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TESTIMONY.

PLAINTIFF'S TESTIMONY IN REBUTTAL.

EXHIBITS.

Notice of Appeal and Reasons.

(Filed January 22d, 1918.)

NEW JERSEY SUPREME COURT.

MONMOUTH COUNTY.

JACOB CASTELBAUM, Plaintiff-Appellee, vs. DAVID WOLFSON, Plaintiff-Defendant.	Action at Law. Notice of Appeal and Reasons.

To GEORGE W. JENKINS, JR.,

Attorney for the Appellee.

TAKE NOTICE that the appellant, David Wolfson, appeals to the Court of Errors and Appeals in the last resort in all cases in New Jersey from the whole of the judgment entered in this cause, and that the following are the grounds upon which the appeal was taken by the defendant from the whole of the judgment entered therein:

1. Because the Court admitted in evidence a transcript of pleadings and a certificate of judgment marked "Exhibit C."

2. Because the Court permitted the plaintiff's counsel to read to the Jury the transcript of the pleadings marked "Exhibit D."

3. Because the Court over-ruled the following question to the witness, Jacob Castelbaum:

> "Was anything said about the interest at the time of the execution of the agreement with Wolfson?"

4. Because the Court over-ruled the offer of evidence made by the defendant's counsel, as follows:

> "Mr. Brown: I might say, in order to save time, that I have several questions to put to this witness (meaning Jacob Castlebaum). Now, in regard to the conversation that was had at the time of the execution of this agreement—I mean the agreement under date of Dec. 21, as to what interest, if any, or what part of the interest, if any, should be assumed or paid by the defendant, and if your Honor over-rules the same—
>
> The Court: Yes, I am inclined to do that and an exception is granted as to the offer.
>
> Mr. Brown: I will make the offer later or now while the witness is here.
>
> The Court: You now ask to examine the witness along these lines?
>
> Mr. Brown: Yes.
>
> The Court: And the Court over-rules that request and an exception to that ruling will be noted."

5. Because the Court over-ruled the defendant's motion for a non-suit.

6. Because the following question to the witness, David Wolfson, was over-ruled:

And was there anything said at the time—(this is to get in on record). Was there anything said at the time this agreement was executed by you, or about the time you signed it in regard to the interest on the Peter Breidt Brewing Company's mortgage?"

7. Because the trial Judge refused to charge the Jury as requested by the defendant, as follows:

First request to charge: That if the Jury finds from all the testimony in the case that the agreement between the plaintiff and defendant was that the defendant should not pay the interest on the chattel mortgage, then they should find for the defendant.

Second request to charge: If the Jury finds there was an accord in satisfaction by the plaintiff accepting the moneys of the Rubsam and Horrmann Brewing Company, in full settlement of all claims against the defendant, they should find for the defendant.

Third request to charge: If the Jury should find there was an accord in satisfaction by surrendering the chattel mortgage endorsed for cancellation, they should find for the defendant.

Fifth request to charge: If the Jury should find that the plaintiff accepted the principal of the mortgage, in settlement, they should find for the defendant.

Sixth request to charge: The Jury should find for the defendant, as the plaintiff did

not make a reasonable effort to prevent the loss which he complains of.

8. Because the Court charged the Jury as follows, over the objection of the defendant:

> "Gentlemen, the facts which the plaintiff in this case relies upon to make his case are practically undisputed."

and again to that part of the Court's charge, as follows:

> "And this same question which is here raised, has been before one of the Justices of the Supreme Court in this very case, and he has said, as you heard suggested during the argument, that the assumption of the assignment by the defendant of the said mortgage therein referred to, carries with it by implication of law, the assumption of payment by the defendant of all interest, both accrued and accruing. Therefore, so far as this case is concerned, when the plaintiff assumed the defendant's chattel mortgage to the Peter Breidt Brewing Co. he assumed the payment of everything that was due upon it, and upon failure to pay it, he assumed such additional expense as was incident to his failure; that is, such as the expense of the collection of the amount due upon the chattel mortgage, with interest and expense of collection."

THOMAS BROWN,
Attorney for Appellant.

Service of a copy of the within reasons and notice is hereby acknowledged this 12th day of November, 1917.

GEORGE E. JENKINSON, Jr.,
Attorney of Appellee.

Further Reason on Appeal.

(Filed February 1st, 1918.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Jacob Castelbaum, Plaintiff-Appellee, vs. David Wolfson, Defendant-Appellant.	On Appeal Further Reason

To Harry Castelbaum,

Attorney for the Appellee:

Take Notice that the following is a further ground upon which the appeal was taken by the defendant from the whole of the judgment entered in the above cause:

Because the Honorable Charles W. Parker, one of the Justices of the Supreme Court ordered and determined that the assumption of the Chattel Mortgage referred to in the Complaint, carries with it by application of law the assumption of payment by the defendant of all interest, both accrued and accruing thereon.

Yours respectfully,

THOMAS BROWN,
Attorney of Appellant.

Service of a copy of the above notice is acknowledged this 29th day of January, 1918.

HARRY CASTELBAUM,
Attorney of Appellee.

Complaint.

(Filed Dec. 23, 1916.)

SUPREME COURT OF NEW JERSEY,

Monmouth Circuit.

Jacob Castelbaum,
Plaintiff,

vs.

David Wolfson,
Defendant.

Action at Law
Complaint.

The Plaintiff residing in the Borough of Highlands, in the County of Monmouth, State of New Jersey, says:

FIRST COUNT.

(1) On or about the 27th day of December, 1915, the Plaintiff was the owner of a certain saloon business, together with the good-will and stock in trade, which said business was located on premises at 351 Prospect Street, in the City of Perth Amboy, New Jersey.

(2) On or about the 27th day of December, 1915, the plaintiff entered into an agreement with one David Wolfson, whereby the said David Wolfson agreed to purchase said business, good-will and stock in trade for the consideration of $2,500 to be paid to complainant in cash, and in addition thereto assumed the payment of a chattel mort-

gage then held by the Peter Breidt Brewing Company of Elizabeth, covering fixtures and stock in trade, located in said premises, which said agreement is annexed hereto and marked "Exhibit A", and plaintiff begs leave to refer thereto.

(3) That on July 28, 1916, the said Peter Breidt Brewing Company instituted a suit against the said plaintiff, in the Supreme Court of New Jersey on a note of $900, together with interest from April 7, 1911, which said note was the original obligation of the chattel mortgage aforesaid, the said chattel mortgage being given as collateral security and being the same chattel mortgage assumed by the defendant, and on October 17, 1916, recovered judgment against the said plaintiff for the sum of $1,197.60 damages and $57.16 costs, making a total of $1,254.76. The payment of the principal and interest of the said chattel mortgage was requested by the said plaintiff of the defendant, and refused by him at the institution of the above suit. The said defendant on or about November 10th paid the principal of said chattel mortgage but has refused and still continues to refuses to pay the interest on said chattel mortgage and costs of said suit.

(4) The said plaintiff on or about the first day of September, 1916, instituted proceedings in the Court of Chancery of New Jersey to enjoin the Peter Breidt Brewing Company from the further prosecution of their suit, which said suit was dismissed and the said plaintiff incurred the sum of $51.96 costs, which plaintiff was obliged to pay.

(5) There is due and owing from the defendant to the plaintiff the sum of $354.76, being in-

terest on the chattel mortgage over and above the principal and costs of defending said suit, and the further sum of $51.96 costs of the suit to enjoin the suit of the Peter Breidt Brewing Company, both of which said sums plaintiff was obliged to pay for the benefit of the said defendant.

The plaintiff demands as damages the amount due for moneys expended by him upon the breach of the covenant of said defendant to pay the said obligations, being the sum of $406.72, besides interest from Oct. 17, 1916.

SECOND COUNT.

(1) That on or about the 27th day of December, 1915, the plaintiff entered an agreement with David Wolfson, the defendant, whereby the said David Wolfson agreed to purchase said business, good-will and stock in trade for the consideration of $2,500 to be paid to the plaintiff in cash, and in addition thereto the said defendant assumed the payment of a chattel mortgage then held by the Peter Breidt Brewing Company in the sum of $900 with interest at 6% covering fixtures located on said premises, which said agreement is annexed hereto and marked "Exhibit A," and which plaintiff begs leave to refer thereto.

(2) On the said 27th day of December, 1915, the said defendant entered into possession of the said business and conducted the same for his own uses and purposes.

(3) The said defendant has never paid any interest on the said chattel mortgage of $900, although requested to do so on numerous occasions by the said plaintiff.

(4) On or about the 23rd day of November, 1916, the said defendant paid to the said Peter Breidt Brewing Company of Elizabeth the sum of $900, being the principal of said chattel mortgage, but did not pay any interest, and the plaintiff was obliged to pay accrued interest on the same, from December 27th, 1915, to that date.

(5) There is due and owing from the defendant to the plaintiff the sum of $49.50, being the said interest from December 27th, 1915, to November 23, 1916.

Plaintiff demands as damages the sum of $49.50, being money advanced to the use of said defendant, besides interest from November 23, 1916.

GEORGE E. JENKINSON, JR.,
Attorney for Plaintiff.

"Exhibit A."

THIS AGREEMENT, dated the 27th day of December, Nineteen Hundred and Fifteen:

Between:

Jacob Castelbaum, of the City of Perth Amboy, County of Middlesex and State of New Jersey, of the first, AND

David Wolfson, of the City of Perth Amboy, County of Middlesex and State of New Jersey, of the second part:

WITNESSETH: That the said party of the first part for and in consideration of the sum of Twenty-five Hundred Dollars ($2500), to be paid in the manner hereinafter set forth, does hereby

agree to sell to said party of the second part, his heirs and assigns, the saloon business now belonging to the said party of the first part, situate at No. 351 Prospect Street, Perth Amboy, together with all the stock of liquor, beers and cigars which are now therein, also including all fixtures which are now a part of said business in the said saloon, the above fixtures being subject to a mortgage of Nine Hundred and Fifty Dollars ($950) now held by the Peter Breidt Brewery, which said party of the second part agrees to assume in addition to the consideration above named.

The said party of the first part hereby acknowledges the receipt of $145 as part of the consideration of this agreement; also the additional sum of $40 for one month's rent ending February 1, 1916.

The said party of the second part is to have the space of one year from date, within which time to raise the balance of said purchase price, and when the said party of the second part has the purchase price, upon five days' written notice, title will be passed. During the time between the signing of these presents and such notice, the said party of the second part is to conduct the saloon and is to pay the monthly rent of $40 per month, payable in advance, until May 1st, 1916, and from that time until the end of this agreement is to pay at the rate of $50 per month, provided the sale is not consummated by that time. From the date of the consummation of the sale the said party of the first part agrees to execute a lease for not more than 5 years at the monthly rent, payable in advance, of $50 per month for the premises for the first year from date, and $60 per month for the balance of the period.

The said party of the second part shall, until

the consummation of said sale, pay all expenses and be liable for all bills contracted from this date in the said saloon business, and shall in addition pay the said party of the first part 10% of all the gross income weekly and from and after the first of May, 1916, said payments shall cease.

In the event of the said party of the second part being unable to consummate said sale on or before the expiration of this agreement, the said party of the first part shall have the option of repaying to the said party of the second part all payments made on account of principal, and upon paying for all the stock of liquors, beers, etc., then found upon the premises, shall take possession of the said saloon business; and this agreement shall be then of no effect.

The said party of the first part hereby acknowledges that the stock of liquors, etc., now upon said premises belongs to the said party of the second part, and this agreement is in lieu of a bill of sale for the same.

The said party of the first part agrees to sign an application for the transfer of the license for said premises after the consummation of this agreement. Said transfer to be made at the cost of the said party of the second part.

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

JACOB CASTELBAUM (L.S.)
D. WOLFSON (L.S.)

Sworn and subscribed to in the presence of

HARRY CASTELBAUM

Filed Dec. 23, 1916.)

Answer.

(Filed Jan. 4, 1917.)

NEW JERSEY SUPREME COURT,

MONMOUTH COUNTY.

JACOB CASTELBAUM, Plaintiff, vs. DAVID WOLFSON, Defendant.	Action at Law. Answer.

The defendant residing in the City of Perth Amboy, County of Middlesex, and State of New Jersey, says:

OBJECTIONS IN POINT OF LAW.

1. Defendant will object that the complaint discloses no cause of action. It fails to show in the first count, according to the terms of the agreement marked "Exhibit—A" that the defendant assumed the interest that might become due and payable on the chattel mortgage therein mentioned. That the defendant is not liable for the interest due on said chattel mortgage, nor the promissory note mentioned in the first count, of the complaint, nor for the costs of the proceedings, and other damages therein claimed. That the defendant did not assume to pay anything but the sum of $900.00, according to exhibit "A" referred to in the second paragraph of the complaint, and that he is not

liable for the interest accruing thereon, as alleged in said complaint, to the plaintiff.

2. Defendant will object that the damages claimed in both counts of the complaint are too remote, and this defendant is not liable therefor.

3. Defendant will object that the complaint as drawn fails to set forth a cause of action, in which this defendant is liable for any damages whatsoever.

GENERAL DEFENSE.

1. The defendant denies the truth of the matters contained in the complaint, except so far as admitted in the following paragraph of this Answer.

2. That the defendant entered into an agreement substantially as set forth in exhibit "A" of the complaint, with the exception that the chattel mortgage therein mentioned of the Peter Breidt Brewing Company, the debt of which was to be assumed by this defendant, was the sum of $900.00, and not $950.00, and that it was then and there understood and agreed that this defendant was not to pay any interest that might have accrued thereon.

3. That the defendant performed all of the matters and things required of him by the agreement marked exhibit "A," and annexed to the complaint in this cause, and did tender to the plaintiff from time to time, and his attorneys, the said sum of $900.00, and did tender the same to the Peter Breidt Brewing Company, as directed by the plaintiff and his attorney; nevertheless, the Peter Breidt Brewing Company, and the plaintiff and his attor-

ney, refused to accept said moneys, and to surrender the chattel mortgage of the Peter Breidt Brewing Company for cancellation, until the said plaintiff paid the interest due on a certain promissory note, which the defendant did not assume or agree to pay.

4. That when the plaintiff refused to pay the interest that was due on the note referred to, in the third paragraph of the complaint, this defendant was reliably informed that the Peter Breidt Brewing Company brought suit thereon, but the defendant says that he is not liable for any of the damages recovered against the plaintiff in said suit as this defendant did pay the sum of $900.00 as agreed upon for the full payment and satisfaction of the chattel mortgage mentioned in exhibit "A," and that upon payment of said money, the said chattel mortgage was given up to the Peter Breidt Brewing Company, with the consent of the defendant and his attorneys.

5. That the suit alleged in paragraph 4 of the complaint was never brought to the attention of this defendant, nor was this defendant made a party thereto, nor was he responsible for the costs therein.

6. This defendant says that the sum of $354.75, claimed in the fifth paragraph of the complaint is not interest due on the chattel mortgage referred to in exhibit "A," and it is a claim for which this defendant is not liable, he never having incurred, nor assumed, nor agreed, to pay the same to the plaintiff or any other person or corporation, and that the costs sought to be claimed in said para-

graph is not a claim which this defendant assumed or agreed to pay.

7. The defendant admits the execution of a contract substantially as set forth in exhibit "A," first paragraph second count of the complaint in this cause, but denies that he was to pay any other sum than the sum of $900.00, which sum he did pay to the Peter Breidt Brewing Company, and received the chattel mortgage duly endorsed for cancellation and satisfaction.

8. The defendant, answering the paragraph 2, of the second count of the complaint, says that he entered possession of the said premises in said place in the month of December, 1915.

9. The defendant admits paragraph 3 of the second count of the complaint.

10. The defendant admits paying the sum of $900.00 to the Peter Breidt Brewing Company, at the solicitation of the plaintiff, and with the understanding that the same was in full satisfaction of the claim of the Peter Breidt Brewing Company against the said plaintiff, as far as this defendant was liable, and that the said mortgage upon the said payment was endorsed as being fully paid and satisfied and delivered to this defendant at the request of the plaintiff.

11. Defendant denies paragraph 5 of the second count of the complaint.

THOMAS BROWN,
Attorney of Defendant.

Notice of Hearing Objections to Complaint.

(Filed March 28, 1917.)

SUPREME COURT OF NEW JERSEY.

JACOB CASTELBAUM, Plaintiff, vs. DAVID WOLFSON, Defendant.	Action at Law. Notice

To Thomas Brown, Esq.,

Attorney for the Defendant.

Sir:—PLEASE TAKE NOTICE that on Saturday the tenth day of March Nineteen Hundred Seventeen, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard, I shall apply to His Honor, Charles W. Parker, one of the Justices of the Supreme Court at the Court House, Jersey City, New Jersey, to hear and determine the objections in law as set forth in the Answer in this cause, and that at that time I shall apply for judgment.

Respectfully yours,

GEORGE E. JENKINSON, JR.,
Attorney for Plaintiff.

Determination of Objections to Complaint.

(Filed March 28, 1917.)

SUPREME COURT OF NEW JERSEY.

JACOB CASTELBAUM, Plaintiff, vs. DAVID WOLFSON, Defendant.	Action at Law. Order

Motion having been made by the plaintiff on the 10th day of March, 1917, before the Hon. Charles W. Parker, one of the Justices of the Supreme Court, at the Court House in Jersey City, New Jersey, to hear and determine the objections in law as set forth in the answer in this cause, and the arguments of counsel for the plaintiff and defendant having been heard.

It is therefore Ordered and determined, on this 19th day of March, 1917:

(1) That the first objection in law raised in said answer, to wit: That the said defendant did not assume to pay anything but the sum of $900 according to "Exhibit A" referred to in the second paragraph of the complaint, and that he is not liable for the interest accrued thereon, is not sustained, and that the assumption of the said mortgage therein referred to, carries with it by implication of law the assumption of payment by the

defendant of all interest both accrued and accruing, thereon.

(2) That the second general objection in law raised in said answer, to wit: That the damages claimed in both counts of the complaint are too remote, and that the defendant is not liable therefor, is not sustained, leave being given the said plaintiff to amend the First Count of his complaint by inserting an allegation of the rate of interest and an allegation of payment by the said plaintiff of said interest, and by annexing a copy of the said chattel mortgage to the complaint. The fourth paragraph of the First Count in said complaint is hereby struck out.

(3) That the third objection in law raised in said answer, to wit: That the complaint fails to set out a cause of action, is not sustained.

It is further Ordered that the said plaintiff serve on the said defendant or his attorney, a true copy of said amended complaint within —— days.

No costs are allowed to either party.

Let this rule be entered.

C. W. PARKER, J. S. C.

Amended Complaint.

(Filed April 11th, 1917.)

SUPREME COURT OF NEW JERSEY,

MONMOUTH CIRCUIT.

JACOB CASTELBAUM, Plaintiff, vs. DAVID WOLFSON, Defendant.	Action at Law. Amended Complaint.

The plaintiff, residing in the Borough of Highlands in the County of Monmouth, State of New Jersey, says:

FIRST COUNT.

(1) On or about the 27th day of December, 1915, the plaintiff was the owner of a certain saloon business, together with the good-will and stock in trade, which said business was located on premises at 351 Prospect Street, in the City of Perth Amboy, New Jersey.

(2) On or about the 27th day of December, 1915, the plaintiff entered into an agreement with one David Wolfson, whereby the said David Wolfson agreed to purchase said business, good-will and stock in trade for the consideration of $2,500, to be paid to complainant in cash, and in addition thereto assumed the payment of a chattel mortgage then held by the Peter Breidt Brew-

ing Company of Elizabeth, in the principal sum of $900, which said chattel mortgage carried interest with it at the rate of 6 per cent, covering fixtures and stock in trade, located in said premises, a true copy of which agreement is annexed hereto and marked "Exhibit A," and plaintiff begs leave to refer thereto. And the said sale was consummated on or about the sixth day of July, 1916.

(3) That on July 28, 1916, the said Peter Breidt Brewing Company instituted a suit against the said plaintiff, in the Supreme Court of New Jersey, on a note of $900 together with interest at 6 per cent from April 7, 1911, which said note was the original obligation of the chattel mortgage aforesaid, the said chattel mortgage being void and of no effect upon the payment of said note, being the same chattel mortgage assumed by the defendant; a true copy of which is annexed hereto and marked "Exhibit B;" and on October 17. 1916, recovered judgment against the said plaintiff for the sum of $1,197.60 damages and $57.16 costs, making a total of $1.254.76. The payment of the principal and interest of the said chattel mortgage was requested by the said plaintiff of the defendant at the institution of the above suit, and refused by him. The said defendant on or about November 10th paid the principal of said chattel mortgage, but has refused and still continues to refuse to pay the interest on said chattel mortgage and costs of said suit. The said interest and costs amounting to the sum of $354.76 were paid by the said plaintiff.

(4) There is due and owing from the defendant to the plaintiff the sum of $354.76, being interest

on the chattel mortgage over and above the principal, and costs of defending said suit, which said sum plaintiff was obliged to pay for the benefit of the said defendant.

The plaintiff demands as damages the amount due for moneys expended by him upon the breach of the covenant of said defendant to pay the said obligations, being the sum of $354.76, besides interest from October 17, 1916.

SECOND COUNT.

(1) That on or about the 27th day of December, 1915, the plaintiff entered an agreement with David Wolfson, the defendant, whereby the said David Wolfson agreed to purchase said business, good-will and stock in trade for the consideration of $2 500, to be paid to the plaintiff in cash, and in addition thereto the said defendant assumed the payment of a chattel mortgage then held by the Peter Breidt Brewing Company, in the sum of $900, with interest at 6 per cent, covering fixtures located on said premises, which said agreement is annexed hereto and marked "Exhibit A" and which plaintiff begs leave to refer thereto.

(2) On the said 27th day of December, 1915, the said defendant entered into possession of the said business and conducted the same for his own uses and purposes.

(3) The said defendant has never paid any interest on the said chattel mortgage of $900, although requested to do so on numerous occasions by the said plaintiff.

(4) On or about the 23rd day of November, 1916, the said defendant paid to the said Peter Breidt Brewing Company of Elizabeth, the sum of $900, being the principal of said chattel mortgage, but did not pay any interest, and the plaintiff was obliged to pay accrued interest on the same, from December 27th, 1915, to that date.

(5) There is due and owing from the defendant to the plaintiff the sum of $49.50, being the said interest from December 27th, 1915, to November 23, 1916.

Plaintiff demands as damages the sum of $49.50, being money advanced to the uses of said defendant, besides interest from November 23, 1916.

GEORGE E. JENKINS, JR.,
Attorney for Plaintiff.

"Exhibit B."

Jacob Casselbaum
To
Peter Breidt City Brewery
Company (a corporation)

Know all Men by
these Presents, That
I, Jacob Casselbaum,
of the City of Perth
Amboy, in the County of Middlesex and
State of New Jersey, party of the first part, for securing the payment of the money herein men-

tioned, and in consideration of the sum of One Dollar, to him duly paid by Peter Breidt City Brewery Company, of the City of Perth Amboy, County of Middlesex and State of New Jersey, party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do bargain and sell unto the said party of the second part, its executors, administrators and assigns all the goods and chattels mentioned in the schedule hereunto annexed, and now in the possession of the party of the first part, at the saloon and premises known and designted as 308 Fayette Street in the City of Perth Amboy, in the County of Middlesex, and the State of New Jersey.

