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Amended Notice of Appeal and Grounds of Appeal.

(Filed Feb. 25, 1927.)

NEW JERSEY SUPREME COURT.

MORRIS GERSHMAN,
Plaintiff-Respondent,
v.
SAMUEL M. ADELMAN,
Defendant-Appellant.

On Appeal from the Supreme Court to the New Jersey Court of Errors and Appeals.

To

Messrs. ADLER & ADLER,
Attorneys of Plaintiff-Respondent.

SIRS:

TAKE NOTICE that the defendant-appellant Samuel M. Adelman hereby serves upon you an amended notice of appeal, and does hereby appeal from the whole of the judgment entered in the New Jersey Supreme Court in the above entitled cause on January 29th, 1927, instead of on February 1st, 1927, as stated in the original notice of appeal, and hereby sets down the following as his grounds of appeal:

1. Because the Supreme Court erred in affirming the judgment of the Hudson County Circuit Court in favor of plaintiff-respondent.

Rule of Affirmance.

2. Because the Supreme Court erred in failing to reverse the judgment of the Hudson County Circuit Court in favor of the plaintiff-respondent.

3. Because the Supreme Court should have rendered judgment in favor of the defendant-appellant and not in favor of the plaintiff-respondent.

GROSS & GROSS,
Attorneys of Defendant-Appellant.

Rule of Affirmance.

(Filed Jan. 29, 1927.)

NEW JERSEY SUPREME COURT.

MORRIS GERSHMAN, Plaintiff-Respondent, *v.* SAMUEL M. ADELMAN, Defendant-Appellant.	On Appeal from Hudson County Circuit Court.

This cause having been duly argued at the October Term of this Court by Adler & Adler, of counsel for plaintiff-respondent, and Gross & Gross, of counsel for defendant-appellant, and the Court having considered the same and finding no error in the record of proceeding in the Hudson County Circuit Court.

It is thereupon ORDERED and ADJUDGED, that the judgment of the Hudson County Circuit Court removed by the appeal in this cause be affirmed with costs; and that the cause be remitted to the Hudson County Circuit Court to be proceeded

Notice of Appeal and Grounds of Appeal.

with, in accordance with the judgment and the practice of said Court.

Dated January 28th, 1927.

Entered January 29th, 1927.

On motion of

ADLER & ADLER,
Of Counsel with Plaintiff-Respondent.

Notice of Appeal and Grounds of Appeal.

(Filed Feb. 11, 1927.)

NEW JERSEY SUPREME COURT.

MORRIS GERSHMAN, Plaintiff-Respondent, *v.* SAMUEL M. ADELMAN, Defendant-Appellant.	On Appeal from the Supreme Court to the New Jersey Court of Errors and Appeals.

To

Messrs. ADLER & ADLER,
Attorneys of plaintiff-respondent.

Sirs:

TAKE NOTICE that the defendant-appellant Samuel M. Adelman hereby appeals from the whole of the judgment entered in the New Jersey Supreme Court in the above entitled cause on February 1st, 1927, and hereby sets down the following as his grounds of appeal:

1. Because the Supreme Court erred in affirming the judgment of the Hudson County Circuit Court in favor of plaintiff-respondent.

2. Because the Supreme Court erred in failing to reverse the judgment of the Hudson County Circuit Court in favor of the plaintiff-respondent.

3. Because the Supreme Court should have rendered judgment in favor of the defendant-appellant and not in favor of the plaintiff-respondent.

GROSS & GROSS,
Attorneys of Defendant-Appellant.

Opinion of Supreme Court.

(Filed Jan. 19, 1927.)

NEW JERSEY SUPREME COURT,

No. 21. OCTOBER TERM—1926.

MORRIS GERSHMAN,
Plaintiff-Respondent,

v.

SAMUEL M. ADELMAN,
Defendant-Appellant.

} On Appeal.

Submitted October Term, 1926. Decided January 19th, 1927.

1.

Under the Uniform Negotiable Instrument Law, *3 Comp. Sts. of N. J., p. 3757, sec. 193,* what is a "reasonable time" or an "unreasonable time," having regard to "the facts of the particular case," for presenting a promissory note, "payable on demand, with interest," under the circumstances of this case, is a question of fact to be submitted to the jury under instructions from the Court.

2.

The questions of payments and whether the plaintiff was a holder in due course, under the facts in the record of this case, were properly left by the trial judge to be determined by the jury, as questions of fact. It was not error for the trial judge to so treat these questions.

Before—Justices BLACK and CAMPBELL.

For the defendant-appellant: Messrs. GROSS & GROSS.
For the plaintiff-respondent: Messrs. ADLER & ADLER.

The opinion of the Court was delivered by BLACK, J.:

The suit was brought to recover the amount due on a promissory note, thus—

$1,011.75 West New York, N. J. Jan. 13, 1921.

On demand after date I promise to pay to the order of Gootman Adelman one thousand eleven 75/100 .....Dollars at the New Jersey Title Guarantee & Trust Co. West New York, N. J.
Value received, with interest.
No. Due S. M. ADELMAN.

The trial resulted in a verdict for the plaintiff for $1,327.06. The defendant appeals and files eight grounds of appeal. 1st and 2nd; error by the Trial Judge in refusing to non-suit the plaintiff or

direct a verdict in favor of the defendant. 3rd to 8th; error in the charge of the Trial Judge.

The exceptions to the charge of the Trial Judge and the errors alleged thereon, 3 to 8, consist of long extracts from the Judge's charge dealing somewhat at length with statements of facts, involving one or more legal principles in each excerpt.

The two meritorious points which the appellant argues in the brief are:

1st. The plaintiff was not a holder in due course, as a matter of law:

2nd. The plaintiff did not have title to the note sued on.

These points being conceded of course there should have been a non-suit or the direction of a verdict in favor of the defendant. It would have been error for the Trial Court to treat these points in the charge as questions of fact, to be decided by the jury. No intelligent discussion, however, of these points can be made without a clear grasp of some of the dominant facts. At the outset, it may be said, that the transaction, the situation and surrounding circumstances are most unusual. It was between two brothers. The promissory note was not given for money owing, but rather as evidence of a money investment. Gootman Adelman, the payee, desired his brother to use the money in his business, so that he, Gootman, might receive the benefit of the interest,* which are significant circumstances. It is dated Jan. 13, 1921. Gootman

* The note is payable on demand, with interest.

Adelman, the payee, died December, 1923; nearly three years after the date of the note. His widow, Rebecca Adelman, retained the note until July, 1925, when it was transferred to the plaintiff, Morris Gershman, in payment of work performed and for advances made to the widow in the business then being operated by her. Suit was commenced on September 11, 1925. Gootman Adelman was stricken with illness; his brother, Samuel, the maker of the promissory note, expended money for him, the amount, and whether such expenditure was voluntary or should be charged against the indebtedness evidenced by the note are controverted questions of fact.

The first question to be answered is, is the plaintiff a holder in due course, as a matter of law?

The Uniform Negotiable Instruments Law; 3 *Comp. Sts. of N. J. p. 3741, sec. 52;* defines a holder in due course and recites four conditions, as prerequisites which were read to the jury by the Trial Judge, in his charge. Section 53 defines a holder in due course, thus: "When an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course." Section 193, in estimating time provides, "In determining what is a 'reasonable time' or an 'unreasonable time' regard is to be had to the nature of the instrument the usage of trade or business (if any) with respect to such instruments and the facts of the particular case." Under ordinary circumstances from the date of the note January 13, 1921, to the commencement of the suit September 11th, 1925, it might well be said, that such a lapse of time might be considered an unreasonable time. But the cir-

cumstances concerning the issuance of the note were peculiar and extraordinary. It was an arrangement between two brothers, who were fond of each other, Samuel the maker of the note being the more successful. It was in the nature of an investment of funds by one brother with the other, except for the intervention of the death of Gootman, his funds would probably have been left in his brother's care for a long period of years, as a continuing security. Providing for the payment of interest on a demand note generally shows or indicates that immediate presentment was not contemplated. This fact is generally to be considered in determining, whether the note has been presented within a reasonable time.

The topic is fully presented and discussed, with a wealth of illustrative citations in *7 Cyc. p. 975 (b)*. According to some courts a note payable on demand, with interest, is a lasting security, and is not dishonored until payment is demanded. *3 R. C. L. p. 1047, sec. 252.* There is no precise time when such a note is to be deemed dishonored, as it must depend upon the circumstances of the case and the situation of the parties. If the facts are involved in dispute, the question is one of mixed fact and law, which should be submitted to the jury under the direction of the Court; *ib.*

The facts are so unusual in this case, from necessity, the Trial Court, under the 193 section of the Statute, in determining what is a "reasonable time" regard being had to the "facts of the particular case," properly left the question to the jury, hence, we think the verdict of the jury should not be disturbed.

The note was endorsed by Rebecca Adelman as administratrix of her deceased husband, Gootman Adelman died without issue and so far as the rec-

ord shows leaving no unpaid debts. The widow was entitled to whatever estate was left by him including the note in question. She therefore had the legal power to transfer the title to the plaintiff. He had the full legal title to the note, so that, he could maintain an action thereon against the maker. *3 R. C. L., p 991, secs. 200, 201.*

The only other question involved is the payments made by the defendant Samuel M. Adelman on account of the sickness of Gootman Adelman and whether such payments were voluntary or to be charged against the note? There is contradictory testimony on this question in the record. We find no error in the Judge's charge on this point when he said; "there must be some agreement or understanding that there was to be a credit on account of this note, that the payments were made in payment, on account, or on reduction of, or in discharge of, whatever the case might be, of this note," or when the Court said: "If that is true (referring to the payments) the plaintiff here would not be a holder in due course, because, he would have had notice of the infirmity of the note, which was that it had been paid, if it is a fact, that it had been paid."

Finding no error in the record, the judgment of the Hudson County Circuit Court is affirmed.

New Jersey Supreme Court

Notice of Appeal.

(*Filed May 5, 1926*)

HUDSON COUNTY CIRCUIT COURT

MORRIS GERSHMAN, Plaintiff-Appellee, vs. SAMUEL M. ADELMAN, Defendant-Appellant.	On Appeal to the Supreme Court.

To Messrs. Adler & Adler,
Attorneys of Plaintiff-Appellee.

Sirs:

Take Notice, that the defendant-appellant, Samuel M. Adelman herein, hereby appeals to the New Jersey Supreme Court, from the whole of the judgment entered in the above entitled cause in the Hudson County Circuit Court, on March 25th, 1926.

Dated, April 2d, 1926.

GROSS & GROSS,
Attorneys of Defendant-Appellant.
ADLER & ADLER,
Attys. of Plaintiff-Appellee.

(*Endorsed*)

Service of a copy of the within notice acknowledged this 9th day of April 1925.
(Filed, April 27, 1926)

Grounds of Appeal.

(*Filed,* May 5, 1926)

NEW JERSEY SUPREME COURT

MORRIS GERSHMAN, Plaintiff-Appellee, vs. SAMUEL M. ADELMAN, Defendant-Appellant.	Action at Law.

The appellant herein hereby states the following as his grounds of appeal herein:

1. That the trial court refused to non-suit the plaintiff at the close of the plaintiff's case.

2. That the trial court refused to direct a verdict in favor of the defendant at the close of the whole case.

3. That the trial court erroneously charged the jury as follows:

"Well now, Gentlemen, in order to determine whether or not a person is a holder in

due course with respect to the length of time in which he acquires the instrument after its date, depends upon the circumstances surrounding the particular case, and so in this case, all of these surrounding circumstances must be taken into consideration: The fact, as it seems to be conceded, that the money which is represented by this note was not in the strict sense, turned over as a loan to Mr. Samuel Adelman, but that it was given to him in order that it might be turned into the courses of trade, and more interest be obtained by his brother, Gootman Adelman: The fact that Mr. Gootman Adelman died in December of 1923, and the further circumstance that thereafter, the payment was not demanded until some time in 1925, 1924 or 1925, whatever the fact may have been on that point, and that suit was not started until November 1925.

I merely recite these different circumstances as being some of the circumstances which you will take into consideration, not that they constitute all of the circumstances in this case."

4. That the trial court erroneously charged the jury as follows:

"His obligation is to pay the note provided the holder of the note is a holder in due course and acquires title to the note, a legal title to the note.

So the defendant says that if I am not protected by any of these defenses, still there is the further defense that he has paid the note before it was ever endorsed over to the plaintiff. Now, of course, whether this is a good defense would depend upon two things, First, did he actually pay this note? Second, that the plaintiff was a holder in due course. And you must be satisfied of both of these things before the defendant can be relieved of liability in this suit."

5. That the trial court erroneously charged the jury as follows:

"Now, if you should find that these payments were made in payment of the note, that does not determine the question of whether the plaintiff can recover, because it must further appear that he was a holder in due course.

If he was a holder in due course, then whether the note was paid or not, would make no difference."

6. That the trial court erroneously charged the jury as follows:

"Now, the defendant also claims that this plaintiff acquired this note an unreasonable time after its issue, and therefore and for that reason, he was not a holder in due course. Now, the note was dated January 13, 1921. Mr. Adelman, the payee of the note, died in December, 1923 and the

plaintiff acquired the note in July 1925, under the circumstances which I have already spoken of, and as were related by the plaintiff on the witness stand, if you believe what he said was true as to the manner in which the note was delivered to him, and the consideration which was given for the note. If the plaintiff acquired the note an unreasonable time after its issue, under all of the circumstances, then this plaintiff was not a holder of that note in due course, and if that note was paid in the manner claimed by this defendant, then the plaintiff could not recover, and your verdict would have to be for the defendant and against the plaintiff of no cause of action.

If, however, it was not acquired by or negotiated to the plaintiff an unreasonable length of time after its issue, then it could not be called overdue paper, making the plaintiff not a holder in due course, on the ground of being overdue paper."

7. That the trial court erroneously charged the jury as follows:

"A holder of a note acquires no title where it was negotiated without authority or in an unauthorized manner, or where the transfer was to pay a private debt of its owner, unless the representative who thus sells or transfers is also residuary legatee, and is the sole distributee or financial beneficiary interested in the estate of the deceased, and the purchaser or the persons to whom the note is negotiated had no no-

tice of any unsatisfied debts of the deceased holder, or any grounds which render it improper for the personal representative to so deal with the assets of the estate, such as a breach of faith, or fraud perpetrated upon the estate.

And so, in this case, if Mrs. Adelman was the sole beneficiary or distributee of her husband's estate, and plaintiff had no notice of any unsatisfied debts, she might transfer the note as she did and the plaintiff would have a good title to it as against this defendant. Because you see, Gentlemen, this defendant is not a person interested in this estate, in the sense that he is a distributee of the proceeds of the estate."

8. That the trial court erroneously charged the jury as follows:

"Of course, if those payments were not made in reduction of the amount of this note, or to be applied when made in the reduction of the amount of this note, but were merely voluntary payments, payments made gratuitously, taking place without a request or suggestion that there be any credit applied upon this note, so that it could be said that they were voluntary payments, well, then of course, there would be no defense upon this ground of payment. But the mere fact that Mr. Samuel Adelman paid the decedent's bills, standing alone, is not sufficient. There must be

some agreement or understanding that there was to be a credit on account of this note, that the payments were made in payment, on account, or in reduction of, or in discharge of, whatever the case might be, of this note."

GROSS & GROSS,
Attorneys of Defendant-Appellant.

Summons.

(*Filed,*)

HUDSON COUNTY CIRCUIT COURT

State of New Jersey.

To Samuel M. Adelman, you are summoned to answer the Complaint of Morris Gershman in an Action-at-Law in the Hudson County Circuit Court, and take notice that unless you file an answer to the said Complaint with the Clerk of the Hudson County Circuit Court at Jersey City, within twenty (20) days after service upon you of this Writ and the annexed Complaint, plaintiff may proceed in this suit and judgment may be entered against you.

WITNESS, Henry E. Ackerson, Jr., Judge of the Hudson County Circuit Court at Jersey City, this Eleventh day of September, Nineteen hundred and twenty-five.

ADLER and ADLER,
Attorneys.

John J. McGovern,
Clerk.

Complaint.

(*Filed, September 14, 1925*)

HUDSON COUNTY CIRCUIT COURT

MORRIS GERSHMAN, Plaintiff, vs. SAMUEL M. ADELMAN, 12 Liberty Place, Weehawken, New Jersey, Defendant.	Action at Law.

Plaintiff, Morris Gershman, residing in the City of Bayonne, County of Hudson, and State of New Jersey, says:

1. He sues for the amount of a promissory note made by the defendant, Samuel M. Adelman, to the order of Gootman Adelman, which note was subsequently endorsed by Becky Adelman, duly appointed administratrix of the Estate of the said Gootman Adelman to plaintiff, a copy of which note is set out here below:

$1011.75 West New York, N. J. Jan. 13, 1921.
On Demand after date I promise to pay
to the order of Gootman Adelman One
Thousand Eleven 75/100.....Dollars
West New York Branch.
at the NEW JERSEY TITLE GUARANTEE
& TRUST Co.
West New York, N. J.
Value received, with interest
No. Due S. M. ADELMAN.

Complaint

(*Endorsed*)

Gootman Adelman

By:
Becky Adelman, Administratrix.

