohen.

Q. After December 1st, did you call Mr. Cohen and offer a \$10,000 rental if structural supports were put in?

A. Yes.

Q. That offer was based on the supposition that

the lease would commence on what date, January 1st?

A. From the time we were able to make the structural changes, or that Mr. Lit would make them.

Q. On what date would the new lease commence?

A. When the greater improvements were made.

Q. You didn't know then that you had renewed your lease, did you?

10 A. I did.

Q. In all your conversations with anyone, either with the owner or anyone representing him, did you ever request a renewal of the lease?

A. I requested the making of a new lease with new increased rights.

Q. Did they ever offer you a renewal of the old lease at the old terms?

A. No.

20 Q. You never requested, and they never offered it?

A. No.

Q. What is your basis, then, for assuming that you had a renewal of the old lease?

A. Because the time came due, and matters were dropped; the check was sent in the usual order, and was accepted.

Q. That is your only reason for thinking that you had a renewal of your old lease?

A. Yes.

30

J. ESTELL EVANS, Re-Called.

Re-Direct Examination.

By MR. CASSMAN:

Q. Mr. Evans, in your conversations with anyone representing the Maxwell Company prior to the \$2400 offer, did you offer them any additional privileges to that in their old lease?

10

A. No, sir.

Q. Did you understand, under the terms of the old lease, that they had the entire roof space there?

A. Always.

Q. Did you lease any of it to anyone else?

A. No.

The defendant asks that the Court find for the defendant, for the reasons stated in the motion for a non-suit, and also for the additional reason that the plaintiff has not proven a case by the necessary weight of the evidence, and also because, for various reasons, no case has been made against the defendant.

20

30

EXHIBIT P-1.

LEASE OF OCTOBER 25, 1918.

THIS INDENTURE made this 25th day of October, 1918, between The Bacharach Real Estate Company, Agents, of the City of Atlantic City, County of Atlantic, and State of New Jersey, party of the first part:

10

AND The R. C. Maxwell Company, a corporation of the State of New Jersey, with its principal offices at Trenton, New Jersey, party of the second part:

WITNESSETH: That the said party of the first part hath let and by these presents doth grant, demise and to farm let unto the said party of the second part the right to use the roofs of the stores located at the Corner of Illinois Avenue & Boardwalk, Atlantic City, New Jersey, for the erection and maintenance of an illuminated advertising display, for the term of one (1) year from the first day of December, 1918, until the first day of December, 1919, at the rent or sum of One Thousand Dollars (\$1,000.-00), payable as follows:—

Four (4) per centum on December 1, 1918.
 Three (3) per centum on January 1, 1919.
 Three (3) per centum on February 1, 1919.
 30 Four (4) per centum on March 1, 1919.
 Five (5) per centum on April 1, 1919.
 Four (4) per centum on May 1, 1919.
 Twelve (12) per centum on June 1, 1919.
 Twenty (20) per centum on July 1, 1919.
 Twenty-four (24) per centum on August 1, 1919.
 Twelve (12) per centum on September 1, 1919.
 Five (5) per centum on October 1, 1919.
 Four (4) per centum on November 1, 1919.

AND the said party of the second part does hereby covenant and agree to and with the said party of the first part to pay the said rent in the proportions aforesaid, and not to use nor permit said roofs or any part thereof to be used for any other purpose than advertising, and also at the expiration of said term to yield up and surrender the possession thereof in as good a state and condition as the same now is, or may be put into by the said party of the first part, reasonable wear and tear and accidents by 10
fire or other casualties excepted.

AND it is further agreed that the party of the second part shall have free access for its agents, servants and employees to said buildings for all purposes necessary in the maintenance of the said display, and also the right to convey material to the roofs and remove same therefrom; and shall have the right to install and maintain all necessary wiring for the supplying of electrical current to be used for 20
said display, subject to the requirements of the Board of Fire Underwriters.

AND it is understood that all material on the said roofs, such as frame work, sign work, electrical equipment, etc., is the property of the party of the second part, and may be removed by the said party of the second part at the termination of this lease and the said party of the second part upon removing 30
all its frame work, sign work, electrical equipment, etc., from the roof, shall leave the roof in the same condition of good order and repair as before the erection of said signs.

AND it is further agreed that if at any time during the term of this lease said advertising display is wholly or partly destroyed so that in the judgment of the party of the second part it is no longer valu-

able for advertising purposes, then the party of the second part shall have the right to cancel this lease, in which case the party of the first part agrees to return to the party of the second part any overpaid rental pro rata for the unexpired term, or if the party of the second part so desire, it may replace the display on the said roofs, in which case the said party of the second part shall not pay any rental from the date of the destruction of said display un-
10 til its replacement, but this lease shall again be in effect from the date of the completion of the replacement of the said display and rental shall again begin to accrue from such date. In the event of sale or demolition of said buildings, this lease may be terminated by sixty days' notice from the party of the first part to the party of the second part.

AND it is also agreed that if for any cause whatsoever, not due to the direct cause of the party of
20 the second part, the view of said display is in any way obscured so that in the judgment of the party of the second part it is no longer valuable for advertising purposes, then the party of the second part shall have the right to cancel this lease and the party of the first part shall return to the party of the second part any overpaid rental pro rata for the unexpired term; or if the obstruction be only of a temporary nature, then the payment of rental from the party of the second part to the party of the first
30 part, under this lease, shall cease from the date of the erection of such obstruction until its removal.

AND it is further agreed that the party of the second part will repair any damage done to said roofs which is directly traceable to the presence of said display on said roofs.

AND the said party of the first part does covenant

and agree that the said party of the second part, upon paying the said rent and performing the covenants aforesaid, shall and may peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid.

IN WITNESS WHEREOF the said parties hereto have hereunto set their hands and seals the day and year first above written.

10

BACHARACH REAL ESTATE CO. (Seal)
Agents,

THE R. C. MAXWELL COMPANY,

By R. C. MAXWELL, President.

Witness:

K. S. Pomelear.

20

Witness:

O. W. Worley.

30

EXHIBIT P-2.

UNEXECUTED LEASE.

THIS INDENTURE made this
day of _____ 1919, between THE BACH-
ARACH REAL ESTATE COMPANY, Agents, of the
City of Atlantic City, County of Atlantic and State
of New Jersey, party of the first part,
10

AND THE R. C. MAXWELL COMPANY, a cor-
poration of the State of New Jersey, with its princi-
pal offices at Trenton, New Jersey, party of the sec-
ond part;

WITNESSETH: That the said party of the first
part hath let and by these presents doth grant, de-
mise and to farm let unto the said party of the sec-
20 ond part the right to use the roofs of the stores lo-
cated at the East Corner of Illinois Avenue & Board-
walk, Atlantic City, New Jersey, for the erection and
maintenance of illuminated advertising displays, for
the term of three (3) years from the first day of
December, 1919, until the first day of December,
1922, at the rent of Two Thousand, Four Hundred
Dollars (\$2,400.00), payable as follows:

30 Four (4) per centum on December 1, each year.
Three (3) per centum on January 1, each year.
Three (3) per centum on February 1, each year.
Four (4) per centum on March 1, each year.
Five (5) per centum on April 1, each year.
Four (4) per centum on May 1, each year.
Twelve (12) per centum on June 1, each year.
Twenty (20) per centum on July 1, each year.
Twenty-four (24) per centum on August 1, each
year.

Twelve (12) per centum on September 1, each year.

Five (5) per centum on October 1, each year.

Four (4) per centum on November 1, each year.