To have and to hold all and singular the said goods and chattels above bargained and sold or intended so to be, unto the said party of the second part, its executors, administrators and assigns forever. And I, the said party of the first part, for myself, my heirs, executors, administrators, all and singular the said goods and chattels above bargained and sold, unto the said party of the second part, its executors, administrators and assigns, against me, the said party of the first part, and against all and every person or persons whomsoever, shall and will warrant and forever defend.

Upon condition, that if I, the said party of the first part shall and do well and truly pay unto the said party of the second part, its executors, administrators and assigns, the just and full sum of Nine hundred dollars, according to the terms of a certain promissory note, of which the following is a true copy:

Amended Complaint

(Stamp) $900.00

Perth Amboy, N. J., Apr. 7, 1911.

On demand I promise to pay to the Peter Breidt City Brewery Company, Nine hundred & no/100 dollars, at the office of the said Peter Breidt City Brewery Company, with interest. No. Value received. Jacob Castelbaum

Then these presents shall be void. And I, the said party of the first part, for myself, my heirs, executors, administrators and assigns, do covenant and agree to and with the said party of the second part, its executors, administrators and assigns, that in case default shall be made in the payment of the said sum above mentioned, or in case the said party of the first part shall at any time before the day of payment herein provided for, remove the said goods and chattels or any of them, or permit or suffer any attachment or other process against property to be issued against me or permit or suffer any judgment to be entered up against me, then the said sum of money herein mentioned shall become instantly due and payable and then it shall and may be lawful for and I, the said party of the first part, do hereby authorize and empower the said party of the second part, its executors, administrators and assigns, with the aid and assistance of any person or persons to enter the said dwelling house, store and other premises and such other place or places whatsoever, in which the said goods and chattels, or any of them, are or may be placed, and take and carry away the said goods and chattels, and to sell and dispose of the same for the best price they can obtain and out of the money arising therefrom to retain and pay the

said sum above mentioned, and all charges touching the same, rendering the overplus (if any) unto me, the said party of the first part, his heirs, executors, administrators or assigns.

In Witness Whereof, I, the said party of the first part have hereunto set my hand and seal the 8th day of April, in the year of our Lord One thousand nine hundred and eleven.

Signed, sealed and delivered in the presence of H. W. Kehoe — Jacob Castelbaum (L.S.)

State of New Jersey

County of Middlesex, *ss.:*

Edward J. Dalton, Agent for the Peter Breidt City Brewery Company, the mortgagee in the foregoing mortgage named, being duly sworn, on his oath says that the true consideration of the said mortgage is as follows, viz: Nine hundred dollars, lawful money for goods and chattels sold and furnished by the Peter Breidt City Brewery Company on the Eighteenth day of January nineteen hundred and eleven, to the said Jacob Casselbaum, at his request. Deponent further says that this mortgage is given by the said Jacob Casselbaum to the said Peter Breidt City Brewery Company to secure the payment of a certain promissory note hereinbefore mentioned, which said not was delivered by Jacob Casselbaum to the said Peter Breidt City Brewery Company in payment of the goods and chattels mentioned in the schedule hereto an-

nexed. The deponent further says that there is due on said mortgage the sum of Nine hundred dollars besides lawful interest thereon from the eighteenth day of January, 1911.

EDWARD J. DALTON.

Sworn and subscribed this 8th day of April, A. D. 1911, before me,

H. M. KEHOE.

SCHEDULE.

The following is the schedule referred to in the foregoing mortgage: One front bar, one back bar, one cooler, window screens, five tap water and air pressure complete, two summer doors, office partition, two tables, seven chairs, one pool table with balls, racks, cues complete, together with all other goods and chattels now on said premises belonging to the party of the first part.

State of New Jersey,
County of Middlesex, *ss.:*

Be It Remembered, That on this 8th day of April, in the year of Our Lord one thousand nine hundred and eleven, before me, a Master in Chancery of New Jersey, personally appeared Jacob Casselbaum, who, I am satisfied, is the grantor in the within Chattel Mortgage named, and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

H. W. KEHOE, M.C.C.

Received and recorded April 11, 1911, at 8:00 A.M.
BERNARD M. GANNON, Clerk.

Answer to Amended Complaint.

(Filed May 17th, 1917.)

NEW JERSEY SUPREME COURT,

MONMOUTH COUNTY.

JACOB CASTLEBAUM, Plaintiff, vs. DAVID WOLFSON, et als, Defendant.	Action at Law. Answer to Amended Complaint.

GENERAL DEFENSE.

The defendant denies the truth of the matters contained in the Amended Complaint.

ANSWER TO FIRST COUNT.

1. The defendant admits paragraph one of the first count of the complaint.

2. The defendant answering paragraph 2 of the first count of the amended complaint, says that he entered into an agreement substantially as set forth in exhibit-A of the complaint, and says that the amount of money assumed to be paid by this defendant, was the sum of $900.00, and not the sum of $950.00, as mentioned in said agreement, as the said sum of $950.00 was erroneously written by the scrivenor of the plaintiff in said agreement;

That said sale was consummated, and this plaintiff did pay all the consideration required of him to be paid by said agreement, including the said chattel mortgage in the sum of $900.00, which sum it was agreed between the plaintiff and defendant at the time of the making of the agreement marked exhibit "A," and again confirmed at the consummation of said sale, should be the total amount assumed or paid for the satisfaction of the said chattel mortgage. That this defendant did not agree in said agreement, or at any other time, to pay the interest on said chattel mortgage, and that it was expressly understood and agreed between the plaintiff and defendant, that the amount of the debt to be assumed by the defendant, by assuming the chattel mortgage of the Peter Breidt Brewing Company, was the sum of $900.00 without interest or any other charge thereon.

3. Answering paragraph 3 of the first count of the amended complaint, the defendant says that he performed all the things required of him to be performed in exhibit "A" of the complaint, and annexed to the amended complaint in this cause, and did tender to the plaintiff from time to time, and his attorney, the sum of $900, which it was agreed was the amount assumed to be paid by the defendant in satisfaction of the chattel mortgage aforesaid; that the plaintiff did thereupon direct that the said money should be paid to the Peter Breidt Brewing Co., and that such tender was made as directed by the plaintiff, and that the Peter Breidt Brewing Co. did at first refuse to deliver up said mortgage for cancellation, but did in the month of October, 1916, by and with the consent and at the direction of the plaintiff, deliver up said mortgage as fully paid and satisfied by this defendant, upon the payment to them of $900.

This defendant is reliably informed that a judgment by default was obtained by the Peter Breidt Brewing Co. against the plaintiff. For what cause, and the amount thereof, this defendant has no knowledge, and therefore denies that he is liable in any manner whatsoever for any judgment obtained by the Peter Breidt Brewing Co. against the defendant, either as stated in the third paragraph of the first count of the amended complaint, or otherwise.

4. The defendant denies the fourth paragraph of the first count of the amended complaint.

ANSWER TO SECOND COUNT.

1. Answering the first paragraph of the second count of the amended complaint, the defendant admits signing an agreement substantially as referred to as exhibit "A-1" in the first paragraph of the second count of the amended complaint, but denies that this defendant was to assume a chattel mortgage in the sum of $900.00 with interest at the rate of 6% held by the Peter Breidt Brewing Co. and says that through the mistake of the scrivenor of the plaintiff, the sum of $950.00 was inserted in said agreement, and that, notwithstanding this, it was expressly understood and agreed between the plaintiff and defendant that the sum of $900.00 was the total indebtedness that should be assumed by this defendant of the claim of the Peter Breidt Brewing Co. against the plaintiff, and no other amount whatsoever, and that the said indebtedness to be assumed by the defendant, was again confirmed by the plaintiff and defendant at the time of the consummation of the said sale of the said business by the plaintiff to the defendant.

Answer to Amended Complaint

2. The defendant admits paragraph 2 of the second count of the amended complaint.

3. Defendant admits paragraph 3 of the second count of the amended complaint.

4. The defendant denies paragraph 4 of the second count of the amended complaint, and says that he paid $900.00 to the Peter Breidt Brewing Co. at the direction of the said plaintiff in full settlement of the claim assumed and agreed to be paid by the defendant in the sale of said business and goods and chattels from the plaintiff to the defendant, as the amount of the mortgage debt of the Peter Breidt Brewing Co., which it was agreed by the plaintiff and defendant should be assumed and paid by the defendant as a part of the purchase price of said business, in the sum of $900.00; that this defendant did not pay the said $900.00, as part of the principal of said chattel mortgage, but as a full payment of the amount of the debt assumed and agreed by him with the plaintiff to be paid.

5. The defendant denies paragraph 5 of the second count of the amended complaint.

As a further defense to the claims made by the plaintiff in his first and second count of his amended complaint, the defendant says that he did pay at the direction of the plaintiff to the Peter Breidt Brewing Co., the sum of $900.00 in full settlement, discharge, and satisfaction of all claims due and owing, or which might be due and owing from the defendant to the plaintiff; that the said Peter Breidt Brewing Co. did deliver up as fully paid and satisfied by this defendant, the chattel mortgage mentioned in the said amended complaint.

THOMAS BROWN,
Atty. for Defendant.

Postea.

(Filed Nov. 10th, 1917.)

NEW JERSEY SUPREME COURT.

JACOB CASTLEBAUM,
Plaintiff,

vs.

DAVID WOLFSON,
Defendant.

COPY OF POSTEA.

This case was tried before Judge Nelson Y. Dungan with a jury at the Monmouth Circuit on June 8, 1917.

The jury rendered a general verdict against the defendant and in favor of the plaintiff for Three Hundred Seventy Dollars and Thirteen Cents ($370.13).

NELSON Y. DUNGAN,
Circuit Court Judge.

Rule for Judgment.

NEW JERSEY SUPREME COURT.

JACOB CASTELBAUM,

vs.

DAVID WOLFSON.

Action at Law.
On Postea.

It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendant for the sum of three hundred and seventy dol-

lars and thirteen cents, besides costs to be taxed *nisi.*

Entered November 10, 1917,
On Motion of

GEORGE E. JENKINSON, JR., Atty.

MONMOUTH COUNTY CIRCUIT COURT.

Freehold, N. J., June 7, 1917.

Testimony.

JACOB CASTLEBAUM, Plaintiff,	
vs.	Action at Law.
DAVID WOLFSON, Defendant.	

Before Hon. Nelson Y. Dungan, Judge, and a Jury.

APPEARANCES.

For Plaintiff—HARRY CASTLEBAUM, ESQ.
For Defendant—THOMAS BROWN, ESQ.

Jacob Castelbaum sworn in his own behalf, being duly sworn, testifies as follows:

Direct examination by Mr. Harry Castelbaum:

Q. Are you the plaintiff in this case? A. Yes, sir.

Q. And were you the owner of a certain saloon business in Perth Amboy on or about December, 1915? A. Yes, sir.

Q. Did you enter into an agreement with the defendant, David Wolfson, to sell him that business? A. Yes, sir.

Q. I show you an agreement and ask you if that is your signature, if that is the agreement that you have reference to? A. Yes, sir.

Agreement offered in evidence and marked Exhibit A. for Plaintiff.

Q. Under that agreement, do you remember what you were to get? A. Yes, sir.

Mr. Brown: The agreement speaks for itself, Mr. Castlebaum.

Mr. Castlebaum: I would like to read such portions as we rely upon: "Witnesseth that the said party of the first part for and in consideration of the sum of twenty-five hundred dollars" (the party of the first part is Castlebaum—the party of the second part is Wolfson) "to be paid in the manner hereinafter set forth. It is hereby agreed to sell to said party of the second part, his heirs and assigns the saloon business now belonging to the said party of the first part, situated at number 351 Prospect Street, Perth Amboy, together with all the stock of liquor, beer and cigars which are now therein, also including all fixtures which are now a part of said business in the said saloon, the above fixtures being subject to a mortgage of nine hundred and fifty dollars now held by the Peter Breidt Brewery which said party of the second part agrees to assume in addition to the consideration above named."

Q. This chattel mortgage that the agreement speaks of was made by you to——? A. Peter Breidt Brewing Company.

Q. Do you remember about what year you made it? A. Yes, sir.

Mr. Brown: I think the chattel mortgage is the best evidence.

Mr. Castlebaum: I am just laying the foundation.

Q. There was only one chattel mortgage you made with Peter Breidt Brewing Company? A. Yes, sir.

Mr. Castlebaum: I offer in evidence certified copy of chattel mortgage made by Jacob Castlebaum to the Peter Breidt City Brewery.

Marked Exhibit B. for plaintiff.

Q. And did you make that sale that you agreed to make by that agreement? A. Yes, sir.

Q. Do you remember when it was when you consummated that sale? A. Some time in December; after Christmas.

Q. I ask you when you transferred the property, do you remember the date? A. December 27.

Q. That is the date of the agreement? A. Yes, sir.

Q. Do you remember the date that you carried out the terms of the agreement? A. It was in July, the 12th or the 10th of July.

Q. Did you receive your consideration, the $2500 in the agreement? A. I did receive it.

Q. What provision, if any, was made with reference to paying off the chattel mortgage? A. I

should bring the bill for the Peter Breidt Brewing Company and they would pay it.

Q. At the time that you went up to the office of Mr. Brown to close this transaction what arrangement, if any, did you make with reference to paying off this chattel mortgage? A. The arrangement was I did refuse to take——

Q. I show you a paper dated July 7, 1916, purporting to be a receipt from Thomas Brown that he is holding the sum of $2350 for you and ask you if that refreshes your memory as to what happened at the time? A. At the time they was supposed to pay to the Peter Breidt Brewing Company the mortgage and pay me mine.

Q. On the 7th of July did you get your money or not? A. No.

Q. Why didn't you get your money on the 7th of July? A. Because I wanted to pay first to the Peter Breidt Brewing Company.

Q. Do I understand that you wanted to see that the chattel mortgage was paid first? A. Yes, sir.

Q. What arrangement was made, if any, with reference to the payment of that chattel mortgage? A. The arrangement was that my attorney shall bring the bill from the Peter Breidt Brewing Company, and whatever that will be they shall pay.

Q. Was there any moneys left for the payment of that chattel mortgage? A. Yes, sir, $900.

Q. In whose hands? A. In Thomas Brown's. There was $900 left in Thomas Brown's hands.

Q. I understand you to say that on the 7th of July you didn't take the money because you wanted everything to be settled? A. Yes, sir; the money was laying there for the Peter Breidt Brewing Company chattel mortgage.

Q. And you were to get the money when you got the statement from Peter Breidt? A. Yes, sir.

Q. So that the money was there; is that right? A. Yes, sir.

Q. Did you finally accept $2350 after they made that arrangement with the Peter Breidt Brewing Company? A. I accepted. After they paid the Peter Breidt Brewing Company what it claimed I received my money.

Q. Did you receive the statement from the Peter Breidt Brewing Company? A. My lawyer did.

Q. Who is your lawyer? A. Harry Castelbaum.

Q. Do you know whether it was before or after the receipt of that statement that you accepted your money? A. It was after the statement.

Q. That you got your money? A. Yes, sir.

Q. And then what happened? A. Then, why Peter Breidt brought me into Court and sued me for the mortgage with interest.

Q. Peter Breidt brought you into court and sued you for the money and interest? A. Yes, sir.

Mr. Castelbaum: I now read from the certified copy of the chattel mortgage the following part: "Upon condition that if the said party of the first part" (that is Jacob Castelbaum) "shall and do well and truly pay unto the said party of the second part, its executors, administrators and assigns" said party of the second part being Peter Breidt Brewing Company) "the just and full sum of nine hundred dollars according to the terms of a certain promissory note of which the following is a true copy;" (then follows the copy of the note, of a demand note) in the sum of nine hundred dollars, dated April 7, 1911.

I also wish to offer in evidence a tran-

script of the case of the Peter Breidt City Brewing Company against Jacob Castelbaum, if there is no objection.

Mr. Brown: If the court please I object to the transcript in so far as the judgment is dated after the date that Mr. Castelbaum says that he accepted the twenty-three hundred and fifty dollars, and it is for the full amount.

The Court: It hasn't been stated when he accepted it that I have heard.

Mr. Brown: I understood about the tenth of July.

The Court: I hadn't understood that. He merely said that the agreements were made about then.

Mr. Brown: This shows a judgment for the sum of $1197.

Mr. Castelbaum: This isn't a transcript of the judgment but a transcript of the proceedings. The theory upon which I offer that is this, that the testimony up to this point is that the plaintiff after he received the statement from the Brewing company as to what they would demand, accepted his money and laid the other money in the hands of the attorney towards the payment of this chattel mortgage. Now, the testimony was that he was then sued some time in July. We will prove what he was sued for and how he was sued and that these proceedings were proceedings in which the present defendant was illegally obliged to pay, and if we recite the judgment (I have a certified copy of the judgment) if we recite the judgment without showing the action upon

which the judgment was recovered the defendant may well say that that doesn't prove anything.

The Court: You said it was a certified copy of the judgment.

Mr. Castelbaum: Transcript of the case, pleadings of Peter Breidt Brewing Company.

The Court: It may be received.

Marked Exhibit C. for Plaintiff.

Mr. Castelbaum: I may erplain to your Honor that the judgment was taken by default and that immediately afterwards there was an action to open up the case and they should be read as one case.

The Court: We haven't your judgment yet.

Mr. Castelbaum: I read from the transcript of the pleadings in the case of Peter Breidt City Brewery vs. Jacob Castelbaum which recites that "On April 7, 1911, defendant made and delivered to plaintiff his note of that date for nine hundred dollars and that the plaintiff has made demand for said payment of said sum" and follows a copy of the note dated April 7, 1911, in the sum of nine hundred dollars.

I read from the answer in the same cause, if your Honor please, "that defendant says that at the time of the execution of the note above mentioned a chattel mortgage covering fixtures then owned by this defendant was executed to the plaintiff in a like amount to secure the payment of the note, which said chattel mortgage was recorded in the register's office of Middlesex County and is now

in the possession of the plaintiff and it was understood and agreed by and between plaintiff and defendant at the time of said execution that it should never bear interest. And further that the defendant on or about July 20 conveyed the fixtures covered by the chattel mortgage to one David Wolfson who assumed the payment of the above mortgage and that on or about the twenty-fifth day of July Thomas Brown acting as attorney for David Wolfson tendered the said sum of nine hundred dollars and was refused; and further says that the defendant says that the plaintiff falsely represented to the defendant that the amount due on the note and chattel mortgage was the sum of nine hundred dollars; that the plaintiff had reason to believe that the statement was false and was made for the purpose of having the same acted upon by the defendant and that the defendant, relying upon the same was misled thereby into adjusting accounts upon that amount to his damage and therefore that the plaintiff is estopped from claiming any sum above the amount set forth in the above statement," referring to the statement tendered by the Peter Breidt Brewing Company.

I now offer a transcript of the judgment rendered in that case, if there is no objection.

Mr. Brown: The only objection that I will have to this, if the Court please, is that there is no connection between this certificate and the record as produced by the other side.

Mr. Castelbaum: It is only for the means

of identification. I have this right, to show the cause which recites the judgment, and recites the amount of the judgment, the amount of the costs and recites the connection.

(Transcript of record of case shown to Court.)

The Court: Was there ever more than one suit against the Peter Breidt City Brewing Company?

Mr. Castelbaum: Only one suit.

The Court: Well, I have some doubt about this, Mr. Castelbaum, as a proper method of proving this. You should have obtained a transcript of the judgment.

Mr. Castelbaum: If your Honor please, I beg leave to introduce it as it will show that judgment has been rendered, and as I understand our case is simply to show that judgment was rendered in that case. It is a part of the same cause.

(Admitted subject to the objection of defendant and exception allowed.)

Mr. Brown: If the Court please I don't know whether my reasons for the objection are clear. One reason is that there is not a proper transcript before the court, it does not show the continuity of action from the time summons was issued to the time judgment was rendered sufficient to identify it with the chattel mortgage about which this suit is brought and the second reason is that they are not evidential for the reason that it does not prove any damages of any kind material to this suit.

(Objection overruled and exception allowed.)

Mr. Brown: I object to this, if your Honor please. Are we bound by the pleadings in this case as being read by counsel between two other parties, between this plaintiff here who is the defendant in another cause, and another party? We have no way of controlling it in any way; we have no connection with it.

(Objection overruled and exception allowed.)

Mr. Castlebaum: (Reading from record of case) "The above entitled case was tried on the tenth day of October, 1916, at the Ocean County Circuit with a jury and judgment was entered in favor of the plaintiff and against the defendant for the sum of eleven hundred and ninety-seven dollars and sixty cents and the defendant not appearing when the case was regularly called for trial after entry of the judgment the defendant applied to the Judge holding the Ocean County Circuit for a rule to show cause why a new trial should not be granted on the ground that he had a good and just defense to the action on the merits of the case; that thereupon the court ordered that the plaintiff and defendant bring into Court on Saturday the fourteenth day of October, 1916, the witnesses of the respective parties to give evidence on said application. And it further appearing that the witnesses of the respective parties did appear before the court on Saturday the fourteenth day of October, 1916, and they were examined and cross examined by the respective attorneys and after considering the evidence presented the court

being of the opinion that defendant's evidence did not disclose a good cause of action upon the merits of the case, the application was discharged.

Marked Exhibit D. for Plaintiff.

Q. After suit was started by the Peter Breidt Brewing Company against you, did you at any time notify Mr. Wolfson? A. I never did, my lawyer—what my lawyer done I don't know.

Certificate of cancellation marked Exhibit F. for Plaintiff.

Mr. Castelbaum: I offer in evidence a letter dated August 9, 1916 to Mr. Thomas Brown,—a letter dated August 9, 1916, from Harry Castelbaum to Thomas Brown.

Mr. Brown: If the Court please, if Mr. Castelbaum will acknowledge his signature to all of these, there are many letters and papers,—that is, Harry Castelbaum, as the attorney for the plaintiff in the case, I have no objection to there all going in.

Mr. Castelbaum: I have no objection to any letters that I wrote going in if they have any bearing on the case. With that statement I understand that there is no objection to the pleadings in the Court of Chancery.

Mr. Brown: No, it does not include that.

Q. What happened after judgment was rendered against you by the Peter Breidt Brewing Company? A. I paid.

Q. What do you mean, you paid? A. I paid the Peter Breidt Company the balance of the money.

Q. How much did you pay the Peter Breidt Brewing Company? A. $375.

Q. What do you mean by the balance of the money? A. There was $1100—

Q. Do you know what the exact figures of the judgment are? A. I couldn't tell you.

Q. Do you mean to say that you paid the difference——

Mr. Brown: I object, if the Court please.

Q. What do you mean when you say "the difference"? A. The difference means $900 and $1100.

Q. What do you refer to by the $900? A. I don't know what—they sued me for the interest.

Q. What do you mean by the $900? A. David Wolfson paid the $900.

The Court: Is that the $900 you left in the hands of Mr. Brown? A. Yes, sir.