2. Said note was payable on demand. Plaintiff has demanded payment of the said note by defendant, but defendant has refused to pay same.

3. Said note is now the property of the Plaintiff and is unpaid.

4. Plaintiff demands as damages the sum of One thousand eleven ($1,011.75) dollars and seventy-five cents, and interest thereon from January 13, 1921.

ADLER and ADLER,
Attorneys of Plaintiff.

To the defendant:

Take Notice that if you intend to defend this action you must file an Affidavit of Merits within ten (10) days and an answer within twenty (20) days from the date of service hereof and that in default thereof judgment will be entered for the amount claimed herein.

ADLER and ADLER,
Attorneys of Plaintiff.

Affidavit of Merits.

(*Filed, September 22, 1925*)

HUDSON COUNTY CIRCUIT COURT

MORRIS GERSHMAN, Plaintiff, vs. SAMUEL M. ADELMAN, 12 Liberty Place, Weehawken, New Jersey, Defendant.	Action at Law.

Samuel M. Adelman, of full age, being duly sworn upon his oath deposes and says:

I am the defendant in the above entitled action.

I believe I have a good and sufficient and proper legal defense, and a defense of merit against this action.

SAMUEL ADELMAN.

Sworn to and subscribed
before me this 21st day
of September, 1925.
Donald M. Carlesco,
Notary Public of New Jersey.

Answer.

(*Filed, October 2, 1925*)

HUDSON COUNTY CIRCUIT COURT

MORRIS GERSHMAN, Plaintiff, vs. SAMUEL M. ADELMAN, Defendant.	Action at Law.

Defendant, residing in the Township of Weehawken, County of Hudson and State of New Jersey, answering the complaint herein, says:

FIRST SEPARATE DEFENSE

1. He denies each and every allegation contained in plaintiff's complaint.

SECOND SEPARATE DEFENSE

1. That the note sued upon by the plaintiff is not held by the plaintiff as a holder for value in due course, the plaintiff having taken the same after maturity.

2. That the defendant herein, after the making of the said note to Gootman Adelman, between the 13th day of March, 1921, and about June 1, 1924, and while the said Gootman Adelman was the holder of the said note, advanced moneys to the said Gootman Adelman, and for and on his ac-

count, and at his special instance and request, in all the sum of $2604.00.

THIRD SEPARATE DEFENSE

1. That the amount due on the said note, while held by the said Gootman Adelman, was paid to the said Gootman Adelman.

2. That the plaintiff is not a holder in due course for value of the said note, having taken the same after maturity.

FOURTH SEPARATE DEFENSE

1. That the plaintiff is not the holder in due course of the said note, the said note not having been negotiated to him as required by law.

GROSS & GROSS,
Attorneys of Defendant.

Reply.

(Filed, October 23, 1925)

HUDSON COUNTY CIRCUIT COURT

MORRIS GERSHMAN, Plaintiff, vs. SAMUEL M. ADELMAN, Defendant.	Action at Law.

Plaintiff, Morris Gershman, in reply to the Answer filed herein by the defendant in the above stated cause of action, says:

1. That he joins issue with the defendant on the allegations in the defendant's First Separate Defense.

2. That he denies all the allegations contained in the defendant's Second, Third, and Fourth Separate Defenses.

3. That any expenditures made by the defendant were voluntary and were not made in discharge of the note sued upon by the plaintiff.

4. That payment to Gootman Adelman is not a discharge of the note held by the plaintiff.

ADLER and ADLER,
Attorneys of Plaintiff.

Rule for Final Judgment.

HUDSON COUNTY CIRCUIT COURT

MORRIS GERSHMAN,
Plaintiff,

vs.

SAMUEL M. ADELMAN,
Defendant.

Action at Law.

This case was tried before Hon. Henry E. Ackerson, Jr., Judge of the aforesaid Court, and a jury, on March 24th, 1926, and the parties having submitted the evidence, and the jury having heard the same, retired and returned and rendered their verdict in favor of the plaintiff, Morris Gershman, and against the defendant Samuel M. Adelman, in the sum of One Thousand Three Hundred and Twenty-seven Dollars and six Cents ($1327.06).

Thereupon it is ordered that judgment final be entered in favor of the plaintiff, Morris Gershman, and against the defendant, Samuel M. Adelman, in the sum of One Thousand Three Hundred and Twenty-seven Dollars and Six Cents ($1327.06) and costs to be taxed.

HENRY E. ACKERSON, Jr.,
Judge.

On Motion of
Adler and Adler,
Attorneys of Plaintiff.
Rule actually entered March 25, 1926.
John J. McGovern,
Clerk.

Final Judgment.

HUDSON COUNTY CIRCUIT COURT

Judgment entered March 25, 1926

MORRIS GERSHMAN,
Plaintiff,

vs.

SAMUEL M. ADELMAN,
Defendant.

Damages	$1,327.06
Costs	55.02
Total	$1,382.08

Adler & Adler,
Attorneys.

Judgment on verdict in the above entitled cause was entered in this court on the 25th day of March, in the year of Our Lord One Thousand Nine Hundred and Twenty-six, in favor of the plaintiff, Morris Gershman, and against the defendant, Samuel M. Adelman, in a plea of Action at Law for the sum of Thirteen Hundred and Twenty-seven Dollars and six cents, damages, and Fifty-five Dollars and two cents, costs of suit.

Judgment entered and signed this 25th day of March, 1926.

HENRY E. ACKERSON, Jr.,
Judge.

Testimony.

HUDSON COUNTY CIRCUIT COURT

MORRIS GERSHMAN,
Plaintiff,

vs.

SAMUEL M. ADELMAN,
Defendant.

Before: HON. HENRY E. ACKERSON, Jr., Judge, and a Jury.

Jersey City, N. J.,
March 24, 25, 26, 1926.

Appearances:

Adler & Adler, Esqrs., for the Plaintiff, by Alfred Brenner, Esq., of Counsel.

Gross & Gross, Esqrs., for the Defendant, by Benjamin Gross, Esq.

A jury was duly empanelled; being found satisfactory, they were sworn.

(Recess to 10 A. M., March 25, 1926.)

10 a. m. March 25, 1926.

Counsel opened to the Jury, stipulation being made that the trial may proceed with eleven jurors.

MORRIS GERSHMAN, sworn.

Direct-examination by Mr. Brenner:

Q. Mr. Gershman, I show you a note dated January 13, 1921, made by Samuel Adelman to Gootman Adelman, and ask you whether you are the holder of that note at the present time? A. Yes, sir.

Mr. Brenner: I offer the note in evidence.

Mr. Gross: I object to the note unless it is first proved that the endorsment was for valuable consideration, the endorsment being made by one in a representative capacity.

The Court: Isn't that presumed?

Mr. Gross: It is presumed to be, your Honor, in a case where the holder is a holder by ordinary process.

Mr. Brenner: I will ask to have it marked for identification.

Marked as Exhibit P-1 for identification of this date.

Q. From whom did you receive that note? A. Mrs. Adelman, Becky Adelman.

Q. Did you give her anything for that note? A. Yes, I will tell you how it is. March 1925, she opened a little store at Avenue C, and she is a

friend of mine, she belongs to the same organization as I belong.

Q. She opened a store? A. And I loaned one hundred dollars to buy some merchandise.

Q. Cash or check? A. Check.

Q. Have you got the check there? (Witness produces.)

Q. That is the check you gave, March 9th, one hundred dollars, and it went through the bank? A. Yes, sir.

Mr. Gross: I object to the check being for a consideration to the lady individually, and not as administratrix of this estate.

(Argued.)

The Court: It may be received.

Mr. Gross: Your Honor will allow me an exception?

The Court: Yes.

Accepted and marked Plaintiff's Exhibit P-2 of this date.

Q. You advanced that check in March? A. Yes, Yes, sir.

Q. Did you advance any further money to her? A. Then June 25th I advanced three hundred dollars for more merchandise to make a living for her.

Q. This is the check of June 25th, 1925? (Handing witness) A. Yes, sir.

Mr. Brenner: I offer that for the same purpose.

Mr. Gross: I object to that offer on the ground that the check appears to be drawn to Rebecca Adelman individually and not

as administratrix of the estate of Gootman Adelman, and on the ground that from this check, the plaintiff was bound to ascertain in the negotiations of the instrument for which this was given as consideration, that the said Rebecca Adelman held the note in administrative capacity and could not negotiate it for an individual consideration to her.

The Court: Let it be marked.

Mr. Gross: Exception.

Accepted and marked as Plaintiff's Exhibit P-3 of this date.

Q. Did you make any further advances after that? A. Yes, I will tell you how. I fixed up her store at Broadway, 536, a nice millinery store, fixtures around fifteen hundred dollars.

The Court: When was that?

The Witness: In July, around the 15th, 1925.

Q. Now, did she pay you back any part of that fifteen hundred dollars in cash? A. Yes, sir; she paid me by check seven hundred dollars.

Q. That left her owing you eight hundred dollars on the job? A. Correct.

Q. And four hundred on these checks? A. Yes, sir.

Q. So that you took this note? A. Yes; even now she owes me around two hundred dollars.

Q. Besides the note? A. Yes, sir.

CROSS-EXAMINATION by Mr. Gross:

Q. This work that you had done, Mr. Gershman, that was done for Mrs. Adelman individually; is that right? A. Yes, sir.

Q. And she owns the store that you did the work in? A. Yes, sir.

Q. You say you did fifteen hundred dollars worth of work in her store in July 1925? A. Yes, sir.

Q. And for that you got seven hundred dollars in cash? A. By check.

Q. And eight hundred dollars you applied towards taking this note? A. Yes, sir.

Q. The same note that you produced here in court? A. Yes, sir.

Q. When did you take the note from her? A. When the job was finished, in July, some time.

Q. Are you sure you took that note from her in July? A. Yes, sir.

Q. You swear that positively? A. Absolutely.

Q. You are sure of that, are you? A. Certainly, in July.

Q. You are positive you took that note from Mrs. Adelman in July 1925? A. Yes, sir.

Q. Now I want you to be sure of that. You are sure of that? A. I am sure it was July 1925. I could not tell you the date, but it was in July.

Q. You are sure it was in the month of July? A. That is when I start to make the fixtures for the store on Broadway.

Q. In July, 1925, you are sure this note which has been offered as Plaintiff's Exhibit P-1 for identification, at that time had this endorsement on the back of it? A. I did not look at that.

Q. I am asking you whether in July, 1925, when

Mrs. Adelman gave you this note it had this endorsement on the back of it? A. Yes, that was in July.

Q. This was endorsed in July, 1925? A. Yes, sir.

Q. In your presence? A. My presence.

Q. Did you go with Mrs. Adelman to see Judge McCarthy? A. Yes, sir.

Q. In November, 1925? A. Yes, sir; this was a different case.

Q. Did you go down with this note? A. Down with her, not with my note, but with her note.

Q. Now did she tell you that this was a note that was left by her husband? A. Yes, sir.

Q. You knew, didn't you, that Mr. Samuel Adelman, sitting here, had advanced a lot of money to his brother, didn't you? A. I didn't know exactly how much. I am not acquainted with Mr. Adelman.

Q. You met him when he attended his brother's funeral? A. Yes, sir.

Q. You were sitting in the same coach with him? A. Yes, sir.

Q. Do you remember at that time, Mr. Adelman telling you that he had advanced to his brother several thousands of dollars? A. He didn't tell me a word about this.

Q. You knew he had advanced a lot of money for his brother? A. I know this, he took care of the funeral and everything else. I don't know exactly what he done.

Q. Didn't you go to Mr. Adelman and ask him to take his brother out of Ward's Island Hospital? A. Nothing of the kind.

Q. Didn't you go with a committee from some lodge to see Mr. Adelman here and ask him to take his brother out of Ward's Island? A. Not me.

Q. You know a committee went? A. Yes, sir.

Q. You knew that this brother here, Samuel Adelman, had spent several thousands of dollars on him in Christ Hospital, for keeping him there? A. I don't know how much he spent.

Q. You know he spent a large amount of money? A. He spent moneys, yes, I know.

Q. You knew that at the time you took this note from this woman, didn't you? A. Yes, sir.

Q. You knew that at the time that you ordered these repairs on her store, didn't you? A. I don't get that.

Q. You knew at the time that you did these repairs to Mrs. Adelman's store that this man, Samuel Adelman, had advanced a lot of money for his brother? A. Yes, that has not to do with the money she got to give me.

Q. I am asking you, did you know that? A. I know that, yes, sir.

Q. You knew that there was a note for one thousand dollars which this man, Samuel Adelman, had made to his brother? A. I knew that, too.

Q. You knew that at the time you went to the funeral, didn't you? A. I guess I knew it.

Q. That was some time in the latter part of 1923? A. He died January—no, December.

Q. You went to the funeral in December, 1923, and you knew that this man Samuel Adelman had given his brother the note for one thousand dollars? A. Yes, sir.

Q. And that very same time that you went to the funeral you knew that this man had advanced a large sum of money for keeping his brother in Christ Hospital? A. That his brother is spending money for him as his brother, not on account of the money.

Q. You don't think it was on account of the note? A. No, not on the note.

Q. Have you been secured by Mrs. Adelman in any way for the one thousand or eleven hundred dollars you advanced to her? A. What do you mean, secured?

Q. Did you get any form of security except this note? A. Nothing at all.

Q. She is in business, isn't she? A. Yes, sir.

Q. What line of business is she in? A. In millinery, ladies hats.

Q. You signed a bond, didn't you, for Mrs. Adelman to secure letters of administration on her husband's estate? A. Yes, sir.

Q. Is this your signature, Mr. Gershman? (Handing witness.) A. Yes, sir.

Mr. Gross: I ask that it be marked for identification.

Marked Exhibit D-1 for identification, of this date.

Q. At the time that you signed this bond, Mr. Gershman, you knew that Mrs. Adelman had this one thousand dollar note of her brother-in-law, didn't you? A. Yes, sir.

Q. Were you told how much the bond was to be for before you signed it? A. No, I didn't know.

Q. You didn't know? A. Just that somebody has got to sign as a witness, I signed it.

Q. Do you know how much the bond is for now?

Mr. Brenner: I object to that if the Court please. I certainly cannot see the materiality of it.

Mr. Gross: It is as to whether he is a bona fide purchaser.

Argued and question withdrawn.

The Court: When was this note negotiated to you, transferred to you?

The Witness: In July.

The Court: Of 1925?

The Witness: Yes, sir.

Q. Did you go to Judge McCarthy with Mrs. Adelman? A. Yes, I went with her.

Q. Do you remember when that was? A. I think it was about a couple of months after the man died.

Q. A couple of months? A. Yes, sir.

Q. You say he died in December, 1923? A. Yes, sir.

Q. Didn't you go to see Judge McCarthy in November 1924, fourteen months later? A. One month.

Q. Or eleven months later? A. To tell you the truth I don't know when I went, but I went with her just to see she gets a living and nothing else, that's all.

Mr. Brenner: Plaintiff rests.

Mr. Gross: I move for a nonsuit on the ground that there is no evidence of proper negotiations in this case, the evidence thus far disclosing that the note was negotiated

for a consideration running, if anything, between the administratrix in her individual capacity, rather than as administratrix. There is no proof of consideration to the estate of the deceased, and it affirmatively appears that the plaintiff in this case is not the bona fide holder for value.

The Court: On what ground do you say he is not a bona fide holder?

Mr. Gross: On the ground, for instance, if one should take from an executor a deed and should pay a nominal consideration, that deed is thoroughly void under the law.

Our contention here is that the same rule applies to the transfer of personalty as to real estate.

Argued.

Mr. Gross: I also ask for a nonsuit upon the ground that the endorsement by this lady is not such as to make the plaintiff a bona fide holder of value, that it is not a valid endorsement.

Mr. Brenner: I would like to complete my case by putting Mrs. Gootman Adelman on the stand.

REBECCA ADELMAN, sworn.

Direct-examination by Mr. Brenner:

Q. Mrs. Adelman, you are the widow of Gootman Adelman? A. Yes, sir.

Q. When Mr. Adelman died were there any children? A. No.

Q. Did you ever have any children? A. No.

Mr. Gross: I object to that as immaterial in this issue.

No cross-examination.

Mr. Brenner: I now offer the note.

Mr. Gross: I object to the offer on the ground that it now affirmatively appears in the plaintiff's case that the transfer in this case, if there were improper negotiations, that the plaintiff is not the holder in due course for value, for the reason that it now affirmatively appears that the consideration, if any, ran to Mrs. Adelman individually, and not as administratrix of her husband's estate; that it affirmatively appears that the plaintiff did not pay any consideration to the administratrix as such for the note in question.

The Court: I will receive the note and allow you an exception.

Mr. Gross: Exception.

Exhibit P-1 for identification now offered in evidence.

Mr. Brenner: Under 88 Law 170, I don't think it makes any difference whether it is transferred by the administratrix as administratrix or individually, there being no other inheritors, and no debts proven.

The Court: The testimony which has just been put in makes this a jury question, at least a question that the Court cannot deal with. Mr. Gross, I deny your motion and allow you an exception.

I find authority for that in 24 Corpus Juris, page 224.

Mr. Gross: Exception.