AND the said party of the second part does hereby covenant and agree to and with the said party of the first part to pay the said rent in the proportions aforesaid, and not to use nor permit said roofs or any part thereof to be used for any other purpose than advertising, and also at the expiration of said term to yield up and surrender the possession thereof in as good a state and condition as the same now is, or may be put into by the said party of the first part, reasonable wear and tear and accidents by fire or other casualties excepted. 10

AND it is further agreed that the party of the second part shall have free access for its agents, servants and employees to said buildings for all purposes necessary in the maintenance of the said displays, and also the right to convey material to the said roofs and remove same therefrom; and shall have the right to install and maintain all necessary wiring for the supplying of electrical current to be used for said displays, subject to the requirements of the Board of Fire Underwriters. 20

AND it is understood that all material on the said roofs, such as frame work, sign work, electrical equipment, etc., is the property of the party of the second part, and may be removed by the said party of the second part at the termination of this lease and the said party of the second part upon removing all its frame work, sign work, electrical equipment, etc., from the roof, shall leave the roof in the same condition of good order and repair as before the erection of said signs. 30

AND it is further agreed that if at any time during the term of this lease said advertising displays are wholly or partly destroyed so that in the judgment of the party of the second part they are no longer valuable for advertising purposes, then the party of the second part shall have the right to cancel this lease, in which case the party of the first part agrees to return to the party of the second part any overpaid rental pro rata for the unexpired term, or if the

10 party of the second part so desires, it may replace the displays on the said roofs, in which case the said party of the second part shall not pay any rental from the date of the destruction of said displays until their replacement, but this lease shall again be in effect from the date of the completion of the replacement of the said displays and rental shall again begin to accrue from such date. In the event of sale or demolition of said buildings, this lease may be terminated by sixty days notice from the party

20 of the first part to the party of the second part, provided, however, that said notice may be given only between October first (1st) and April thirtieth (30th) of any year.

AND it is also agreed that if for any cause whatsoever, not due to the direct cause of the party of the second part, the view of said displays is in any way obscured so that in the judgment of the party of the second part, it is no longer valuable for advertising purposes, then the party of the second part shall have the right to cancel this lease and the party of the first part shall return to the party of the

30 second part any overpaid rental pro rata for the unexpired term; or if the obstruction be only of a temporary nature, then the payment of rental from the party of the second part to the party of the first part, under this lease, shall cease from the date of the erection of such obstruction until its removal.

AND It is further agreed that the party of the second part will repair any damage done to the said roofs which is directly traceable to the presence of said displays on said roofs.

AND the said party of the first part does covenant and agree that the said party of the second part upon paying the said rent and performing the covenants aforesaid, shall and may peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid. 10

IN WITNESS WHEREOF, the said parties hereto have hereunto set their hands and seals the day and year first above written.

..... (Seal)

THE R. C. MAXWELL COMPANY,

20

..... (Seal)

Witness:

Witness:

30

EXHIBIT P-3.
ATLANTIC CITY BRANCH,
1115 Boardwalk

November 6th, 1919.

Attention Mr. S. Cohen.
Mastbaum Bros. & Fleischer,
1424 South Penn Square,
Philadelphia, Pa.

Dear Sir:—

10 Confirming the conversation with Mr. Cohen yesterday, with reference to the advertising on the Lit property, Illinois Avenue & Boardwalk, Atlantic City, N. J.—The Windsor Block.

20 We have today taken steps at your request to have plans and specifications prepared which will be for the structural supports for the advertising display, including the concrete base in the ground, up through the stores and including the footing for the sign on the roof.

 The specifications will have to be carefully prepared, which will take at least until next Monday night, we will endeavor to get them into your hands on Tuesday next.

30 We understand your proposal, quoted to us by Mr. Evans from your letter, to be \$8,000.00 per year, five (5) year lease. You to furnish all expense in connection with structural supports for the sign to rest upon, and in case of sale notice to be given only between October 1st and January 1st of any year, and in event of cancellation we be reimbursed for damage that we suffer.

Yours very truly,

THE R. C. MAXWELL CO.

By C. L. Maxwell,
Sales Manager.

No. 34|CLM

EXHIBIT P-4.

TRENTON, N. J.

413-415 East State St.

Sept. 29th, 1919.

Attention of Mr. John E. Evans.
Bacharach Real Estate Company,
1510 Atlantic Ave.,
Atlantic City, N. J.

10

Gentlemen:—

In answer to your letter of September 27th, increasing the rent on the advertising rights of the property Illinois Ave. & Boardwalk, Atlantic City, to \$2400.00, beg to advise that we will accept this, inasmuch as you have an offer of this amount.

In order that it may be considered closed, and as our representative may not arrive for a day or two to redraft the lease with you, and also as we have been doing business with Mr. Cohen of Mastbaum & Fleisher—in talking with him over the telephone this morning we told him we were accepting, through you, the offer of \$2400.00 and we both agreed therefore that it was closed at that amount. 20

We also stated that we wanted to put some materials and labor in this sign at this time, as it was more convenient than later, and we requested early execution of the signatures of the lease—so he said that if the same was forwarded promptly to him he could get it back to Atlantic City by Saturday. 30

Yours very truly,

THE R. C. MAXWELL CO.

By R. C. Maxwell,
President.

EXHIBIT P-5.

ATLANTIC CITY, N. J.

1115 Boardwalk.

Mastbaum Brothers & Fleisher,
1424 South Penn Square,
Philadelphia, Pa.

10 Attention Mr. S. Cohen.

Dear Sir:

20 We wrote you Saturday, the 8th, advising that plans and information on the structural supports for Illinois Avenue and Boardwalk would be mailed you tonight. We prepared some rough plans today which are being held in the Building Department's hands this afternoon, they having promised us that they would deliver the same late this afternoon to us with a letter commenting on it, which we intended to forward you tonight, but on calling there at four o'clock the Building Inspector said he would have the letter ready for us tomorrow morning at 9.30, which is the earliest hour he will have a complete analysis of the proposition in our hands.

30 Therefore, we beg to advise that we will place this in special delivery mail tomorrow morning about ten o'clock, or if the writer can possibly get away he will bring it to you in person, arriving about twelve o'clock.

Yours very truly,

THE R. C. MAXWELL CO.,

C. L. Maxwell, Vice-Pres.

EXHIBIT D-1.

Town Atlantic City, N. J. Date 191

Received of THE R. C. MAXWELL CO, TREN-
TON, N. J., Forty Dollars, in payment of rent due
Dec. 1, 1919, on adv. privilege cor. Ill. Ave. & Board-
walk, Atlantic City, N. J.

Bacharach Real Estate Co. 10
Signed

Ck. No. 36469

Street No.

20

30

EXHIBIT D-2.

Trenton, N. J., Nov. 29, 1919. No. 36469.

THE MECHANICS NATIONAL BANK

Pay to the Order of Bacharach Real Estate Co.

FORTY DOLLARS

The R. C. Maxwell Co.

10 \$40.00

FRANK VOLZ,

Treasurer.

Received the above amount in payment for rent due Dec. 1, 1919, on adv. privilege, Ill. Ave. & Boardwalk, Atlantic City, N. J.

Bacharach Real Estate Co.

20 Endorsement of this Check acknowledges receipt as per above voucher.

Endorsed:

Pay to the order of
Second National Bank,
Atlantic City, N. J.
Bacharach Real Estate Company.

30

THE STATE OF NEW JERSEY.

(Clerk's Certificate)

County of Atlantic, ss.