Q. You paid the difference between that and what the amount of the judgment was? A. Yes, sir.

Q. What is the amount of the judgment? A. $1247.76.

Q. I understood you to say you paid $375; is this the check? A. Yes.

Mr. Castelbaum: I offer in evidence check for $375, to Peter Breidt Brewing Company.

Objected to. Objection overruled and exception allowed.

Check dated Nov. 23, 1916, marked Exhibit F. for Plaintiff.

Q. Has Mr. Wolfson ever paid you? A. No, sir.

Q. Any part of it? A. No, sir.

Cross examination by Mr. Brown:

Q. Mr. Castelbaum, you had this agreement executed where? A. With Wolfson.

Q. What place? A. At Perth Amboy.

Q. At your house, upstairs in your house? A. Yes, sir.

Q. Who drew the agreement? A. Harry, my son.

Q. Did Mr. Wolfson have anybody there representing him? A. No.

Q. That is the chattel mortgage, is it not, that you gave to the Peter Breidt Brewing Company? (Paper shown to witness). A. Yes, sir.

Chattel mortgage marked for Identification.

Q. Was anything said about the interest at the time of the execution of the agreement with Mr. Wolfson? A. Yes, sir.

Mr. Castelbaum: I object to any evidence as to what conversations took place at the time of the signing of the agreement under the rule of Newburg vs. Young and the long line of cases which hold that no oral evidence is permissible as changing or modifying a written instrument.

Mr. Brown: If the Court please, my contention in this case, under the decision of Court of Errors and Appeals in the case against McBride, 77 New Jersey Law, is that this is not changing a written instrument by oral testimony. In that case the agreement was made subject to a certain lease that was on the property that was being sold and the controversy or issue was to certain conversations that were had as to the rent that was payable according to that lease. It is similar to this case for the reason that it did not state in the agreement the amount of rent

that was contained in that lease and in this case it is the amount of interest. In the McBride case an effort was made to show what conversation was had as to the amount of rent that was payable or that could be gotten for the premises and the objection was made that testimony of that kind would be changing the written instrument and the court held that that was not so, that the agreement was silent as to the rent and that therefore it was proper testimony.

And then in the case of O'Brien vs. Patterson Brewing Company, Vice Chancellor Pitney's decision in regard to omissions of this kind: "To show this by oral testimony is no more a breach of the rule invoked than it is to prove that an absolute deed is given as a mortgage or that a promissory note is given by the maker to the payee without consideration and as an accommodation to the latter or that it was a free gift." I contend that this is not an effort to vary the terms of that instrument between Mr. Castelbaum and Mr. Wolfson. If your Honor has in mind the chattel mortgage—they referred to that—I say still that the agreement is silent as to the interest and we have the right to show the conversations, if the Court please, about the agreement between Wolfson and Castelbaum.

The Court: Evidently the plea was fraud in the McBride case.

Mr. Brown: But the rule as to the admission of evidence is the same.

The Court: I don't agree with you as to that, at all. They refer to a written instru-

ment, a lease; the agreement was taken subject to the lease. It was fraudulent—fraudulent representations upon which the plaintiff claimed that they were acquiring of defendants certain real estate for the price of $15,000. Fraud is shown. If you show fraud then of course you can go into it in the same way. The point was made that the defendant, intending to deceive and defraud the plaintiffs had falsely and fraudulently represented to them that the property sold by him to them produced a rental of one hundred and forty-two dollars every month whereas in truth such rental was only one hundred and thirty-two dollars per month and that the plaintiffs' damage by reason of rental was the value of this monthly excess of ten dollars for the unexpired term of the lease, a period of about four years.

Mr. Brown: If your Honor please, I would like to go into detail. The plaintiffs' suit was not founded upon any alleged breach by the defendant of the terms of the agreement, but upon matters arising out of the written agreement. Here is the important point—recovery of damages was sought by the plaintiff because of the alleged false representations by the defendant to the plaintiffs respecting the amount of rent payable by force of this lease. Fraud was the allegation. Many questions were asked by the plaintiffs' counsel of the witnesses purporting to show that both before and after the contract of sale the defendant had made false representations to the plaintiff regarding the amount of the rent in question.

The Court: I don't think this case aids your contention.

Mr. Brown: If your Honor will bear with me half a minute—my contention is that, while it isn't the same sort of a suit—that is very evident—still I think the ruling of the court in this very specific declaration as to its finding upon the question has its bearing upon this case. Of course, if it had been expressed in the contract, the written contract, which they said was subject to this lease, that there would be a rental of $142, then there wouldn't be any question about it. There would have been no fraudulent representation; but because it wasn't expressed in the lease it was permitted to be shown.

The Court: Because it was a fraudulent representation, for no other reason; because the representation made was that it was $142 per month, while in fact it was only $132, and it was therefore a fraudulent representation.

Mr. Brown: What I claim is that this agreement is silent about the interest as that was about the rent in that lease.

The Court: That is just what I said. Isn't it a matter of judicial construction? Is it a matter which is susceptible of oral proof, whether or not that written agreement carries with it the interest or whether it does not? Can the Court avoid the responsibility of deciding that question under the terms of the agreement itself where no fraud is alleged?

Mr. Brown: If the Court please, by implication of law, where there is a reference

made—there is no case in the state that I can find, but I believe there is authority for it—that where there is a reference to a mortgage and the assumption of it without anything being said as to the interest, that it carries interest with it. I will concede that, if the Court please, but it doesn't, I say, shut us off from showing what the agreement was between the parties, particularly where the agreement is silent as to the interest. I may owe a debt or I may owe a judgment and there may nothing be said about its bearing interest, but under the law it carries interest with it, but it cannot be said that if there was any transaction in regard to an agreement concerning the settling of that judgment or the assumption of that debt, that I couldn't take in consideration a conversation that it shouldn't carry interest. The contention I am endeavoring to make is that this contract is silent upon this particular point and that I am endeavoring to produce the oral testimony or oral evidence about it, and as it is silent we are not varying the terms of it, we are not changing it at all, we are trying to show what the contract actually was. This agreement says on its face $950, and the fact of the matter is the chattel mortgage of the Peter Breidt Brewing Company is nine hundred dollars. Can't we show what the actual mortgage was and what the actual agreement was, and what mortgage we are taking over? They say it is $950. There is no such mortgage in the agreement. The contract itself, their own pleadings admit it. The contract itself is

$950, so that the point I want to show is—and this man bears it out by some of the pleadings he has read here in evidence—that the agreement he had with the Peter Breidt Brewing Company was that there shouldn't be any interest paid and he so told this man. Now, here is a man that wasn't there with any attorney, there by himself, and he was relying upon what they told him and he accepted their statement. We want to show what the actual agreement was under those conditions, by the oral evidence, that the written contract was $900 to be assumed, and that there was no assumption of any interest as to this man. That they there stated there was no interest on the mortgage.

Mr. Castelbaum: May I cite, your Honor, an equity case which I think will dispose of the whole matter? 17 Cyc. 570 says: "The legal effect of a written instrument, even though not apparent from the terms of the instrument itself, but left to be implied by law, can no more be contradicted, explained or controlled by parol or extrinsic evidence than if such effect had been expressed." There are a number of cases on that. That is, I think, decisive of the question here now, as far as answering Mr. Brown's contention as to our setting up in the answers to the Peter Breidt Brewing Company that we had such arrangement. They were produced in court and showed all the evidence in good faith that we fought to the last not to pay these people.

The Court: Mr. Brown, I am inclined to sustain this objection. My view is contrary to yours in this matter.

Mr. Brown: I most humbly submit that I thought in all seriousness that that case was decisive on that point especially, where it refers to a lease; I thought it was almost identical, except that the action was fraud.

The Court: If you had pleaded fraud in this case, if it had been possible to have pleaded fraud, then I think the situation would have been entirely different. That is what changes the situation in that case to which you have referred, the pleading of fraud.

Mr. Brown: You see the very issue here is the matter of that interest by implication; it is not expressed there.

The Court: The legal construction of what was said there—that contract must have been made by the parties with knowledge of its legal effect—ignorance of the law is no excuse—consequently when that contract was expressed in the words in which it was they could understand what was meant by it rather than to have the parties explain what they meant by it and what was said.

Mr. Brown: The legal effect of it, yes; but in this case the parties themselves understood what the arrangement was. Now, in the case of a mortgage carrying interest, if the reference to the mortgage is a mere means of identification of the mortgage, not the amount that is due on it or the amount of interest that is due, for instance, I could refer to the book and page, as well as to the amount, or to the name between the parties, but what I am trying to show here is that this was not a reference for identification at all, but the reference was as to the

amount that was due, the amount that was to be assumed by those parties. The real issue here is whether Wolfson was to assume $900, or the mortgage with interest on it. That is the issue. Their contention is that it is a mere reference to the mortgage, and that, being a mere reference for identification, that the mortgage carries with it interest. Our contention is that it was not. The agreement doesn't show that on its face, that it wasn't a reference for identification, that it was a reference as to the amount that should be assumed.

The Court: Is there a decided case in New Jersey holding that when a person assumes a mortgage it is presumed that he assumes the interest?

Mr. Castelbaum: Well, that question has been decided.

The Court: I don't think so.

Mr. Castelbaum: That is why I presumed the Court would take judicial notice of all proceedings in this case, that was a proceeding to determine the question of law. If your Honor please, I may be able to enlighten you by showing you the original answer and the complaint filed. I can't find a New Jersey case on it, but my contention is that that point has been decided in this case. There is the original answer. That may clear up the question as to what was decided.

The Court: You have no other case to which you can refer the Court except this?

Mr. Castelbaum: This is the only one I have. I have some chancery cases, but I

suppose they would not be directly in point except as to a general reference made in the case of Schloss against Sheffield Company 74 Equity. That was an insurance contract and the action there was to reform the contrct.

The Court: Mr. Brown, I can see that the view of the Court, if correct, practically disposes of your defence—the view of this Court. What have you got to say about the accord and satisfaction defence? I may be that that will present another defence.

Mr. Brown: If your Honor cares to hear me about those equity cases—

The Court: I don't think the same rule applies in equity cases, Mr. Brown; that is my view about it. I will sustain the objection to the question and an exception will be noted and at the proper time you may make a general offer instead of producing the witnesses if you care to do that, and if objection is made the Court will overrule it and grant an exception.

Mr. Brown: I might say, in order to save time, that I have several questions to put to this witness now in regard to the conversation that was had at the time of the execution of this agreement—I mean the agreement under date of December 27—as to what interest, if any, or what part of the interest, if any, should be assumed or paid by the defendant, and if your Honor overrules the same—

The Court: Yes, I am inclined to do that and an exception is granted as to the offer.

Mr. Brown: I will make the offer later or now while the witness is here.

The Court: You now ask to examine this witness along those lines?

Mr. Brown: Yes.

The Court: And the court overrules your request and an exception to that ruling will be noted.

Mr. Brown:

Q. You came to my office, did you not, Mr. Castelbaum, about July 7? A. I did; come with my son.

Q. And Mr. Voss was there? A. Yes, sir.

Q. And Mr. Wolfson was there? A. Yes, sir.

Q. And didn't you give orders to Mr. Voss or state to him that you would accept in settlement of this chattel mortgage check of the Rubsam-Hoorman Brewing Company in the sum of $2,350, one check, and the other check for $900? A. I didn't accept the $900.

Q. Didn't you give orders to Mr. Voss and tell him that you would accept in payment of Wolfson's claim a check in the sum of $2,350, check of the Rubsam Hoorman Brewing Company, and another check for nine hundred dollars? A. No.

Q. Didn't you say also, or order me, as the attorney for the Brewing Company, to send the check for $900 to the Peter Breidt Brewing Company in settlement of their claim? A. No.

Q. Is this the statement that you have reference to that was furnished to you on July 10 from the Peter Breidt Brewing Company? A. No, sir.

Q. Where is that statement? A. Guess my lawyer has it.

Mr. Castelbaum: That statement was retained by Judge Silzer on that rule to show cause and he has all the papers.

Q. There was a statement sent to you about July 10, 1916, from the Peter Breidt Brewing Company? A. Not to me.

Q. To whom, then? A. To my lawyer.

Q. How did your lawyer come to get that statement? A. Well, I don't know.

Q. Didn't you instruct him to get it? A. No, sir.

Q. Didn't he say he was going to get it for you? A. No, sir.

Q. That statement showed that you owed the Peter Breidt Brewing Company $900 for this mortgage? A. I didn't see the statement.

Q. You know that it did?

The Court: How would he know if he didn't see it?

Q. Didn't Mr. Castelbaum, your son, tell you that it did? A. I don't remember.

Q. The check for $900 that was in my office was the check of the Rubsam Hoorman Brewing Company, wasn't it? A. I don't understand what you mean.

Q. The check that was in my office in the sum of $900 was the check of the Rubsam Hoorman Brewing Company? A. I don't know. I didn't see the check.

Q. Where did you see the check for $2,350? A. At your office.

Q. And didn't you see the check of $900 at the same time? A. No, sir.

Q. You made an application for an injunction in the Court of Chancery, didn't you, in your suit, against David Wolfson and others?

Mr. Castelbaum: I object to that. I don't see where it has anything to do with this

present case, what he made or did in any other suit or action.

The Court: I don't either, now.

Mr. Brown: It is preliminary to another question to prove what he stated in his evidence in that case.

The Court: I think you had better ask him the questions first which you claim the chancery suit contradicts and then confront him with the differences; wouldn't that be the proper way? It may be that they come in under the ruling of the court already made.

Q. Didn't you say in your suit in the Court of Chancery between you and David Wolfson and others wherein you applied for an injunction, didn't you say in an affidavit in that suit, a copy of which was served upon Wolfson, the defendant, didn't you say that you were in my office on July 7, 1916, Thomas Brown's, and that Mr. Voss of the Brewing Company turned over two checks to you, one in the sum of $2,350 and the other in the sum of $900?

Mr. Castelbaum: I object at this time; not that I object to the answer, but I think the question is not allowable unless he has the affidavits or a certified copy of the affidavit to prove that the answer is not correct.

Objection overruled.

A. I didn't see the checks.

The Court: The question is, did you make such an affidavit as that? A. I don't remember it.

Q. Didn't you take in settlement of your claim against Wolfson in this case a check from the Rubsam Hoorman Brewing Company in the sum of $2,350 and another check in the sum of $900 that you instructed to be paid to the Peter Breidt Brewing Company?

Mr. Castelbaum: I object to this raising the question of the accord and satisfaction. If your Honor, please, I cite the case of the Board of Chosen Freeholders of Somerset County vs. John Veghte, reported in 7 New Jersey law, 145. The state of facts there was something like this: Veghte was the county collector and appropriated moneys to his own use. Upon investigation Veghte sent a communication to the board in which he offered to pay the said sum of money, which he does pay and it is accepted by the Board of Chosen Freeholders by a resolution. The board then sued Veghte for interest upon this amount of money, upon the theory that Veghte was liable for interest from the time he became possessed of the borrowed money, and that the payment of the full sum did not discharge the latter obligation.

The Court: The objection is overruled.

A. No.

Q. In your suit in the Court of Chancery wherein you made application for an injunction in the affidavit made by you a copy of which you had served upon the defendant in this cause, didn't you say—— A. I don't know.

Q. Didn't you state in that affidavit that you had paid the sum of nine hundred dollars or ad-

justed your account of $900 with David Wolfson? A. No, sir.

Q. Did you adjust your accounts with Wolfson by the payment of a check of the Rubsam Hoorman Brewing Company, or money from that company? A. No.

Q. You left $900 at my office, did you not? A. No, sir.

Q. It was there, was it not? A. I don't know.

Q. Wasn't there a check for $900 there? A. I didn't see the checks, so I don't know.

Q. When you were at my office about July 7, didn't you and Mr. Wolfson have a dispute or conversation about the interest on this mortgage and didn't you tell him that all you owed was $900 on the mortgage? A. No, sir.

Q. And for him to pay the Brewing Company check to the Peter Breidt Brewing Company and that would settle it? A. No, sir.

Q. And you would take care of the rest of it? A. No, sir.

Q. Didn't you through your attorney, order me, or request me, to pay the money which I held in my hands, or check, in my office, from the Brewing Company, to the Peter Breidt Brewing Company and for them to give me the mortgage? A. No.

Q. When did you pay this money that you speak of as having been paid to the Peter Breidt Brewing ing Company? A. I didn't pay it, my lawyer paid it.

Q. Didn't you request the Peter Breidt Brewing Company, through your attorney, to send to me, endorsed for cancellation as fully paid and satisfied the mortgage which this dispute is about? A. I do not know, because that was left with my son and he took care of it.

Q. Didn't you accept the nine hundred dollars as the principal of this mortgage? A. No, sir.

Q. Was there nine hundred dollars offered to you if you would produce the mortgage? A. No, sir.

Q. When you first came to my office in regard to this transaction you had a lease prepared, did you not? A. Yes, sir.

Q. And you had a bill of sale prepared, did you not? A. No, sir.

Q. You did not have a bill of sale? A. Only just the lease.

Q. The sale was subject to the lease, wasn't it? A. I don't know.

Q. You were there? A. Well, yes, I was there.

Q. You and your son, with a new lease signed by yourself? A. Yes; not a new lease; I didn't sign only one lease.

Q. You say the new lease wasn't signed? A. No.

Q. Is that your signature to that? A. Yes, sir; there is only one lease, I didn't have two leases.

Q. The first lease your son drew, didn't he? A. No, sir.

Q. Who prepared the first lease? A. I don't know.

Q. This lease here is the second lease that was drawn? A. I don't know whether it was the first or the second.

Q. You say that you didn't sign the second? A. No, I didn't sign the second; I signed a lease, that is all I know.

Q. Did you sign the first one? A. I had only one lease.

Q. The first lease that was drawn you said you didn't sign? A. I don't know how many leases there was on this property; all I signed was one lease.

Q. When you came to settle up you got your $2,350 and delivered a bill of sale, did you not?

A. I don't know; I didn't settle. My son settled with you. I didn't get no check.

Q. Didn't you sign the bill of sale? A. No.

Q. Didn't you give a bill of sale to Wolfson? A. I don't know what my son gave or whether he gave a bill of sale or not. I wasn't in your office.

Q. You say that you didn't sign a bill of sale? A. I don't know if I did sign it; I don't remember.

Q. Wasn't that bill of sale delivered because you were satisfied with the check of the Rubsam Hoorman Brewing Company for $900 that was to go to pay the Peter Breidt Co.? A. No, sir.

Q. Didn't you, through your attorney, on August 9, 1916, state that the Peter Breidt Brewing Company were suing you for $900 that was left at my office? A. No, sir.

Q. Or words to that effect? A. No, sir.

Q. Whatever Mr. Castlebaum did as your attorney, you empowered him to do, did you not? A. Yes, sir, I didn't bother with it.

Q. Didn't you, in October, through your attorney, request me to send the $900 to Mr. Stamler, the attorney for the Peter Breidt Brewing Company and that he thereupon would send to me the cancelled chattel mortgage marked for cancellation? A. I don't know.

HARRY CASTLEBAUM, attorney for Plaintiff, testifies as follows:

I am an attorney at law in the State of New Jersey, and on or about July 7, 1916, I appeared at the office of Thomas Brown to consummate the sale under the agreement of December 27. At that time, in discussing the terms of the settlement the

question was raised that the Peter Breidt Brewing Company claimed interest under the chattel mortgage. The owner of the property, Jacob Castlebaum, refused to pay the interest unless he was sure there was sufficient funds in the hands of the attorney with which to pay his consideration and cancel the chattel mortgage. For that reason Mr. Brown made a statement that he was retaining in his hands the sum of $2,350 to pay over to the said Jacob Castlebaum upon the surrender of a lease or tender of a lease and a bill of sale. He, at that time, retained also in his possession a check of $900 made out by the Rufsam Hoorman Brewing Company which was already made out by Mr. Voss, the agent. A statement was to be received from the Peter Breidt Brewing Company showing the amount of the indebtedness and for that purpose as well as for the purpose of executing the lease and bill of sale the settlement was laid over. Subsequently I received a statement from the Peter Breidt Brewing Company showing that the amount due was the face of the chattel mortgage, or nine hundred dollars. Thereupon I consented, acting as agent for Mr. Jacob Castlebaum, to accept the $2,350 and to tender or turn over the lease and the bill of sale; then the next step was a suit instituted by the Peter Breidt Brewing Company in which they claimed the accrued interest. Then, by letter of August 9, 1916, which was about a week after service of the summons in the Peter Breidt case (and I here wish to mark in evidence letter dated August 9, 1916, from Harry Castlebaum addressed to Thomas Brown, Esq., in which I informed him that suit was started and that we were very much surprised because we had understood that he was going to take care of the whole matter).

Harry Castelbaum—For Plaintiff

Letter marked Exhibit G. for Plaintiff.

To that communication and subsequent communications no satisfactory reply was given, the defendant, Wolfson, and Mr. Brown contending that they were not liable for the interest. We entered appearance in the case of Peter Breidt vs. Castlebaum and contested the matter upon the ground that the statement had estopped them, as we would not have settled the matter and accepted our money if they had not furnished us with that statement, and that contention of ours was overruled and a judgment was entered for $1,200. Judgment was entered by default. We applied to have the judgment opened. All our evidence was put in and our contention was overruled. Thereupon John J. Stamler, the attorney of the Peter Breidt Brewing Company, issued execution on the judgment and informed me that unless the same was paid that he would hand it to the Sheriff. I thereupon wrote again to the attorney for the defendant and to the defendant, instructing them that inasmuch as execution was to issue, they were to turn over their check, laying in the hands of Mr. Brown, and that we would have to make up the deficiency, and so Mr. Wolfson, some days later, or John J. Smalley, wrote me that he had mailed—

Mr. Brown: I object to the correspondence.

The Court: The objection is sustained.

Mr. Castlebaum: Some time later I was informed by Mr. Thomas Brown that he had the chattel mortgage in his possession. I did not order the chattel mortgage to be sent to Mr. Brown. At the time that we paid the judgment, I previously vis-

ited Thomas Brown at his office relative to having him turn over the check to Peter Breidt Brewing Company for the nine hundred dollars. At that time the chattel mortgage was in his possession, sent there, so I was informed, by Mr. Smalley. I, at that time spoke to David Wolfson and made an arrangement with him to proceed with him to the Peter Breidt Brewing Company, where he was going to make an arrangement by form of note or some how, to pay the interest which we had laid out, and when I left Mr. Wolfson, he and Mr. Jacob Castlebaum were going to his place to arrange for the day when he was to go to the said Brewing Company.

Cross-examination by Mr. Brown:

Q. You say that you didn't instruct me to accept a chattel mortgage from the Brewing Company, or for them to send it to me, the chattel mortgage in issue here? A. No.

Q. This is your letter, is it not? (etter shown to witness.) A. I suppose it is. It is my stationery; yes.

Q. Didn't you say, "October 30, 1916. Thomas Brown, Esq., 308 State St., Perth Amboy, Dear Sir: Mr. Stamler has been in touch with me and has informed me that he will give me the cancelled chattel mortgage upon the payment to him of the funds in your hands. Will you kindly do this"? A. Yes, that is my letter.