DEFENDANT'S TESTIMONY

SAMUEL M. ADELMAN, sworn:

Direct-examination by Mr. Gross:

Q. Mr. Adelman, you are the brother of Gootman Adelman? A. Yes, sir.

Q. The man who signed this note in question upon which this suit is brought? A. Yes, sir.

Q. And this is the note which you signed, dated January 13, 1921? A. Yes, sir.

Q. Now, will you tell the jury, please, for what that note was given? A. It was given to me for cash, and for considerations, other considerations, which I don't remember exactly what, but it was given to me which it was fully taken consideration though when the note was made.

Q. Did your brother leave cash with you? A. Well, he gave me cash, yes sir.

Q. For what purpose did he give you the cash? A. Well, he gave me the cash, he says that time, "You are handling a lot of money if I will have the money it would not bring me much interest. You handle a lot of money and you are

doing it, why don't you take it from me so that you should pay me interest?"

Q. The note bears interest, does it not? A. Yes, the note is with interest.

Q. Do you recall your brother becoming ill some time in March 1921? A. Yes, sir.

Q. What is your business, Mr. Adelman? A. Well, I am a builder and contractor.

Q. How long have you been a builder and contractor? A. Well, I have been for twenty or twenty-five years.

Q. In Hudson County, is that correct? A. Yes, sir.

Q. You have built considerable apartment houses and other buildings in this county? A. Yes, sir.

Q. Now after you gave this note to your brother and in March of this same year, you say your brother was taken sick? A. Yes, sir.

Q. Did you visit him when he was taken sick? A. Well, they called me up on the phone as soon as he was stricken down, and they called me up, so my son, myself and my wife went to see him.

Q. Where did you see him? A. At the apartment which he occupied.

Q. Where did he live? A. Well, he lived, I think, I don't remember exactly the street, I think it was in 18th or 20th Street.

Q. Was he lying in bed at the time? A. Yes, sir.

Q. Was his wife present? A. Yes, sir.

Q. This lady sitting back there in court? A. Yes, sir.

Q. Did you have a conversation with your brother at the time? A. Well, when I came in I

guess it was mixed up; he was stricken with a paralytic stroke, something like that. As soon as I came in I asked his wife—we went into the bedroom, "What was the matter," and he was practically paralyzed, that he could not move his hands, I asked what was the matter and he started to cry and he asked me to save him.

Q. What did you tell him? A. Well, I told him "Look here, I have got your money."

Mr. Brenner: I object to that, if the court please, if this is for the purpose of offsetting another claim against this claim, I think that this testimony is objectionable by virtue of the fact that there is no counterclaim filed in this case.

A. Well, I says, "I have got your money."

Q. You said what? A. I told him, I said, "I have got your money." I said first, "Have you got some money?" "Yes," he said. "I have got some money." I said, "All right, I have got it all. I will try to save it if you think I can." He says, "Call in a doctor," and so on, and we called in a doctor. So he didn't know anything about it, he told us, and then at the same time we called my son too, says, "Call a doctor," so we called another doctor from Jersey City, and that doctor said that he didn't know what was the matter with him, but he could tell in about twenty-four hours. Then I guess we were not satisfied. In the meantime there was another man in the house which made a suggestion that he knows a doctor from Brooklyn, by the name of Dr. Hoffman, which is a specialist on anything like that. Then we decided we would call him up. We called him

up by telephone and he answered that he would come as soon as he could get there. I don't remember how long it took, but he did come, this man from Brooklyn. When he came over he examined him and he said, "This man has got to go to the hospital." In fact the doctor from Jersey City which I don't recollect his name, also said he has got to go to the hospital. As soon as he heard that, he says, "Don't take me to Bayonne Hospital." That conversation was of course, I know he said, "If I go into Bayonne Hospital I won't some out alive." Well, we want to know, and he says he wants to go to Christ Hospital. Well, then, all right then—

Q. Was there any conversation with reference to the payment of the bills?

Mr. Brenner: I object to that if the court please, as very leading.

Q. Have you been in Christ Hospital previous to this time yourself? A. Yes, sir.

Q. How long previous? A. Well, I have been there about six days, I think it was; I have been in an automobile accident and I have been very badly cut.

Q. It was shortly before this time that you were in Christ Hospital yourself? A. Yes, before this time.

Q. Did you have any conversation with your brother at that time regarding this note?

Mr. Brenner: I object to that as very leading. The witness is relating the conversation, and I think he should get that in under a general question. This conversation is going to become very important in the issue in this case.

The Court: He is not asking what the conversation was.

Q. Was there any conversation had between you and your brother relating to the note? A. I said, "I have got your money. If you give me the note, I will give you the money. If you need to get any money, give me the note, I will give you the money." Then he called in his wife, he called his wife, "Becky," he says, "Find the note and give him the note, and get the money." So she gets up; she comes to me and she says, "Mr. Adelman, where am I going to find these notes? I am so upset, and besides if you give us the money, why, I would be glad, but being so upset, you know I am upset, whatever the expenses will be, and so on, of course we will fix it up, we will straighten it out after." That is Mrs. Adelman back there.

Q. Was this in the presence of Mr. Adelman, your brother? A. Yes, that was her answer to what he said to her, "Becky, find the note, and give him the note, he will give you the money. I want to be saved." He was crying, "I want to be saved, I will make other money when I get well."

Q. He will make other money when he gets well, he told her that. Did you then arrange to have him taken to Christ Hospital? A. I sent my son and Dr. Hoffman and another man which I don't remember exactly who it was. They all went to Christ Hospital, and when they got there Dr. Hoffman went to explain what his ailment was.

When he explained there they told him they would not take him unless there be a day nurse and a night nurse. Otherwise they would not take him in. So they came back and said, "Here is the expenses," what it would be to have it fixed up, it would be in the neighborhood of a hundred and fifty to a hundred and sixty or a hundred and seventy-five dollars.

Q. It amounted to a hundred and fifty or a hundred and seventy-five dollars how long? A. A week. Well then, I said again, "What are you going to do?"

The Court: You said this to who?

The Witness: I said it to him and to Mrs. Adelman.

The Court: Who do you mean by "him"?

The Witness: To my brother. I said, "Now, what are you going to do. Do you want to go?" He says, "I want to go to Christ Hospital, I want to be saved." He referred again, he said again: "You have got my money." He called me, "Adelman." He said, "Please, Adelman, save me, try to save me, try to get me well." Talking that all the time and crying all the time.

Q. I show you three batches of checks. The signature there is that of your son Harry? A. Yes, sir.

Q. That is the young man sitting over there? A. Yes, sir.

Q. He conducts your business affairs, does he not? A. Yes, sir.

Q. He has power of attorney to sign checks for you? A. Yes, sir.

Q. I show you three batches of checks and ask you whether these checks bear your signature? (Handing witness.) A. Well—

Mr. Brenner: If you say they bear his signature I won't object to them.

Q. They do? A. It is all my son's signature.

Q. You gave me these checks, did you not? A. Yes, sir.

Q. Now what were those checks used for? A. Well, these checks are paid, I guess. I guess you have got to examine them and you will see my son deducted these—I guess he paid some of the nurses and some the hospital and some for the other expenses, only most of it that was paid these nurses and to the hospital.

Q. I show you three receipted bills purporting to be in the stationary of Christ Hospital, Jersey City. Did you pay those bills? (Handing witness.) A. I paid those bills. Of course my son paid it for me.

Q. It was your money that paid it? A. Yes, sir.

Q. Were these payments made after you had this conversation with your brother that you have spoken of? A. What do you mean?

Q. Were these bills paid after you had the conversation with your brother? A. Yes, sir.

Q. That you have mentioned here? A. Yes, sir.

Q. And were these checks used in payment of these bills after this conversation that you had with your brother? A. Yes, sir.

Mr. Gross: I offer the checks and the bills.

Mr. Brenner: I object to them if the court please on the ground that there is nothing in the case at the present moment that shows that this was anything but a voluntary payment.

(Argued.)

(Decision reserved.)

Q. How did you come to make payment of the hospital and the nurses' bills for your brother at Christ Hospital? How did you come to do that? A. What do you mean?

Q. Why did you do that? A. Well, in fact, I have been told, I have been asked to pay this money.

Q. By whom? A. By him.

Q. What did he say to you; tell us exactly, or as near as you can recall, what he told you when he told you to make these payments, without rambling on. A. When he was started negotiating the different amounts, it began after they came from Christ Hospital, after they came, the doctor and my son, and find out that it was going to be expensive, about a hundred and fifty to a hundred and seventy-five dollars a week, well, I says to him, "Now, what are you going to do? What are you people"—to him and to Mrs. Gootman, "What are you people going to do"? He says, "I want to go to Christ Hospital. I don't want to go to any other hospital." He says, "Adelman, you are my brother, you have got my money. Get my money, try to save me, try

to get me well. When I get well I will make other money."

Mr. Gross: I now offer the checks.

Mr. Brenner: The same objection, a voluntary payment, nothing in the evidence so far to show that the amount should be charged against this note.

The Court: Objection overruled.

Mr. Brenner: Exception.

(Checks and bills accepted as one exhibit and marked Exhibit D-2 of this date.)

Mr. Gross: As to Exhibit D-2, the payment is of $1667, to Christ Hospital and the nurses; that is for a period in March and extending through from some time in March 1921, to some time at the end of June 1921.

Q. How long was your brother in Christ Hospital? A. I think he was fourteen weeks.

Q. Where was his wife living while he was in the hospital? A. Well, she was living at my house, most of the time.

Mr. Brenner: I object to that if the court please. That certainly cannot have any bearing on the situation. That can only be put in for one purpose.

The Court: I think it is for the purpose of disclosing why the note was not surrendered up.

Mr. Brenner: If it is for that purpose I have no objection.

Q. She was living at your house? A. Yes, sir, most of the time. She would go off a day or two to her sister, or something.

Q. You were living where at the time? A. I am living in Weehawken, I am living at the same place where I am living now, 831—3 Boulevard East, Weehawken.

Q. Did she board with you? A. Yes, sir.

Q. She ate at your table? A. Yes, sir.

Mr. Brenner: I certainly object to all of this.

The Court: It was in before your objection.

Mr. Brenner: I am going to ask the court to please do this. On account of this witness' disability that he cannot hear me make my objection, I am going to ask the court to reserve the ruling on it.

Q. Did you advance any other money under this arrangement that you have testified to other than is represented by these checks? A. Well, when Christ Hospital started to tell us that they don't want to keep him any longer, that he is incurable, and they cannot keep him, that it is not a hospital for incurables, they wanted us to take him away. Now, of course we have been looking around to see where we should take him. Then in the meantime Mrs. Adelman came and suggested: she said that there is a doctor—

Mr. Brenner: I object.

Q. Don't tell us what Mrs. Adelman said. Just answer the question and don't make

speeches. A. You were asking whether we advanced any other money.

Q. You can answer that yes or no? A. Yes, sir.

Q. Did you? A. Yes, sir.

Q. How much additional did you advance under this arrangement? A. Well, I advanced first two hundred dollars I think for Dr. Grossman. I advanced that money. I gave that money to a man by the name of Walickson, Mrs. Adelman's brother-in-law.

Q. Was that for your brother? A. Yes, for the Montefiore Home in New York.

Q. You arranged to take him there? A. Yes, sir.

Q. Did you pay additional moneys outside of that two hundred dollars? A. I paid—I guess my son can remember better.

Q. You cannot remember the details of how much was paid? A. I paid Christ Hospital, I paid for all the other, practically all the other expenses; to take him from Christ Hospital to the Montefiore Home.

Q. Did you pay the Montefiore Home? A. I gave a check to a man by the name of Walickson that he should take the check over for two hundred dollars which he paid to the Montefiore Home.

Q. When did your brother die? A. He died in 1923, in December some time. I don't recall exactly the time.

Q. Was this man Gershman at the funeral? A. Yes, sir.

Q. Do you remember coming home from the

funeral with Mr. Gershman and Mrs. Adelman, your son and your wife? A. Yes, sir.

Q. You came in one car? A. Yes, in my car.

Q. Did you have a conversation with Mr. Gershman at that time? A. Well, the conversation, Gershman had started the conversation. He asked my son, he leaned over that way (indicating). He was sitting in the middle seat, I was sitting to the right of my son. And he says, "Harry, we are trying to find the policy, the insurance policy and the lodge papers and so on, and we want you to attend to that. We want you should look over this for Mrs. Adelman." While he was talking, then I turned around and I says, "Look here, Mr. Gershman, while you are looking for the papers, you know I have got a note, Mrs. Adelman has got my note, which note you know very well is paid for. While you are looking in Mrs. Adelman's papers find that note." He promised me several times that when he finds the note sure he will give it to me. He said that he can find out whether it is there among the papers, that she has got a trunk at some friend's and she will look in the trunk. I says, "Well, Mr. Gershman, if you look over the papers when you find the papers, and you will find my note there. I want that note back." He says, "Why, sure," and he turned to Mrs. Adelman, and she said, "Of course as soon as we find the note we will give it to you."

Q. How much money altogether, Mr. Adelman, to the best of your recollection how much did you pay out for your brother under this arrangement? A. Well, as far as having an account I paid over

three thousand dollars. I paid even a few other expenses.

The Court: You don't insist, Judge Brenner, that if these had been moneys by way of counter-loan to the deceased, that that could be offset. You insist that this was what you term the words imply, that this was a gift?

Mr. Brenner: Yes, sir.

Q. Did you pay your brother's funeral expenses? A. Yes, sir.

Mr. Brenner: I want to make myself clear. On my original objection I made objection to this testimony that it could only be raised by way of counterclaim, and there was no counterclaim filed in this case. Therefore all this testimony now has no bearing on the issue.

Mr. Gross: I don't see how, we cannot claim against an assignee.

The Court: Objection overruled.

Mr. Brenner: Exception.

Q. I show you a letter dated November 18, 1924, and ask you whether you received this letter from Judge McCarthy (handing witness)? A. Yes, sir.

Mr. Gross: I would like to have that marked for identification.

Marked Exhibit D-3 for identification of this date.

Q. After you got this letter did you send your son down to see Judge McCarthy? A. Yes, sir.

Q. Was there any demand made on you for the payment of this note before the date of this letter by anybody? A. No, sir.

Q. By Mr. Gershman? A. No, sir.

Q. Or by any one else? A. No, sir.

Q. You say your brother died in December 1923? A. Yes, sir.

CROSS-EXAMINATION by Mr. Brenner:

Q. Did your brother send for you? He wanted you to help him, didn't he? A. Yes, sir.

Q. And as soon as he told you that he wanted you to help him you wanted him to look for the note, didn't you? A. When I came in—

Q. Just answer me? A. What should I say?

Q. You wanted him to look for the note so as to turn it over to you so that you could give him the money? A. Not him. He was paralyzed. I didn't mean I said to him that I wanted the note. I wanted his wife, because we are all there, him and his wife, both in together. I says, "Give me the note now. You have got the note, give me the note?" That was what I was interested in. He was present. "I will give you the money right away," I said.

Q. You wanted him or his wife to give you the note so that you could turn the money over to him? A. Yes, sir.

Q. And that is the first day when you came there? A. Yes, that is first when they called me up.

Q. How long after you came there did you ask him for that; how long were you there when you asked him to get the note? A. That was some

time. They told them to come with the ambulance, come to take him to the hospital.

Q. When you talked to him about the note how long were you in the house? A. When I talked to him about the note I must have been about two or three hours, then I talked to him about the note and they came back from Christ Hospital.

Q. Before they came back from Christ Hospital there wasn't any talk about money? A. There was not any talk.

Q. As soon as they went to Christ Hospital, they came back and you wanted the note back so that you could give him the note for it? A. There was talk; don't mix me up. I have testified that when I came in I asked what was done and they told me that they had a doctor and the doctor didn't know what it was.

Q. Did you at once talk about the note, or did you talk about the note when you first went to the house? A. No.

Q. Was the talk about the note after they came from Christ Hospital? A. After they came back from Christ Hospital.

Q. You say that at the time of the funeral you were coming back from the funeral—that is the time that you had this talk with Mr. Gershman? A. Yes, sir.

Q. Or your son had the talk? A. Mr. Gershman had the talk with my son about some papers that there was. He was leaning towards him, so I said "Look here Mr. Gershman, while you are going over the papers look up for me my note. That note is paid and you know it is paid, and I want that note. I am not in the habit of

having my papers, my paid up papers, that they should be not in my hands." He said, "Mr. Adelman, as soon as I look over the papers I will give it to you, I know it is paid." He said, "I know it is paid."

Q. Gershman said that? A. No, sir.

Q. Did you have any trouble with your hearing at that time? A. Yes, sir.

Q. And how has your trouble with your hearing been since? A. I have trouble with hearing for a number of years.

Q. At that time that they were talking this talk between themselves, you at that time were just as hard of hearing as you are now? A. Yes, sir.

Q. They were just talking between themselves? A. They were talking in the car. My son was sitting to the left of the machine and I was sitting to the right, and he sat back in the car. It was a seven passenger car and he was sitting here and my son here, and I was here. And at that time I had this instrument on my ear (indicating).

Q. You were quite fond of your brother? A. Yes sir, I loved him.

Q. Did they talk in a loud voice between your son and Mr. Gershman? A. Who?

Q. Did your son and Mr. Gershman talk in a loud tone of voice? A. They had been talking so that I could hear every word they said.