I, W. L. Risley, Clerk of the District Court of the City of Atlantic City, in the County of Atlantic, do certify that the foregoing is a true copy of the whole record in the cause wherein Jacob D. Lit, Samuel D. Lit and Charles A. Wimpfheimer is plaintiff and R. C. Maxwell Company, a corporation, is defendant: Case No. 33556, as full, entire and complete as the same remains on file in said Court in the case there stated. 10

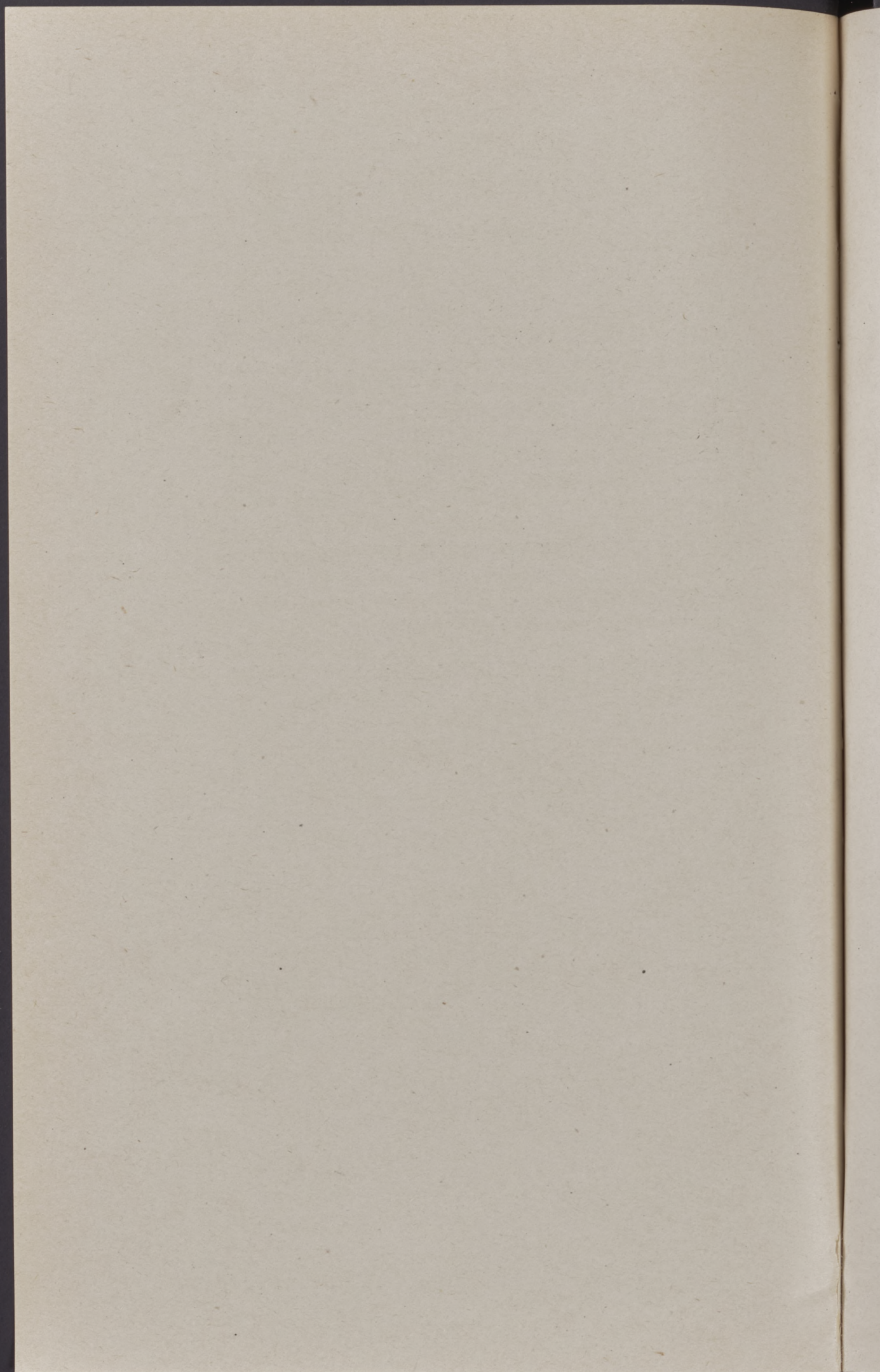
IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 26th day of February, in the year of our Lord, one thousand nine hundred and twenty.

WILLIAM L. RISLEY (Seal)

Clerk.

20

30



NEW JERSEY SUPREME COURT.

R. C. Maxwell Company,
Prosecutor,

vs.

Jacob D. Lit, Samuel D.
Lit and Charles A.
Wimpfheimer,
Respondents.

ON CERTIORARI.
Stipulation Amending
Reasons.

10

IT IS HEREBY STIPULATED between Babcock & Champion, Counsel for Prosecutor, and Harry Cassman, Counsel for Respondents, that subdivision (B) of the Reasons heretofore filed in the above stated cause be and it is hereby amended to read as follows:

(b) The affidavit alleged the making of a parole agreement between the Bacharach Real Estate Company Agents for Plaintiffs below, and the R. C. Maxwell Company. There was no proof to show that there was any agreement made and entered into between the said Bacharach Real Estate Company, Agents, and the R. C. Maxwell Company, or between any other persons for the letting of said premises for the term stated in said affidavit. 20

BABCOCK & CHAMPION,
Attorneys for Prosecutor.

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HARRY CASSMAN,
Attorney for Respondents.

NEW JERSEY SUPREME COURT.

R. C. Maxwell Company,
Prosecutor,

vs.

Jacob D. Lit, Samuel D.
Lit and Charles A.
10 Wimpfheimer,
Respondents.

ON CERTIORARI.
STIPULATION.

IT IS HEREBY STIPULATED AND AGREED
between Babcock & Champion, Counsel for Prose-
cutor, and Harry Cassman, Counsel for Respon-
dents, that the testimony returned with the Writ of
Certiorari, filed in the above stated cause, which
20 testimony appears in the printed State of the Case,
appearing upon the following pages, concluding with
page fifty-six, inclusive, is a true, complete and cor-
rect transcript of the evidence taken and had at the
trial of said cause.

BABCOCK & CHAMPION,
Attorneys for Prosecutor.

30 HARRY CASSMAN,
Attorney for Respondents.

NEW JERSEY SUPREME COURT.

R. C. Maxwell Company,
Prosecutor,

vs.

Jacob D. Lit, Samuel D.
Lit and Charles A.
Wimpfheimer,
Defendants.

ON CERTIORARI.
Rule of Affirmance.

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This cause coming on to be heard at the February Term, 1920, and being argued by Louis D. Champion, Esq., of the law firm of Babcock & Champion, counsel for the Prosecutor, and Harry Cassman, Esq., counsel for the Defendants, and the court having taken time to consider the same, and being of the opinion that the judgment of the District Court of Atlantic City should be affirmed in all things with costs;

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It is on this 15th day of April, in the year of our Lord one thousand nine hundred and twenty, ORDERED, ADJUDGED and DECREED that the judgment of the District Court of Atlantic City be in all things affirmed with costs and that the record and proceedings be remitted to the District Court of Atlantic City to be therein proceeded on according to the law and the practice of said court.

On motion of

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HARRY CASSMAN,
Counsel for Defendants.

NEW JERSEY SUPREME COURT.

R. C. Maxwell Company,
Prosecutor,

vs.

Jacob D. Lit, et al.,
Defendants.

ON CERTIORARI.

10 Argued February Term, 1920, before Justices
Trenchard, Bergen and Kalisch.

Babcock & Champion, for Prosecutor.

Harry Cassman, for Defendants.