Q. Isn't that ordering me to pay the money over to pay the mortgage? A. No, because of the fact that that was a letter sent in addition to our oral conversation.

Q. Isn't that an order on October 10, for me to do that, to send the money?

The Court: Are you asking his legal opinion or are you asking him if that isn't his order?

A. That was merely explanatory of our oral conversation; it wasn't made in the form of an order.

Q. You wanted me to do that, didn't you, you wanted me to send the $900 to Stamler and to get the mortgage, didn't you? A. Certainly.

Q. And you were satisfied for me to get the cancelled mortgage, endorsed for cancellation, if I would pay the $900? A. I wasn't satisfied. The $900 was laying in your hands for three months and we were unable to get that money out of your hands without the cancelled mortgage, and we had an execution against us and in order to pay off the execution I said that I would advance the $375 and pay off the mortgage, and the only way we could get rid of the execution was by using the nine hundred dollars, and I instructed you to pay over the nine hundred dollars under those conditions, and I told Mr. David Wolfson that I was going to sue him if he didn't pay the balance, and he made an arrangement with me to go to the Peter Breidt Brewing Company——

Q. You have answered my question. You were satisfied with the arrangement, you have just testified to it, that I should pay to the Peter Breidt Brewing Company nine hundred dollars and in turn that they should send me the cancelled mortgage, nda that you would pay the $375 to them? A. I don't understand the question. I have already explained that I asked you to produce the nine hundred dollars, and that was the only way we could get the nine hundred dollars, because the Brewing Company insisted that the chattel mort-

gage be cancelled. We had the money lying there for three months.

Q. And you wanted it used? A. Yes.

Q. And you said that Peter Breidt Brewing Company could surrender the chattel mortgage up to Wolfson? A. I had no dealings with Wolfson. I was after the $900 of the Rubsam Hoorman Brewing Company which had been lying there.

Q. And you didn't care how you got it? A. I had no other way of getting it.

Q. You did try every way to get it and at last you said that you would pay the balance and have the mortgage cancelled? A. I didn't try every way to get it. The judgment was rendered against us and execution was about to be issued, and I said that we would have to pay it because they refused to surrender up that nine hundred dollars unless they got the chattel mortgage, and I made an arrangement with you, acting as the attorney for the Rufsam Hoorman Brewing Company to turn over the money in your hands, but I had no conversation whatsoever with David Wolfson, except as I have stated.

Q. I was acting for Wolfson then, was I not? A. I don't know what you mean. I assume you were acting for the Rubsam Hoorman Brewing Company.

Q. Why do you say the two checks were held in my hands—the check for $2,350 and the check for $900? A. Because of the fact that at the time that the sale was to be consummated the question came up. Somebody raised the question, I don't know whether it was I or my father, that while they never had demanded interest on it, there might be a possible dispute inasmuch as the mortgage carried interest on its face, that they might demand the in-

terest of Mr. Jacob Castlebaum. I didn't care much for the financial integrity of David Wolfson, and I refused to carry out the transaction unless we could be sure that money enough was there to pay all the encumbrances.

Q. Isn't that your signature to that? A. Yes, sir.

Q. Affidavit made by you? A. Yes, sir.

Q. In this affidavit didn't you say this—affidavit made on the second day of September, last year—didn't you say that the reason that the two checks were left with me was as follows: "And that at the time, owing to some defect in the lease, an agreement was made whereby Mr. Voss deposited with the said Thomas Brown two checks, one for $2,350 and one for $900?" A. You might read the whole affidavit.

Q. I am reading that part of it concerning the holding of those two checks. A. Yes.

Q. So that the reason that the two checks were left there was because there was an objection made to the lease? A. No, because my recollection of the affidavit is that all my explanation that I have just made was contained in this affidavit; that is why I asked you to read the whole affidavit. I made a statement that the reason you held it was because a bill of sale was to be executed and a lease was to be executed.

Q. Didn't you say in your affidavit, at that time that owing to some defect in the lease an agreement was made whereby Mr. Voss deposited with the said Thomas Brown two checks, one for $2,350, being the balance of the purchase price, and one for nine hundred dollars? A. That is one of the statements in that affidavit.

Q. Wasn't that the reason? A. That wasn't the full reason.

Q. Wasn't that the only reason? A. That wasn't the only reason.

Q. At the time there was an objection made to the lease, you made a new lease, did you not? A. No, sir.

Q. I prepared them for you? A. I did not see the lease, except as they came in through the mail.

Q. You saw them before they were delivered to me? A. Yes, sir.

Q. Signed by your father, were they not? A. Yes, sir.

Q. The first lease wasn't signed by your father? A. No.

Q. At that time wasn't it drawn to your attention by myself that the mortgage in this case carried interest with it, that I had found it on the records in New Brunswick? A. No. My recollection of the matter was that we wanted to be sure that the money was there in your hands sufficient, and we raised the question whether the six per cent would not be asked for by the Peter Breidt Brewing Company.

Q. Didn't you tell me that the Peter Breidt Company wasn't charging any interest to your father, that they hadn't charged any interest, and that you had an agreement with them that there was to be no interest? A. Yes.

Q. Didn't I say to you then, Mr. Castlebaum, "They have a chattel mortgage on record that states that it does draw interest? A. We knew that.

Q. Why, when you drew this agreement, you didn't know the amount of the mortgage, did you? A. No.

Q. Still you say you knew it carried interest? A. At the time the agreement was drawn we knew the amount of the mortgage and that it drew interest.

Q. Why didn't you put it in the agreement, when this man had no attorney there, because of the fact that neither of the parties thought that the Peter Breidt was going to charge any interest? A. I assume they did have an understanding about it.

Q. The Peter Breidt Brewing Company and Mr. Castlebaum? A. There was no conversation between the parties.

Q. How do you know they understood there was no interest? A. I simply was speaking with reference to Mr. Castlebaum and the Peter Breidt Brewing Company in the answers to the suits that you brought.

Q. On the answer that you have referred to here and in the suits in chancery, you set up that fact do you? A. Set it up as a defense against the Peter Breidt Brewing Company.

Q. It was to the effect that Jacob Castlebaum had an arrangement with Peter Breidt Co.? A. The court did not so hold.

Q. That was the fact as far as you were concerned? You were stating a truthful fact in your affidavit and in the answers to the suits? A. Certainly.

Q. Didn't you tell Wolfson that they wouldn't charge them any interest? A. No, I made the statement.

Q. Then didn't I insist upon your getting from the Peter Breidt Brewing Company a statement as to what the indebtedness was? A. No.

Q. Then didn't I state to you that I would get it? A. No.

Q. And didn't you say, "No, you had better let me get it?" A. No.

Q. Didn't you get it? A. I did get it.

Q. Isn't that the statement? Paper shown to witness. A. That is not the statement. As I remember, the statement was on a regular statement head. The statement, I believe, is with Judge Silzer's papers.

Q. What is there about this paper that is incorrect? A. I can probably get the original from Judge Silzer if you want it.

Q. What is there about this statement that isn't the same as the one that Judge Silzer has? A. I say that to my recollection that is not the original statement that I received.

Q. What is the difference; the amounts are the same, are they not? A. Just the same. I have answered that to my recollection that isn't the same statement that I received.

Q. Isn't the amount the same? A. Yes, sir; I have answered that. The amounts are the same.

Q. When you brought that statement down you wanted the nine hundred dollars, didn't you? A. No, sir, I asked for the check for $2,350.

Q. Didn't I say to you, then, and didn't you accept the check for $2,350 and deliver the bill of sale and the lease, upon condition that you were to get the cancelled chattel mortgage from the Peter Breidt Brewing Company? A. Oh, no.

Q. You did leave the bill of sale and the lease, didn't you? A. Yes.

Q. And you took the $2,350? A. Yes.

Q. You knew, then, that by delivering that bill of sale the agreement was consummated, didn't you? A. Yes, sir.

Q. And you knew when that $900 was to be paid over? A. I took the check for $2,350 because of the statement being made, and you having the money, I understood that there would be enough money to

pay and that there was no danger in taking the money.

Q. So that the $900, as I understand, was in settlement of the Peter Breidt account as between you and Wolfson? A. No.

Q. You so understood it when you saw this statement? A. I took the $2,350 because we thought there was enough money there to pay the chattel mortgage, that we would not incur any liability.

Q. And you adjusted your matters with Wolfson accordingly, didn't you? A. By adjusting matters with Wolfson, I mean.

Q. But didn't you? A. No, not if you call that adjusting matters.

Q. Didn't you make an affidavit in the Chancery suit in this case? A. I did. The same statement appears in the answer. What I meant by adjusting accounts was the fact that I was satisfied that there was enough money left to pay the indebtedness and that upon their suing for more money that they had put us in a position where we couldn't make the Rubsam Hoorman Brewing Company pay the difference in the amount.

Q. And so it was the Rubsam Hoorman money that was to adjust this account? A. Yes, sir.

Q. When you went out there that day with the $2,350 and left the lease and the bill of sale from your father, as his attorney you thought the whole thing was adjusted? A. And that you would pay the chattel mortgage.

Q. With the money that you were satisfied was sufficient in amount? A. At that time.

Q. In the letter that you have offered in evidence marked Exhibit G, dated August 9, you didn't refer to any other sum than the nine hundred dollars, did you? A. I don't know what the letter is. (Letter

shown to witness.) A. I referred to more than that. There is no sum in the letter at all.

Q. "The Peter Breidt Brewing Company has commenced suit for the recovery of the sum of nine hundred dollars" (reading from letter), isn't that so? A. It must be. I didn't notice it.

Q. You just said there wasn't any sum there? A. I would read it for you if you would let me. I say now that I did refer to other matters, other amounts.

Q. Isn't your letter as follows: "On Monday morning of this week I called you up and not finding you in I left word that the Peter Breidt Brewing Company has commenced suit for the recovery of the sum of nine hundred dollars? A. "And interest," it says there, I think. If you will let me read the letter I can tell. (Witness reads from letter.) "The Peter Breidt Brewing Company of Elizabeth has commenced suit for the recovery of the sum of nine hundred dollars. This occasions me very great surprise, as I was under the impression that you had paid this. I thereupon got in touch with Mr. Stamler, the attorney, who informed me that he had written a number of letters to Mr. Wolfson asking for money, but has never received a reply."

Q. Where is there anything there about interest? A. There is nothing there about interest.

Q. You said there was, didn't you? A. I thought there was.

Q. Mr. Voss was in my office, wasn't he, when this conversation took place with you? A. He was at the office the night of July 7. I think that was the only time I saw him.

Q. Were you at the office later than that? A. I was at your office when I received the check for

$2,350, and I was at your office when we made the adjustment so that you would send the check to the Peter Breidt Brewing Company to cancel that judgment.

Q. With the understanding that the chattel mortgage should be surrendered, duly endorsed for cancellation? A. You already had the chattel mortgage in your possession.

Q. You had said to send nine hundred dollars to them to adjust it. Is that right? A. I believe at that time that you had already sent to Mr. Stemler your check and that Mr. Stemler refused to use your check until I paid him the balance.

Q. You are not sure of that, are you? A. I have a letter from Mr. Stemler to that effect.

Mr. Castlebaum: I would like to explain this $375 check. The judgment was for $1,247.76. There was $347.76 due on that judgment and $7 was costs on the rule to show cause. That made the sum of $354, and this check of $375 included that, as there were costs of the chancery suit which were included in this one check.

PLAINTIFF RESTS.

MOTION FOR NONSUIT.

Mr. Brown: I move for a nonsuit in this case on the ground that according to Mr. Castlebaum's own testimony there appears to have been an accord and satisfaction.

Now there are two phases to this accord and satisfaction: One is the surrender of the

chattel mortgage, duly endorsed for cancellation, according to his order, on what he supposed—I think he is mistaken about it —but on what he supposed was an adjustment that it would not thereafter cost him any money. But even though he did, as he says in one part of this testimony, pay $375, that notwithstanding that, this chattel mortgage, which is an instrument under seal, acts as a technical release. I mean by that, that if a man has a note and it belongs to him and it calls for the sum of $100 and he comes to me and I pay him $75, if he is willing to accept that amount that is an accord and satisfaction, even though it is less than the amount specified in the note. And in this case the delivery of the chattel mortgage, the payment of the $900, the delivery of the bill of sale and the delivery of the lease was an entire and consummate act in the accord that was made. The satisfaction is the sale that was extended to the plaintiff in this case.

And then again, if the court please, there is another reason why this is an accord and satisfaction, according to the testimony, because it was the check of the Rubsam & Horrmann Brewing Company, and that he received that check in satisfaction. And the courts hold that consideration, and even the slightest consideration from another, is sufficient consideration, and even if the amount were liquidated, if the consideration was that the moneys of the Rubsam & Horrmann Brewing Company were to be applied to that judgment and indebtedness, or if on his

production of the lease and the bill of sale they were to be so applied, the proof that the chattel mortgage was so surrendered was an entire accord and satisfaction.

(Mr. Brown argues and cites authorities. Mr. Castelbaum replies.)

The Court: The motion for a nonsuit will be denied.

(Objection noted for defendant as ground of appeal.)

ALBERT F. VOSS, Sworn for defendant.

Direct examination by Mr. Brown:—

Q. You are the gentleman referred to in this suit in the testimony? A. Yes, sir.

Q. You were in my office about the 7th day of July, 1915, was it? A. That was the date; yes, sir. I was at your office about that time.

Q. Who was there at that time? A. Mr. Castelbaum, Mr. Jacob Castelbaum, Mr. Castelbaum, Jr., and Mr. Wolfson.

Q. Now, what was the conversation, if any, about a lease that was made on that day? What was the purpose of the parties being at the office? A. If I remember, there was some objection to the lease in some way or other. I don't know the exact objection, but I know there was an objection to it, and it was distinctly understood—

The Court: No, no.

Q. What happened after objection was made to the lease? A. That we were to wait and sign a new lease.

Q. Now, was there anything said about this agreement—that is, any controversy, was there, about the agreement? A. What agreement?

Q. In regard to purchasing the property and paying the interest to the Peter Breidt Brewing Company? A. Yes, it was mentioned there at—

Q. Who did the talking? A. If I remember right, young Mr. Castelbaum and his father interrupted at times.

Q. Now, what was said about that, about the mortgage at that time? A. That the mortgage was to be without interest.

Q. What was said about money? What else was said about money? A. With reference to the lease?

Q. No, money. Where was the money to come from and how was it to be made up? A. $2,350 made up in one check and $900 in another.

Q. And who gave orders to make them up that way? A. Mr. Castelbaum, sir. He had spoken to me previously about that.

Q. And what did he say the $900 was for? A. To satisfy the chattel mortgage.

Q. Which chattel mortgage? A. The Peter Breidt Brewing Company.

Q. And did you make them up accordingly? A. Yes, sir.

Q. And when you were at my office that day did you have those checks? A. Yes, sir.

Q. And were they tendered Mr. Castelbaum? A. Yes, sir.

Q. And what was said then about the interest that day? Was there anything said about interest? A. Why, no interest was to be paid—

(Objected to.)

The Court: Strike it out.

Q. Go on, Mr. Voss.

The Court: What was said about interest?

Q. What was said about interest?

The Court: Who said it?

Q. Did anybody say anything about interest? A. Pardon me if I just think over that. I don't want to answer anything that I don't know anything about. I don't remember at that particular occasion hearing anything of interest.

Q. Was there anything said about a statement by the Peter Breidt Brewing Company at that time? A. Yes, there was something said.

Q. How did that come up? A. That came up through your reference to a chattel mortgage that you found on record. Now, if I may answer that question, to bring me back to it—

Q. What was said then? A. About interest? Do you want me to state the conversation? The matter was brought up about the interest, Mr. Brown stating to Mr. Castelbaum, Jr., that he had searched the records and found on record a chattel mortgage of $900—that wasn't $950, as the agreement calls for—that the chattel mortgage called for $900 and bore interest at the rate of six per cent. And I believe the language of that was that Mr. Castelbaum stated that he had an understanding with the Peter Breidt Brewing Company—

Q. Which one? A. Senior, that they were to receive no interest on that chattel mortgage, and Mr. Brown then suggested, "If that is the case, you better get a statement or allow me to get a statement for you." Mr. Castelbaum, Jr., then said, "No, I will take care of that statement. I will get

that for you." That is the best of my recollection.

Q. And what was said as to the use of that $900 they put up?

A. For the payment of that chattel mortgage.

Q. And what was said if there was any interest charged, was there anything said about that, who would take care of it?

(Objected to. Objection overruled.)

A. It was distinctly stated they were to take care of anything over $900, if there was any. That was the purpose of getting the statement.

Q. And was this money paid accordingly, Mr. Voss, or handed from you to me for that purpose? A. It was paid over from us to you for that purpose.

Q. What have you to say about the chattel mortgage? Was there anything said about its surrender at that time? A. Why, at the time it was surrendered?

Q. No, at the time you got the statement, was there anything said about the chattel mortgage? A. Why, we naturally requested that the papers when they were returned, the chattel mortgage for cancellation, the other papers that were to be sent would be mailed to us, together with the papers that Mr. Wolfson had signed.

Q. Were you in my office after that, when the Castelbaums were present? A. I believe I was there when the check for $2,350—no, I am not sure. No, I don't—yes, I must have been there when they—

Q. Talk up a little louder so that the last juror can hear you. A. Yes, I was there when we accepted the lease.

Q. The first time you came the lease was objected to by me, was it not? A. Yes, sir.

Q. And then a new lease was delivered? A. Yes, sir.

Q. And you were there then, were you? A. I was there then.

Q. Do you remember what date that was? A. No, I couldn't testify as to the date.

Q. Was Mr. Castelbaum or his son there that day? A. Yes.

Q. What was done that day? A. They received the check for $2,350 and turned over what papers were necessary to turn over.

Q. That is the bill of sale and the lease? A. They are part of the papers that were required.

Q. Now, on that day, what was said about the $900 they were to leave there? A. Why, that the $900 was to go towards paying the chattel mortgage.

By the Court:

Q. Who said that? A. Why, the conversation took place between Mr. Castelbaum, Jr., and Mr. Brown, also Mr. Castelbaum, Sr.

Q. You haven't answered the question. Who said the $900 was to go to pay off the chattel mortgage? A. Mr. Castelbaum.

By Mr. Brown:

Q. Was there anything else said about how it should be paid? A. I don't remember.

Cross examination by Mr. Castelbaum:

Q. You are employed by the Rubsam & Horrmann Brewing Company? A. I am.

Q. And you are interested in this matter? A. Yes, sir.

Q. And you advised Mr. Wolfson that he did not have to pay? A. Yes, sir.

Q. And you advised Mr. Wolfson that he did not have to pay the interest? A. I what?

Q. You advised Mr. Wolfson that he did not have to pay the interest? A. I had nothing to do with the advice.

Q. At any time did you advise him? A. No, sir.

Q. Now come back to the 9th, or to the date of July 7th, when you say you tendered the checks. You say that Mr. Castlebaum, Sr., and Mr. Castelbaum, Jr., talked about interest at that time? A. Yes.

Q. And they mentioned the interest on the chattel mortgage? A. Mr. Brown mentioned it.

Q. I thought you said that Mr. Castelbaum talked and they mentioned the matter. A. I said Mr. Brown mentioned the matter of interest and he stated that the chattel mortgage—

Q. But the question before that, I understood you to say he talked, and you said that Mr. Castelbaum junior and senior talked about the interest. Is that right? A. That Mr. Brown and Mr. Castelbaum talked about interest?

The Court: He said, Mr. Castelbaum, Sr., said that their understanding with the Peter Breidt Brewing Company was they were charged no interest.

Q. And they said their understanding was Peter Breidt was to charge them no interest; that is true, isn't it? A. The Peter Breidt Brewing Company wasn't charging any interest on the chattel mortgage.

Q. Now you say that you made the different checks you produce, for $2,350 and $900, according to the order of Mr. Castelbaum? A. Yes, sir.

Q. Who was advancing the money? A. The Rubsam & Horrmann Brewing Company.

Q. And do they generally make out checks to suit the convenience of lawyers at the bar?

(Objected to. Objection sustained.)

Q. But when you came that night you had the checks drawn up and already filled up? A. When I came to the office of Mr. Thomas Brown the checks were filled up.

Q. And the checks were for the full amount of the loan that you were granting to Mr. Wolfson? A. For $2,350 and $900.

Q. That was the amount you were loaning to Mr. Wolfson? A. That was the amount of the check, and if there had been any interest check—

Q. Answer the question.

(Question repeated.)

A. That was the amount we were loaning Mr. Wolfson.

Q. And if there had been an interest charge there wouldn't have been enough money to pay Mr. Castelbaum and the Peter Breidt Brewing Company unless you had made an additional loan, would there? A. If there had been interest charged?

Q. On the chattel mortgage. A. There wouldn't have been sufficient money?

Q. To pay the consideration of Mr. Castelbaum and pay the consideration of the mortgage? A. No, sir.

Q. And wasn't that the reason of the delay, or that you deposited the checks in Mr. Brown's hands? A. No, sir.

Q. That wasn't the reason? A. No, sir.

Q. You say you tendered the checks to Mr. Castelbaum, the $2,350 and the $900? A. I said they were tendered.

Q. Why did you tender them? A. I said they were tendered. We deposited them with Mr. Brown. I said they were tendered.

Q. On the night of July 7th, when these arrangements were made, you said you tendered Mr. Castelbaum both checks. Did you do that? A. I said that. What do you mean by tender checks?

The Court: You used that word.

A. I presented the checks on that occasion. Of course it is not likely we would tender the checks until we had the necessary papers we required as security. If I said that, it was a mistake. I presented the checks. That language is correct.

Q. To Thomas Brown? A. That is correct, at the office of Mr. Thomas Brown.

Q. And you say that it wasn't that you waited for a statement in order to see whether there would be enough money? A. No.

By the Court:

Q. If that is so, why weren't the checks paid over, Mr. Voss, on account of the lease? A. On account of the lease? There was a discrepancy in the lease.

By Mr. Brown:

Q. And were you there when the lease and the

bill of sale were handed over to Mr. Castelbaum? A. Yes.

Q. Why wasn't the chattel mortgage paid at the same time? A. To him? Mr. Brown was instructed by Mr. Castelbaum to send the amount for the chattel mortgage to the Peter Breidt Brewing Company.

Q. Were you there? A. When he sent it.

Q. You said Mr. Castelbaum instructed Mr. Brown to send the money to the Peter Breidt Brewing Company. A. That he was to settle with the Peter Breidt Brewing Company.

Q. When was that? A. On both occasions.

Q. You are positive you were there when he received the check for the $2,350? A. Yes.

Q. You heard the testimony of Mr. Castelbaum that he did not receive the check for $2,350, Mr. Harry Castelbaum? A. As attorney.

Q. Do you want to change your answer? A. No, sir; I was there.

Q. Who was present at the time that check for $2,350 was turned over for the lease and the bill of sale? A. To the best of my knowledge you were both there, both you and Mr. Castelbaum, your father.