Q. They talked so loud? A. Not loud; I want to explain. If I should take this off, you talk to me, talk a little lower tone, I can hear anybody that can talk to me.

Q. You can hear without that? A. I can hear without. Sometimes I put this on and I in fact transact all of my business without this instrument, but when I want that people should talk to me, not talk above an ordinary tone, I am using this instrument.

Q. If they should talk above the ordinary tone? A. If he talk above the ordinary tone because I had my instrument.

RE-DIRECT EXAMINATION by Mr. Gross:

Q. Mr. Adelman, if you are in a machine and there is any metallic noise, does that help any, the metallic noise? A. What do you mean by that?

Q. If you are riding in a train can you hear better than if you are standing on the street where it is quiet? A. Well, I will tell you, I never paid much attention to that, I never did notice. Maybe I can hear better—maybe I can.

Q. Isn't your case of deafness one of these cases where you are able, when there is a metallic noise, you hear better than you do ordinarily? A. I would not swear to that.

Recess until 2 p. m.

Afternoon Session, 2 p. m.

A. HARRY ADELMAN, sworn.

Direct-examination by Mr. Gross:

Q. Mr. Adelman, you are an attorney at law of this State? A. I am.

Q. And have been for how many years? A. I was admitted in 1920.

Q. And you have been in business with your father? A. I have.

Q. How many years? A. For the past twelve years.

Q. Your father is engaged in the building business in Hudson County? A. Yes, sir.

Q. In the northern part of the county? A. Yes, sir.

Q. You have been in that business with him? A. Yes, since I was a boy.

Q. Did you know your uncle Gootman Adelman? A. I did.

Q. Do you recall when he deposited some money with your father in 1921? A. I do.

Q. Do you recall when your father issued the note on which this suit is brought, the note dated January 13, 1921, for $1,011.75? A. Yes, sir; it is in my handwriting, signed by my father.

Q. Do you know for what that note was given? A. Part cash and part something else; I don't just recollect what it was. There was something my mother bought, through Mrs. Adelman, but what the things were, I don't know.

Q. The greater part of it, however, was cash? A. Cash.

Q. Do you remember under what conditions that cash was held by your father? A. To be held by my father, to be held for more interest than he would get if he left it on deposit in a bank.

Q. You mean your uncle? A. Yes, sir.

Q. Do you recall the time your uncle was ill? A. It was about March 18th we received a call about half past seven in the morning.

Q. What year? A. 1921.

Q. Did you go over to see your uncle? A. I did.

Q. With whom? A. With my mother and father.

Q. Where was your uncle? A. Eighteenth Street, I don't just recollect the number, but Eighteenth Street, Bayonne, I believe it was.

Q. Did you see your uncle there? A. I did.

Q. Did you see your aunt, Mrs. Adelman, there? A. Yes, sir.

Q. In what condition did you find your uncle to be in? A. We found him in bed.

The Court: What month was that?

The Witness: That was in March, March 18, 1921. I can give you a more definite date if you will show me the Christ Hospital checks.

Q. At that time did you or your father have any conversation with your uncle? A. Yes, sir.

Q. Just tell us as briefly as you can what that conversation was. A. You refer to any particular part of the conversation or after we came into the house? You want the series of events?

Q. As you came in the house? A. We came into the house and found my uncle lying in bed. My aunt was crying, she had told my father that he had been stricken about five o'clock in the morning in the bathroom. He had fallen down and she screamed for help and they broke down the bathroom door and brought him from the bathroom door to his bed. They called a doctor and he said he could not diagnose the illness, so she then telephoned for us. We came in. They asked me to get another doctor. I got Dr. Faison, who is now dead, Dr. Faison of Jersey City. Dr. Faison diagnosed it as paralysis. He said that Gootman Adelman, my uncle, had suffered a stroke of paralysis. Mrs. Adelman broke down at the time and there was considerable weeping; my mother broke down, my father began to cry. It was a question then as to what we were to do. It was suggested that a Dr. Hoffman be called, from Brooklyn. I went to the telephone on the corner, and I called Dr. Hoffman, I explained to him over the telephone just what was going on, and he said he would come in an hour, meet me in an hour at the tubes. I went to the tubes in my father's automobile.

Mr. Brenner: I object to all this as having no bearing on the situation.

Q. Get down to the conversation. A. I am giving you the entire series as it went on. I think I can get to it much quicker that way. Dr. Hoffman came over and examined the patient. He said that he thought that the patient should be taken to a hospital, and with that Mr. Adelman, Gootman, says that if he has to go to a hospital he does not want to go to the Bayonne Hospital, he wanted to be taken to the hospital where my father was. He did not remember the name. He recalled it later, that he wanted to be taken to Christ Hospital. Dr. Hoffman and I then went to Christ Hospital.

Mr. Brenner: I want to object to this.

Q. After you came back from Christ Hospital did you talk with Gootman Adelman? A. Yes, sir.

Q. And as a result of what transpired in Christ Hospital did you tell Gootman Adelman what the situation was? A. Yes, sir.

Q. From there tell us what you or your father said to Gootman Adelman about his going to the hospital. What was to be done in connection with that? A. We told him the hospital would not take him, in Christ Hospital, unless he had a day nurse and a night nurse, and a private room. I had made inquiry at the hospital to find out what this would cost, and a private room would cost between thirty-five and forty dollars a week. That a private nurse would cost for a day nurse forty-two dollars a week, for a night nurse forty-two dollars a week. We would have to pay the board for the nurses, for each of the nurses.

Q. Did you tell him how much that would approximately total per week? A. I told him that the expenses would probably total between a hundred and fifty and a hundred and seventy-five dollars a week, depending on the medicine and treatment he would require at the hospital.

Q. Tell us as near as you can recall the sub-

stance of the conversation that was had with Gootman Adelman? A. My father, after I told him that, the total, walked over to the bed and Pop told Mr. Adelman, my uncle, that the expenses at the hospital would be between a hundred and fifty or a hundred and sixty or a hundred and seventy dollars a week. He asked him if he had any money.

Q. Yes, use the words that were used. A. My father asked Gootman Adelman if he had any money. I will use the word Gootman for my uncle. My father asked Gootman, "Have you any money"? and Gootman said, that he did not have any money in the house, and he said to Pop, "You have my money, I have your note, which you gave me for the money which you held for me. I want you to use that money and pay everything, and take it out of the note, and if you use up any more money than you have which belongs to me, if you use up more money, when I get well I will pay for it."

Q. Did you take charge of the expenditures on behalf of your uncle after this time? A. I did.

Q. These checks which have been offered in evidence represent part of the money which you laid out for him? A. Yes, they do.

Q. Now, I show you two bills which are apparently dated some time in 1924, and ask you whether these are the original or duplicate bills? A. These are duplicate bills.

Q. The originals of those bills have been mislaid? A. No, I got one bill from the hospital, an original bill thereafter, and I went into the hospital office and inquired from the secretary or

the treasurer, whoever happened to be in the office, what the weekly bills were, and paid them.

Q. Is this the bill, the bill dated April 16, 1921, the only original bill you have? A. Yes, sir.

Q. It was after the commencement of this suit? A. No, prior to the commencement of the suit. That was after I received a letter from Judge McCarthy, I believe then I got those bills.

Q. After you received this letter marked Exhibit D-3 for identification, dated November 18, 1924, you procured duplicates of all of these bills? A. I did.

Q. Did you go to see Judge McCarthy? A. I did.

Q. After receipt of this letter? A. Yes, sir.

Q. Did you have any talk with him? A. I did.

Q. Now, did you expend any other moneys except what is represented by these checks that have been offered in evidence, on behalf of your uncle, at your father's direction? A. Yes, and a good deal of my own, too.

Q. Never mind what you laid out of your own, but of your father's money what other moneys? A. I gave a check to Mrs. Adelman's brother-in-law, Mr. Walickson, to be used to get Mr. Adelman into the Montefiore Home, after Christ Hospital said they could not take him any more, that they could not keep him any more, they needed the room, he was an incurable case, and it was only running up expenses for everybody.

Q. How long was he in Christ Hospital? A. Approximately I think thirteen or fourteen weeks.

Q. Your father paid for all that stay? A. Yes sir, besides a considerable amount of my fa-

ther's cash which I handled and paid out, and I have no record of.

Q. Can you tell us approximately how much you expended in cash? A. Aside from these checks and the nurses and the hospital I should say over one thousand dollars.

Q. Are you referring to the expenses at the Montifiore Home as well? A. Yes, sir.

Q. How long was he in the Montefiore Home? A. We gave Mrs. Adelman's brother-in-law a check for two hundred dollars, which was to pay for four weeks advance board in the Montefiore Home. They kept him there about ten days, and they wrote me a letter and they phoned me that they could not keep him there any longer, because I heard Mrs. Adelman signed a committment putting him in Bellevue Hospital, in New York; he was taken from there and he went to the State Hospital in Ward's Island, Manhattan, and became a patient of the State of New York.

Q. Did you go, Mr. Adelman, to anywhere in this state to try to place your uncle in an institution? A. I did.

Mr. Brenner: I object to that unless there was an expenditure.

The Witness: Yes, there was.

Q. Did you have any other expenditures? A. Yes, considerable.

Q. Tell us what, briefly. A. In going to various sanitariums in New Jersey and also Connecticut trying to get him placed in there, after the Christ Hospital authorities refused to keep him there. We tried to get him in—I went to

almost every sanitarium in the State of New Jersey, in the medical directory, and went to the State of Connecticut, so as to get him in a sanitarium so he could be taken care of and they refused to take him.

Q. Was there anything said in this conversation that you referred to regarding the return of this note? A. I beg pardon.

Q. Was there anything said in this conversation by your uncle as to the return of this note in question? A. Nothing other than as I have said on the particular day, but subsequent during the time he was confined in Christ Hospital he asked me once or twice, my uncle asked me how much the expenses were, so I told him I didn't know definitely, that the thing would be straightened out, not to worry himself about it, that we woud pay it, and then he said, "Well, whatever you pay, it will be taken out of the note; any excess in amount you paid over, I hope I will get well and I will pay it all back to you."

Q. Did you attend the funeral of your uncle? A. I did.

Q. Do you recall being in a coach together with Mr. Gershman, the plaintiff in this suit? A. Yes, Mr. Gershman was in our car, or he was in with us, with my father and my mother; they sat opposite him, Mr. Gershman on one of the seats.

Q. Did you have any conversation with Mr. Gershman then? A. After coming from the cemetery, on the way back, Mr. Gershman leaned over. He said to me, "Harry, you are a lawyer, and I want you to take care of all the insurance papers and the lodge papers. There are some

papers have to be signed and the other papers I want you to take care of them and see everything is fixed up, so that Becky can get her money."

Q. Was there any further conversation? A. My father even heard it, and he said, "Gershman, you know that we have made the note. Becky says that the paper was left in her care, I want that note back."

Q. What did Gershman say? A. Gershman said he would find it and return it to us.

Q. Do you know, Mr. Adelman, whether any demand was ever made on your father or you, for payment of this note up to the time— A. Absolutely no demand.

Q. —up to the time that you received this letter? A. In November?

Q. 1924, from Judge McCarthy? A. No demand whatever. We didn't know they were ever going to raise any question about it.

CROSS-EXAMINATION by Mr. Brenner:

Q. After coming home from this funeral did you ever make demand for the return of the note? A. None other than what was asked of Mr. Gershman at the time. We never saw Mrs. Adelman, she never came to our house, never came near us at all.

Q. Gershman promised to return the note to you? A. Yes, sir.

Q. It was not her promise? A. It was his promise that he would let us have it for sure.

Q. It was his promise that when going through her papers he would return the note to you? A.

Yes sir, in going over her papers he said he would find the note and return it.

Q. Did he say he had all of the papers with this note? A. Yes, she had made a statement before—

Q. In spite of the fact that he had told you or you asked if he had all of the papers you never demanded the return of the note? A. That is right.

Q. Now, when you went to your uncle's house you could tell by observing him that he was very sick, could you not? A. Yes, sir.

Q. There was no difficulty likewise on the part of your father in observing that he was very sick? A. That is right.

Q. And from his attitude, that is, your uncle's attitude, it was clearly indicated to you that he realized that he was very sick? A. I don't think that he ever realized how sick he was.

Q. But having been stricken in the early morning he knew or he seemed to know that he was a pretty sick man? A. Yes, the doctor told him that he would be out in about four to six weeks.

Q. He was asking your father to save him wasn't he? A. Yes, sir.

Q. Your father was very fond of him? A. I think so.

Q. You likewise? A. Yes, sir.

Q. Both of you were assuring him that whatever you could do you would do for him? A. Yes, sir.

Q. After all of that assurance, after you had returned from Christ Hospital, both you and your father assuring him that no money or pains would

be spared in bringing him back from the hospital, and you then started talking about the note, is that so? A. No.

Q. Hadn't you then assured him that you would take care of him? A. When I came in I told him the expenses would be about a hundred and fifty to a hundred and seventy dollars a week. He said "You have my money that you owe me for which I have your note. If you pay any more than that why when I get well I will pay you back."

Q. Was that the time that you assured him that no pains would be spared to bring him back to health? A. Yes, sir.

Q. It was not a question of money with you at all, you were going to do everything within your power? A. I don't see it was any question of money. I will tell you—

Q. Was it a question of money at that time? A. I could not say.

Q. Was there any question of money in your mind at that time? A. I didn't take time to reflect.

Q. Are you now, looking back now, would you say that it was in your mind that you wanted to be assured that you would get this money back before you wanted to take care of your uncle? A. To be perfectly candid I thought the primary thing was to bring him back.

Q. So that this note was not paramount in your mind? A. It was talked about then, I am not saying it was paramount.

Q. Your uncle was lying paralyzed? A. Yes, sir.

Q. Pretty bent up? A. No, sir.

Q. Arms twisted? A. No.

Q. Didn't show the physical characteristics? A. Not at that time.

Q. No difficulty or infirmity? A. Not at that time.

Q. No difficulty in moving around? A. Not at that time.

Q. Although he was lying in bed you didn't think he was sick? A. Except he could not move his arm or hand.

Q. That was the only thing that was the matter with him? A. That was the only thing at the time, subsequently he had a relapse.

Q. But not on that particular day? A. No, nothing at all.

Q. So that there wasn't any reason to be unduly disturbed at that time about his condition? A. No.

Q. Still everybody was around there crying? A. Yes, sir.

Q. Was this man's arm only paralyzed? A. Arm and leg.

Q. Practically looking all right, a temporary condition and everybody was crying about it? A. Yes.

Q. Incuding yourself and your father? A. No sir, I was not, Pop—I think Mrs. Adelman was crying and my mother was crying, and my father too.

Q. Over what then at that time appeared to be a slight ailment, that the doctor said he would probably be all right in ten days, and everybody was overwrought? A. That is right.

Q. Everybody crying over there, with all this

excitement, your uncle went through this long story of saying, "You have my money, you spend it out of that, and when I get better I will straighten everything out." "Take it out of this note, and if there is not enough there in this one thousand dollar note, take care of this, and I am going to work after this and pay you back the money." A. Yes.

Q. Did anybody anticipate that ten days illness was going to cost one thousand dollars? A. It wasn't a question of ten days, it was for four weeks or six weeks.

Q. You said something about the doctor saying that he would be out in about ten days—

Mr. Gross: Just a moment, he didn't say that.

Q. Didn't you say about ten days? A. I don't recall it.

Q. What was it you said, what do you recall saying? A. I said the doctor said, four weeks to six weeks.

Q. Was it anybody's mind at that time that four weeks to six weeks was going to cost over one thousand dollars? A. When we considered that one hundred and fifty to one hundred and seventy dollars a week, plus the incidental expenses and the doctors it would have cost considerably more. I might say at that time we had no doctor's bill, because Mrs. Adelman talked with Dr. Morgan Jones, and he waived the bills for him.

Q. You had gotten an estimate of expenses between a hundred and fifty and a hundred and seventy-five dollars a week? A. Yes, sir.

Q. That was the entire expenses in the hospital so that in that time, assuming the whole six weeks it would have amounted to something under one thousand dollars? A. That is right.

Q. And still with that in your uncle's mind, having told him that, he said "If it runs over a thousand dollars he would straighten it out when he would be well, he would be working again and he would pay you the money." A. I don't know just what he had in his mind, that is just what he said.

Q. He didn't say, "You don't need to worry about this, as soon as I am better I will go out and work and I will repay." A. That is right.

Q. He made sure to mention about paying it out of the note. You are positive he said that? A. Oh, yes sir.

Q. Did your father say anything about getting the note at that time? A. Yes, Pop asked for the note.

Q. You didn't tell us that before? A. He wanted to give him all of the money right then and there.

Q. You didn't tell us that before? A. No.

Q. Is that something you forgot? A. No.

Q. When you were asked to state whether there was any other conversation you didn't tell that? A. No, I don't think so.

Q. You are sure that your father said that later on? A. Pop wanted to give him all of the money and he wanted the note.

Q. He wanted the note at that time? A. Yes, sir.

Q. It was only after your uncle assured him

that the note would be given to him after he got the total, that you father then said he would stand for the expense? A. Yes, sir.

Q. You say that a good deal was expended outside of this money that appeared in the check, that you paid, you paid all of your accounts by check, didn't you? A. Yes, I paid all of my accounts, but not particularly this, this is not a business account.