Per Curiam:

20 The writ in this case was allowed to review the
judgment of the District Court of Atlantic City, in
dispossessing a tenant in a proceeding instituted
for that purpose by the landlord. It is admitted
that the affidavit, which is the basis of this pro-
ceeding, set out the required jurisdictional facts,
but it is urged by the prosecutor that the trial court
was without jurisdiction to enter judgment in favor
of the landlord because he failed to prove on the
trial certain jurisdictional facts set out in the pre-
liminary affidavit, to wit: ownership, that the rela-
30 tion of landlord and tenant existed, or that there
was any agreement which authorized the said agents
of the owners to let the premises to the prosecutor.
It was held by this court in *Moreland vs. Steen*, 89
N. J. L. 383, that on a review of proceedings insti-
tuted by a landlord to dispossess a tenant, where
the jurisdictional affidavit is sufficient, the only
matter for determination is whether the landlord on
the trial has produced any evidence tending to es-

tablish the jurisdictional facts set out in the preliminary affidavit, and that this court will not weigh the evidence but sustain the finding if there is any evidence to support it. On the trial it appeared that the Bacharach Real Estate Company, acting as the agents of the owners, had leased to the prosecutor the privilege of maintaining some kind of an advertising display on the roof of a building standing on the corner of Illinois Avenue and the Board Walk which expired by its terms on the first day of 10
December, 1919; that before the expiration of the lease, negotiations were entered into between the prosecutor, and Mr. Lit, acting for the defendants as owners, and the agents of the owner, for a new lease on different terms; that the tenant applied to Mr. Lit for temporary occupation of the premises while the negotiations were pending, and that Mr. Lit referred the proposed tenant to the Real Estate Company as agents for the owners, saying to the prosecutor that he had no objections but the details 20
must be consummated by his agents; that the agents leased the premises for the term of one month, until January 1, 1920; that the negotiations for a new lease were abandoned, and the rent for the month of December paid by the prosecutor at the rate agreed upon in the written lease. As to the point that there was no proof of ownership, or that the relation of landlord and tenant was not proven, there was evidence that the Bacharach Company was acting as agent for the owners, for it appears 30
that the prosecutor applied to the owner for permission to maintain the advertising display on the roof of the building, where it was located, pending the negotiations for a new lease, and was told that the owners would not object, but they must make arrangements with the Real Estate Company as the agent for the owner and that thereupon the prosecutor and the agent entered into a lease for the

month of December, 1919. There can be no doubt under the evidence that the prosecutor knew who was the proposed landlord, and that the Bacharach Real Estate Co. was the authorized agent of the owners, or of the persons claiming to be the owners, but whether the agent represented the owner or not is immaterial because the tenant can not dispute the title of the person under whom he holds as landlord. As to the authority of the Bacharach Real Estate

10 Company to make the lease for the month of December, 1919, there was evidence from which it can be inferred that this was done by the authority of Mr. Lit whom the prosecutor recognized and dealt with as owner. This disposes of the objection that the agent had no authority to act for the owner. It appears that the prosecutor, and others in his behalf, *contradict* the truth of the evidence from which the foregoing inferences may be drawn, but the court does not weigh the evidence in cases of this

20 class. The judgment will be affirmed with costs.

NEW JERSEY SUPREME COURT.

ON CERTIORARI.
Notice of Appeal.

{	R. C. Maxwell Company,
	Prosecutor,
	vs.
	Jacob D. Lit, Samuel D. Lit and Charles A. Wimpfheimer,
Respondents.	

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TO HARRY CASSMAN, Esq., Attorney for (Plaintiff) Respondents.

TAKE NOTICE that the Prosecutor appeals from the whole of the judgment entered in this cause, to the New Jersey Court of Errors and Appeals on the following grounds:

1. The Supreme Court should have decided that the Atlantic City District Court was without jurisdiction to enter a judgment for possession in favor of the Plaintiffs below, because there was no proof establishing the relation of Landlord and tenant in that,

20

(a) The affidavit filed upon which the summons was issued, alleged the owners of the premises in question to be Jacob D. Lit, Samuel D. Lit and Charles A. Wimpfheimer, and there was no proof from which the Court could find, as a fact, that said Jacob D. Lit, Samuel D. Lit and Charles A. Wimpfheimer were the owners of said premises.

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(b) The affidavit alleged the making of a parole agreement between the Bacharach Real Estate Company, Agents for Plaintiffs below, and the R. C. Maxwell Company. There was no proof to show that there was any agreement made and entered into between the said Bacharach Real Estate Company, Agents, and the R. C. Maxwell Company, or between

any other persons for the letting of said premises for the term stated in said affidavit.

2. The Supreme Court should have decided that the District Court was without jurisdiction to render said judgment for possession in favor of the Plaintiffs below, because the Plaintiffs below, through their agent, Bacharach Real Estate Company, accepted rent from the defendant below, under and pursuant to the terms of the lease theretofore
10 existing between the parties of said premises, which payment by defendant and acceptance by plaintiffs, renewed said lease for an additional term of one year, and, therefore, defendant's term in said premises had not then expired.

3. The Supreme Court should have decided that the District Court was without jurisdiction to render said judgment for possession in favor of the Plaintiffs below because there was no proof of the
20 contract of letting alleged in the affidavit.

Yours respectfully,

BABCOCK & CHAMPION,
Attorneys for Prosecutor.

Dated April 16, 1920.

**NEW JERSEY COURT OF ERRORS AND
APPEALS.**

JACOB D. LIT, SAMUEL D. LIT and CHARLES A. WIMPFHEIMER, <i>Plaintiffs-Appellees,</i>	}	On Certiorari. 10
vs. R. C. MAXWELL Co., <i>Defendant-Appellant.</i>		

BRIEF OF APPELLEES.

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FACTS.

The plaintiffs-appellees are the owners of a property on the Boardwalk in Atlantic City known as the "Windsor Block." The firm of Mastbaum Brothers and Fleisher of Philadelphia is the general real estate agent for the appellees, and the Bacharach Real Estate Company is the agent for this property in Atlantic City, to rent, collect rents, and dispossess tenants. 30

The appellant, a sign advertising company, on October 25, 1918, leased from the Bacharach Real Estate Company, agents, the right to the use of the roofs of appellees' property for an illuminated advertising display from December 1, 1918, to De-

ember 1, 1919, at a rental of \$1000 a year (page 44). In September of 1919, the appellant commenced negotiations for a new lease. In the course of those negotiations the appellant had numerous conferences with Mr. Evans, of the Bacharach Real Estate Company, and Mr. Cohen, of Mastbaum Brothers and Fleisher, and also interviewed Mr. Lit, one of the owners, who was acting for the appellees (page 35). In none of those conferences did the appellant even suggest that it be permitted to renew the old lease at the old rental. On the contrary the appellant did make several offers to rent the roofs at a yearly rental in the respective sums of \$2400, \$3600, \$8000 and \$10,000. The \$2400 offer and the \$3600 offer were made for the same roof space to which the prosecutor was entitled under the lease of October 25, 1918. The \$8000 offer and the \$10,000 offer were made on the condition that the appellee put in structural supports for the appellant's sign. These offers were also made on the basis of a longer term. For some reason none of the offers was accepted, and negotiations were still pending in the latter part of November. At this point Mr. Solis Cohen, of the firm of Mastbaum Brothers and Fleisher, testified respecting a conversation which he had with Chester Maxwell, a representative of the appellant (page 14, line 26), as follows:

“Q. What, if anything, did he ask of you?

A. He asked for temporary permission for his sign to be there while we were negotiating a new lease.

Q. And what did you tell him in answer to that?

A. I told him to see the Bacharach Real Estate Company, that the owners were willing to permit them to be there another month,

pending the adjustment of whether or not we would be successful in making a new lease.”

The evidence then discloses that the appellant did not see the Bacharach Real Estate Company as Mr. Cohen testified he asked appellant to do, but that it did on November 29, 1919, mail to the Bacharach Real Estate Company a check in the sum of \$40 which was accepted by the latter. Mr. Evans, of the latter company, testifies (page 20, line 12), as follows: 10

“Q. Did you or did you not receive instructions from Mastbaum Brothers and Fleisher or the owners of this property to rent the advertising space to the R. C. Maxwell Company for the month of December?

A. I did.

Q. When was it that you got those instructions?

A. Somewhere about December 1st. 20

Q. When you received that \$40 check, did you call on the owners, or their representatives, for instructions regarding it?

A. I did.

Q. And what instructions did they give you?

A. They instructed me that I was to accept that as the December payment, pending negotiations with Maxwell for a new lease.”

R. C. Maxwell on cross-examination, testified 30 (page 41, line 33), as follows:

“Q. After December 1st did you call Mr. Cohen and offer a \$10,000 rental if structural supports were put in?