Q. You are not positive? A. No.

Q. You wouldn't say that he wasn't there? A No, I cannot.

Q. So when you say that he instructed Mr. Brown to forward the $900 to the Peter Breidt, when was that? A. That was stated each time I met Mr. Castelbaum at Mr. Brown's office.

Q. Each time? A. Whenever that fact was mentioned, that the settlement of the Peter Breidt Brewery was to be taken care of.

Q. You had gone over the agreement as to Peter Breidt and as to David Wolfson? A. Yes, sir.

Q. And you knew that by that agreement David Wolfson assumed the payment of that $900? A. Yes.

Q. What? A. To the best of my knowledge his agreement or pledge was for $900.

Q. Just answer the question. You knew that he assumed the payment? A. For $900; yes, sir.

Q. Of the chattel mortgage, whatever it was? A. Yes.

Q. And yet you say Mr. Castelbaum insisted on it every time and gave instructions to Mr. Brown to send that check to Peter Breidt? A. I said the settlement of the chattel mortgage was left with Mr. Brown with the $900.

Q. Mr. Castelbaum had nothing to do with it? A. Mr. Castelbaum left it to Mr. Brown to settle with the Peter Breidt Brewing Company.

Q. Because they had agreed they would assume the chattel mortgage? A. They were to assume $900. That was why our check was made out for $900.

Q. And therefore when you say Mr. Castelbaum instructed Mr. Brown every day to send it to the Peter Breidt Brewing Company—— A. To settle with the Peter Breidt Brewing Company.

Q. You say that was so regardless of the fact that Thomas Brown was to do that anyway? A. That was regardless of the fact?

Q. You say you know that Thomas Brown was going to pay them for the chattel mortgage? A. I presume he was.

Q. And the Rubsam & Horrmann Brewing Company, it was to their interest that they instructed Mr. Brown to do that, didn't they? A. Instructed Mr Brown to do it? No, sir. We had no interest in it only the cancellation of the chattel mortgage.

Q. Did the Rubsam & Horrmann Brewing Company ever have any interest in the payment of that chattel mortgage?

(Objected to.)

The Court: He said they had no interest.

Mr. Castelbaum: He said they did awhile ago.

The Court: You may answer the question.

A. Yes, to the extent that we wanted the cancellation of the chattel mortgage, that we wanted the cancelled chattel mortgage.

Q. But you understood Mr. Castelbaum every time you saw him to tell Mr. Brown to send that check to the Peter Breidt Brewing Company? A. I said every time Mr. Castelbaum was there and that it was mentioned, that the settlement of the chattel mortgage, or the payment of the chattel mortgage was left to Mr. Brown.

Q. How many times did you see Mr. Castelbaum? A. Do you mean before or after, in reference to the chattel mortgage?

Q. Including July 7th and thereafter. A. I couldn't state positively.

Q. Was it more than that once on July 7th? A. Yes, sir.

Q. You were there when the arrangements were made for the payment of the chattel mortgage and the cancellation of the same, were you not? A. Originally?

Q. No, when Mr. Brown made arrangements to turn over the check for $900 to John J. Stemmler, you were there in Mr. Brown's office? A. I don't remember. There were so many meetings and talks in reference to it that I don't remember.

Q. Do you remember anything as to when the pay-

ment of that $900 was made to John J. Stemmler? Were you there at the meeting? A. No, sir.

Q. Do you remember whether you were there? A. No, sir.

Q. Do you know whether there was a meeting in Mr. Brown's office at the time of the paying of this $900? A. By Mr. Stemmler?

Q. By Mr. Brown to Mr. Stemmler. A. I never met Mr. Stemmler there in my life.

Q. You were in Mr. Brown's office? A. Yes, sir.

Q. And do you remember being in Mr. Brown's office when Mr. Wolfson was there and Mr. Castelbaum and myself, that is, Thomas Brown, with reference to paying off the mortgage? A. Yes, sir.

(Adjourned till June 8, 1917, at 9.30 A. M.)

Freehold, N. J., June 8, 1917.

(Trial of the cause resumed at 9.30 A. M.)

ALBERT F. VOSS, resumed.

Further Cross Examination by Mr. Castelbaum:

Q. Mr. Voss, did I understand you to say yesterday that on July the 7th when you left the checks in the hands of Mr. Brown, that those checks were left there for the purpose of satisfying Mr. Brown as to the amount due upon the chattel mortgage; is that correct? A. That the checks were left there for what purpose?

Q. For what purpose were they left there, will you tell me? A. For the purpose of paying the

amount that was due Mr. Castelbaum according to his statement.

Q. Yes, but what if anything had the checks to do with the procuring of the statement from the Peter Breidt Brewing Company? The checks that you deposited with Mr. Brown, what, if anything, did they have to do with the procuring of the statement from the Peter Breidt Brewing Company? A. At the time Mr. Castelbaum, Sr., spoke to me about the transaction with Mr. Wolfson?

Q. I am speaking of the transaction of July 7th. A. I am stating it to you. He said it would be necessary for the Rubsam & Horrmann Brewing Company——

Q. Did this occur on July 7th? A. No, sir.

Q. I am asking you what occurred on July 7th, the time you turned in the checks to Mr. Brown. A. What the checks had to do with the procuring of a statement from the Peter Breidt Brewing Company?

Q. Yes. A. At the time that these checks were produced, the lease, I believe, was the first thing that came up. The discrepancy in the lease made it necessary to postpone the settlement and the question of the $900 on the checks, on Mr. Castelbaum's statement that $900 had to be paid for the cancellation of the mortgage. Mr. Brown stated that he had found on record a mortgage with interest and told Mr. Castelbaum of the fact. Mr. Castelbaum stated at that time that there was no interest on the mortgage, that was his agreement

Q. You haven't answered my question, though. What I want to know is this: whether the check of $2,350 payable to Mr. Castelbaum was to be turned over to him upon the surrender of the lease and bill of sale or if there were any other condi-

tions that you know of. A. Why, I don't know. I couldn't answer that question.

Q. Was Mr. Castelbaum entitled to his check for $2,350 when he turned in the bill of sale and lease on that particular day? A. On that particular day?

Q. Yes. A. The lease wasn't right.

Q. The lease wasn't right and you left the checks in Mr. Brown's hands, Mr. Voss? A. Yes, sir.

Q. Now I ask you what did Mr. Castelbaum have to do to procure his check for $2,350? A. In order to procure his check for $2,350?

Q. Yes. A. Why, deliver the necessary papers that would secure the place for us.

Q. Deliver the lease and the bill of sale? A. Assuming those were the necessary papers at the time.

Q. And if he produced those he was entitled to the money? A. To the $2,350?

Q. Yes. A. Yes.

Q. He didn't have to produce any statement from the Breidt Brewing Company to be entitled to the money, did he? A. I don't think the Breidt Brewing Company was interested in that particular check.

Q. I say he didn't have to turn over any statement from the Breidt Brewing Company or make a statement? There was some discussion as to procuring a statement and Mr. Castelbaum testified he procured the statement for his own benefit. You testified yesterday the statement was procured by Mr. Brown——

The Court: No, sir; he didn't testify to that. He said Mr. Brown said he would procure the statement and you said you would get it.

Mr. Castelbaum: I will withdraw it.

Q. Then I am to understand you that Mr. Castelbaum was to receive his check upon the production of the lease and the bill of sale; is that correct? A. Mr. Castelbaum was to receive his check on condition that he turned over to us the cancelled mortgage and the necessary papers to secure our lien.

Q. And therefore he was not entitled to secure the consideration of the sale until he turned over to you canceled mortgage? It is customary.

The Court: Strike it out.

Q. I am asking you when was Mr. Castelbaum entitled to his $2,350. A. When was what?

Q. Did it include the surrender of the canceled mortgage by Mr. Castelbaum or not? A. Not necessarily at that time.

Q. I want an answer. A. Why, not necessarily at that time.

Q. And when Mr. Castelbaum received his check for $2,350, was that all that Mr. Castelbaum was entitled to receive from you or from Mr. Wolfson? A. From me or from Mr. Wolfson?

Q. From you as agent for the Rubsam & Horrmann Brewing Company. A. That was all that was to be loaned to Wolfson.

Q. How much was loaned to Wolfson from the Rubsam & Horrmann Brewing Company? A. $3,250.

Q. Made up how? A. $3,250.

Q. Made up how? A. One check of $2,350 and one check of $900 for the cancellation of that mortgage.

Q. And Mr. Castelbaum had a balance due him of $2,350. Now when he produced the papers was

he entitled to this $2,350? A. On condition that he lived up to the agreement.

Q. And what was the condition? A. We was to have the lease, the bill of sale and the cancellation of the $900 mortgage at the time that payment was made to the Peter Breidt Brewing Company. Those were the conditions upon which he was to receive his money.

Q. And those you have just stated yourself were the conditions upon which he was to receive the money? A. Who was to receive the money?

Q. Mr. Castelbaum. A. They were what?

The Court: Oh, what you have just stated.

A. If I stated it.

Q. And Mr. Brown is agent and attorney for the Rubsam & Horrmann Brewing Company? A. Yes, sir.

Q. And do you know whether he signed a notice on a certificate on that day to Mr. Castelbaum? A. I do not.

Q. I show you this and I ask you if you recognize this signature as Mr. Thomas Brown's signature. A. It looks like Mr. Thomas Brown's signature to me.

Mr. Castlebaum: I will read from a letter of Mr. Thomas Brown, dated——

Mr. Brown: Is that another one?

Mr. Castelbaum: I am merely contradicting the witness.

The Court: But you cannot contradict him by reading a letter that is not in evidence.

Q. Will you look at that letter and tell me whether that makes you change your mind as to

the conditions under which Mr. Castelbaum was to receive his money?

(Witness reads letter.)

A. I do not see that that letter changes my testimony any.

Q. Is there anything in this conditioned upon the cancellation of the mortgage?

Mr. Brown: I object that the paper speaks for itself.

The Court: The objection is sustained.

Q. But you still insist then that Mr Castelbaum received his money or got the check when the mortgage was turned over for cancellation? A Whatever I said in my testimony I will stick to, regardless, yes.

Q. And by the agreement between David Wolfson and Mr. Castelbaum you know Mr. Wolfson assumed the payment of the mortgage? A. That there was an agreement that Mr. Wolfson was to? I didn't know that Mr. Wolfson was to assume payment of the mortgage.

Q. Yesterday you testified that Mr. Wolfson assumed payment of the mortgage. A. Of $900.

Q. You knew that. Just now you said you didn't know. A. You probably put it different.

Q. You knew he was to pay $900 for the cancellation of that mortgage? Isn't it a fact that when Mr. Castelbaum received his money that that was the end of the transaction as to him, and when he received his $2,350 that ended his affairs with Mr. Wolfson and the Rubsam & Horrmann Brewing Company? A. No, sir.

Q. Did you have to pay Mr. Castelbaum? Did you, acting as the agent of the Rubsam & Horrmann Brewing Company, or did Mr. Wolfson have to pay the $900 to Mr. Castelbaum or to the Peter Breidt Brewing Company? A. Did Mr. Wolfson have to pay the mortgage or Mr. Castelbaum? Mr. Wolfson had to pay it to Mr. Castelbaum.

Q. Mr. Wolfson had to pay it to Mr. Castelbaum? A. Yes, sir.

Q. I thought the agreement says that he assumes the payment of the mortgage. A. He assumes payment of the $900.

Q. And yet you say that Mr. Wolfson and you were willing to pay the money to Mr. Castelbaum? A. Yes, sir; upon the presentation of that cancelled mortgage.

Q. Were you present when the check for $2,350 was turned over? A. I am not positive of that. I testified to that yesterday.

Q. I thought you stated that at that time you were present and that that money was accepted.

The Court: I understood you to say so too, that you were present at that meeting.

A. I believe I was present.

Q. You so testified? A. It is possible I had that transaction in my mind. That money was turned over for that purpose. I go all over the country and they send these here for me to testify. Whether I was present on this particular occasion, there were many meetings, it is hard to state whether I was present. But I was present when one of the Mr. Castelbaums, when one of the individuals collected this $2,350, when it was turned over.

Q. You ought not to say so if you are not certain.

You ought not to guess at it. A. I have stated to the best of my knowledge what happened.

Q. When the $2,350 check was turned over did you see that? A. Yes, sir; I remember that.

Q. Was there anything said about the $900 check at that time or not? A. I have in mind that there was.

Q. Do you know anything about it? A. Not positively no, because I don't bring that back.

Q. When that check was turned over to Mr. Castelbaum was there any more money due or owing to Mr. Castelbaum from Mr. Wolfson or from the Rubsam & Horrmann Brewing Company? A. No, sir.

By the Court:

Q. Yesterday you testified positively what was said about the $900 when the $2,350 was paid off. How is it that your recollection was so much better on it yesterday than it is today? A. About assuming the $900 when the $2,350 was paid off?

Q. Yesterday you testified what was said by Mr. Castelbaum when the $2,350 check was turned over to him. A. I am under the impression I was there, whether it was Mr. Brown's office or downstairs—we met several places, upstairs and downstairs. Now I am not positively sure of the time we met, particularly on this occasion of the $2,350. My memory does not recall. It would be turned over without my being there.

By Mr. Castelbaum:

Q. As a matter of fact you don't know whether there was any conversation about the payment of the $900? A. No, sir.

By the Court:

Q. Do you mean you have no distinct recollection of it at all? A. Of the $900?

Q. Of what you said about the $2,350 check being turned over. A. I have a distinct recollection of that occasion when the $2,350 was mentioned. Whether it was turned over at that second meeting or not I don't know.

Q. Now tell us again what was said at that time about the $900 check. A. That was the time the interest was again mentioned by the different parties.

By Mr. Castelbaum:

Q. When was this? A. At the second meeting, at the time we met the second time.

By the Court:

Q. When the check was turned over? A. I am not positive. That is what I am not clear on, whether the check was turned over at that time. That is what I am not clear on, whether the check was turned over at that time or not.

By Mr. Castelbaum:

Q. How many meetings did you have? A. We had three, I think. The 7th of July——

Q. What was the first one? A. The 7th of July.

Q. That was when the checks were left in Mr. Brown's office? A. That was when the checks were left in Mr. Brown's office.

Q. When you said it was upon certain conditions? A. Yes.

Q. When was the second time? A. The second time was when the lease and the bill of sale were present.

Q. And you don't know whether the check was turned over at that time or not? A. No, sir.

Q. And you had the lease and the bill of sale presented to you and you don't know whether the checks were present or not? A. I did the business on them.

Q. But at that particular time to which you are referring now in your explanation. A. That I am referring to; yes, sir.

Q. You spoke about the $900 this second time? A. It came up every time we met; yes, sir.

Q. You were going to give us a statement of what was said this second time. That is what we want. A. Why, the matter came up again about the interest, I believe it was at that time that the counsellor was again told about the $900 by me and also by Mr. Castelbaum, and that he was to settle his affairs with the Peter Breidt Brewing Company so that the——

Q. Who was to settle his affairs? A. Mr. Castelbaum, with the Peter Breidt Brewing Company so that they could cancel, or get the cancellation for this $900 check.

Q. That is your recollection? A. That is my recollection.

Q. And I ask you at that time if you have any recollection of the check being paid over for $2,350, the time the check, the lease and the bill of sale were left there? A. On the second meeting?

Q. You say you have such a clear recollection? A. The check was turned over and the case was absolutely in the hands of Mr. Brown.

Q. Wasn't this in Mr. Brown's office? A. Yes, sir.

Q. Were you present? A. At the second meeting.

Q. And did you all leave at the same time? A. That I don't know, whether I left there the same time.

Q. You remember about the lease and apparently you don't remember about the check. A. I don't remember whether the check was turned over or not.

Q. You wouldn't say the check wasn't turned over? A. No, sir; I wouldn't.

Q. And after the check was turned over to Mr. Castelbaum by David Wolfson the Rubsam & Horrmann Brewing Company owed no more money to Mr. Castelbaum? A. The Rubsam & Horrmann Brewing Company never owed any money to Mr. Castelbaum.

Q. I am speaking in reference to this transaction when the check was turned over at this second meeting to Mr. Castelbaum, whether that would close the transaction as far as Mr. Castelbaum was concerned. A. There was $900 due Mr. Castelbaum.

Q. They owed $900 to Mr. Castelbaum? A. Yes, sir; for the cancellation of that mortgage.

Q. And that agreement says that David Wolfson is to assume the payment of that mortgage? A. The agreement says David Wolfson is to pay $950.

Q. Do you know how this check was made out in payment of this mortgage? A. No, sir.

Q. Did you turn over the check? A. To him.

Q. You testified you deposited the check. A. With Mr. Brown.

Q. You know what the $900 check was? A. Yes, sir.

Q. You have just said you didn't know. A. Whether it was turned over by him to the Peter Breidt Brewing Company?

Q. By the Peter Breidt Brewing Company? A. I don't know.

Q. How was that check made out? A. How was it made out?

Q. Yes, sir. A. To whom, do you mean?

Q. Yes. A. It is customary we make our checks——

Q. How was that made out? A. It was customary for us to make our checks out to Thomas Brown, Attorney, and I believe that is the way that was made out.

Q. And you say that you still feel yourself indebted as agent of the Rubsam & Horrmann Brewing Company to Mr. Castelbaum for $900? A. Yes, sir; for the $900 mortgage.

Q. Even after the check was paid for the principal? A. The $900 check?

Q. The question is whether the Rubsam & Horrmann Brewing Company felt themselves indebted to Mr. Castelbaum for $900 even after the payment of the check of $2,350 to him. Have you answered it? Just answer the question now. A. We felt ourselves indebted to Mr. Castelbaum?

Q. You were not indebted to Mr. Castelbaum? A. We were not indebted to Mr. Castelbaum at any time.

Q. I ask you this question again: after the payment to Mr. Castelbaum of the check for $2,350, you as the agent of the Rubsam & Horrmann Brewing Company and David Wolfson owed no more money to Mr. Castelbaum? A. We didn't owe any money to Jacob Castelbaum at any time.

Q. And then after you paid this $2,350 in this transaction you didn't owe Jacob Castelbaum any money? A. No, sir.

Q. You paid him a check for $2,350? A. No, sir; to our attorney.

Q. Wasn't he acting as agent? A. No, sir. The money was loaned to Wolfson. We made a loan to Wolfson.

Q. You made a loan to Wolfson of $3,250 A. Yes, sir.

Q. You paid Jacob Wolfson $2,350, didn't you? A. Yes, sir.

The Court: It seems to me that you are going around in a circle.

Mr. Castelbaum: I am trying to get an answer from the witness.

The Court: But you have asked the same question three or four times and have received the same answer from the witness. And I should say when you have asked the same question three or four times and received substantially the same answer there is no reason why the question should be continued.

Q. Yesterday you testified that Mr. Brown had charge and it was left in his hands, the payment of the chattel mortgage; isn't that so? A. The payment, that he was left in charge of the payment of the $900 for the cancellation of that mortgage.

Q. And that was solely in Mr. Brown's hands? A. It was in Mr. Brown's hands, that money.

Q. And I ask you whether Mr. Brown was supposed to pay that money to Mr. Castelbaum or to the Peter Breidt Brewing Company. A. That was paid to Wolfson and he was to pay it to Mr. Castelbaum, for which Mr. Castelbaum was to produce the canceled chattel mortgage.

By the Court:

Q. You make that statement, do you, with full

knowledge of the agreement between Mr. Castelbaum and Mr. Wolfson? A. Yes, sir; that check was to be paid to Wolfson to be paid to Mr. Castelbaum when Mr. Castelbaum presented to him the cancelled chattel mortgage from the Peter Breidt Brewing Company.

Q. And I say you make that statement with a full knowledge of the contents of the agreement between Castelbaum and Wolfson, do you? A. Yes.

By Mr. Castelbaum:

Q. Now just one more question. Did you know that Mr. Wolfson had procured a loan from the Peter Breidt Brewing Company shortly before he procured a loan from you? A. No, sir.

Q. You didn't know that? A. No, sir.

Q. And do you remember a conversation on July the 7th in which a statement was made to you that the money for the purchase of this business was already laying in the hands of the Peter Breidt Brewing Company, and that you would have to make satisfactory arrangements that day or not at all? A. I don't remember such a conversation.

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

Q. And do you remember a statement also made at the same time that under the arrangement made that the Peter Breidt Brewing Company already had advanced the money to David Wolfson and they were not going to charge him any interest? A. No, I don't remember that.

Q. And wasn't that the reason that the question came up, that upon their gaining the knowledge that the Rubsam & Horrmann Brewing Company were advancing the money that we would get the interest? A. No, sir.

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

Q. And yet you wouldn't say that this statement might not have been made to you? A. That statement was not made.

Q. You are positive that statement was not made? A. I am positive I never heard that statement.

Q. You are not so positive as to what else happened on July 7th, but you are positive that that statement was not made? A. I am positive that was not brought into the matter at all.

Q. And were you present when arrangements were made towards paying off the chattel mortgage finally after the judgment had been recovered against Mr. Castelbaum? A. No, sir; not that I remember.

Q. You were not present at that time? A. No, sir.

Q. So to sum it up in a few words: do you have any recollection of any arrangement at any time between Jacob Castelbaum whereby he consented to receive any moneys from the Rubsam & Horrmann Brewing Company or David Wolfson in consideration of the chattel mortgage. A. Where he was to receive any money? I don't know what you mean.

The Court: That is not a question. I presume if that is put in the form of a question he may answer.

Q. Do you have any knowledge? A. Do you want an answer to the question?

The Court: Let us have the question.

(Question repeated.)

A. Do you mean on July 7th or prior to that?

The Court: At any time.

A. Yes.

Q. When? A. Prior to July the 7th, that I was at Mr. Castelbaum's at Atlantic Highlands.

Q. Let us see if you understand the question. Do you mean that prior to July the 7th Mr. Castelbaum consented to receive a certain sum of money? A. If you will let me answer the question. If you want to answer the question for me——

Mr. Brown: That was in answer to your Honor's question, at any time. He said before July the 7th and he went on to tell.

The Court: That has been some time since and I have lost some of the questions.

Mr. Brown: The question was did you say it at any time. I should think he should be permitted to answer the question first.

Mr. Castelbaum: I have no objection to his answering the question.

Q. The question is whether you at any time heard any conversation, or have any recollection of any arrangement between them whereby he was to receive a certain, or any sum of money in payment of the chattel mortgage on the premises, and is so when? A. At Atlantic Highlands Mr. Castelbaum stated to me that he had sold his place for a certain amount of money to David Wolfson. He stated to me that it would be necessary for us to loan David Wolfson $2,350—I think the amount was $2,500—and David Wolfson had paid him $150, and it would be necessary for the Rubsam & Horrmann Brewing Company to loan him $2,350, which Mr. Castelbaum was to receive, and $900 for which Mr. Castelbaum was to deliver the canceled chattel mortgage.

Q. And that is the only conversation you have a

recollection about on the subject? A. I had several conversations with Mr. Castelbaum subsequent to that.