Q. You do as a matter of fact in your business pay all of your accounts by check? A. Yes, sir.

Q. And your father likewise? A. I pay for him.

Q. You have a power of attorney to sign his checks? A. Yes, sir.

Q. Was there any expenses in connection with Christ Hospital that do not appear in these checks? A. Yes, I think the fee for the ambulance.

Q. And what was that? A. I think that was five dollars.

Q. Any other expenses? A. The fee for the ambulance in taking him from Christ Hospital, to the Montefiore Home.

Q. And how much would that amount to? A. I think that was by a New York firm, Smith & Smith, who went up there with the ambulance.

Q. And how much did that cost? A. Thirty dollars.

Q. Any other expenses at Christ Hospital? A. Outside of tips that were given the nurses and the attendants, and the doctors, and candy that I spent to get him properly fixed up.

Q. You are not charged anything here for that?

A. No, that is some of the money which I personally paid out.

Q. I am talking about your father's money which you say you paid out? A. That is some of the money that I personally paid out from my father's cash.

Q. And that you are charging as against the note of Gootman Adelman? A. No.

Q. Outside of the expenses by check, all you spent in Christ Hospital was the amount of the ambulance to New York, and the amount for the ambulance to Christ Hospital? A. And tips that I gave to the attendants.

Q. Is that included? A. You asked me what there was.

Q. Let us assume that the tips were given? A. They were quite heavy.

Q. How much? A. I think they probably ran to about two hundred dollars.

Q. Two hundred dollars in tips? A. Yes, sir.

Q. Let us assume that is the amount. You say you didn't intend to charge that amount against him but you charge that against him now? A. No, that is not included in the list. That is just in anyway.

Q. That is not part of this three thousand dollars you are talking about? A. Yes, sir.

Q. So that you are including it? A. Yes, sir.

Q. Isn't it a fact that you never intended to include it? A. Yes, sir.

Q. You say in the neighborhood of about two hundred and fifty dollars tips? A. About two hundred dollars.

Q. And he went from Christ Hospital to this home that you are talking about, and he was only

there how many days? A. We paid for him for four weeks.

Q. How long was he there? A. I don't know how long he was there.

Q. Less than four weeks? A. Considerably less, because they committed him then to Bellevue Hospital.

Q. You say you paid for four weeks? A. Yes, sir.

Q. Did you pay that by cash or check? A. That was paid by a check.

Q. That is here? A. Yes, sir.

Q. Did you pay anything else beside that check in that home there? A. No, not in that home.

Q. He went from there to Bellevue? A. Yes.

Q. In Bellevue did you pay any cash? A. No. He was there I think one day.

Q. Where, in Bellevue? A. The Manhattan State Hospital on Ward's Island.

Q. He went there from Bellevue? A. Yes, sir.

Q. Did you pay anything in cash or did your father pay anything in cash there? A. No, sir.

Q. Did he pay anything in cash after his leaving Christ Hospital? A. In cash for Gootman Adelman himself?

Q. Yes. A. No, except we gave Mrs. Adelman money to go to see him, and during intervals paid her carfares, and for her to bring him different things there.

Q. How much? A. We have checks for it.

Q. That is in these checks, this bunch of checks? A. Yes, sir.

Q. I am talking now about cash? A. No.

Q. Your checks in the amount of sixteen hundred dollars—you said that there was expended for him altogether in the neighborhood of three thousand dollars? A. Yes, sir. Well, some of the checks here—I have the list, well, $1667, was paid.

Q. How much in checks? A. The checks we have here amount to $2,032.

Q. And you say that there was another one thousand dollars expended beyond that? A. Yes, sir. $572, of which I have kept a record, and the balance I don't know.

Q. What was that $572 for? A. That I cannot say just at this moment. I have kept a record of it. I believe that is on the list. I think the most of that $572 was paid to Mrs. Adelman during the time that she was going to the hospital to bring eatables, to bring different things, some of it was paid to her for her carfare, and to bring him different things.

Q. So that you gave her carfare to go and see her husband and charged it against her account? A. And she stayed at our home all the time.

Q. Did you charge her for that? A. Absolutely not, she didn't pay a penny. She didn't have a penny to her name.

Q. Are you figuring that in the amount that you say you expended up to three thousand dollars? A. No.

Q. You don't show that cash account of one thousand dollars? A. I don't show that cash account here of one thousand dollars.

RE-DIRECT-EXAMINATION by Mr. Brenner:

Q. Did she pay for board while she was living with you? A. Oh, no.

Q. Did you ever charge her for board? A. No.

Q. Did your father ever charge her for board? A. No.

Q. How many months did she live at your house? A. Over two years.

Q. You have not charged anything for that board? A. Not a penny.

Q. That is not included there? A. No.

Mr. Gross: That is our case, Your Honor.

REBECCA ADELMAN, called in rebuttal:

Direct-examination by Mr. Brenner:

Q. Mrs. Adelman, it has been testified that at the time Mr. Samuel Adelman came to your house there was an agreement whereby the expenses of the Doctors and the hospital and whatever other expenses there were to be made were to be deducted from the amount of this note. Was there any such agreement between your husband and his brother Samuel Adelman? A. What do you mean by an agreement?

Q. Was there any talk about that? A. When he was sick?

Q. Yes. A. No,nothing at all, because my husband was not—

Q. Never mind because— A. Not anything because he—

Mr. Brenner: Wait a minute, please.

The Court: Just answer the question, Madam.

Q. Was there any talk whatever about this money that your brother-in-law should spend from that note? A. No.

Q. At the time that your brother-in-law and your nephew were present that morning, was your husband able to talk? A. No. His mouth was all over this side, the right side, he could not talk even at that time. Nobody could understand him then, he could not say a word even because his mouth was moved.

Q. His mouth was twisted? A. Yes, his eyes was closed, he was entirely paralyzed.

Q. Is it a fact that all that was the matter was that his one hand was paralyzed? A. No, his whole face was paralyzed.

Q. It has also been testified that when you returned from the funeral that this note was paid, or he knew that the note was paid, and that he would return it? A. Well, he didn't even say, he didn't say a word about that.

Q. Was there any talk about expenses? A. Nothing at all.

CROSS-EXAMINATION by Mr. Gross:

Q. Why did you come to court to-day, Mrs. Adelman? A. Because I give Mr. Gershman my note. He wants the money.

Q. Gershman wants the money? A. Yes, I give him the note because I owed him money.

Q. You owed him money yourself? A. Yes.

Q. You are not going to get any of this money

if Mr. Adelman should lose this case and the jury should find a verdict for Mr. Gershman you would not get any part of this money, would you? A. I don't know.

Q. Will you or will you not get any part of this money? You can answer that. Will you get any part of this one thousand dollars if Mr. Gershman wins this suit? A. Mr. Gershman does not take money from me; I pay him that note, that's all.

Q. Did you understand my question? A. Yes, sir.

The Court: Just listen to the question and don't answer if you don't understand it.

Q. If Mr. Adelman should lose this suit how much of this one thousand dollars will you get from Gershman? A. I don't understand what you mean.

Q. You have no interest in this note any more, have you. You are not going to get any part of this money? A. No.

Q. Why did you come to court to-day? A. It it Mr. Gershman's note.

Q. You transferred the note to him? A. Yes, he makes a job for me. I owed him four hundred dollars, and now I owe him two hundred dollars more.

Q. You still owe him two hundred dollars? A. Yes, sir.

Q. He took this note from you for the job? A. Yes, sir.

Q. And for the other money he gave you? A. Yes, sir.

Q. You have no interest in this case at all? A. No. Don't ask me because I don't know. I am not educated, I don't understand. I don't know.

Q. You don't understand this question? A. I don't understand.

The Court: You don't understand what?

The Witness: I am asked if I will give him money.

Q. You are asked if Mr. Gershman will give you any of this money if Mr. Adelman loses this case? A. No, he don't do that.

Q. Why did you come to court to-day? A. Because Mr. Gershman told me I should.

Q. Did you get a subpoena? A. No, Mr. Gershman told me I should come over here.

Q. That is the only reason you came to court? A. Yes, sir.

Q. You went down to see Judge McCarthy once, your lawyer, in 1924? A. Yes, sir.

Q. You told Judge McCarthy all about this case, didn't you? A. Yes, sir.

Q. Judge McCarthy wrote your brother-in-law, Mr. Adelman, a letter, didn't he? A. Yes, sir.

Q. And that was about a year after your husband died? A. Yes, sir.

Q. He was the only lawyer you saw before you began this suit, before you saw Mr. Adler, your present lawyer? A. Yes, sir.

Q. You asked Judge McCarthy to write that letter is that right? A. Yes, sir.

Q. Do you know whether Judge McCarthy wrote that letter that you asked him to write? A. Yes, I asked him to write a letter. They did not

answer him. I was busy that time and I left it this way.

Q. Didn't Judge McCarthy tell you at that time, that Mr. Adelman, Mr. Harry Adelman had been to see him to explain the whole case to him. Didn't Judge McCarthy tell you that? A. No, I didn't see him. I didn't see him only once, I just gave him the note, he said all right, and after I didn't have no time to go see him again and I left it that way.

Q. Didn't you go to Judge McCarthy to find out what happened? A. No. Because I haven't got no time. I got my store, and I have not time.

Q. You know, don't you, that your brother-in-law, Samuel Adelman, laid out several thousand dollars for your husband? A. Yes, he promised him to give him. He told him, "Don't worry, I will pay for everything. I will try to get well your husband." That's what he told me.

Q. "I will try to get well your husband." Mr. Adelman said that to you, did he? A. Yes, sir.

Q. You know now and you knew then, that Mr. Adelman, Mr. Samuel Adelman, was spending hundreds of dollars to try to get your husband well, you know that, don't you? A. Yes, he told me he will spend ten thousand dollars to get well my husband.

Q. You knew that he was spending a lot of money? A. Sure I knew it.

Q. You knew at that time that he was spending this money, that Mr. Adelman had one thousand dollars of your husband's money which your husband had left with him at six per cent interest? A. Yes, sir.

Q. You know that? A. Yes, he promised—

Q. You knew that this note which you have transferred to Mr. Gershman represented that one thousand dollars which Mr. Adelman was going to spend ten thousand dollars to get your husband well had given your husband? You knew that? A. Yes, I knew it.

Q. With all of that, in July, 1925, you transferred the note to Mr. Gershman? A. Yes, sir; he told me that he will give me one thousand dollars to make some business for me, because I was very weak, I could not work. He said it will be for you to make a living.

Q. Who told you that? A. Mr. Adelman and Harry Adelman.

Q. They told you that? A. Yes, sir.

Q. They told you they would give you this one thousand dollars? A. Yes, sir.

Q. And then you went to Judge McCarthy a year after your husband died and you had Judge McCarthy write a letter and then you didn't do anything more about it? A. He told me that they don't want to give me.

Q. Judge McCarthy did? A. Yes, sir.

Q. Did you tell him to start suit for you on the note? A. I didn't tell him nothing. He told me they don't want to give it to me; I leave it there; I was too busy and I could not go to court and everything.

Q. You were too busy? A. Yes, sir.

Q. So that you remained busy from November, 1924, until July, 1925, when you turned the note over to Mr. Gershman? A. Yes, sir.

Q. You didn't do anything with the note? A. No, sir; I didn't do nothing.

Q. That year's time, from the time that your

husband died until Judge McCarthy wrote that letter there, you didn't do anything with the note? A. No.

Q. Is that right? A. I lend money of Gershman, he make me a job, and I gave him the note.

Q. Did you ever tell that to Judge McCarthy, when Judge McCarthy told you that Mr. Adelman would not pay the note, did you then tell Judge McCarthy to sue on the note? A. No, I didn't tell him nothing.

Q. You knew that Mr. Adelman was a very responsible man, Mr. Samuel Adelman? A. Yes, I knew.

Q. You knew that he could pay the one thousand dollars if he owed it? A. Yes, but they don't want to pay me.

Q. Why didn't you tell Judge McCarthy to sue then for that one thousand dollars?

Mr. Brenner: I object to that. Under the statute this lady, if she wanted, could have prosecuted the case as long as six years afterwards. The mere fact that she didn't prosecute it is not material.

The Court: I suppose that it goes to credibility.

Mr. Gross: For that purpose, your Honor.

Mr. Brenner: Then I have no objection.

(Question read as follows: "Q. Why didn't you tell Judge McCarthy to sue then for that one thousand dollars?")

A. I didn't never have time to bother any because at that time—

Q. That is why? A. I was sick, I thought may-

be they will send me, maybe they will bring me. I didn't—I was busy.

Q. How many times did you see Judge McCarthy altogether, Mrs. Adelman?

The Court: Let me ask here: Is it conceded that no interest was paid on the note?

Mr. Gross: I don't know, your Honor. We have not gone into that.

The Court: Do you know of your own knowledge whether any interest money was paid on this note, or don't you know?

The Witness: No; he was very sick, he didn't know what he talk.

Q. Now, Mrs. Adelman, how many times did you see Judge McCarthy? You went down to see him once with Mr. Gershman? A. That is one time.

Q. And that was the time that you gave the note and before you endorsed it over to Mr. Gershman? A. Yes, sir.

Q. The reason now that explains why you didn't tell Judge McCarthy to sue on this note is because you were too busy? A. Yes, sir.

Q. You know that you are not responsible on this note where you have endorsed it. Do you know that? A. Maybe.

Q. Do you know that? A. I don't know.

Q. You know that you have no interest in this note, you have no part of this money, you know that? A. Yes, sir.

Mr. Gross: I desire to offer in evidence at this time the two letters written by Judge McCarthy to Mr. Adelman.

Mr. Brenner: I object to them. They certainly cannot have any bearing on this case.

(Argued.)

Exhibit D-3 now marked in evidence.

Exhibit D-5 now marked in evidence.

Mr. Brenner: I think that for the purposes of the record it should appear that both of these letters were written long before the institution of this suit.

Mr. Gross: The letters show that.

Exhibits D-3 and D-5 now read to the jury.

Q. In March, 1925, Judge McCarthy still represented you in this matter? A. I don't understand.

Q. In March, 1925, that is four months before you gave the note to Mr. Gershman, Judge McCarthy still represented you in this matter?

Mr. Brenner: I object to that if the Court please, as not relevant here.

(Argued.)

(Objection withdrawn.)

Q. He was your lawyer in this matter? A. Who?

Q. Judge McCarthy? A. No, I just go to him like, I show him the note, and he said, "All right, I will write a letter," and I didn't see him any more.

Q. How many times did you see Judge McCarthy altogether? A. Only one time.

Q. Didn't you see him between November, 1924, and March, 1925? A. I didn't see him.

Q. Did you leave the note with Judge McCarthy? A. No, I just showed him the note.

Q. You say you didn't leave the note? A. No, I did not.

Q. And you say you were there only once? A. Yes.

Q. With Mr. Gershman? A. Yes, sir; that was with Mr. Gershman.

Q. Did you authorize Judge McCarthy to bring suit for you? A. I didn't tell him nothing. I told him and he said he will write him a letter.

Q. Did you ever ask Judge McCarthy why he didn't send him the money? A. No, I didn't.

Q. You were not interested enough to find out why he did not send the money? A. Because I was busy; I was a long time sick. I think that they will pay me any time.

Q. You didn't think it was necessary to find out from Judge McCarthy why he didn't collect this money? A. I didn't. I thought they will send me a letter or something.

Q. After you did not get a letter, why didn't you go to see him? A. No, I didn't go.

Q. You didn't bother with it? A. What do you mean? I didn't go, why I didn't bother.

The Court: Did you employ him to collect this note?

The Witness: No, I just ask if I can get my money. He said, "I will write a letter to Mr. Adelman and I will see if I hear again and I will let you know." He did not let me know.

Mr. Brenner: Plaintiff rests.

A. HARRY ADELMAN, in sur-rebuttal:

Direct-examination by Mr. Gross:

Q. In response to this letter that you received from Judge McCarthy, did you see him? A. I did.

Q. Did he exhibit this note to you at that time? A. He did.

Q. Do you recall when that was? A. That was about the early part of—I think it was March, the following year.

Q. March, 1925? A. Yes, sir.

Q. The note was then unendorsed, wasn't it? A. Yes, sir.

The Court: You saw it, did you?

The Witness: Yes. Judge McCarthy had it in his hand; he showed it to me. I asked if he had the note.