A. Yes.

Q. That offer was based on the supposition

that the lease would commence on what date, January 1st?

A. From the time that we were able to make the structural changes, or that Mr. Lit would make them.”

ARGUMENT.

- 10 Under the evidence in this case the trial Judge had to determine (1) either that the receipt and acceptance of the \$40 check operated as a renewal of the old lease, or (2) that this payment was made in pursuance of a parol lease for the month of December, 1919. Referring to the inference of a renewal, the uncontradicted fact disclosed by the evidence is that in all the conferences which the parties to this suit had, the matter of a renewal of the
- 20 old lease at the old rental was never discussed. To find that there is a renewal is to find that the owners against their interest, accepted a fictitious offer, which the tenant never conveyed to them, and which every inference in the case indicates the owners and their agents would have refused, if it had been conveyed to them. Aside from the evidence that the officers of the R. C. Maxwell Company, presumed there was a renewal when they sent the \$40 check to the Bacharach Real Estate Company, there is nothing in the case to indicate that they made their pre-
- 30 sumption known to the owners. No proposition of renewal accompanied the \$40 check, and no offer of renewal preceded it. When the landlord has on numerous occasions stated to the tenant that any additional lease can be had only upon different terms than the old lease, on what basis is the tenant

entitled to presume that the landlord intends to renew his old lease? A renewal inferred under those circumstances merely from the receipt and acceptance of a rent payment similar in amount to a rent payment under the old lease would be a trick of the law designed to trap people into contracts which they never contemplated.

In view of the fact that the one proposition which was not discussed between the parties was that of a renewal there must have been some other arrangement in pursuance of which the \$40 check was sent and accepted. Mr. Evans testified that at the time he received the check he was authorized to accept it as rent for the month of December pending negotiations for a new lease. Mr. Solis Cohen testified that the prosecutor requested this temporary lease pending negotiations for a new lease. R. C. Maxwell testified that after December 1st (which was subsequent to the time the \$40 check was received and accepted), he continued negotiations for a new lease and made an offer of \$10,000 rental on different terms than the old lease. This fact indicates that not only was the temporary lease for the month of December made, but that the appellant used the opportunity to negotiate for a new lease. It shows that before and after the acceptance of the \$40 payment (which the appellant now contends constituted a renewal), all the negotiations between the parties involved a new lease. Not until the time of this suit was a renewal suggested. The trial Judge was fully justified in his finding of fact (which cannot be questioned in this proceeding) that the lease for the month of December, 1919, as set forth in the affidavit, was in fact made.

LAW.

The first reason assigned by the appellant for reversal is: "Because there is no proof establishing the relation of landlord and tenant." This reason is not available to the appellant. On certiorari review the intendment is taken in favor of a judgment. *New Jersey Produce Company vs. Gluck*, 79 N. J. L. 175. There is no statement of facts upon which the trial Judge pronounced its judgment, in the printed book filed by the appellant in this case. This Court has repeatedly refused to examine or consider the notes of testimony and proceedings at the trial sent up by a Judge of the District Court with his return.

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Lyman vs. Richman, 75 N. J. L. 385;
Deubel vs. Vanderbilt, 64 N. J. L. 159;
Board of Health vs. Rosenthal, 67 N. J. L.
216;

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Royal Manufacturing Company vs. Rahway, 75 N. J. L. 416.

In the case of *Monitor Lodge vs. Goldy*, 58 N. J. L. 119, our Supreme Court in the opinion of Justice Harrison held:

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"This Court can determine the existence of judicial error only when the record of the proceedings is certified by the inferior Court in obedience to the writ, together with a statement of the facts (not the testimony) upon which the trial Court pronounced its judgment. The case before us presents neither of these essential matters. A stipulation of counsel cannot form the foundation upon which to reverse the judgment of a Court, nor can the transcript of

the testimony take the place of the judicial report of the findings of fact upon which the Court below acted."

On certiorari of a conviction before a police justice in the case of *Board of Health vs. Rosenthal*, 67 N. J. L. 216, this Court held:

"We are asked to look into the evidence returned by the police justice as part of this transcript. This evidence is not embraced in the conviction, and is not required to be under the prescribed form. Nor is it here pursuant to any rule of this Court. The evidence not being properly a part of the record we cannot examine it."

Counsel for appellant relied on Pamphlet Laws of 1912, page 318, as authority for the consideration on certiorari review of the stenographer's notes taken on the trial of this cause. The certification of the trial Judge as it appears in the state of the case (page 318) was not a certification of the transcript; and these notes cannot be considered by this Court.

The question raised by the appellant in his first reason was not raised in the trial of this cause before the Atlantic City District Court, or alleged erroneous action, and cannot be presented to or considered by this Court on certiorari.

Reeves and Lane vs. Jones, 74 N. J. L. 330; 30
Steward vs. Lears, 36 N. J. L. 173.

The affidavit filed in this case in the Atlantic City District Court sets forth the relation of landlord and tenant as clearly as language can (page 9). The appellant admits that the affidavit is sufficient.

We are unable to find any case in our State reports in which this Court reversed the judgment of a lower tribunal in a landlord and tenant proceedings, in which all the jurisdictional facts are set forth in the affidavit. Counsel for the appellant relied on the case of *Fowler vs. Roe*, 25 N. J. L. 549, as authority for his proposition that this Court will examine the proofs even though the affidavit is sufficient. An examination of that case shows that the affidavit there filed was defective in failing to allege the jurisdictional facts. Where these facts sufficiently appear in the affidavit the District Court has jurisdiction and it cannot be questioned on certiorari review.

Yetter vs. King, 66 N. J. L. 49;

Steffen vs. Earl, 40 N. J. L. 128;

Mundy vs. Warner, 61 N. J. L. 395.

If the stenographer's notes in this case are considered, then admittedly the only question for this Court to determine is whether the landlord on trial has produced any evidence tending to establish the jurisdictional facts set out in the preliminary affidavit. The *per curiam* opinion of the Supreme Court in this case enumerates the evidence sufficient to prove ownership in the appellees. This evidence disclosed that the appellant dealt with Mr. Lit, one of the owners, as representing the appellees (page 35, line 21); that the Bacharach Real Estate Company acted as agents for the appellees in making the original lease (page 44) and in the proposed new lease (page 48); that the appellant knew who the owners were and negotiated with one of them regarding structural changes (page 42, line 3). It also seems clear that the appellants cannot question the rights of the appellees from whom they leased.

The second reason questions the finding of fact of the lower Court. If this reason is available to the appellant at all it must be on the ground that, as a matter of law, the Court must find that there was a renewal of the lease theretofore existing. This is a fact question.

There appears to be no doubt that a holding over constitutes a renewal only when the landlord so elects. If he does not elect to recognize a renewal, he may treat any occupation at the expiration of the lease as a trespass. *Moore vs. Moore*, 41 N. J. L. 515. 10

The burden is upon the tenant, to show that the landlord assented to continuation or removal of the tenancy. *Yetter vs. King Co.*, 66 N. J. L. 491.

It is also law that where a tenant holds over and pays rent and a landlord accepts it, there is a presumption of a renewal, but the presumption is a rebuttable one. *Condon vs. Barr*, 47 N. J. L. 113. 24 *Cyc.* 1014. 20

A very full summary of the cases in which the presumption has been rebutted appears in the notes to the case of *Turner vs. Wilcox*, 40 L. R. A. (N. S.) 498. As there are no cases cited in our New Jersey Reports similar to the case at bar, we cannot more clearly state the law than to quote part of that note:

“In some instances the question is made to depend upon whether or not the holding over is with the landlord’s consent, it being quite generally held that a holding over pending negotiations for a new lease with the landlord’s consent does not constitute a renewal, while, if such consent has not been extended either expressly or impliedly, a renewal is effected at the option of the landlord.” 30

Thus in *Mastin vs. Metzinger*, 99 Mo. App. 613, 74 S. W. 431, it was said:

10 “In this case there was no evidence whatever that plaintiff (landlord) consented to defendant’s (tenant’s) holding over. There was no evidence of an implied consent; indeed, the implication is to the contrary. It is true that the agent (of the landlord) did not bodily eject him from the premises, nor did he immediately on the expiration of the lease, institute an action against him; but there was at no time the slightest indication that he consented to a continuance of the tenancy. It would be a strange condition of affairs if a landlord in order to avoid implied consent to a continued tenancy under an expired lease, would be compelled to refuse to listen to a proposition of further lease, and set about immediately to eject the tenant.”