Q. When? A. I met him once or twice later, once at Atlantic Highlands.

Q. Not at this meeting? A. No, sir.

Q. Now you said that Mr. Castelbaum said that. You knew of the agreement between Mr. Castelbaum and Mr. Wolfson at that time, didn't you? A. Yes, yes.

Q. And that was before any loan was made at all, this conversation? A. I so stated.

Redirect examination by Mr. Brown:

Q. And is that where you got your orders to draw the checks, from Mr. Castelbaum? A. That was the time when the orders were given to me, when Mr. Castelbaum stated how it was necessary to have the checks drawn.

Q. Now, Mr. Voss, you have answered the question in regard to the payment of the money to me. The Rubsam & Horrmann Brewing Company deposited these checks with me, the $2,350 and the $900? A. Yes, sir.

Q. And they were there on the first meeting? A Yes.

Q. That is July 7th? A. Yes, sir.

Q. And they were there at the second meeting? A. Yes.

Q. The checks? A. Yes.

Q. Whenever this was? A. Yes, sir.

Q. And you don't know whether they actually turned over the $2,350 the second meeting or not? A. No, I don't.

Q. Now was Mr. Wolfson at any time to receive possession of those checks, Mr. Voss? A. Why, I

believe the consideration was that the necessary papers were to be turned over.

Q. Yes, but were the checks to be delivered to Wolfson at all?

The Court: He has already said they both were.

A. I answered that about Wolfson.

By the Court:

Q. What did you mean awhile ago when you said they were? On cross-examination you said they were. A. The loan was made to Wolfson.

Q. You said the checks were to be turned over to Wolfson. A. If you will allow me to state this, why Mr. Wolfson had this difficulty with the Rubsam & Horrmann Brewing Company. He had a very bad reputation and we instructed Mr. Brown not to turn over the checks to Mr. Wolfson, who was to turn them over to the proper people, but he was not to get the checks.

Q. And what did you mean when you said you were to make out these checks and turn them over to Wolfson? A. Through our attorney. He was not to deliver them to Wolfson, but he was to deliver them to some one. We didn't trust Wolfson with the checks. I am sorry to state that, but it is true.

DAVID WOLFSON, sworn for Defendant.

Direct examination by Mr. Brown:

Q. Mr. Wolfson, you are the defendant in this case, are you? A. Yes, sir.

Q. And it was you who signed this agreement as one of the parties? A. Yes, sir.

Q. In Mr. Castelbaum's home? A. Yes, sir.

Q. Upstairs? A. Yes, sir.

Q. And Mr. Castelbaum's son drew the agreement? A. Yes, sir.

Q. And was there anything said at the time—this is to get it on the record—was there anything said at the time this agreement was executed by you, or about the time that you signed it, in regard to the interest on the Peter Breidt Brewing Company's mortgage?

(Objected to.)

The Court: The answer yes or no is not permissible unless the next question is asked as to what was said. So I will sustain the objection to this question and an exception will be noted.

(Objection noted for plaintiff as ground of appeal.)

Q. Well, after you signed the agreement did you have any talk with Mr. Castelbaum about the Peter Breidt mortgage? A. Yes, sir.

Q. And when was the time that you had it? A. Well, it was before or after we signed that agreement. I asked him if there was any interest to be paid on that mortgage and he said no, the interest was paid up on the mortgage.

Q. But about that agreement, where did you first have a conversation about it? A. The same time in the house after that agreement was signed. He was sitting in the house and he was living upstairs and I was downstairs and we always used to talk over the matter about different things and he always said that no interest has got to be paid on that mortgage.

Q. And what have you to say about getting the money from the Rubsam & Horrmann Brewing Company? Did you make any arrangement with him about that? A. No, sir; I didn't make any arrangement at that time. I didn't want to make business with them.

Q. But when you did how did you come to get in touch with the Rubsam & Horrmann Brewing Company? A. Well, I had been trying—I didn't have money enough to pay Mr. Castelbaum for his place and I went to the Rubsam & Horrmann Brewing Company and asked for a loan and they helped me out by loaning me money. They helped me out advancing me money.

Q. And did you communicate that fact to Mr. Castelbaum or state to Mr. Castelbaum that you had been there? A. Well, after the license got transferred I did.

Q. Was Mr. Castlebaum ever with you to the brewery? A. No, I don't think he was ever with me to the brewery. I know he wasn't.

Q. Well, you failed to get the checks, the checks that were made out by the Rubsam & Horrmann Brewing Company? A. Yes, sir.

Q. And left in my office? A. Yes, sir.

Q. Did you have the checks in your hands at all? A. No, sir.

Q. And do you remember the time Mr. Castelbaum and his son came there with the first lease? A. Well, no, sir; I couldn't exactly say. I think it was the 7th of July of that year.

Q. And do you remember the conversation that took place there that day if any in regard to the chattel mortgage and the money to settle the case? A. Yes. Well, it was he was talking at that time about that chattel mortgage, about the money, and

we asked Mr. Castelbaum to produce that mortgage and he was going to get his money. So——

Q. Yes. A. And Mr. Castelbaum said that he didn't have exactly something—I couldn't remember exactly—that he was going to see the Peter Breidt Brewery. But at the same time as I remember, too, the statement from the Peter Breidt Brewery——

THE COURT:—

Q. What about the statement? A. The mortgage of $900.

BY MR. BROWN:—

Q. How did that talk come up about the statement? State how that came about. A. He was talkiug about—I couldn't remember what he was talking at that time, but the little I do remember that Mr. Castelbaum—I didn't take that thing down—but he asked for his money and we asked him to produce that mortgage, so——

Q. Yes. A. The cancellation of that mortgage, as near as I can remember.

Q. Why did you ask him that? A. I asked him because I wanted the place free.

Q. Was there anything said about purchasing it before that time? A. Yes, sure there was.

Q. When was it said? A. That was on the 7th of July.

Q. And isn't that the date the conversation was so much about the mortgage? A. About that mortgage.

Q. And what was said about producing it, whether he would or not? A. Well, he asked for his money and we asked him to produce that mortgage, the cancellation of the mortgage.

Q. And what did he say? A. Well, he said this way, he said that he will produce the mortgage, as far as I can remember.

Q. What? A. I can't remember what was said.

Q. You can't remember what was said? A. No, sir; not at that time.

Q. Do you remember an objection being made to the lease on the 7th of July? A. Oh, yes.

Q. And the date was put off from the 7th until some other day? A. Yes, sir.

Q. And no money was paid over that day? A. No, sir.

Mr. Castelbaum: I object to the leading way in which the questions are put.

The Court: The questions are leading.

Mr. Brown: I appreciate that. It is just preliminary.

Q. Then after the matter was put over until a following day, was there at that time—that is, the date that the arrangement was put over—or who was it first mentioned anything about a statement from the Breidt Brewing Company? A. I think that——

Q. I will withdraw that question. In what manner was the $900 to be paid to the brewing company, that is, the Peter Breidt Brewing Company? Was there anything mentioned about it on the 7th, as to how it should be paid over? A. Yes, sir; it was mentioned that who produced the cancellation of the mortgage they are going to get the $900.

Q. And what conversation was there as to how the money should get to Peter Breidt? A. Why, they should get a statement from the Peter Breidt Brewery.

Q. Who should get a statement? A. Why, Mr. Castelbaum.

Q. And who was to bring the money to the Peter Breidt? Who said they would bring the money first, if it was to be brought or sent to them? I will withdraw that question. Do you remember Mr. Castelbaum's son on that day offering to take the money to the Peter Breidt? A. Yes, he did.

Q. And what was said in answer to that? A. Well, it was said then that he should get a cancellation of the mortgage and then he was going to get the money.

Q. And what did Mr. Castelbaum say to that? A. Well, he said if you will give him the money so they will settle the mortgage, that he is satisfied to accept the $900 in settlement for that mortgage, and he will sign a paper for it and he will give a receipt for it that he is satisfied.

Q. Well, what was said? How was it that the money wasn't paid over to him then? A. Well, I don't know. You asked him at that time, you wanted to see the cancellation of that mortgage.

Q. And what did he say about that? Did he agree to give it or not? What was the arrangement? A. He agreed to get the mortgage canceled.

Q. And did he get the mortgage? A. Yes, sir.

Q. He got the mortgage? A. Well, I don't know who got the mortgage. I think you got it.

Q. Do you know how it got in my hands? A. Well, I couldn't say.

Q. You can't say that? A. No, sir.

Q. And you know the money was held by me for some time, a few days, a week or more? A. No, sir.

Q. Do you know why it was held? A. It was held because the lease wasn't made proper or something.

Q. But after the lease came back? A. It was held on account of that you didn't get the cancellation of the mortgage yet at that time.

Q. Did Mr. Castelbaum speak to you about it, do you remember that? A. I couldn't remember that.

Q. You remember that the Peter Breidt Brewing Company asked for interest on the mortgage, don't you? A. Well, that he asked him for interest on the mortgage?

Q. No, but do you remember the Peter Breidt Brewing Company continued to ask for interest on the $900 mortgage? A. No, I don't know anything of the kind. I don't know of anything about it.

Q. And who directed that the $900 check should be made out? A. Mr. Castelbaum himself.

Q. And what was the $900 check for? A. In payment of that mortgage, to pay off the mortgage, the $900 mortgage, which was held by the Peter Breidt Brewing Company against Mr. Castelbaum.

Q. For all of it or part of it or what? A. All of it.

Q. For everything? A. For everything.

Cross-examination by Mr. Castelbaum:

Q. You don't know much about this transaction at all? A. What is that?

Q. You don't know very much as to this transaction? Your recollection as to this whole thing is very faint? A. I will explain as far as I know.

Q. Your recollection is very faint? You don't remember much about it? A. No.

Q. And do you remember getting a loan from the Peter Breidt Brewing Company just shortly before getting a loan from the Rubsam & Horrmann Brewing Company? A. That I got a loan from the Peter Breidt Brewing Company?

Q. Yes? A. Not exactly a loan, no.

Q. And did they give Mr. Castelbaum a receipt that they held the money in their hands for him if he produced the lease and bill of sale? A. Yes, sir.

Q. And that was how long before you got the loan from the Rubsam & Horrmann Brewing Company? A. About two weeks.

Q. And you signed an agreement with the Peter Breidt Brewing Company? A. No, sir.

Q. You made some arrangement with them? A. No, sir.

Q. Did you make some arrangement with them? A. I done business with those people for years and they trusted me.

Q. And you had some arrangement with them about procuring a loan to purchase this property from Mr. Castelbaum? A. Yes, sir.

Q. And did they charge you interest in the calculation of this loan? A. No, sir; I never paid any interest.

Q. That is not the question. I say in the calculation of that loan, the receipt of which was given to Mr. Castelbaum, they didn't charge you any interest on the chattel mortgage?

Mr. Brown: I object to that, that part about the receipt being given to Mr. Castelbaum.

(Objection sustained.)

Q. Do you remember being in Mr. Stemmler's office with Mr. Castelbaum? A. Yes, sir.

Q. And do you remember Mr. Stemmler drawing a lease to be signed by Mr. Castelbaum? A. Yes, sir.

Q. And do you know that Mr. Stemmler gave Mr. Castelbaum a letter, to the effect that he was re-

taining moneys in his hands to be turned over to Mr. Castelbaum upon the presentation of that lease? A. Yes, I do remember.

Q. You do remember that? A. Yes, sir.

Q. And in the calculation of that loan, part of which was to be paid for by Mr. Castelbaum, as per that letter, did the Peter Breidt Brewing Company charge you any interest? A. No, sir.

Q. And two weeks later you got a loan from the Rubsam & Horrmann Brewing Company? A. Yes, sir; about two weeks later I got a loan from the Rubsam & Horrmann Brewing Company.

Q. Now, coming to the events of July 7th—

By the Court:

Q. And both of these loans involved the purchase by you of the beer of the brewing company loaning you the money, didn't it? A. Yes, sir.

By Mr. Castelbaum:

Q. Coming to the events of July the 7th, the night you made the arrangement with the Rubsam & Horrmann Brewing Company, do you recollect any conversation at the time? A. On the 7th of July?

Y. Yes? A. Yes.

Q. Do you recall any conversation? A. Yes, sir.

Q. And do you recall a conversation to the effect that the Peter Breidt Brewing Company might charge interest under the new conditions and that it would be better to get a statement? A. No, sir; I never said anything of the kind.

Q. I am asking you if you heard any conversation by Mr. Castelbaum or anybody else to that effect? A. No, sir.

Q. There was no conversation to that effect? A. Will you explain to me again?

Q. I ask you if there was any conversation in reference to the interest of the Peter Breidt Brewing Company? A. Yes, sir; we had a conversation.

Q. And what was it? A. We had a conversation, and at that time we talked that matter over again, and Mr. Castelbaum said distinctly there was no interest on that chattel mortgage held by the Peter Breidt Brewing Company for $900.

Q. You knew that they didn't charge you any interest? A. On that $900.

Q. And you know that because the Peter Breidt didn't charge you any interest when you procured the loan from them?

Mr. Brown: He didn't say that he procured a loan from them.

The Court: He made the arrangements.

Q. When you made arrangements in reference to the procuring of the loan— A. I say I haven't that. What was the question?

(Question repeated.)

A. Oh, I don't know exactly that I know that. I always done business with that brewery and made different arrangements was all at different times.

Q. You don't remember anything about any arrangement, do you? You don't remember Mr. Castelbaum ever saying that he would take money for the payment of the canceled mortgage? A. I remember—

Q. Now, nothing else? A. I never would have bought the place if Mr. Castelbaum would say there was interest on the place.

Q. You made an agreement to purchase the place? A. Yes, sir.

Q. And under that agreement you assumed the payment of the chattel mortgage, didn't you?

A. Yes, sir; assumed $900 or $950.

Q. And you went with that agreement to the Rubsam & Horrmann Brewing Company to procure a loan towards the purchase of the property, did you? A. I didn't go with that agreement, I explained to the brewery.

Q. You showed that agreement to the brewery? A. I couldn't remember that I did show that agreement to them or not. I explained it to them and asked for a loan, and they knew the place and they advanced me the loan.

Q. You made a statement on direct examination that the $900 was to be paid to the Peter Breidt Brewing Company, something like that. What did you mean by that? A. Well, I meant by that to pay $900.

Q. To the Peter Breidt Brewing Company? You made that statement on direct examination? A. Not exactly to the Peter Breidt at that time. I don't know exactly how it was—$900 I said, it was $900 more besides the $2,350 we agreed at that time.

Q. I ask you what you meant when you made the statement that $900 was to be paid to the Peter Breidt Brewing Company. A. I don't remember what I meant at this time. I meant this way, that the $900 was to be paid—

Q. To the Peter Breidt Brewing Company for their chattel mortgage? A. I can't remember.

Q. And your recollection is very good that on July the 7th there were a great number of conversations about the cancellation of the mortgage and that I asked for the money? A. Yes, you did.

Q. Regardless of the fact that you said that at

that time Mr. Brown objected to the lease and the transacion could not be closed?

The Court: I think the question is too complicated.

Q. I will split it in half. On July the 7th you stated that the transaction could not be closed because of the fact that the lease was not satisfactory to Mr. Brown; is that right? A. Well, the $2,350—what money do you mean, the $900 or the $2,350?

Q. I am not asking you anything about the $900 or the $2,350. I am asking you whether on July the 7th it was not a fact that the transaction could not be closed, because of the fact that the leases were not satisfactory to Mr. Brown. A. What do you mean, that bill of sale couldn't be closed?

Q. The money couldn't be turned over because the leases were not satisfactory to Mr. Brown? A. The $2,350 couldn't be turned over.

Q. Why do you make a distinction between the $2,350 and the $900, because they were to different people? A. The $2,350 was for the cancellation of that mortgage. I don't remember on that.

Q. But none of those checks could be turned over at that time, because of the fact that the leases were not satisfactory? A. I am not talking about two, I am talking about one.

Q. I am asking you about two. A. The one couldn't be turned over because the lease wasn't proper and the $900 couldn't be turned over because the mortgage wasn't cancelled.

Q. Then am I to understand there were two separate transactions, and if I were to turn in the bill of sale and the lease I would have got $2,350? A. Yes, sir.

Q. And that is all I would have to do, would I?

A. To get the cancellation of the mortgage and get the rest of the $900.

Q. Who had to get the rest of the $900? A. Well, you asked me about the $900.

Q. Who had to get the $900? A. Well, I don't know who was to get the $900. I know you asked for $900.

Q. I did? A. Yes, sir.

Q. I thought the transaction couldn't be closed because I didn't have the papers ready.

Mr. Brown: That is objected to. He has answered it about four times.

The Court: The answer may remain.

Mr. Castelbaum: I will withdraw that question.

Q. Do you know whether Mr. Jacob Castelbaum had it in his office? A. Who had it?

Q. Jacob Castelbaum. A. I don't know.

Q. You don't know? Do you remember when Mr. Brown signed the check or made arrangements for the payment of the chattel mortgage and the cancellation of the same, after the judgment was rendered against Mr. Castelbaum? Were you present then? A. No, sir.

Q. You were not present then? A. In Mr. Brown's office, no, sir. What was it you said?

Q. Were you present when Mr. Brown made arrangements to cancel the mortgage? A. Yes, I think I was. I couldn't remember exactly.

Q. I will refresh your recollection. You gave Mr. Brown a $10 check and a $20 check at that time? A. Yes, at that time; yes, sir.

Q. And do you remember a conversation between Mr. Castelbaum and myself and you that you

were to make arrangements to go to the Peter Breidt Brewing Company and have them advance the moneys represented by the interest? A. No, sir; nothing of the kind.

Q. And did you not say that you could pay off the interest? A. No, sir.

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

Q. And do you not remember going with Mr. Jacob Castelbaum to your saloon and making arrangements to go to the Peter Breidt Brewing Company on the following Wednesday; do you remember that? A. No, sir; I don't remember that.

Q. You are not positive about it? A. I am not positive about it. We was talking different things. After the Peter Breidt Brewery sued us Mr. Castelbaum says to me——

BY THE COURT:

Q. Did you finish your answer? A. No, sir. Me and Mr. Castelbaum was walking together and Mr. Castelbaum says, "Well, the Peter Breidt Brewing Company is suing me interest for the money," and I says, "I am awfully sorry, Mr. Castelbaum, if I had known that before or if you had told me there was any interest on that mortgage it would be different. You told me distinctly there was no interest on that mortgage." I said, "I will see Mr. Stemmler, he is the President of the Peter Breidt Brewery, and he is a friend of mine, and I will see Mr. Stemmler and see if he will do something for me." I never made any promises or anything of that kind.

Q. And was that after or at the same time that arrangements had been made to cancel the mortgage? A. It was after.

Q. And at the same time or about the same time that you met him at the office to discuss the matter? A. I don't rememer the time it was. We was talking together and walking together and talking about the matter.

Q. But at this time you were in Mr. Brown's office you were there to settle this matter of cancelling this mortgage? A. I don't remember.

Q. And that you stayed all night——

Mr. Brown: It was after suit was brought.

A. We was walking on the street and I don't remember where it was, but in the saloon he told me himself.

Q. And was this on the day we made arrangements to cancel the mortgage that you turned over the checks to Mr. Brown for $10 and $20? A. I don't remember.

Q. You are not sure, it might have been that day? A. I wouldn't say exactly. I don't remember.

Q. I ask you whether it might have been that day? A. (No reply.)

HARRY CASTELBAUM, recalled for defendant.

Direct examination by Mr. Brown:

Q. Mr. Castelbaum, is this the bill of complaint prepared by you in the case of Wolfson et als., and is that your signature thereon? A. That is my signature.

Q. And that is your bill? A. I presume it is the bill. It seems to be a copy.

Q. And in the seventh paragraph of your complaint you have alleged the following: "That on

or about the 9th day of July, 1916, the complainant, knowing that the said David Wolfson was not pecuniarily responsible, and that he had no moneys or credits with which to pay the purchase price or to pay off the chattel mortgage, and relying upon the checks deposited with the said Thomas Brown of the Rubsam and Horrmann Brewing Company, procured the aforesaid statement and executed the bill of sale and lease for these premises and received a check for $2,350, the said Thomas Brown and David Wolfson agreeing to have the aforesaid chattel mortgage canceled of record." A. That is exactly the arrangement that was made. That was, as I said yesterday, the reason I insisted on getting the statement, was that Wolfson was not financially responsible.

Q. Is that paragraph or not exactly what happened at my office on the day that the deal was finally closed? A. The paragraph contains exactly what——

Q. As it stands there? A. It is an allegation of practically what was agreed on there.

Q. Isn't it what was agreed on there? A. For instance, I mean by that——

Q. Not what you mean. A. You are asking me whether it is a statement or not.

Q. Isn't it a statement of what was agreed on there? A. I said they were.

By the Court:

Q. Is that a true statement of what took place?

(Witness reads complaint.)

A Yes, certainly.

Q. That is all.

A Juror: May I ask him a question?
The Court: You may.

By a Juror:

Q. Who paid that $900 check over to secure that canceled mortgage? A. I never saw the check. I saw the mortgage. The check was sent direct by Mr. John J. Stamler to Mr. Brown. The chattel mortgage was sent direct by John J. Stamler to Mr. Brown some time prior to my knowledge, before I had a letter from Mr. Stamler that he had issued execution. And subsequently we visited Mr. Brown's company and made arrangements to turn over the check to Mr. Stamler. That one there at the meeting was the check—it was made direct to Mr. Brown or Mr. Stamler, I presume.

The Court: That is not answering the question.

Q. Who was that canceled mortgage returned to from the Brewing Company? A. The Peter Breidt Brewing Company?

Q. Who to? A. To Mr. Brown.

Q. You had nothing to do with paying the mortgage off? A. No, sir.

(Lease marked Exhibit D 1 and bill of sale Exhibit D 2.)

THOMASS BROWN, sworn for defendant.

Mr. Brown: If the court please, on or about the 7th day of July, 1916, I think it was, I think it was last year, Mr. Wolfson and Mr. Castelbaum, both of the Castelbaums,

came to me, to my office, and Mr. Voss was with them, and they stated that they wanted to close the transaction of the sale of Castelbaum's place to Wolfson, and Mr. Voss had with him two checks. And they passed to me a lease that Mr. Castelbaum, Jr., had and I read it and made some objection, I don't know what it was, I know it was material. Then the agreement that was made between the parties came into my hands some way, I don't know how it was, whether it was called to my attention or I just happened to pick it up and read it. In reading it over I asked Mr. Castelbaum if he or Wolfson knew or had prepared a statement, or had obtained a statement from Mr. Castelbaum as to all his credits and the outstanding claims against him, and I said that that was the usual thing to do, and because of the bulking of the sales we had better have that done. They said there were no claims except some small accounts and the license question and they would straighten them out between them. Then I read the mortgage over and said, "What are you doing about the interest in this case? You have a check here for $900 and you have another check for $2,350; how do you know but there is some interest due on this mortgage?" to both of them. Then Mr. Castelbaum said there was no interest, he never paid any interest and the agreement with the brewing company was that he was not to pay any interest. Then I said, "I have had a young man in the office look at the record in New Brunswick, in anticipation of this deal and in preparing for it, and I

have telephoned him to see if there is anything on record, and he informs me that there is a chattel mortgage of $900—not of $950," I think that it does carry interest—and they didn't seem to believe me. They said it was either $900 or $950 and they weren't even sure it was $950. I said, "You will have to make some arrangements about the thing and you better have an understanding about it now before you go any further. So Castelbaum and Wolfson agreed if they found that the mortgage was $950 Wolfson would have to pay the extra $50, that he was to pay the extra $50, and if it was not all that he would have to pay would be the $900.