Q. Did you explain to him the nature of this transaction? A. I certainly did; I told him the whole thing.

Q. Did you ever hear from him any further? A. No.

CROSS-EXAMINATION by Mr. Brenner:

Q. The first letter came to you, did it? A. No, it came to my father.

Q. Did you look at it? A. Yes, I answered it.

Q. How did you answer it? A. By letter.

Q. By going there? A. I made an appointment with the Judge. I have a copy of that letter.

Q. Just answer my question. You made an appointment when? A. Some time in the early part of the following week.

Q. Did you go there? A. I did not. I was then subpoenaed in another case.

Q. You say you were subpoenaed in another case? A. Yes, there was a criminal charge, and I was a witness.

Q. And you did not take it up with him from November to March? A. That is when I went to see him.

Q. Did you make an appointment with him? A. I have my correspondence there.

Q. Did you make an appointment with him after that? A. Yes, sir.

Q. How many times did you make an appointment with him? A. Once after that.

Q. Just once? A. Yes, sir.

Q. When was that appointment for? A. That was some time in December.

Q. In December? A. Yes, sir.

Q. Did you go there in December? A. No.

Q. Did you make any appointment with him after December? A. No.

Q. And that is what prompted this letter to you in March, that he did not hear from you? A. Yes, sir.

RE-DIRECT EXAMINATION by Mr. Gross:

Q. Do you recall that Judge McCarthy was laid up for several weeks with pneumonia? A. Yes, sir.

Q. And Judge McCarthy was sick last December? A. It was around that time.

Q. He was better along in the first of the year? A. I don't think he was taking care of any business until beyond that.

A. Harry Adelman—Cross
Motion for the Direction of a Verdict

Q. Don't you know that he was out before January first? A. I don't know.

SAMUEL M. ADELMAN, called by the Court:

Q. Did you ever pay any interest on this note?
The Witness: No, sir.

Mr. Gross: I move for a direction of verdict on the ground that it appears uncontradicted and beyond dispute in this case that the plaintiff in this action, Gershman, has not got title to the note upon which the suit is brought.

The uncontradicted evidence shows that an administratrix passing property of her intestate, has endorsed the note over to the plaintiff for a consideration, moving solely and exclusively to her, and by reason of that fact, the plaintiff is not a holder of the note in question in due course, and has no legal title to it, and therefore cannot maintain this action.

(Argued.)

The Court: I deny your motion and will give you an exception.
Mr. Gross: Exception.

Counsel summed up to the jury.

Recess until March 26. 1926, at 10 A. M.

Charge

March 26, 1926. 10 A. M.

The Court then charged the jury as follows:

Charge.

The Court: Gentlemen of the Jury:

This action is brought by Morris Gershman, as plaintiff, against Samuel M. Adelman, as defendant, to recover the amount claimed to be due upon a demand note, with interest, the note being made by Samuel M. Adelman, dated January 13, 1921, in which there is a promise to pay the sum of $1011.75 on demand after date, to the order of Gootman Adelman, brother of the maker of this note, at the West New York Branch of the New Jersey Title Guaranty & Trust Company.

Now, the payee of this note, Gootman Adelman, died in December, 1923, and his wife, Rebecca Adelman, was apparently appointed administratrix of his estate.

No interest was paid on this note which it appears was given as a memorial or record of a transfer of money from Gootman Adelman to his brother Samuel Adelman, for the purpose of investment, in order, as it is claimed, that Mr. Samuel Adelman, who was a business man, might get more interest money for his brother than he would ordinarily get in a savings bank or in an interest bearing account at an ordinary commercial bank.

Now, it is claimed that this sum of $1011.75 was turned over by Mr. Gootman Adelman to his

brother for the purpose which I have indicated, and this note, payable on demand was given by this defendant.

It further appears that this note is endorsed as follows, "Gootman Adelman by Becky Adelman, Administratrix," and the plaintiff in this suit, Morris Gersham, claims to be the present holder of this note for value in due course.

The plaintiff claims that in March, 1925, he loaned to Mrs. Adelman $100 and a little later $300 more, and that in July, 1925, he did some work in and about a store of hers to the value of $1500 and that she paid him $700 of this $1500 bill and gave the note which is the subject-matter of this suit to him, on account of the payment of the balance of the money, that is to say, the balance of the $1500 and on account of the other moneys that had been loaned, as he says, by him to Becky Adelman, and it appears that on September 11, 1925, this present suit was started against the defendant, the maker of the note, to recover the sum of $1011.75 with interest at six per cent from January 13, 1921, and in order to recover, Gentlemen, the primary burden rests upon the plaintiff to prove his case to your satisfaction by a fair preponderance of the evidence in the case. Now, that does not mean, as I might take the time here to say, the greater number of witnesses, necessarily, on the one side nor on the other. But burden of proof, where it is referred to in legal proceedings means the greater weight of the evidence. The preponderance of the proof means the greater weight of the evidence.

Now, the defendant, while admitting that the sum of money represented by this note was turned over by his brother to him and while he admits the making of this note to the brother, nevertheless, the defendant claims by way of a defense, that the note was not negotiated to the plaintiff as required by law and that the plaintiff is not a holder in due course, and because the plaintiff is not a holder of this note in due course, all defenses which would have been open to him as against the payee, Gootman Adelman, are open as against the plaintiff and that therefore the defendant claims by way of defense that this note was paid. Of course on the question of payment, the burden of proof rests upon this defendant to prove by a fair preponderance of all the evidence in the case that defense, if he would have the benefit of any such defense.

In the first place, therefore, it will be necessary for you to know who is a holder in due course.

A holder in due course is a holder who has taken the instrument under the following conditions:

First: That it is complete and regular upon its face.

Second: That he became the holder of it before it was overdue and without notice that it had been previously dishonored, if such was the fact.

Third: That he took it in good faith and for value.

Fourth: That at the time it was negotiated to him, he had no notice of any infirmity in the instrument, or defect in the title of the person negotiating it.

Now, this same statute also provides that where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course.

Well, now, Gentlemen, in order to determine whether or not a person is a holder in due course with respect to the length of time in which he acquires the instrument after its date, depends upon the circumstances surrounding the particular case, and so in this case, all of these surrounding circumstances must be taken into consideration. The fact, as it seems to be conceded, that the money which is represented by this note was not in the strict sense, turned over as a loan to Mr. Samuel Adelman, but that it was given to him in order that it might be turned into the courses of trade, and more interest be obtained by his brother, Gootman Adelman. The fact that Mr. Gootman Adelman died in December of 1923, and the further circumstance that thereafter, the payment was not demanded until some time in 1925, 1924 or 1925, whatever the fact may have been on that point, and that suit was not started until November, 1925.

I merely recite these different circumstances as being some of the circumstances which you will take into consideration, not that they constitute all of the circumstances in this case.

Now, it is also provided in this same Negotiable Instruments Act, that every holder is deemed,

prima facie, to be a holder in due course, but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person from whom he claimed to acquire the title is a holder in due course. The last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title.

Now, in connection with the sections or part of sections which I have read from the statute, portions of the law as laid down there would not fit the case, but I am giving you the whole section so that you may see the principles of law that are intended.

Now, what is a defect in the title?

The Act says that to constitute notice of infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

And then it is further provided that a holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.

Well, now, many of these principles that are set forth in the sections just read to you from

the Negotiable Instruments Act are declaratory of what had theretofore been the common law of this state, and there is a purpose running through all of these provisions and that is that the course of trade between merchants, between people who are engaged in commerce should be free and unobstructed, and therefore that negotiable paper should pass freely from hand to hand, and where a person takes paper as a holder in due course, within the definitions that I have given you, that he should not be molested or bothered by defenses that existed between prior parties to the instrument, because to hold otherwise would be to put an undue obstruction upon the free exchange of commercial paper in the commercial world.

Now, the defendant says, in the first place, that this note was not negotiated as required by law; that the title of the plaintiff is defective, or illegal, because he says Mrs. Adelman, who transferred the note to the plaintiff, did so to pay her own individual debt.

A holder of a note acquires no title where it was negotiated without authority or in an unauthorized manner, or where the transfer was to pay a private debt of its owner, unless the representative who thus sells or transfers is also residuary legatee, and is the sole distributee or financial beneficiary interested in the estate of the deceased, and the purchaser or the person to whom the note is negotiated had no notice of any unsatisfied debts of the deceased holder, or any grounds which render it improper for the personal representative to so deal with the assets of the estate, such as a breach of faith, or fraud perpetrated upon the estate.

And so, in this case, if Mrs. Adelman was the sole beneficiary or distributee of her husband's estate, and plaintiff had no notice of any unsatisfied debts, she might transfer the note as she did and the plaintiff would have a good title to it as against this defendant. Because, you see, Gentlemen, this defendant is not a person interested in this estate, in the sense that he is a distributee of the proceeds of the estate. His obligation is to pay the note provided the holder of the note is a holder in due course and acquires title to the note, a legal title to the note.

So the defendant says that if I am not protected by any of these defenses, still there is the further defense that he has paid the note before it was ever endorsed over to the plaintiff. Now, of course, whether this is a good defense would depend upon two things. First, did he actually pay this note? Second, that the plaintiff was a holder in due course. And you must be satisfied of both of these things before the defendant can be relieved of liability in this suit.

Now let us consider whether the defendant paid the note. You will remember what the testimony was, and you are the sole judges, Gentlemen, of all the testimony in this case. It is for you to decide the facts, but as I remember the testimony, this defendant says that while he held the money turned over to him by his brother, Gootman Adelman, the brother was taken seriously ill and the defendant was sent for and when he came there, the question of the expenses of treatment was taken up and this defendant claims it was then agreed and understood that he was to advance the

money and that the money thus advanced was to be credited on the note. That is the claim, and that any excess of expenditure over the amount of the note would be repaid by Gootman Adelman if he got well and was able to go to work again.

In other words, he claims that all the payments were made—I don't understand that it is denied; I think all the witnesses who have any knowledge on the subject say that payments were made by this defendant to take care of this deceased.

Of course, if those payments were not made in reduction of the amount of this note, or to be applied when made in the reduction of the amount of this note, but were merely voluntary payments, payments made gratuitously, taking place without a request or suggestion that there be any credit applied upon this note, so that it could be said that they were voluntary payments, well, then, of course, there would be no defense upon this ground of payment. But the mere fact that Mr. Samuel Adelman paid the decedent's bills, standing alone, is not sufficient. There must be some agreement or understanding that there was to be a credit on account of this note, that the payments were made in payment, on account, or in reduction of, or in discharge of, whatever the case might be, of this note. Now, if you should find that these payments were made in payment of the note, that does not determine the question of whether the plaintiff can recover, because it must further appear that he was a holder in due course.

If he was a holder in due course, then, whether the note was paid or not would make no difference. The defendant claims that the plaintiff had notice that the note was paid and for that reason, the plaintiff here was not a holder in due course. Now, you will remember what the testimony was upon that subject. The defense claims that coming home from the funeral, this plaintiff and Mrs. Adelman were in the car with the defendant and the defendant's son, and that the subject of straightening out the affairs of the deceased was brought up and that this defendant called the attention of the plaintiff to the fact that there was this note of his, upon which he was the maker, held by Gootman Adelman, and it had been paid and that he wanted this note back. As I recall the testimony, the defendant says it was promised to him.

Now, of course, if that is so, Gentlemen, that event occurred before this plaintiff acquired title to the note, which was not until the year 1925 and therefore, if that is true, the plaintiff here would not be a holder in due course, because he would have had notice of the infirmity of the note, which was that it had been paid, if it is a fact that it had been paid.

Now, the defendant also claims that this plaintiff acquired this note an unreasonable time after its issue, and therefore and for that reason, he was not a holder in due course. Now, the note was dated January 13, 1921. Mr. Adelman, the payee of the note, died in December, 1923, and the plaintiff acquired the note in July, 1925, under the circumstances which I have already spoken of, and as were related by the plaintiff on the witness stand, if you believe what he said was

true as to the manner in which the note was delivered to him, and the consideration which was given for the note. If the plaintiff acquired the note an unreasonable time after its issue, under all of the circumstances, then this plaintiff was not a holder of that note in due course, and if that note was paid in the manner claimed by this defendant, then the plaintiff could not recover, and your verdict would have to be for the defendant and against the plaintiff of no cause of action.

If, however, it was not acquired by or negotiated to the plaintiff an unreasonable length of time after its issue, then it could not be called overdue paper, making the plaintiff not a holder in due course, on the ground of being overdue paper.

If the defendant is entitled, Gentlemen, to your verdict, of course, there being no counterclaim here, your verdict would be that you find in favor of the defendant and against the plaintiff of "no cause of action."

If, on the other hand, you find that the plaintiff is entitled to your verdict, then he is entitled to the amount due on the note with six per cent interest from January 13th, 1921.

Now, Gentlemen, motions were made by the attorney for the defendant, first, for a nonsuit; and secondly, for the direction of a verdict in favor of this defendant, both of which were denied by the Court. I think I should say something on that, because I have gathered the impression in the past that jurors who have not had much experience in serving get the idea that the judge is trying to indicate to them in some manner by the denial of these motions, that the Court feels the jury should find for the plaintiff, or if the motions come from the plaintiff and are denied, that the verdict should be for the defendant. Now, Gentlemen, if you have any such notion, you must eradicate that from your mind, because it is not part of the Court's function to indicate to you what your verdict should be. In denying these motions, the Court was merely passing upon the question of whether or not there were conflicting facts in the case which should be submitted to you for your determination, applying the rules of law which the Court might give to you.

So, Gentlemen, do away with the impression that the Court, either with respect to the denial or granting of motions, or with respect to the rulings upon evidence, as those rulings are called, overruling objections in the course of the trial, that the judge has any idea of influencing you as to which side your verdict should be rendered for, because that is peculiarly and solely your function. You are to decide the facts and then apply the law which the Court gives you to the facts that you find. Now, if you do that, conscientiously, according to the oaths that you have taken, then your verdict will necessarily be a right one, no matter for which party it may be rendered.

You may now retire.

(The jury retired.)

Mr. Gross: I respectfully except to that portion of your Honor's charge in which you say that

on the question of negotiation to the plaintiff, that it is for the jury to consider whether the plaintiff was a holder for value without notice, since it appears beyond dispute that as a matter of law, the instrument was negotiated an unreasonable length of time after its making and it appears further undisputed, that the note was taken for the individual debt of the administratrix, and hence, as a matter of law, that would charge the plaintiff with knowledge of any infirmity or defect in the title by the very consideration given for the note.

I further respectfully except to that portion of your Honor's charge in which you say if Mrs. Adelman was the sole distributee of her husband's estate, that the jury might find that the plaintiff had thereby acquired from her by endorsement, a good title to the note in question. On the ground that it affirmatively appears from the evidence, without dispute, that there was a liability of the estate of Gootman Adelman, at least for funeral expenses and that therefore the case would not come within the exception noted by your Honor in the Charge.

I further except to that portion of your Honor's charge, in which you leave it to the Jury to say whether the plaintiff in fact, was a holder in due course, because it affirmatively appears, on the ground before mentioned, that the plaintiff was not a holder in due course.

I further except to that portion of your Honor's charge in which you say that, if the payments in question made by the defendant, were voluntary payments that this would be no defense, because the moneys paid out and expended by the defendant were at least the expenses of the last illness of the deceased and as such, a preferable debt payable under the statute out of his estate and would make the plaintiff, who, without dispute had knowledge of these payments, a holder not in due course.

The Court: It may be noted that there is no counterclaim filed in the case.

Mr. Gross: I further except to that portion of the Court's charge in which the Court instructs the Jury that they are to pass on the merit of the question of notice to the plaintiff when he acquired the note in question, because it appears beyond dispute, that the plaintiff had notice of all of the infirmities existing in the note.

I further except to that portion of your Honor's charge in which you permit the Jury to pass upon the question of the unreasonableness or reasonableness of the length of time between the making of the note and its negotiation to the plaintiff, on the ground that it appears to be a question of law for your Honor to pass upon, rather than one of fact for the Jury, and that the Jury should have had binding instructions that the note was negotiated an unreasonable length of time after its making.

The Court: You may take exceptions.

Mr. Brenner: I just want to call the Court's attention to the fact that the Jury were not told that it is for them to compute the interest.

Exhibit P-1.

$1011.75 West New York, N. Y.
Jan. 13, 1921

On demand—after date—I promise to pay to the order of Gootman Adelman
One Thousand Eleven 75/100.....Dollars.

WEST NEW YORK BRANCH

At the N. J. Title Guarantee & Trust Co.

West New York, N. J.

Value Received with Interest.

M. ADELMAN.

No..... Due.....

Endorsed - Becky Adelman - administratrix.

Exhibit P-2.

BAYONNE BRANCH

Union Trust and Hudson County National Bank

Bayonne, N. J., Mar. 9, 1925.

Pay to the order of R. Adelman $100.00
One Hundred 00/100.....Dollars.

MORRIS GERSHMAN.

Exhibit P-3.

BAYONNE BRANCH

Union Trust and Hudson County National Bank

Bayonne, N. J., June 25, 1925.

Pay to the order of R. Adelman $300.
Three Hundred.....Dollars.

MORRIS GERSHMAN.

Extract of Exhibit D-2.

Three (3) receipted bills of Christ Hospital, totaling $874.00, together with checks in payment of the same and checks to the order of various persons, nurses who attended Gootman Adelman; total of items aforementioned $1667.00; total of all checks offered, $2032.00.

Part of Original Exhibit Offered:
Checks to Mrs. Beckie Adelman and Hospital and Nurses.

	$1,667.00
	200.00
	30.00
	45.00
	25.00
	35.00
	10.00
	20.00
	2,032.00
cash	572.00
	$2,604.00

Exhibit D-3.

(Letter from James W. McCarthy)

Nov. 18th, 1924.

Mr. M. Adelman,
12 Liberty Place,
Weehawken, N. J.

Dear Sir:

Mrs. Rebecca Adelman of #422 Avenue C, Bayonne, who I understand is your sister-in-law, is the holder of a demand note dated January 13th, 1921, payable to the order of her husband Gootman Adelman, in the sum of $1011.75. Mrs. Adelman is desirous of having this note paid and I thought I would write to you to see what you proposed to do about it.