20 And in *Schilling vs. Kleim*, 41 Ill. App. 209, a tenant, remaining in possession by consent of the landlord pending a treaty for a new lease, and paying monthly rental after the expiration of the original lease, which was one for years, was held not to be a tenant upon the former terms, but to be a tenant by the month. See also *Bruckle vs. Adams Bros. Co.*, *supra*, which is to the same effect.

30 In *Kenwood Hotel Co. vs. Hiland*, 153 Ill. App. 108, where the tenant, induced by the conduct of the landlord, held over pending unsuccessful negotiations for a new lease, it was held that the tenant had a reasonable time after the termination of such negotiations in which to vacate, and that the landlord could not enforce

against such tenant liquidated damages, as provided for in the original lease, beyond the rental value of the premises for the time overheld.

The third reason is also directed to the sufficiency of the proof of the contract of letting. The evidence cited in this brief is in itself sufficient to prove the letting set forth in the affidavit.

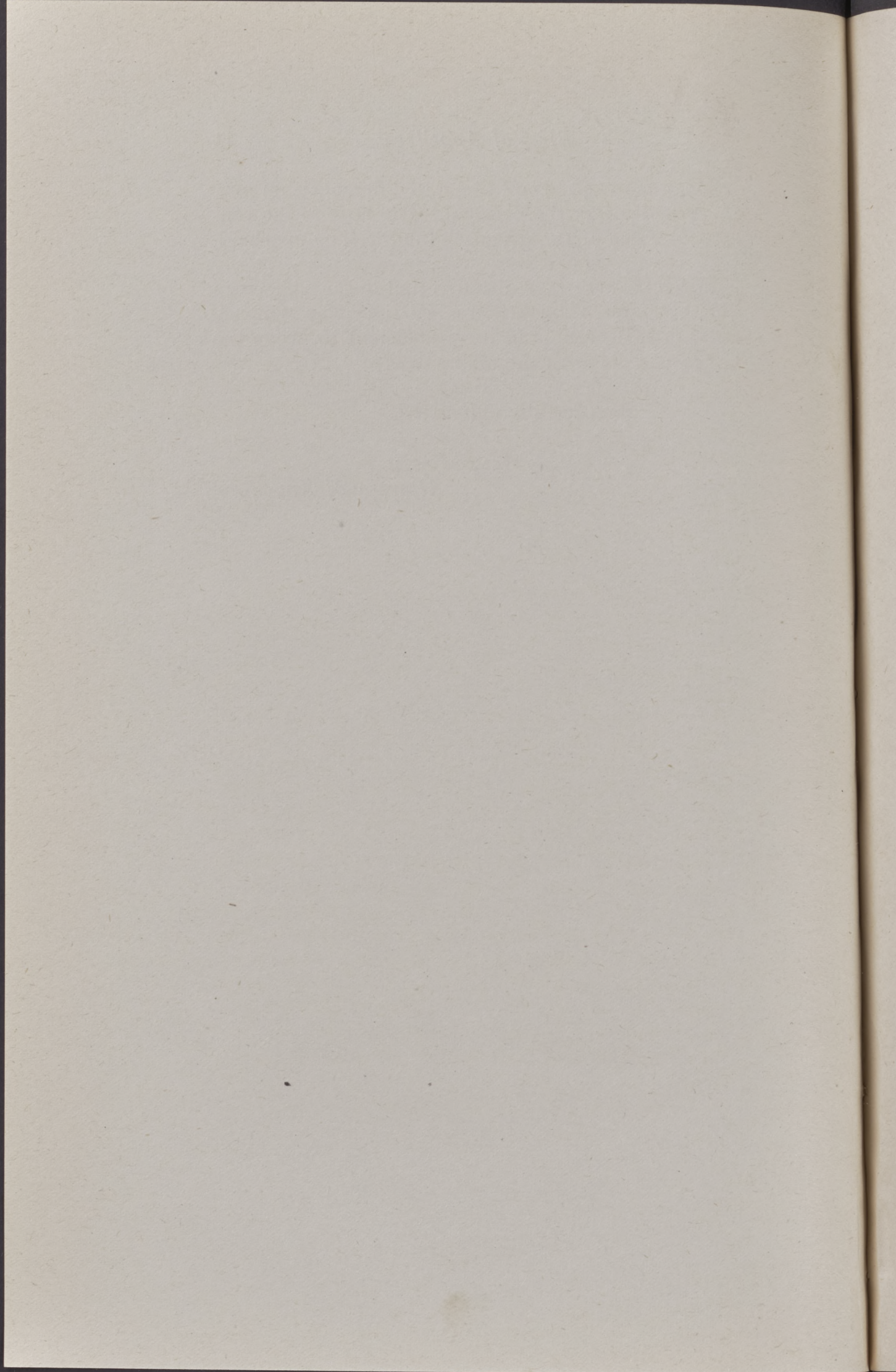
Respectfully submitted,

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HARRY CASSMAN,
Attorney of Appellees.

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NEW JERSEY COURT OF ERRORS AND
APPEALS.

R. C. Maxwell Company, (Prosecutor), Appellant,	}	On Appeal from SUPREME COURT.	10
vs.			
Jacob D. Lit, Samuel D. Lit and Charles A. Wimpfheimer, Respondents.	}		

BRIEF FOR APPELLANT.

On October 25, 1918, the Bacharach Real Estate Company (without stating for whom they were agents), entered into a written lease with the appellant, for the roof of premises situate at the corner of Illinois Avenue and the Boardwalk, Atlantic City, New Jersey, for the term of one year from December 1, 1918, for the rental consideration of \$1,000 payable: 4% December 1, 1918; 3% January 1, 1919; 3% February 1, 1919; 4% March 1, 1919; 5% April 1, 1919; 4% May 1, 1919; 12% June 1, 1919; 20% July 1, 1919; 24% August 1, 1919; 12% September 1, 1919; 5% October 1, 1919; and 4% November 1, 1919, (pp. 11, 44). 20

During September, October and the early part of November, 1919, negotiations were carried on between the appellant and the real estate agents of respondents, in Philadelphia for additional privileges (pp. 33, 52, 53, 54). Various propositions were taken up and considered but none of them were finally agreed upon, and by the undisputed evidence in the case, all negotiations respecting a new lease with the added rights and privileges were suspended 30

about the middle of November, 1919 (p. 32). Mr. Cohen, a witness of plaintiffs below, testified that about November 20th he spoke with Chester Maxwell, one of the witnesses for the appellant, and told him that the respondents would be willing to have the appellant company remain for an additional month but that he should see the Bacharach Company and conclude the arrangement, (p. 14).

10 Upon the expiration of the written lease, defendant below made payment on account of the rent for the second year, which payment was accepted and the lease was thereby renewed for one year from December 1, 1919 (p. 17).

Suit for possession was instituted by respondents in the Atlantic City District Court on January 15, 1920, which suit was tried on January 28, 1920, at which time decision was reserved, and on February 19, 1920, decision was rendered in favor of respondents (p. 7). A stenographer was sworn and
20 recorded all testimony (p. 7) which appears in the state of the case beginning with page 11 duly certified. The affidavit upon which the suit was based is found at page 9.