Mr. Castelbaum—I object to that. He has no greater rights as a witness than the other witnesses. That is the conversation of the 7th. I object to his statement as to what Wolfson was to pay or was not to pay. Whatever he was to pay is covered by the contract.

The Court: The objection will be sustained. But you are only required to omit those things which would change or affect the agreement.

Mr. Brown—Well, Mr. Castelbaum said at that time and Wolfson that if it was $950 that he would have to pay would be the $900. would not take my word for what I got from New Brunswick, and about the interest, Castelbaum said he would take care of that with the brewing company.

Mr. Castelbaum: I object to that on the same ground. The interest has been covered and the legal liability between Wolfson and Castelbaum has been laid down.

The Court: It may remain.

Mr. Brown: I insisted upon an understanding, what they were going to do with the chattel mortgage, that is, about the interest, how it should be applied, and Mr. Wolfson said he would have no trouble in adjusting a mortgage with the Peter Breidt Brewing Company for $900.

By the Court:

Q. Mr. Wolfson? A. Not Mr. Wolfson, Mr. Castelbaum. I still was a little "leary" about the thing and I said, "You better get a statement from the Peter Breidt Brewing Company to make sure that you can make such an arrangement," and Mr. Castelbaum said, "What is the use of gettting a statement? I have always done business with Peter Breidt and they never charged me any interest. I know this thing can be settled for $900." I asked him then if he was willing to accept the money that was in the office, the $900, if he was willing to have that apply as a settlement of that chattel mortgage. I repeated that to him several times and he said yes and Wolfson so said. Then I said, "I will send for a statement to the Peter Breidt Brewing Company, not only for the reason about the interest, but in case there is anything due you in there it would be a good thing to have the statement anyway." Well, Castelbaum said, "You better not go near the Peter Breidt Brewing Company, as you represent the other brewer, and I will do it." So whether he went down or not I don't know—yes, he did write a letter to me and said that he had been to the brewery, as I remember, as I remember it—I haven't the letter—but he enclosed a letter to

me with this statement, which I have here in my hand.

I will offer that in evidence, if the Court please. If there is no objection to that statement I will read it. (Reads statement to the jury.)

(Statement marked Exhibit D 1.)

After receiving that statement I went up to Mr. Castelbaum's or he came to my office, I don't know which it was.

By the Court:

Q. When did you receive that? A. It is dated July 10th, and I think it was the next day. I know that it got in my office very quickly and I was surprised to receive it so quickly. And shortly after that Mr. Harry Castelbaum called up and I explained to him about the license account there and they made arrangements then that Wolfson should keep on paying that account, that is, that he was to pay $10 a week, and that was all the arrangement that was made about that part of it. I also told him when I got that statement I called up the lawyer of the Peter Breidt Brewing Company, the lawyer, or General Collins, the president, and told him I had the $900 there left by Castelbaum and Wolfson for the settlement of that chattel mortgage, and I asked him, if I remember, what way I should send the money to him, whether take it up or send it by mail, and I asked him if that would satisfy the mortgage. I was informed by General Collins—I don't know what he informed me—but I know as the result of the conversation with him I was sent to Stamler, his lawyer, and Stamler told me that the brewing company insisted on the payment of all the interest.

Just before that time, if the court please, I think it was the day of the payment of the $2,350, that is, after the lease came back corrected, and I don't know just what date that was on, but it was shortly after the first visit on July the 7th, they came to close the deal, and I then had knowledge that the Peter Breidt Brewing Company wanted that interest and I conveyed that to Mr. Castelbaum, Jr. And he did everything possible, I will say this, to get this money. First he wanted to take the money himself, or he wanted to leave a receipt—I think it was that he would take the money and leave a receipt with me that if there was any trouble with the Peter Breidt Brewing Company that he would return the money afterwards and that he would save me harmless if I would give him the $900 check. I refused to give him the $900 check and then I offered to go with him to the Peter Breidt Brewing Company with the check. He said that wouldn't do any good and then I told him before the $900 would be paid that we would have to get the canceled mortgage. Then he asked me about the $2,350, why that couldn't be paid over, that that had nothing to do with the $900. I told him as I looked upon the thing the whole transaction was one and the same thing and that it ought not to be split up and that all the money ought to stay there until they settled that account of the $900. And the father and the son promised that if they would get the $2,350 that day they would settle with the Peter Breidt Brewing Company and I took their word for that, and they delivered the bill of sale and the lease—that was the day he told me that—and I should give them a check for $2,350, and I should hold back $900 until Mr. Castelbaum had arranged with the Brewing Company about settling

the mortgage for that amount, and if he couldn't settle it for that he said he would pay the difference. Mr. Castelbaum then kept calling me up about the mortgage, about the money, and stated that it hadn't been paid, and to every conversation and communication I answered that I was ready and willing to deposit that $900, or pay it, if they would surrender that mortgage as agreed. After they had been sued he called my attention to it and said he wanted the matter settled and he would go to Mr. Stamler and arrange to pay the $900 and see that the mortgage was sent to him and they would see about the rest of it. I know I made assurance then both by telephone and letter that after he sent the letter in I would receive the mortgage. I got Mr. Stamler's consent and I called up Mr. Castelbaum about it. I wanted to make sure, and I asked if he would not confirm the matter by letter, and then upon his promise that he should send the letter to Stamler I sent the check. And just a day or two before the check was sent Mr. Stamler sent the mortgage to me and said he wanted it sent to Castelbaum and he was willing to have that money paid over and I could send the check to Castelbaum. I received the mortgage on or a few days after the 24th of October, 1916, duly endorsed for cancellation, and I received the letter that has been offered in evidence by Mr. Harry Castelbaum, where he states: "Mr. Stamler has been in touch with me and informs me that he will give up the canceled chattel mortgage upon the payment to him of the funds in your hands." That is already in evidence.

I don't know anything else about the case, if the court please, except that the checks that were sent by the Rubsam & Horrmann Brewing Company to me were made out in my name as attorney and I

deposited them in the trust account that I had and sent my own check to Mr. Stamler for the $900 and I believe that—I am not sure that I gave Mr. Castelbaum the check for the $2,350, whether that was my own check. That is all, Mr. Castelbaum.

By a Juror:

Q. Did this mortgage say anything about interest? A. The chattel mortgage says interest.

Q. I mean the chattel mortgage. A. Yes, sir. That is what the dispute is about.

By the Court:

Q. Was that the clause of the chattel mortgage that is in evidence? A. It was marked for identification. The certified copy is in evidence. I will have it marked.

(Paper marked Exhibit D 4.)

The Court: You might read that to the jury.

(Mr. Brown reads from chattel mortgage to the jury.)

Cross-examination by Mr. Castlebaum:

Q. At that time, July 7th, you represented Mr. Wolfson and the Rubsam & Horrmann Brewing Company? A. Well, I can't say that when they first came in that I represented the brewing company. That was only a retainer I had at that time

Q. I mean when you examined the agreement in whose interest were you examining the agreement? A. The brewing company.

Q. And you say that Mr. Castelbaum was entitled

to his money? That is one transaction, did I understand you to say, that $2,350 and $900? Were they one transaction or two? A. That $2,350 and $900?

Q. Yes, one or two transactions, how do you classify it? A. One transaction.

Q. And therefore Mr. Castelbaum wouldn't be entitled to the $2,350 unless he satisfied you that the $900 had been paid? A. I don't know. What is that?

Q. I mean that they or you would not have been authorized in your own opinion to pay him that money unless you were satisfied that he had paid the chattel mortgage? A. I wouldn't pay the money over unless I had assurance the $900 would satisfy the chattel mortgage.

Q. That is, you wouldn't pay his $2,350? A. No, sir.

Q. I don't suppose you will object to my reading this in evidence. (Letter shown witness.) A. I won't use it, as I didn't write it.

Q. Well, you signed it? What is the date of it? A. July the 7th.

The Court: Do you offer it in evidence?

Mr. Castelbaum: Yes, sir.

The Court: It will be received.

(Letter marked Exhibit P 1.)

Mr. Castelbaum: It is a letter from the office of Thomas Brown, dated July 7, 1916, to Jacob Castelbaum.

(Mr. Castelbaum reads letter to the jury.)

Q. There is nothing in that statement which would call for Mr. Castelbaum to give you assurances as to the chattel mortgage? A. No, sir. Given at that time? I don't know about it.

Q. You didn't discuss it on July 7th? A. We did discuss it, but we didn't know whether the brewery would carry out Mr. Castelbaum's agreement.

Q. And why did you give him a statement that you would allow him to collect his money in any event whether the statement from the Peter Breidt Brewery was more or less than it was supposed to be? A. I trusted what you said, that they would get a statement, and what your father said, that $900 would be that claim.

Q. And did you acting as attorney for the Rubsam & Horrmann Brewing Company feel that money lying in your hands for the payment of that chattel mortgage was to go to Mr. Castelbaum or the Peter Breidt Brewing Company? A. According to the agreement we had made it was to be paid direct to the Peter Breidt Brewing Company.

Q. And when you paid Mr. Castelbaum $2,350, so far as the Rubsam & Horrmann Brewing Company and David Wolfson were concerned, who was there with them in reference to this transaction? A. He was not. Between the time that was signed and the time I received the statement you mailed to me I ascertained that the brewing company would not accept the mortgage unless interest was paid, and it was through the pleading of yourself and your father that you would take care of any interest there might be that the brewing company paid the check of $2,350.

Q. And did you on July 7th know that the Peter Breidt Brewing Company had made arrangements for the granting of a loan to Mr. Wolfson? A. I didn't know anything about that.

Q. And you have no recollection of a letter produced by you from John J. Stamler? A. No, sir.

Q. And you have no recollection of any conver-

sation to the effect that under the new arrangement that the Peter Breidt Brewing Company might claim more money, that the statement made might be more, to Mr. Castelbaum? A. When I suggested making the statement you said that you had better get it, or something was said that you could do more with the brewing company than I could.

Q. And something was said under the new conditions we offered that they might claim interest? A. Well, you were a little bit timid about it and I said I didn't care.

Q. There was some conversation to that effect and we hesitated to close the matter until we were sure there was sufficient money lying there to pay the incumbrances? A. You say we.

Q. I ask in reference to Mr. Jacob Castelbaum and myself. A. You wanted to take whatever money you could get and to protect your father every time on the interest.

Q. I ask you whether you remember any statement being made showing that we were not desirous of closing the transaction until we were assured or saw that there was enough money to pay all the incumbrances. A. No, sir. You were as hungry for that money as anybody I have ever seen. You wanted the money right or wrong, as you stated yesterday.

Q. Well, maybe you misunderstood me. A. I mean that he testified yesterday he did everything to get that money, in court.

(Objected to.)

The Court: The statement of the witness will be stricken out, as to what he said yesterday as to its being right or wrong.

Mr. Brown: Right or wrong—he did not say that yesterday, but I think he did say

excuse me, if the Court please—that he did everything to get the money.

The Court: That will be stricken out.

Q. Now on July 7th the arrangement was that you were to produce the chattel mortgage and the lease and collect the $2,350? A. I didn't say that.

Q. Well, the instrument speaks for itself. A. I don't care what the instrument said, you ask me what I said.

Q. And you said at the time you paid over that check for $2,350 that Jacob Castelbaum and myself were present; is that so? A. Well, at the time that check was paid over, Mr. Castelbaum, I wouldn't say you were both exactly there at that time.

Q. Well, you did make that statement? A. Well, if I did say it there was not much difference between the time you were in the office and the time that your father was there.

Q. Well, let's see. A. Because you were there about the same time, but whether you went in there and came out together I don't know.

Q. Now, let's see. On July 7th we made arrangements upon the production of the bill of sale and the lease, and, as you say, other matters, the matter was to be closed; is that correct? A. Yes, sir.

Q. And then you say—— A. If you mean by other matters what I have testified to.

Q. Now you said this was on July 7th and that on July 11th or 12th you received a statement from the Peter Breidt Brewing Company? A. I didn't say it was the 11th or 12th, it was shortly after, the statement.

Q. And at the time that you closed the deal—and by closing the deal I mean paying over the $2,350—then you already knew they were going to

claim interest; is that right? A. Yes, sir; I knew that when the $2,350 was paid.

Q. And when you paid the $2,350 you knew that interest was claimed by the company? A. Yes, sir.

Q. Isn't it a fact that the circumstances were like this: that after the receipt of the statement you received a number of communications from me in reference to the closing up of the matter, and that you delayed the closing up of the matter for some reason best known to yourself, and that Mr. Jacob Castelbaum was never present after July 7th, that the lease and the bill of sale were executed at the Highlands in the presence of George E. Jenkinson, and that after the transactions of July 7th that the first time you saw Mr. Jacob Castelbaum was after suit was started on the Peter Breidt claim? A. I couldn't say that, Mr. Castelbaum, not truthfully. I know the instruments were not executed in my office for the reason that your mother was not there and I know that the $2,350 was paid over, but whether it was paid over to you or to your father, I can't say. I know that when the money was paid one or the other was in the office and we were talking about it and the other came in about the time of the closing, or shortly after. What I mean by that, it was at that time or a few seconds afterwards. As I remember, there was some disarrangement about your father coming in on the train.

Q. You heard the testimony of Mr. Jacob Castelbaum that he was not there when the check was passed, that is, when the lease and bill of sale was turned over? A. Yes, sir.

Q. And still you say that he was there during that time? A. He was there that time, yes.

Q. Now you made some reference—have you got the letter of August 21st of the Rubsam & Horrmann Brewing Company—you made some reference about

my anxiety to get the money and I feel that I should place something on record to explain that.

(The witness is handed letter and reads the same.)

A. What do you want me to do with this?

Q. Do you object to my offering it in evidence? A. I do not see that it is material.

Q. It is material. You have made statements that we made efforts to get this money simply with the insinuation that we were there to get something that we were not entitled to. A. I don't say that. I didn't insinuate that.

Mr. Castelbaum: Mr. Brown has testified to that.

The Court is not interested in the personal controversy between you and Mr. Brown, but only in legal evidence.

Mr. Castelbaum: Do you rule that out?

The Court: Yes, sir.

Q. And did I understand you correctly, Mr. Brown, to say that I and my father—you don't know who received the check for $2,350 that day—but upon the receipt of that check we made arrangements with you that upon receipt of that $2,350 we were going to pay the excess, or any excess, if there was any, on the chattel mortgage? A. You said as I have told you that you could arrange——

By the Court:

Q. Answer it. A. Yes, if it were necessary; yes, sir.

By Mr. Castelbaum:

Q. If it were necessary? A. Yes.

Q. In the face of the express contract? A. In the face of everything that was done in the office and that money being turned over to you.

Q. And did you feel that the $900—I don't know whether I asked you this question—but whether that $900 was to be turned over to Mr. Castelbaum or the Peter Breidt Brewing Company? A. I felt, according to the arrangement that you and your father promised, that if that money was turned over to the Peter Breidt Brewing Company that would settle it. You wanted the money and I wouldn't give it to you.

Mr. Castelbaum: That is what I want to put in, that line of evidence. I wanted to read it to you and his Honor said he was not interested in any feeling between Mr. Brown and myself.

The Court: But you have not offered anything.

Mr. Castelbaum: I thought you rejected it.

The Court: I did not reject anything.

Mr. Castelbaum: I asked Mr. Brown if he would object to the introduction.

The Court: Why not offer it?

Mr. Castelbaum: I offer in evidence a letter dated August 21st and addressed to the Rubsam & Horrmann Brewing Company from me.

The Court: From whom?

Mr. Castelbaum: From me, written by me, to which letter Mr. Brown has referred in his testimony.

The Court: Is this the letter?

Mr. Brown: I have not read the letter.

Mr. Castelbaum: My understanding of the testimony was that Mr. Brown said he received the letter at the same time from me in which I tried by every means to get that $900.

Mr. Brown: No, sir.

The Court: He did not say that.

Mr. Castelbaum: I will offer this letter. I have served Mr. Brown with a notice to produce and Mr. Brown says he has got a copy.

The Court: Do you object to the letter?

Mr. Brown: Yes, sir; on the ground that it is not between the parties in this case. We have no control over the Rubsam & Horrmann Brewing Company.

Mr. Castelbaum: You are the agent of the Rubsam & Horrmann Brewing Company.

The Court: I suppose the original could have been subpoenaed.

Mr. Castelbaum: The original is in Mr. Brown's possession and I served him with a notice to produce.

The Court: The objection will be sustained.

Q. When the mortgage was received by you for cancellation do you know whether I had knowledge of that or not? A. I can't say what knowledge you had. I know that after I got it you got knowledge of it.

Q. After you got it I got knowledge of it? A. Yes, sir.

Mr. Brown: That is all I have now, if the Court please.

DEFENDANT RESTS.

PLAINTIFF'S TESTIMONY IN REBUTTAL.

JACOB CASTELBAUM, recalled for plaintiff.

Direct examination by Mr. Castelbaum:

Q. You heard Mr. Wolfson testify that on July the 7th that he had no recollection of a statement made by you with reference to the interest on the chattel mortgage? A. Yes.

Q. Will you tell the Court and jury what conversation took place as to that?

Mr. Brown: That is objected to. I do not think there was proper foundation laid and it is not contradiction.

The Court: By Mr. Wolfson. Do you have to lay a foundation for it? You do in rebuttal, I suppose?

Mr. Brown: As I remember the question it was denied.

The Court: Well, I am having so much difficulty, Mr. Brown, to get at what the parties are testifying to in this case that I think I should admit it.

Mr. Brown: It would not be contradiction according to the form of the question.

The Court: No, it is not contradiction in that form.

Mr. Castelbaum: I will withdraw the question.

Q. Did you make any statement on July the 7th with reference to the interest on the Peter Breidt chattel mortgage? A. Yes, sir.

Q. And what were they? A. On July the 7th, in the morning, I went over to David Wolfson's that he should go with me to the Peter Breidt Brewing Company and get my money what belongs to

me. And then Wolfson said to me that they made the arrangement with the Rubsam & Horrmann Brewing Company—he called the brewing company up on the phone and made arrangements to meet me at three o'clock at Mr. Brown's office. I says to Mr. Wolfson, "If you change your beer to the Rubsam & Horrmann Brewing Company you will have to pay interest for that mortgage and if you take the money from Peter Breidt there is no interest. If you change your beer there will be interest." I explained that to Mr. Wolfson and he says the Rubsam & Horrmann Company will pay it. And we was waiting till three o'clock and Mr. Voss didn't show up. And at night at seven o'clock we met at Mr. Brown's office and there was a question came before Mr. Brown and I said, "I am not willing to accept my money." I said to Mr. Voss I wouldn't accept the money, the Peter Breidt Brewing Company might be doing two different games and that I would rather go to Peter Breidt and get my money without any fooling.

Q. And you made an objection to taking your money at their place? A. At their place; yes, sir, to Mr. Voss and the Rubsam & Horrmann Brewing Company.

Mr. Brown: I object to it as not rebuttal.

Mr. Castelbaum: I don't know whether it was a statement as to interest.

The Court: The question is whether it was made as to interest. If it was made as to interest it is rebuttal, I presume.

Q. Was there any other conversation as to interest? A. Yes, sir.

Q. Except what you have said that night? A. Yes, sir; at that time there was a conversation that Mr. David Wolfson was to pay the interest to the

Peter Breidt Brewing Company with that money, $800 or $900.

Q. And was that the reason you got the statement from the Peter Breidt Brewing Company?

(Objected to as not rebuttal. Objection overruled.)

A. Yes, sir.

Q. Now were you present in Mr. Brown's office when arrangements were made to pay the chattel mortgage? A. Yes, sir.

Q. And did you have any conversation on that day with Mr. Wolfson as to the payment of interest? A. Yes, sir.

Q. State briefly what the conversation was. A. He said that he will——

Mr. Brown: I object, that he went into it on direct examination. He didn't know anything about it in the beginning.

The Court: Maybe he has had his recollection refreshed.

Mr. Brown: He has had his chance.

(Objection sustained.)

(Objection noted for plaintiff as ground of appeal.)

Q. He was to pay the mortgage with interest. When did you have this conversation? A. On the 7th day.

Q. When? A. To be paid for the Peter Breidt Brewing Company of $900.

Q. Where did you have this conversation? A. In Mr. Brown's office.

By the Court:

Q. Was that the time you received the $2,350? A. I didn't receive the money.

Q. When was this? A. The 7th of November some time. I don't remember exactly the date.

By Mr. Castelbaum:

Q. What happened on the 7th of November? A. We went to Mr. Brown's.

Q. That is, to settle up with the Peter Breidt Brewing Company?

The Court: Are you going over this again?

The Witness: This was on the 7th of November.

The Court: I see. Proceed.

Q. And did you have a conversation with Mr. Wolfson after his leaving the office? A. Yes, sir.

Q. And what was the conversation? A. He said he was going to see John Collins and John Collins would not charge him interest.

Q. And who was John Collins? A. The superintendent of the brewery. He wouldn't charge him any interest because he was using his beer.

Cross-examination by Mr. Brown:

Q. And isn't it a fact that you have signed an affidavit or sworn in the Court of Chancery, that you said you destroyed your accounts with Mr. Wolfson because of the statement that the Peter Breidt Brewing Company gave you? A. I settled with my side but not for the Peter Breidt Brewing Company.

Q. That is what I say, you settled with Castel

baum and myself, relying on the statement that the Peter Breidt Brewing Company gave to you?

Mr. Castelbaum: He didn't say that.

A. I settled my side. I had my $2,350 and got it all settled.

The Court: I don't know what you said then.

A. I say I settled my side. I was entitled to get $2,350 and I got my money and I settled.

Q. And don't you say this in your affidavit: "Deponent further says, that the deponent has fully satisfied the Peter Breidt Brewing Company in such said answer and deponent has alleged that the said note of $900 was secured by a chattel mortgage, the assignment of which said plaintiff is entitled to upon the payment of the $900 and it is further alleged that he offered the said brewer in usual settlement of the amount due for a less amount than that now claimed in release of which the complainant adjusted his said accounts with the said David Wolfson—— A. I don't remember that.

Q. And did you not swear to that affidavit which was drawn and which you signed? A. My son made the affidavit.

Q. Did you swear to that and sign it? A. Yes, sir.

Q. And is it a fact that when the Peter Breidt Brewing Company sent in a statement that you relied on that statement and settled your account with David Wolfson accordingly? A. No, sir.

Redirect examination by Mr. Brown:

Q. Will you explain what you meant when you said you settled that thing, that part of it?

(Objected to. Objection sustained.)