Awaiting your favor of a reply, believe me,

Very truly yours,

JAMES W. McCARTHY.

JWMCC:FC

Exhibit D-5.

(Letter from James W. McCarthy)

March 3, 1925.

A. Harry Adelman, Esq.,
Attorney-at-law,
833 Boulevard East,
Weehawken, N. J.

My dear Adelman:

I have been waiting to see or hear from you in the matter of Gootman-Adelman.

Will you kindly let me know when you will take this matter up with me?

Very truly yours,

JAMES W. McCARTHY.

JWMCC:FC

New Jersey Court of Errors and Appeals

MORRIS GERSHMAN, Plaintiff-Respondent, *v.* SAMUEL M. ADELMAN, Defendant-Appellant.	On Appeal from the Supreme Court.

BRIEF OF DEFENDANT-APPELLANT.

Statement.

This is defendant's appeal from a judgment of the Supreme Court which affirmed a judgment of the Hudson County Circuit Court entered upon the verdict of a jury on March 25, 1926, in the sum of $1,382.08.

The facts are quite fully stated in the opinion of the Supreme Court (Case, p. IV) except that there are a few pertinent facts which are not in dispute and to which the Supreme Court did not advert. These additional facts are as follows: The plaintiff in November or December, 1924, accompanied Beckie Adelman, the administratrix, to the office of her attorney, Judge McCarthy, for the purpose of having action taken against the defendant for the collection of the note and at that time plaintiff was advised that the defendant resisted payment because the note had already been paid by the advances made by the defendant for the account of his brother, Gootman Adelman (Case, p. 21, fol. 10; p. 71, fol. 10). In addition plaintiff, as far back as December, 1923, knew that the defendant had given this note to his brother,

Gootman, and that the defendant then contended that it had been paid by these advances (Case, p. 22, fol. 30, etc.), and the plaintiff was present at Judge McCarthy's office when Beckie Adelman, the administratrix of Gootman Adelman, retained him in November or December, 1924, to demand payment of the note (p. 21, fol. 10; p. 65, fol. 20; p. 67, fol. 20, etc.; p. 71, fol. 10, etc.). This the plaintiff himself admitted on cross examination.

It is also of importance to note that it was not disputed, and hence admitted, that the defendant had advanced to his brother a sum considerably in excess of the amount of the note and the only dispute was whether this was considered in payment of the note or as a mere voluntary advancement. This was the *only* disputed question of fact in the case.

The plaintiff further admitted that he knew prior to the taking of the note in question that the defendant had expended a large sum of money on behalf of his brother Gootman and that he had paid Gootman's funeral expense (p. 21, fol. 30, etc.; p. 22).

Argument.

Appellant contends that since the note in question was payable on demand and was negotiated to the plaintiff four and one-half years after its making, plaintiff was not a holder in due course *as a matter of law* and that the Trial Judge erroneously, under his charge, to which exception was duly taken, submitted this question to the jury. The facts not being disputed, the plaintiff was not a holder in due course and the submission of this question to the jury was harmful error to the appellant in that the jury, under the Court's charge, could well have eliminated from its consideration

the defense of payment by the defendant, by finding that the plaintiff was a holder in due course. Against him, as such holder, the defense of payment would not be available.

Appellant contends further that the plaintiff, having admittedly taken the note from one acting in a representative capacity in payment of her individual debt, when the plaintiff had knowledge of liability against the estate for funeral expense and expense of last illness, would not have title to the note and hence the defendant was entitled to his motion for a non-suit and for direction of verdict. That it was immaterial whether the payments made by the defendant for funeral and expense of last illness of Gootman were voluntary or not, if, when the plaintiff took this note, he knew, as he admits he did, that the defendant had paid the funeral expense and the expense of last illness of his brother, which by statute are made preferential claims against the estate. He could not acquire title to the note paid to him for an individual debt of the administratrix, knowing that the estate owed this debt.

POINT I.

Plaintiff was not, as a matter of law, a holder in due course, and the Trial Court erroneously submitted this question to the jury.

The sections of the Negotiable Instrument Law, which are pertinent to this case, are the following:

Section 53 (C. S., Vol. 3, p. 3741):

> "Holder in due course; time of negotiation. —Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course."

Section 58 (C. S., Vol. 3, p. 3741):

> "Defenses against holder not in due course; title through holder in due course.—In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable; but a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter."

Section 71 (C. S., Vol. 3, p. 3741):

> "Time of presentment.—Where the instrument is not payable on demand, presentment must be made on the day it falls due; where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof."

Section 193 (C. S., Vol. 3, p. 3757):

> "Estimating time.—In determining what is a 'reasonable time' or an 'unreasonable time' regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case."

The question of what is a reasonable time in which to present negotiable paper due on demand, in most cases arises in actions brought against one who has endorsed such paper, but the rule of construction is the same in those cases as it is in cases such as this, where defenses are being set up against the holder which would have been available against the payee.

The Trial Court, in charging the jury, said this:

> "Now if you should find that these payments were made in payment of the note, that does not determine the question of whether the plaintiff can recover, because it must further appear that he was a holder in due course.
>
> "If he was a holder in due course, then, whether the note was paid or not, would make no difference" (Ground of Appeal 5, p. 4; Charge of the Court, p. 82, fol. 30, to p. 83, fol. 1).

This, appellant contends, was error harmful in the extreme, for the Court, by this portion of the charge, eliminated from the case the question of payment by the defendant. The jury could or may have found that the plaintiff was a holder in due course, and that therefore payment by defendant would be no defense.

In the case of *Foley* v. *Emerald Brewing Co.*, 61 N. J. Law, 428, it was held that a note payable on demand which was presented nine months after it was made, was presented an unreasonable length of time after its making. It is true that this was an action against an endorser, but under the provisions of the Negotiable Instrument Law in the sections cited above, the rule is the same when the question to be determined is, "Is the holder one in due course?" Mr. Justice Dixon, in speaking for the Court, indicates that the reasonableness of the time for presentment is determined by the ability of the holder to make presentment excluding any other factor, such as any notion of credit or indulgence to the maker (61 Law, at p. 430).

The Supreme Court in its opinion (bottom, p. VII, top, page VIII) says that in the case at bar the circumstances concerning the issuance of the note were peculiar and extraordinary. Since it was an arrangement between two brothers and the note is payable on demand, with interest, ~~admission~~ omission of presentment of the note was in contemplation of the parties and hence in this case the question was one properly submitted to the jury.

We respectfully contend that the rule, as thus stated by the Supreme Court, would upset a well-settled principle of the law of commercial paper, in which particular branch the rule of *stare decisis* should be most rigidly adhered to. In the first place the term "reasonable time," as used in the statute, is not to be construed in the light of the relationship of the maker to the payee, but rather the ability of the *holder* to make presentment to the maker. As stated by Mr. Justice DIXON in *Foley* v. *Emerald Brewing Co.*, 61 Law., at page 430:

> "The circumstances to be considered in determining whether a demand has been made in due time are scarcely suggested by the phrase 'a reasonable time,' but the form of the rule requiring due diligence in the holder indicates what, in Merrit *v.* Todd, 23 N. Y. 28, Chief Justice COMSTOCK declared to be the true principle, *that it is merely the reasonable ability of the holder which can be considered, excluding any notion of credit or indulgence to the maker.*" (Italics ours.)

Furthermore, Gootman Adelman died in December, 1923, more than two years after the making of the note. His administratrix, Becky Adelman, negotiated the note in question to the plaintiff in July, 1925. Assuming for the sake of argument that the relationship existing between the maker and payee could be taken into consideration in determining the question of the reasonableness of time, there is no answer whatsoever in the opinion of the Supreme Court to the proposition that after this relationship had ceased for over a year and a half the note in question reposed with the administratrix, and was then negotiated to the plaintiff. As a matter of law this lapse of time alone would make the plaintiff not a holder in due course. *Foley* v. *Emerald Brewing Co., supra.* Furthermore, it affirmatively appeared without

dispute that the plaintiff, when he took this note, knew that the defendant had previously in November or December, 1924, refused payment thereon while it was still in the hands of the administratrix (p. 21, fol. 10; p. 71, fol. 10).

The Supreme Court, in its opinion, adopted the view which the Trial Judge held, as reflected in his charge to the jury, to which exception was taken, namely, that because the maker and payee of the note were brothers an extraordinarily long time might be held to be a reasonable time, overlooking entirely the additional fact that for almost two years after the payee's death the note was not presented for payment, and that a year and a half after the payee's death it was negotiated to the plaintiff.

The Supreme Court, in its opinion (p. VIII, fol. 22), says:

> "According to some courts a note payable on demand, with interest, is a lasting security, and is not dishonored until payment is demanded. 3 R. C. L., p. 1047, Sec. 252."

This portion of the Supreme Court's opinion, down to the end of the paragraph, is taken *verbatim* from 3 R. C. L., although not so quoted. It is set forth by the Supreme Court to indicate that the rule is that a demand note, payable *with interest*, is not overdue until presented. This very section cited by the Supreme Court, to wit, Sec. 252, indicates that the prevailing view in this country is directly to the contrary. We will here set forth *verbatim* Section 252, including in italics the part which the Supreme Court omitted, and which we contend indicates the rule to be to the contrary.

3 R. C. L., p. 1047, Sec. 252:

"Instruments Payable on Demand.
"According to some courts a note payable on

demand, with interest, is a lasting security, and is not dishonored until payment is demanded. *But the prevailing view in the United States is that a sight bill or demand note must be presented within a reasonable time, and that if not so presented it must be deemed overdue and dishonored within the rule subjecting the transferee of overdue paper to defenses available between the original parties. And this is the rule whether the instrument is payable with or without interest. The Negotiable Instruments Law provides that 'where an instrument payable on demand be negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course.'* There is no precise time when such a note is to be dishonored, as it must depend upon the circumstances of the case and the situation of the parties. If the facts are involved and in dispute, the question is one of mixed fact and law which should be submitted to the jury under the direction of the court."

In the concluding part of Section 252 are given numerous particular instances in which the holder was held *not* to be a holder in due course, where the following length of time elapsed and the note was one due on demand *with interest,* to wit: ten months, nearly three months, two and one-half months.

In most jurisdictions the mere length of time which elapsed between the making and the negotiation of the note involved in this suit would be sufficient to charge the plaintiff as a holder *not* in due course without the necessity of considering further facts in the particular case.

Greer v. *Downing*, 176 Ill. App. 355 (1912).

The facts in this case are strikingly similar to the facts in the case at bar. The defendant made a note dated August 22, 1910, payable on demand,

with interest. The payee died on August 4th, 1911. His widow was appointed administratrix of his estate. Within three or four days thereafter she endorsed the notes to the plaintiff, who sued the maker, the defendant. The defendant attempted to set off an alleged debt due him from the payee. The Court said:

> "We do not know of any case in which it has been held that an endorsee of a demand note, negotiated a year after its date, has been held to be a purchaser before maturity."

To the same effect is

Title Loan & Investment Co. v. *Fuller,* 184 Pac. (Kan.) 727 (1919),

in which it was held that the mere lapse of twenty months between the making and the negotiation of a promissory note payable on demand was an unreasonable length of time as a matter of law, charging the plaintiff with knowledge of any infirmities existing in the note.

See also

Nevins v. *Townsend,* 6 Conn. 5;
Guckian v. *Newbold,* 23 R. I. 553; affirmed 23 R. I. 594;

in which it was held that eighteen months was an unreasonable length of time as a matter of law.

The Court further held that when a note, payable on demand, with interest (as in the case at bar) has run for so long, with no apparent reason for delay in presentment, the note providing for interest which most men expect to receive at least once a year, and the payment of which would have recognized the obligation, but none of which was paid, the note, as a matter of law, must be taken to be overdue paper. In the case at bar no interest was ever paid.

See also

Sylvester v. *Crapo,* 32 Mass. 92.

Note negotiated eleven months after date of issue.

Commercial National Bank v. *Zimmerman,* 185 N. Y. 210.

Note negotiated three and one-half years after date of issue.

The decision in the case at bar overrules the rule adopted in this State in *Foley* v. *Emerald Brewing Co., supra,* which follows the prevailing view elsewhere, and we respectfully contend that the rule in the *Foley* case is not only consonant with principle, but having been acted on for many years, should not now be disturbed.

In addition, it is our contention that the fact that the plaintiff knew, as he admits he did, that the defendant had refused payment on this note nine months before he took it and the further fact that plaintiff knew that defendant based his refusal on the fact that he had paid it, would in addition to the mere lapse of time, make the plaintiff not a holder in due course. In fact it must be considered that the note was presented. While still in the hands of the administratrix, her attorney, in December, 1924, demanded payment. The plaintiff, taking it six months later, took overdue paper.

The error in the Trial Judge's charge in this respect was manifestly injurious to the defendant.

POINT II.

The Trial Court should have nonsuited the plaintiff and should have directed a verdict in favor of the defendant.

Appellant's contention is that the plaintiff did not have title to the note sued on. The plaintiff admitted that he took the note in payment of the

individual debt of the administratrix (p. 20, fol. 1, etc.). He knew also that the defendant had paid the expense of Gootman Adelman's last illness and funeral expense (pp. 21, 39). He knew this before he took the note. One dealing with a person acting in a representative capacity cannot take the property of the estate for the payment of the individual debts of the representative. This is elementary.

Prall v. *Hamil,* 28 N. J. Eq., 66;
Gaston v. *American Exchange National Bank,* 29 N. J. Eq. 101;
Jeffray v. *Towar,* 63 N. J. Eq. 530;
Harrison v. *Fleischman,* 70 N. J. Eq. 301;
Shaw v. *Spencer,* 100 Mass. 382;
Ford v. *Brown,* 114 Tenn. 467;
National Bank v. *Insurance Co.,* 104 U. S. 54; 29 L. R. A. (N. S.) 365.

Theses cases consider what elements constitute notice sufficient to put a purchaser from one holding in a representative capacity, on inquiry. It was held that the mere presence of such words as "trustee," "executor," "guardian," etc., was sufficient notice to put the purchaser on inquiry. Our case is much stronger. The word "administratrix" in the endorsement is sufficient notice. Besides that, the plaintiff admitted on cross examination (p. 23) that he knew that Mrs. Adelman held this note when he signed her bond to secure letters of administration. Since the word "administratrix" alone put the plaintiff on inquiry, *a fortiori,* his statement that he knew she held as administratrix also put him on inquiry to ascertain her right to use this note in payment of her individual debt.

The Trial Judge in this case, in denying the motion for nonsuit (p. 27), relied upon the fact that Becky Adelman, the widow of Gootman Adelman,

was the sole distributee of her husband's estate, and as such could pass title to the note for her individual indebtedness. This, we contend, in view of the facts that appeared in plaintiff's own case, was error.

The Supreme Court, in its opinion (p. IX), cites 3 R. C. L., p. 991, Sections 200 and 201, and then in conclusion adopts the Trial Judge's views that there must be some agreement or understanding that the payments, which were made by the defendant, were to be credited on account of the note. The admitted facts in this case, which were *not* in dispute, and which appeared in *plaintiff's* case, indicated that the defendant had paid the funeral expenses and the expense of last illness of Gootman Adelman and even if these payments were voluntary, by operation of law, an implied promise would be raised for their repayment by the administratrix out of deceased's estate, which would have made the defendant a creditor of the estate, of all of which plaintiff had knowledge before he took the note. With these additional facts affirmatively appearing, the rule adopted by the Supreme Court in its affirming opinion would not apply.

The Trial Judge, in his charge, to which exception was duly taken, told the jury that if these payments were voluntary the defendant would not be entitled to their repayment (Grounds of Appeal 7 and 8, pp. 5 and 6).

That one who voluntarily pays the expense of a funeral or the expense of the last illness is a preferential creditor of the estate is well settled. There need be no promise to repay the amounts disbursed, for the law in such instance raises an implied promise.

Sullivan v. *Horner,* 41 N. J. Eq. 299,

in which it was held that one who voluntarily paid the funeral expenses of another, was entitled to their repayment by virtue of the provisions of the Orphans' Court Act which re-enacted what had theretofore been a rule of the common law.

See also cases and note 33 L. R. A. 660.

By Section 66 of the Orphans' Court Act, *C. S., Vol. 3, page 3833,* funeral expense and expense of last illness are made preferential debts against the estate. Such was the well settled rule of common law. *See 9 L. R. A. 462; 1 L. R. A. (N. S.) 819, at page 821.*

The defendant was entitled to the repayment of these, of all of which the plaintiff had knowledge at the time that he took the note, before the administratrix would have a right to appropriate the note to her own individual use, as she did in negotiating the note to the plaintiff. The factual situation presented in this case did not warrant the Trial Judge in assuming that the negotiation of the note in this case was within the exception to the general rule applicable to the disposition of property by one acting in a representative capacity.

The error in refusing to nonsuit and direct for the defendant, upon this last ground, and subsequently in charging the jury that if the payments were voluntary, the defendant could not avail himself of these in defense, was extremely harmful to the appellant.