On February 20, 1920, application was made to Mr. Justice Black for a writ of certiorari to review said judgment, which writ was allowed on said date on condition that the prosecutor consent to an early hearing and accept short notice of trial (p. 2).
30 The cause was argued March 5, 1920, before the Supreme Court, which court, by opinion filed April 14, 1920, affirmed the judgment of the Atlantic City District Court. The opinion is found in the state of case on pages 62, 63, 64.

ARGUMENT.

The cause is before the Court upon the judgment record, pleadings and evidence certified by the Judge

of the Atlantic City District Court. The reasons assigned for reversal and hereinafter mentioned are not directed to the insufficiency of the affidavit to vest jurisdiction in the Atlantic City District Court but upon the insufficiency of the proof submitted in said Court in support of the allegations of said affidavit. The evidence is certified under the provisions of section 1 of an act of the Legislature entitled, "An act to amend an act entitled, 'A supplement to an act entitled, "An act concerning district courts (Revision of 1898)" approved June fourteenth, one thousand eight hundred and ninety-eight,' approved April twelfth, one thousand nine hundred and five," approved March 28, 1912, which provides as follows: 10

"1. Whenever either party to any cause in any district court in this State makes application to the judge thereof for the appointment of a stenographer to transcribe the proceedings at the trial of the said cause and take down the testimony therein, it shall be the duty of the said judge to designate a stenographer to act as aforesaid in said case, at the expense of the party so applying, which stenographer shall be duly sworn; and if an appeal shall be taken from or a writ of certiorari allowed upon the judgment in said cause, the transcript of said proceedings and said testimony made by said stenographer, shall be certified by said judge as the state of the case, to be used on the hearing of said appeal or certiorari, and shall be transmitted by the party so appealing or suing out said writ of certiorari to the clerk of the Supreme Court within fifteen days from the rendition of the judgment." 20 30

The only question for the Court to consider in this case is whether the Supreme Court erred in holding that the District Court of Atlantic City had

jurisdiction to enter a judgment for possession in favor of plaintiffs below, and since no objection is made to the affidavit on which the proceedings were based, the Court will determine whether there was any evidence from which the Court below might have found the existence of the jurisdictional facts.

Fowler v. Roe, 25 Law, 549.

Moreland v. Steen, 99 Atl., 135.

10 In the last cited case, Mr. Justice Swayze, speaking for the Supreme Court, said:

20 "The only question therefore before us is whether the district court had jurisdiction. No objection is made to the affidavit on which the proceedings were based. The objection is to the proof at the trial. In view of the limitation upon our power of review in cases of this character, the question is within very narrow limits. We cannot review the findings of fact by the trial judge; we can only determine whether there was any evidence from which he might have found the existence of the jurisdictional facts."

There are two sub-divisions under reason one and they will be discussed in their order. (pp. 65, 66.)

1.

30 The Supreme Court should have decided that the Atlantic City District Court was without jurisdiction to enter a judgment for possession in favor of the plaintiffs below, because there was no proof establishing the relation of landlord and tenant in that

(a) The affidavit filed upon which summons was issued alleged the owners of the premises in question to be Jacob D. Lit, Samuel D. Lit and Charles A. Wimpfheimer and there was no proof from which the Court could find, as a fact, that said Jacob D.

Lit, Samuel D. Lit and Charles A. Wimpfheimer were the owners of said premises.

Upon the argument before the Supreme Court counsel for respondents objected to the consideration of sub-division A of reason one for the reason that the objection had not been presented to the trial court and therefore was not subject to review by the Supreme Court.

At the close of the case of the plaintiffs below, counsel for appellant moved for a nonsuit (p. 27),
10
upon the ground, among others, that "there has been no evidence produced before the Court to show a contract such as is alleged in the affidavit." The affidavit (p. 9), alleges that Jacob D. Lit, Samuel D. Lit and Charles A. Wimpfheimer, are owners of the premises in question, and that there was an agreement entered into for the rental of said premises between the Bacharach Real Estate Company, agents for said owners, and appellant. It being
20
alleged, therefore, that the named persons are the owners, there must be proof that they are in fact the owners, and when the attention of the trial court is directed to the objection that there is no proof of the contract between the owners and the tenant as alleged in the affidavit, the question of the lack of proof of ownership in plaintiffs below is presented for consideration because in order to prove the contract, plaintiffs were required to prove ownership as alleged.
30

Assuming, however, for the sake of argument, that said objection was not presented to the trial court, it is properly before the Court for review because it is addressed to the jurisdiction of the Court and need not have been, therefore, specially called to the attention of the trial court in order that it may be reviewed. Before the trial court had jurisdiction, it was necessary that all of the juris-

dictional facts be established by competent proof, and failure to make proof thereof at once deprives the Court of jurisdiction of the subject matter.

In the case of *State v. Shupe*, decided in the Court of Errors and Appeals, 88 Law, 610, 97 Atl. 271, the Court held:

10 “A court of last resort need not hear a party as to a question which could have been, but was not, raised in an intermediate court of appeals, except where the question goes to the jurisdiction of the subject-matter or where a question of public policy is involved.”

See also, *Kennedy v. Coon*, 106 Atl., 211, decided in the Supreme Court, to the same effect, which holds that:

20 “The general rule of practice in this state relative to matters determinable in this court, and in the Court of Errors and Appeals, has been settled in accordance with the rule promulgated by the federal Supreme Court, with the additional qualification that the rule shall not apply where, as in this case, the question presented is one dealing with the jurisdiction of the court, or the general public policy of the state.”

30 The affidavit alleges that Jacob D. Lit, Samuel D. Lit and Charles A. Wimpfheimer are owners of the premises in question (p.9). A careful reading of the testimony shows that there is no proof from which the Court below could find that the named persons were owners or were entitled to the possession of said premises. In fact, there is testimony showing that persons other than those alleged in the affidavit to be owners are owners. The witness, Cohen, testifying for plaintiff upon direct examination, (p. 14) testified as follows:

“Q. Mr. Cohen, are you connected with the firm of Mastbaum Brothers & Fleisher?

A. I am.

Q. And have you charge of the Atlantic City properties which they own?

A. Yes.”

After careful examination, we are unable to discover any testimony other than that above quoted 10 wherein counsel for respondents seeks to show the ownership of the premises in question.

In the case of Cleary v. Waldron, 26 N. J. Law Journal, p. 176, 54 Atl., 565, the Court held that “Where, in a landlord’s proceeding for possession, his affidavit shows neither his ownership, nor any right of possession in him, the court has no jurisdiction.”

In the case of Snedecker v. Quick, 12 Law, 129, 20 which was an action for unlawful detainer under the statute, the Court held that the tenancy should be proved as alleged, and that if tenancy of two or more is averred, such a tenancy should be proved.

(b) The affidavit alleged the making of a parole agreement between the Bacharach Real Estate Company, agents for the plaintiffs below, and the R. C. Maxwell Company. There was no proof to show that there was any agreement made and entered into 30 between the Bacharach Real Estate Company, agents, and the R. C. Maxwell Company, or between any other persons for the letting of said premises for the term stated in said affidavit.

The affidavit sets out that the Bacharach Real Estate Company, as agents of the plaintiff, let the premises in question to the defendant by a parole agreement made on or about the first day of Decem-

ber, 1919, "between said R. C. Maxwell Company and said Bacharach Real Estate Company, agents, as aforesaid" for a period of one month from December 1, 1919, to January 1, 1920, for the rent or sum of forty dollars. Careful examination of the testimony fails to show the proof of the making of any such agreement. Mr. Cohen, one of plaintiff's witnesses, testified (p. 14) that a representative of the appellant company, on or about November 20,
10 1919, asked for temporary permission for his sign to be there while they were negotiating for a new lease, and that he told him to see the Bacharach Real Estate Company; that the owners were willing to permit them to be there for another month pending the adjustment of whether or not they would be successful in making a new lease; that he did not know the rent appellant was paying without referring to the lease; that (p. 17) Mr. Maxwell was to go to the Bacharach Real Estate Company to arrange the details of the monthly agreement. Mr.
20 Evans, who is a member of the firm of the Bacharach Real Estate Company, testified (p. 21) that he did not have any conversation with the Maxwell Company concerning the rental of the sign space for said month of December. There is no proof of the consummation of any contract for the letting of said premises to appellant for said month of December, as alleged in the affidavit. Failure to prove the tenancy alleged was fatal to the jurisdiction of
30 the Court.

24 Cyc., 1445.

Snedeker v. Quick, supra.

2.

The Supreme Court should have decided that the District Court was without jurisdiction to render said judgment for possession in favor of the plain-

tiffs below, because the plaintiffs below, through their agent, Bacharach Real Estate Company, accepted rent from the defendant below, under and pursuant to the terms of the lease theretofore existing between the parties for said premises, which payment by defendant and acceptance by plaintiffs, renewed said lease for an additional term of one year, and therefore. defendant's term in said premises had not then expired.

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In the case of *Moreland v. Steen*, supra, Mr. Justice Swayze examined into the question whether evidence was introduced by the defendant of some new fact which demonstrated the want of jurisdiction in the trial court. In the case in hand, it is undisputed that prior to the making of the alleged agreement for one month, defendant below was in possession of the premises in question under a written lease for one year, extending from December 1, 1918, to December 1, 1919, at the rent of \$1,000, payable 20 four per centum on December 1, 1918, etc. (See plaintiffs' exhibit P. 1, p. 44.) There is no proof of the making of any new agreement between plaintiffs and defendant. It is further undisputed that negotiations for the making of a new lease with additional privileges at a greatly increased rental had been suspended because of the failure of the parties to agree upon terms therefor about the middle of November, 1919. Prior to the expiration of the written lease, and on or about November 29, 30 1919, the agents of the plaintiffs received from defendant a check for forty dollars (p. 17). The check was accepted and a receipt therefor sent to defendant (p. 22). Copies of the check and receipt appear at pp. 55 and 56. Both the receipt and check have noted upon them the following "in payment of rent due Dec. 1, 1919, on adv. privilege cor. Ill. Ave. & Boardwalk, Atlantic City, N. J." The

payment due under the lease, Exhibit P. 1, on December 1, was \$40.00 (pp. 22, 44). Said payment was accepted by Mr. Evans, of the Bacharach Real Estate Company, who had personal charge of the premises in question, as rent for that property (p. 22) without any arrangement being made by him with the appellant (p. 20). There is no proof of an agreement with any other person either prior or subsequent to the expiration of the written lease.

10 Defendant intended said payment as a renewal of said written lease (p. 42). It will be observed from a reading of the written lease that the smaller payments are made during the winter and spring months and the larger payments are required to be made during the summer season (p. 44). The rent is not payable in equal monthly payments but at the time and in the manner arbitrarily agreed upon.

20 The payment of \$40.00 made and accepted, therefore, of itself, indicated, in the absence of any agreement to the contrary, an intent upon the part of both plaintiffs and defendant to renew said written lease. The defendant was clearly, after the payment and acceptance of said sum, a hold-over tenant, its term under said renewal had not expired and the Court was without jurisdiction.

30 When the tenant pays and the landlord accepts rent, it creates a tenancy for another term which cannot be terminated by either party within the period of the term without the consent of the other, and renews all the rights and obligations incident to the relationship of landlord and tenant under the original lease.

24 Cyc., 1014.

The receipt of rent by the landlord from one so holding over, or distraining for it, indicates with certainty a design to continue the relation of landlord and tenant.

Condon v. Barr, 47 Law, p. 114.

Adams v. Adams, 12 Law, p. 101.

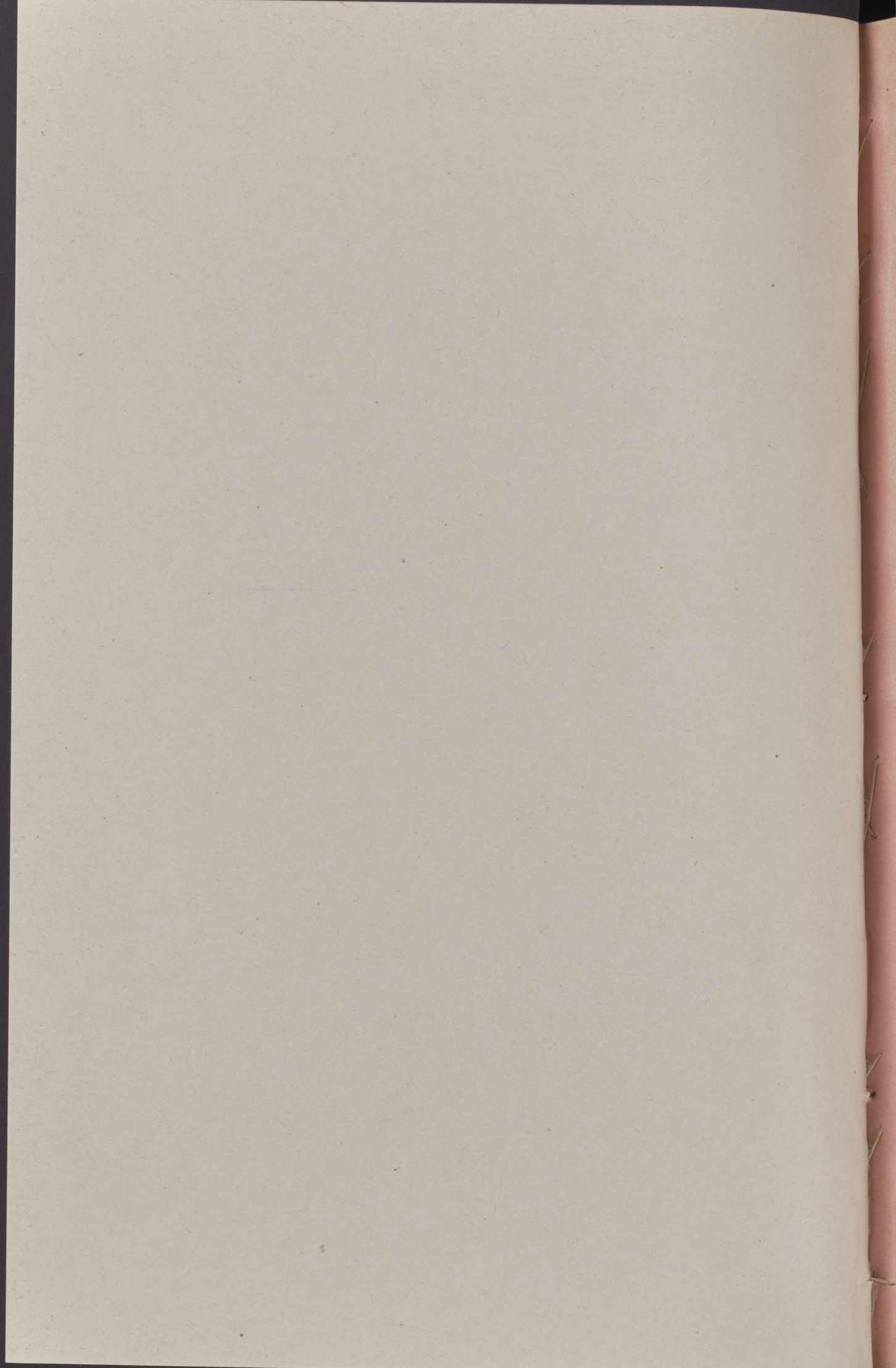
Reason No. 3 has been fully discussed under reason one.

It is respectfully submitted that because of the foregoing reasons the judgment of the Atlantic City District Court under review should be reversed and set aside. 10

BABCOCK & CHAMPION,
HERVEY S. MOORE, *appellant.*
Attorneys for ~~Prosecutor.~~

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WILLIAM BOYD