The Trial Court, in treating this question *arguendo* with counsel, particularly when exceptions were taken to the Court's charge (p. 87, fol. 10), intimated that the defendant could not avail himself of this point because no counterclaim had been filed. It is our position that this is no answer to the defendant's contention because defendant could not file a counterclaim, which has the sole effect of seeking an affirmative judgment against

the plaintiff. This could not be done because the plaintiff was at best an assignee. The answer to the Court's contention is twofold. In the first place, the second separate defense set forth in the answer (Case, p. 11) set up as a separate defense moneys advanced for Gootman Adelman and for his account, and for which he and his estate were chargeable by a promise implied in law, as distinguished from an express agreement to repay, which in turn was set out in the third separate defense. This, it is our contention, was a sufficient plea to raise the question of the matter of these payments, although voluntary. The second answer to the Trial Court's position is that by the fourth separate defense the defendant pleaded that the plaintiff did not have title to the note. In other words, that he took the note from one acting in a representative capacity, with knowledge of the defendant's rights against the estate, and hence did not have legal title to the note. By this plea the defendant was entitled to raise the question, although no counterclaim had been filed.

POINT III.

It is respectfully submitted that the judgment of the Supreme Court and of the Hudson County Circuit Court should be reversed and a new trial granted the appellant, with costs.

Respectfully submitted,

GROSS & GROSS,
Attorneys of Appellant.

BENJAMIN GROSS,
Of Counsel.

New Jersey Court of Errors and Appeals

MORRIS GERSHMAN,
Plaintiff-Appellee,

v.

SAMUEL M. ADELMAN,
Defendant-Appellant.

On Appeal from the Supreme Court.

BRIEF OF PLAINTIFF-APPELLEE.

Statement.

On January 13th, 1921, appellant Samuel M. Adelman executed and delivered to a brother, Gootman Adelman, a promissory note in the sum of $1,011.75 (Exhibit P-1, p. 88). The transaction was unusual in that it was not for money owing, nor for moneys advanced, but rather as evidence of the fact that Gootman Adelman desired his brother to use the money in his business so that he, Gootman, might receive the benefit of the interest (p. 27, lines 28-40; p. 28, line 4); the idea being that more interest could be procured than if the money were held on deposit in a bank (p. 45, lines 1-10).

There is nothing in the testimony to indicate that the money was to be held for any definite length of time, but the general impression which would prevail from the evidence was that the arrangement as to time for repayment would remain indefinite and the money repaid only upon actual demand.

Gootman Adelman thereafter became ill and appellant states as a fact that at that time it was agreed because of the financial inability to pay the expense of effecting a cure, an agreement was entered into that the amount should be advanced by the appellant and deducted from the amount which he owed, as represented by the note.

It is true that there was evidence on the part of Samuel M. Adelman and his son to that effect, but the testimony is put in dispute by the widow, Rebecca Adelman, who denies that any conversation ensued at the bedside of Gootman Adelman, where Samuel Adelman says that the conversation was had, which could be construed as an agreement to that effect (p. 62, lines 25-40), and strengthens her denial by claiming that her husband was so paralyzed that he could not utter a word even though he desired so to do (p. 63, lines 1-20).

It is not disputed that during the illness of Gootman Adelman that a considerable amount of money was expended by the brother, Samuel, which it is claimed was in the neighborhood of $3,000, and as actually shown by the tabulation thereof (Exhibit D-2, p. 89) to be $2,604.

It is denied that there was any agreement made for the return of this amount, the contention being that this money was expended by the wealthier brother voluntarily because of his desire that such less fortunate brother should be cured of his affliction and without any hope that repayment thereof should be made.

Even after the death of Gootman Adelman, if the testimony of the widow is to be given any weight whatsoever, it remained the understanding that the amounts expended should not be charged against the indebtedness evidenced by the note, because she testifies (p. 67, lines 1-20) that both Samuel Adelman and his son agreed to pay the amount

of the note to her so that she might use the proceeds thereof to open a business, she then being weak and unable to work.

Gootman Adelman remained alive until December, 1923, almost three years after the note was made, the note bearing date January 13, 1921, and Rebecca Adelman retained the same until July, 1925, when it was negotiated to the plaintiff Morris Gershman in payment of work performed and for advances made to the widow in the business then being operated by her (pp. 17-19).

Upon the failure of the appellant to make payment of the note Gershman started suit for the recovery thereof on September 11th, 1925, a period of only two months after the note came into his possession (p. 7).

The action was subsequently tried at the Hudson County Circuit Court and resulted in a verdict for the plaintiff for the full amount claimed.

Samuel M. Adelman appealed to the New Jersey Supreme Court and urged that the Trial Court erred in leaving to the jury the question of whether the plaintiff was a holder in due course, contending that the plaintiff took the note subject to defenses that might be raised, first, because of the delivery to him of the note more than four years after the making thereof, and second, because the note was endorsed by Mrs. Adelman as administratrix and not by her both in her respective and individual capacity. The Supreme Court found no error in the record and affirmed the judgment of the Hudson County Circuit Court from which judgment the defendant now appeals to this Court.

ARGUMENT.

POINT I.

To be deemed a holder in due course it is conceded that the plaintiff must have acquired the instrument before it was overdue and without notice of previous dishonor.

3 C. S., p. 3741—Section 52.

Before going into the argument as to whether or not the plaintiff was a holder in due course, we desire to call the Court's attention to a misstatement of fact in counsel's brief.

On the first page of counsel's brief in behalf of the defendant, they state that, "the plaintiff in November or December, 1924, accompanied Beckie Adelman, the administratrix to the office of her attorney, Judge McCarthy, for the purpose of having action taken against the defendant for the collection of the note and at that time plaintiff was advised, etc., etc." The exact date as appears in the testimony is November, 1925, and not November, 1924, as evidenced by the cross examination of the plaintiff, wherein he was asked:

> "Q. Did you go with Mrs. Adelman to see Judge McCarthy? A. Yes, sir.
> "Q. In November, 1925? A. Yes, sir. This was a different case" (Case, p. 21, lines 11 to 14, inclusive).

The note being payable on demand plaintiff would be considered a holder in due course unless the same was negotiated an unreasonable length of time after its issue.

3 C. S., p. 3741—Section 52.

What the Legislature meant by the term "reasonable time" is indicated by the statute in which the following language is used:

> "In determining what is a 'reasonable time' or an 'unreasonable time' regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instrument and THE FACTS OF THE PARTICULAR CASE."

3 C. S., p. 3757—Section 193.

Under ordinary circumstances it might well be said that a lapse of more than four years would be considered an unreasonable time and that the acceptance of a note after such a lapse of time would constitute the holder thereof one not in due course.

The circumstances, however, concerning the issuance of the note in question as previously indicated were peculiar and extraordinary and such circumstances were known to the plaintiff.

The note upon which suit is brought is payable on demand with interest, which signifies a lasting security and which note does not become dishonored until payment is demanded.

3 R. C. L., p. 1047—Section 252.

It was an arrangement between two brothers unquestionably fond of each other (p. 42, line 30), Samuel being the more successful. The desire of Gootman was that his meager savings should be deposited with his brother rather than be held in a bank so as to gain the advantage of additional interest (C., p. 45, lines 1-10), with the understanding that repayment of the amount advanced was not to be made for a considerable length of time. Except for the intervention of the death of Gootman, his funds would probably have been left in his brother's care for a period of years.

It is now contended that repayment was made by charging the amounts advanced for medical expenses against the indebtedness, but, as previously stated, this evidence is in dispute by the denial of the widow that any agreement was made to this effect (C., p. 62, lines 25-40; C., p. 63, lines 1-20), and it was a matter for the jury to determine whether an unreasonable time had elapsed between the date of issue and the date of negotiation in view of the particular circumstances, especially if they consider the testimony of Mrs. Adelman that even after the death of her husband there was the promise made that the note would be paid (C., p. 67, lines 1-20).

Further consideration could also be given by a jury to the testimony of the defendant who claims that almost immediately upon his being summoned to the bedside of his brother, who was suffering from an affliction which placed him in a critical condition, that a definite agreement was then entered into for the repayment of the amount advanced by charging against the same such amounts as might be paid for medical expenses as testified to by the defendant (C., p. 29, lines 20-40).

The jury in the realization that this statement was so incredible as to be unworthy of belief could entirely disregard it and determine that the payments made for physicians, and the like, were voluntarily made without the desire or hope of repayment and were only made with tne thought of the stronger and more successful brother aiding the weaker and less responsible one in his then present dilemma.

The entire situation and surrounding circumstances were so unusual that it certainly did not lie within the power of the Court to hold that the mere lapse of time between the date of issue and date of negotiation was sufficient to justify a de-

termination as a matter of law that such time was unreasonable thereby having no regard for the language of the statute that the "facts of the particular case" must be considered as a basis for finding the time reasonable or otherwise.

It is further argued that plaintiff was not a holder in due course because he had knowledge that it was claimed that payment of the note had been made.

Much stress is laid on the testimony that at the funeral there was a promise on Gershman's part that the note would be returned, because he then knew that payment had been made and on the further testimony that he, the plaintiff, accompanied Mrs. Adelman on her visit to the office of Judge McCarthy in an effort to collect the note and then received information from Judge McCarthy that payment had been refused, because it was alleged by Adelman that the amount represented by the note had been previously repaid.

Appellant claims that this testimony was not in dispute, but an examination of the record will reveal to the contrary, as Gershman testified that although he knew that a considerable amount of money had been expended, such expenditures were made by one brother for another without charging same on account of the note (Case, p. 23, lines 1-10). He further denies any conversation at the funeral relative to the money advanced (Case, p. 21, lines 25-32).

Concerning the visit to the office of Judge McCarthy, Gershman says that the time of such visit was in November of 1925 (Case, p. 21, line 15), a period of four months after the negotiation to him of the note in question, and denies that he knew at the time of such visit, or at any subsequent time

that there was a claim of payment by the defendant.

As to the knowledge, therefore, which it is claimed that Gershman had at the time when the note was negotiated that there was a defense thereto, in view of his denial, presented a question for the jury.

Numerous cases are cited in appellant's brief which it is claimed sustained the contention that the lapse of time is sufficient to make a demand note non-negotiable. An examination of all cases cited, both from our own courts and from those of foreign jurisdictions, will clearly indicate that there was involved therein the responsibility of endorsers and not of the makers of such notes, which presents an entirely different situation.

No authorities have been found by us presenting issues similar to those present in the case at bar and an examination of the appellant's brief will show a like absence of authority.

A general statement of the law appears in 7 *Cyc.* 975, wherein it is said:

> "The courts have not fixed upon any particular time as a reasonable time within which to present paper payable on demand or at sight, but what is a reasonable time depends upon all the circumstances of each particular case. In determining the question the courts will consider all the circumstances by which the question of diligence can be affected, as the distance between the residences of the parties, the mail facilities, the usages of the country respecting such paper, etc. * * * In the case of a note payable on demand or endorsed and transferred when overdue, the terms of the instrument or the extraneous circumstances may show that the parties intended that it should be a continuing security and should not be presented immediately. If a demand note provides for the payment of interest this generally shows that immediate presentment was not contemplated and is to be considered in determining whether it has been presented within a reasonable time."

In the defendant's brief much stress is laid upon the decision in the case of *Foley* v. *Emerald Brewing Company,* 61 N. J. L. 428, and without going into the facts and circumstances of that case, it may suffice for us to say that in the *Foley* case, *supra,* the action was brought against an endorser of the demand note in question and not against the maker. We consider, therefore, that the *Foley* case is not controlling and has no bearing upon the question as to whether or not the plaintiff in the case at bar, was a holder in due course.

The case at bar comes directly within the language used because the circumstances show that the parties to the note intended that it should be a continuing security and as corroborative of that requires the payment of interest.

It is, therefore, contended that the question as to whether under the particular circumstances of this case the note was negotiated within a reasonable time, thereby making the plaintiff a holder in due course, was one of fact and, therefore, properly submitted to the jury and that the charge of the Court covering this issue was likewise proper.

POINT II.

Appellant argues that title to the note was not acquired because endorsed by Rebecca Adelman in her representative capacity as administratrix.

She testified that she was the widow of Gootman Adelman and that he died without issue (Case, p. 26, lines 1-10). She, therefore, unquestionably became entitled on the death of her husband to what-

ever estate was left by him, including the note in question.

The widow being entitled to the entire estate her position is analogous to that of a residuary legatee and if the purchaser had no notice of unsatisfied debts, or of facts making the transfer improper, his title to the note would be valid.

> "* * * Nor is even a purchaser for value protected where the conveyance by the representative was in payment of his private debt, UNLESS THE EXECUTOR WHO THUS SELLS IS ALSO RESIDUARY LEGATEE, AND THE PURCHASER HAS NO NOTICE OF ANY UNSATISFIED DEBTS OF THE TESTATOR ON ANY GROUNDS WHICH RENDER IT IMPROPER FOR THE EXECUTOR SO TO DEAL WITH THE ASSETS."
>
> 24 C. J., 224.

A number of cases are cited in support of the contention that a person acting in a representative capacity cannot use the funds nor securities with which he is intrusted for payment of an individual debt, but an examination of these cases will clearly indicate that the rights of third persons, who were entitled to the fund or securities or some part thereof, intervened.

Appellant cites no cases, nor can any be found, in which the position is taken contrary to the provision of the law previously cited that good title is procured from a person acting in a representative capacity where such person is entitled to the entire fund.

The position taken by the appellant is rather unique. If it is his contention that no title can be procured from a person occupying a representative capacity, it would necessarily mean that the sole legatee, or person occupying similar position, could not dispose of the negotiable securities received under the will of a testator, if, as well as

being sole legatee, he had also qualified as executor, with the result that such securities must necessarily be held by him and the proceeds thereof never realized.

If, on the other hand, the argument is that a sole legatee could reduce the negotiable securities to cash but only if such securities were first endorsed by the legatee in his representative capacity, followed by an endorsement in his individual capacity, it would require the performance of a meaningless act.

It is the appellee's contention that neither position is sound. There is nothing in the law that prohibits the transfer of the assets of an estate and the application of the proceeds to the payment of a private indebtedness, where, as in this case, the transfer is made by one who has become entitled to, or will eventually be entitled to the entire estate, and that certainly no serious consideration can be given to the argument that for the purpose of making a proper transfer of a negotiable instrument that the executor or administrator is obliged to go through the useless procedure of placing his name on the instrument, both in his representative and individual capacity.

The further objection is made that owing to the fact that Samuel Adelman advanced moneys in payment of medical expenses and funeral expenses, he became a creditor of the estate and, therefore, title to the note was invalidated by reason of such indebtedness.

It is conceded that under the statute, 3 C. S., page 3833, Section 666, that expenses of last sickness and funeral charges,—

> "Shall have preference and be first paid out of the personal and real estate of the testator or intestate."

It is likewise admitted that there need be no express agreement that the amount so expended would be repaid, but on the contrary, that the law is that there is an implied promise that repayment would be made and that such implied promise is enforceable.

Sight is lost by appellant, however, of the claim of the plaintiff that there was no indebtedness which arose either by express or implied agreement that repayment of the amounts expended for medical expenses or funeral charges would be repaid, but to the contrary that it was expressly understood that Samuel M. Adelman had no claim against the estate and would make no claim against the estate for the same.

The evidence adduced by the plaintiff is to the effect that the payments made by Samuel M. Adelman were so made voluntarily without the expectation of any return to him, and that after all expenditures had been made that he had definitely agreed to make payment of the note without deducting therefrom any part of the expense incurred by him.

Mrs. Adelman testifies:

> "Q. You know, don't you, that your brother-in-law, Samuel Adelman, laid out several thousand dollars for your husband? A. Yes, he promised him to give him. He told him, 'Don't worry, I will pay for everything. I will try to get well your husband.' That's what he told me.
>
> "Q. You know now and you knew then, that Mr. Adelman, Mr. Samuel Adelman, was spending hundreds of dollars to try to get your husband well, you know that, don't you? A. Yes, he told me he will spend ten thousand dollars to get well my husband (Case, p. 66, lines 20-40).

> "Q. With all of that, in July, 1925, you transferred the note to Mr. Gershman? A. Yes, sir; he told me that he will give me one thousand dollars to make some business for me, because I was very weak, I could not work. He said it will be for you to make a living.
>
> "Q. Who told you that? A. Mr. Adelman and Harry Adelman.
>
> "Q. They told you that? A. Yes, sir.
>
> "Q. They told you they would give you this one thousand dollars? A. Yes, sir" (Case, p. 67, lines 10-22).

There is, of course, nothing which prohibits a person prompted by generosity from voluntarily making payments of the indebtedness of another without the expectation or hope of recompense.

The testimony of Mrs. Adelman indicates that the intention of the defendant was to waive all claim which he might have had against the estate and that his intention then was to recognize his obligation to repay the amount intrusted to his care without any deduction being made therefrom.

This testimony, it is true, was denied by the defendant, but this makes an issue of fact which the jury had the right to determine and it must be assumed from the determination in favor of the plaintiff that it was found that the payments claimed to have been made were not only voluntarily expended, but likewise that there was no intention to seek repayment thereof.

This would, of course, mean that there were no debts against the estate at the time of the negotiation of the note and that good title passed from the administratrix, who by law was entitled to the entire estate.

It is, therefore, respectfully submitted that the grounds urged for reversal are without merit and that the judgment of the Supreme Court and Hudson County Circuit Court should be affirmed, with costs.

Respectfully submitted,

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