Harry Castlebaum—Recalled in Rebuttal—For Defendant

Q. What do you mean by that, adjusted your account? A. I was supposed to get $2,350.

HARRY CASTELBAUM, recalled for defendant.

Mr. Castelbaum: I just wish to state as to what the transaction as to that letter was, that communication. I communicated with Mr. Brown in reference to the $900 and the communication was to the effect——

Mr. Brown: I object that the communication is the best evidence.

Mr. Castelbaum: Mr. Brown testified as to what did occur in his testimony.

The Court: But you are starting to tell the effect of the letter. Where is the letter?

Mr. Brown: The letter is in evidence, about the $900.

Mr. Castelbaum: I am speaking of the statement that I communicated with you in reference to the $900.

The Court: You may deny that if that is not so.

Mr. Castelbaum: I wish to deny that, if your Honor please.

The Court: If you can do so in a legal way. You cannot do so by reciting the contents of a written document which is not in evidence.

Mr. Castelbaum: At the time this conversation took place was shortly before I instituted the chancery suit against David Wolfson, or Wolfson and the Peter Breidt Brewing Company. Prior to the institution of this suit I endeavored to have this money de-

posited with me so that I would not have to sue and Rubsam & Horrmann Brewing Company to make them turn over the $900. That is what statement I meant.

By the Court:

Q. You made that statement to whom? A. To Mr. Brown and to the Rubsam & Horrmann Brewing Company, over the telephone, and accompanied the statement with a communication.

Mr. Brown: There is no letter to that effect.

Mr. Castelbaum: There was a telephone conversation to that effect.

The Court: And do you want to deny that, Mr. Brown?

Mr. Brown: Yes, sir.

Mr. Brown: I want to offer paragraph 10 of Mr. Castelbaum's complaint.

The Court: He admitted it. That closes the case?

Mr. Brown: Yes.

RECESS TILL 1.45 P. M.

(TRIAL OF CAUSE RESUMED AT 1.45 P. M.)

Motion for Direction.

Mr. Castelbaum: At this time I desire to move for the direction of a verdict in favor of the plaintiff and against the defendant for the sum of $354.76, being the amount due to be paid by the plaintiff. Now we have had quite a lot of evidence

and a lot of chaff, and I suppose is partly my fault, but the case is not very complicated and it results in this: the plaintiff's case is that the defendant assumed the payment of the mortgage, that is, assuming that the assignment carried with it the payment of interest, and it is admitted that part of that interest was not to be paid by us; that the plaintiff was forced to pay that interest, and for that he sues. Now the only question now is has the defendant set up a good defence in law? That is the question to be decided. Now my learned friend has put in the law of evidence and his defence seems to be solely upon the question of accord and satisfaction, that is, it seems to be upon the question of accord and satisfaction. Now I contend that accord and satisfaction is not a prior defence in this case even if it is proved, for this reason, that an accord and satisfaction is not a good defence in this case.

(Mr. Brown argues and cites authorities.)

What occurred and what is proved by the defence is this: that the defendant assumed the payment of this mortgage, that he did not pay it and that the original obligor was sued and upon the institution of this suit he notified the defendant. Now the law is well settled as to principal and surety that where the surety is sued upon an obligation, or his principal, that upon notification of the principal, even though the principal is not joined in the suit, that that judgment binds the principal. That, I think, is well settled. Now the situation comes that judgment was rendered between the plaintiff and defendant for the amount of $1,198 and some cents. The surety then approaches the principal and his agents and says, "You pay over"—even assuming that everything they said is true—"you pay over

to the co-creditors, the principal and the surety, whatever funds there are in your hands and I will make a partial payment of the balance." Now there is no evidence that the payment was made to the principal and the surety, nor is there any evidence that the payment to the Peter Breidt Brewing Company was an agent or surety of the present claimant, and it is up to them as co-claimants, and he must establish that in an accord and satisfaction. There was no payment to the present plaintiff and no satisfaction of any debt of David Wolfson and the legal liability cannot be changed. And therefore I contend on that ground that the relationship between the plaintiff and defendant were principal and surety and not debtor and creditor.

(Mr. Brown continues argument and says:)

And I think there is another strong point, and that is that Mr. Castelbaum says in his affidavit—although he may not know it, he had the subject up in court with this man—in view of his statement before the suit was started—it is in writing and sworn to by him in the form of an affidavit—but he swore that he had actually adjusted his accounts, he said he was aware of the money that was left there and he relied on the money of the Rubsam & Horrmann Brewing Company to carry this thing into effect. Because the testimony shows he had no faith at all in Wolfson, that he knew that Wolfson could not do anything.

The Court: What do you want to say about the other point?

Mr. Brown: That the payment of the principal carried with it interest and that Mr. Castelbaum in this case, even though he was not obliged to pay interest, if he accepted the principal and was satisfied with that as being payment he is bound by it.

The Court: I cannot see the slightest testimony

that Mr. Castelbaum ever was under the agreement to accept the $900 or that he ever did accept the $900. That was not the agreement. The agreement between the parties was that the mortgage was to be assumed by the defendant Wolfson, not that it was to be paid by Mr. Castelbaum. Now if he chose to pay $900 on account then there is no proof in the case that it was accepted by the Peter Breidt Brewing Company as payment of principal exclusive of interest and there is no such suggestion as that in the case.

(Mr. Brown continues argument and Mr. Castelbaum replies.)

The Court: I think perhaps there is some evidence in the case that would make it a question for the jury besides whether or not there has been an accord and satisfaction. It may be slight, but if there be any evidence I assume that the Court has no right to decide it as a matter of law and withdraw it from the consideration of the jury. The motion for the direction of a verdict for the defendant will be denied and an exception to that will be noted.

(Objection noted for defendant as ground of appeal.)

The Court: Now, gentlemen, in the argument you should confine yourselves to the question of whether there has been an accord and satisfaction. The other matters I have decided, as I consider the situation a matter of law, Justice PARKER having already decided in the case that the assumption of the mortgage carries with it by implication of law the assumption of payment by the defendant of the interest both accrued and accruing thereon. So that matter has been decided as a matter of law by Justice PARKER, and therefore the only question

which this jury need consider is the matter of whether or not there was an accord and satisfaction.

Charge of the Court.

Gentlemen, the facts which the plaintiff in this case relies upon to make his case are practically undisputed. It appears beyond dispute that by the agreement dated the 27th day of December, 1915, but which was not executed until sometime in the middle of 1916, the plaintiff agreed to sell a saloon business at Perth Amboy to the defendant, David Wolfson, upon these terms: "That the said party of the first part for and in consideration of the sum of twenty-five hundred dollars to be paid in the manner hereinafter set forth does hereby agree to sell to said party of the second part, his heirs and assigns, the saloon business now belonging to the said party of the first part, situate at No. 351 Prospect Street, Perth Amboy, together with all the stock of liquor, beers and cigars which are now therein, also including the fixtures which are now a part of said business, the above fixtures being subject to a mortgage"—and that is the important part—"the above fixtures being subject to a mortgage of nine hundred and fifty dollars"—which it is now admitted was nine hundred dollars instead of nine hundred and fifty dollars—"now held by the Peter Breidt Brewery, which said party of the second part agrees to assume in addition to the consideration above named."

It is admitted that Wolfson entered into the business of this saloon, that he paid to the plaintiff $2,500, and that he paid upon this chattel mortgage

$900. It is not disputed that the plaintiff in this case was obliged to pay and did pay upon this chattel mortgage $354.76 more than the $900 in liquidation of this chattel mortgage, and it is this sum of $354.76 which the plaintiff seeks to recover in this suit, together with interest from November 23, 1916, to this 8th day of June, 1917, at six per cent.

Now all of this is undisputed, and those facts standing alone are sufficient to entitle the plaintiff to recover.

The defendant has sought to combat the plaintiff's case by alleging that the agreement does not state the true agreement between the parties; that there was an agreement at the time this contract was executed, that the plaintiff was to pay the interest upon this mortgage, if there was any interest upon it, and that the defendant was not to pay this interest. But, gentlemen, you see what a dangerous precedent that would be, when people enter into a solemn written agreement and have signed it and it has been executed, that is, it has been signed by one of the parties, for him to take possession of the property and deprive the other party of what he previously had, and to say that that solemn agreement which has been signed between the two parties was not the agreement, but that is something else. It would mean that written agreements do not amount to very much and that people, notwithstanding their signatures to a written agreement, might come into court afterwards and say that something else was the agreement besides what is written down. And therefore in a recent case, which is on the subject of one of the defences in this case, the court says that particular evidence, oral evidence, is inadmissible to show that the parties at the time agreed to something else that enlarges

or modifies the contract they have written. It may have been foolish to have entered into such a contract—with that you are not concerned at all—but that is the agreement into which they have entered. And it may be that the defendant did not understand the contract, did not understand the effect of what he signed. But the presumption of the law is that every person is presumed to know the law. If that were not so a person could always come into court, after having signed his name to a solemn agreement, and say, "I did not understand what I was signing." You can see that would not do. It would not do to permit people to come into court and say, "I did not understand what I was signing and something else was the agreement." That is the reason the court overruled the testimony offered as to what the other contract was at the time, and the jury and court must assume that this contract which was signed between the parties embraced the agreement between them at the time. And this same question which is here raised has been before one of the Justices of our Supreme Court in this very case and he has said, as you heard suggested during the argument, that, "The assumption of the assignment by the defendant of the said mortgage therein referred to carries with it by implication of law the assumption of payment by the defendant of all interest both accrued and accruing." Therefore so far as this case is concerned, when the defendant assumed the plantiff's chattel mortgage to the Peter Breidt Brewing Company he assumed the payment of everything that was due upon it, and upon failure to pay it he assumed such additional expense as was incident to his failure, that is, such as the expense of the collection of the amount due upon the chattel mortgage, which interest and expense of

collection, as I have already indicated, admittedly was $354.76. I say admittedly, because it is not disputed. There was no evidence to the contrary offered in the case but that was the amount which the plantiff had to pay in extinguishment of that chattel mortgage.

But, gentlemen, the defendant says that there was an accord and satisfaction between the parties—an accord and satisfaction—and the burden is upon the defendant to prove by the greater weight of evidence that there was an accord and satisfaction between the parties. And I propose to define what is meant by an accord and satisfaction. There are many definitions, but one of the best I know is that an accord and satisfaction is an agreement between two persons, one of whom has a right of action against the other, that the latter should do or give and the former accept something in satisfaction of the right of action different from and usually less than what might be legally enforced. And when an agreement is executed and the satisfaction has been made that is called an accord and satisfaction. Now to illustrate, in this agreement between these parties, what the defendant would pay or was obliged to pay to the plaintiff was $2,500, and in addition to that to pay all the principal and interest due upon the Peter Breidt mortgage, and if there was any expense to it then that additional expense, the expense of collection, that is, for his failure to make the payment, and if the plaintiff was put to expense by reason of such failure, that additional expense. So you see in this case before the plaintiff can establish an accord and satisfaction it must appear that there was an agreement between the plaintiff and defendant that the defendant should do or give and the plaintiff

should accept something in satisfaction of his right to collect this $354 and some cents, different from what he might have collected or enforced from the defendant. Now, as I have already indicated, to constitute a valid accord and satisfaction it is essential that the debtor, Mr. Wolfson, shall have offered what was given and that the creditor, that is, Mr. Castlebaum, shall have accepted it, with the intention that it shall operate as a satisfaction. The intention of the parties must be determined from all the circumstances attending the transaction. Now where the claim is unliquidated, that is, where the amount is uncertain, as where, for instance, you are injured by my automobile and you claim damage from me because of that injury, then the payment of a less sum than claimed in satisfaction operates as an accord and satisfaction. And therefore if I offer you, or if you demand of me $500 and I offer you $100, and you accept it, that is an accord and satisfaction, because the damages were unliquidated, that is, they were uncertain. But where the debt is liquidated, that is, certain, and is due, payment by the debtor and receipt by the creditor of a less sum is not satisfaction. The mere payment by one and receipt by the other of a less sum is not a satisfaction thereof, although the creditor agrees to receive it as such, if there be no release under seal and no new consideration, that is, unless there be a valid dispute between the parties. The payment of an amount less than that for which the defendant is obligated does not constitute a valid accord and satisfaction unless there is a bona fide dispute or controversy as to the debtor's liability, or as to the amount due from him, or, as I have said, unless the damages are unliquidated.

Now, gentlemen, the facts have been fully argued

before you and I shall not attempt to recite them, but simply to call your attention to the principles of law applicable thereto. Mere payment in this case, or rather, circumstances like these, are relied upon by the defendant as constituting an accord and satisfaction: there was left in escrow in the hands of Mr. Brown, the attorney, a check of $2,350, $150 in cash having been paid by the defendant to the plaintiff at the time the agreement was signed. As I say, a check of $2,350 was left in escrow in the hands of Mr. Brown and there was left in his hands a check for $900 to pay this mortgage. Subsequently it was ascertained that the Peter Breidt Brewing Company, which it had been assumed before that time would not charge any interest upon this mortgage, the agreement between these parties being, as stated by one of the witnesses in the case, that he chattel mortgagor should purchase beer from the brewer making the loan; and it was assumed, apparently, by these parties at the time the original agreement was made that the Peter Breidt Brewing Company would not charge any interest upon this claim. And it appears that the original arrangement for the loan was made with the Peter Breidt Brewing Company by Mr. Wolfson, not by a written agreement, but that he did arrange with them or their attorney verbally for this loan, and it appears that when that arrangement was made it was understood that they would not charge any interest upon the loan, which was to be adjusted in some way between these parties which he has not explained, but he subsequently went to another brewer and obtained the money from that brewer, and the Peter Breidt Brewing Company then required interest upon their claim. Now it is disputed between these

parties whether or not there was an agreement by Mr. Wolfson or by Mr. Castelbaum to pay this excess. As I say, that makes no difference in this case whether or not there was such an agreement unless it was an agreement which amounted, as I have stated, to a mutual accord and satisfaction. Mr. Wolfson says, and so does Mr. Brown, that it was agreed when it was found that the Peter Breidt Brewing Company was going to charge interest on this excess, that Mr. Castelbaum would pay the excess. Mr. Castelbaum says just exactly the other thing; in fact, he says it was all agreed before and at the time the agreement was made, particularly when they were discussing the matter of where he was going to get the money, that if by reason of his getting the money from other brewers than the Peter Breidt Brewing Company the Peter Breidt Brewing Company charged him interest, then he was to pay it. But as I say, all of that is only throwing a side light upon the main question as to whether or not there was an agreement on the part of Mr. Castelbaum to receive $900, whether or not in the first place there was a genuine dispute between these parties as to which should pay the interest, and if there was whether there was an agreement by Mr. Castelbaum to receive $900 to be paid by Mr. Wolfson upon this chattel mortgage in full satisfaction for the assumption by Mr. Wolfson or Mr. Castelbaum's debt to the Peter Breidt Brewing Company. Now was there any advantage? As I have stated to you, there must be a consideration for such an agreement as that. Was there any consideration? Was there any advantage which accrued to the plaintiff Castelbaum by such an arrangement? And in order to constitute a valid accord and satisfaction

there must have been some advantage accruing to him. Under this agreement the defendant was obliged to pay the chattel mortgage, and was obliged to pay not only the principal on that chattel mortgage but the interest, whether he understood or not at the time he signed it that he was to pay the interest; that was the legal effect of that document. But the defendant says that the advantage which accrued to the plaintiff in this case was that he got his $2,350. But you will see, gentlemen, under the agreement the plaintiff was obliged to do so and to deliver his lease and bill of sale to the defendant to entitle him to get his $2,500 and to have the defendant assume this chattel mortgage. That is all that it was necessary for him to do. When he had delivered his lease and his bill of sale he had done all that he was required to do in order to entitle him to get his $2,500, $150 of which he had already received, or to get his $2,350 which was in escrow in Mr. Brown's hands and to require the defendant to assume the payment of that chattel mortgage. Now, gentlemen, what advantage was there which accrued to the plaintiff by the assumption of any such agreement as is testified to by the defendant?

Now, as I have said, the burden of proof is upon the defendant in this case to establish by the greater weight of the evidence that there was an accord and satisfaction. If you find that to be so by the greater weight of the evidence then the defendant is entitled to your verdict. There can be no middle ground. Either the defendant has established an accord and satisfaction and is entitled to your verdict or else your verdict must be in favor of the plaintiff for the full amount of the claim, $354.76.

I have here some requests to charge. Have I

covered the defendant's requests to charge? Have I covered the plaintiff's requests to charge? Do you withdraw them?

Mr. Castelbaum: Yes, sir.

Mr. Brown: Are there any that your Honor has not covered?

The Court: I am requested by the defendant to charge:

First: That if the jury finds from all the testimony in the case that the agreement between the plaintiff and defendant was that the defendant should not pay the interest on the chattel mortgage then they should find for the defendant.

I decline to charge you that. In fact, I have charged you just the opposite of that.

Second: If the jury finds there was an accord and satisfaction by the plaintiff accepting the moneys of the Rubsam & Horrmann Brewing Company in full settlement of all claims against the defendant they should find for the defendant.

I think I have covered that fully. I decline to charge that excepting as I have charged.

Third: If the jury should find there was an accord and satisfaction by the surrender of the chattel mortgage endorsed for cancellation they should find for the defendant.

I decline to charge you that.

Fourth: If the jury should find there was an accord and satisfaction between the parties they should find for the defendant.

I charge you that.

Fifth: If the jury should find that the plantiff

accepted the principal of the mortgage in settlement they should find for the defendant.

I decline to charge that excepting as I have charged.

Sixth: The jury should find for the defendant as the plaintiff did not make a reasonable effort to prevent the loss which he complains of.

I decline to charge you that.

Defendant's Objections.

Mr. Brown: I object to that part of your Honor's charge in which it says that the facts that the plaintiff relies upon to sustain his case are practically not in dispute.

I also object to that part of your Honor's charge wherein your Honor said that the same thing was before one of the Justices of the Supreme Court in so far as this case is concerned, and that he assumed everything that was due upon the chattel mortgage.

I also object to that part of your Honor's charge wherein your Honor said that what the defendant was to pay was the sum of $2,500, together with the chattel mortgage and the interest and expense that was incurred in the collection thereof.

I also object to the refusal of your Honor to charge each request specifically as requested.

The Court: The objections will be noted.

Exhibit "A" of Plaintiff.

THIS AGREEMENT, dated the 27th day of December, Nineteen Hundred and Fifteen,

BETWEEN:

Jacob Castelbaum, of the City of Perth Amboy, County of Middlesex and State of New Jersey, of the first part, AND

David Wolfson, of the City of Perth Amboy, County of Middlesex and State of New Jersey, of the second part;

WITNESSETH: that the said party of the first part for and in consideration of the sum of Twenty-five Hundred Dollars ($2500) to be paid in the manner hereinafter set forth, does hereby agree to sell to said party of the second part, his heirs and assigns, the saloon business now belonging to the said party of the first part, situate at No. 351 Prospect Street, Perth Amboy, together with all the stock of liquor, beers, and cigars which are now therein, also including all fixtures which are now a part of said business in the said Saloon, the above fixtures being subject to a mortgage of Nine Hundred and Fifty Dollars ($950) now held by the Peter Breidt Brewery which said party of the second part agrees to assume in addition to the consideration above named.

The said party of the first part hereby acknowledges the receipt of $145 as part of the consideration of this agreement, also the additional sum of $40 for one month's rent ending February 1st, 1916.

The said party of the second part is to have the space of one year from date within which time to raise the balance of said purchase price, and when the said party of the second part has the purchase price, upon five days written notice title will be passed. During the time between the signing of

these presents and such notice, the said party of the second part is to conduct the saloon and is to pay the monthly rent of $40 per month payable in advance until May 1st, 1916, and from that time until the end of this agreement, is to pay at the rate of $50 per month, provided the sale is not consummated by that time. From the date of the consummation of the sale, the said party of the first part agrees to execute a lease for not more than 5 years, at the monthly rent payable in advance of $50 per month for the premises for the first year from date and $60 per month for the balance of the period.

The said party of the second part, shall until the consummation of said sale, pay all expenses and be liable for all bills contracted from this date in the said saloon business, and shall in addition pay the said party of the first part 10% of all the gross income weekly, and from and after the first of May, 1916, said payments shall cease.

In the event of the said party of the second part being unable to consummate said sale on or before the expiration of this agreement, the said party of the first part shall have the option of repaying to the said party of the second part all payments made on account of principal, and upon paying for all the stock of liquors, beers, etc., then found upon the premises, shall take possession of the said saloon business and this agreement shall be then of no effect.

The said party of the first part hereby acknowledges that the stock of liquors, etc., now upon said premises belongs to the said party of the second part, and this agreement is in lieu of a bill of sale for the same.

The said party of the first part agrees to sign an application for the transfer of the license for

Exhibit "B" for Plaintiff
Exhibit "C" for Plaintiff

said premises after the consummation of this agreement. Said transfer to be made at the cost of the said party of the second part.

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

Sworn and subscribed to:

JACOB CASTELBAUM [L. S.]

In the presence of:

DAVID WOLFSON [L. S.]

Changes made prior to execution
HARRY CASTELBAUM.

Exhibit "B" for Plaintiff.

(Same as Exhibit "B" to Amended Complaint.)

Exhibit "C" for Plaintiff.

NEW JERSEY SUPREME COURT
UNION CIRCUIT.
Transcript of Pleadings for Trial.

THE PETER BREIDT CITY BREWERY COMPANY, A CORPORATION, Plaintiff, VS. JACOB CASTELBAUM, Defendant, Summons Issued July 28, 1916	John J. Stamler, Attorney for Plaintiff, Harry Castelbaum, Attorney for Defendant.

The Peter Breidt City Brewery Company, a corporation duly authorized under and by virtue of the

Exhibit "C" for Plaintiff

laws of the State of New Jersey, having its principal office at the City of Elizabeh, in the County of Union and State of New Jersey, says:

1. On April 7, 1911, the defendant made and delivered to plaintiff his note of that date, for $900.00, payable to the plaintiff on demand.

2. That the said plaintiff has made demand on said defendant for the payment of the aforesaid sum of money, and that the said defendant has failed and neglected to pay the same.

3. The following is a true copy of said note:

"$900.00/100 Elizabeth, N. J., Apr. 7th, 1911

On demand I promise to pay to the Peter Breidt City Brewery Company Nine Hundred 00/100 Dollars at the office of the said Peter Breidt City Brewery Company, with interest.

No. Value received

(Signed) JACOB CASTELBAUM."

4. Plaintiff still owns said note. It has not been paid.

Plaintiff demands as damages, $900.00 with interest from April 7th, 1911.

JOHN J. STAMLER,
Attorney for Plaintiff.

(Filed Aug 11 1916)

The answer of Jacob Castelbaum, defendant in the above entitled action, to the complaint of Peter Breidt Brewery Company, plaintiff herein.

The defendant says:

1. He admits paragraph 1 of said complaint.

2. He denies paragraph 2 of said complaint.

3. The defendant denies paragraph 2 of said complaint but admits the making and delivery of a note

on or about April 7, 1911, in the amount of $900 payable on demand, at the office of the Peter Breidt City Brewery Company.

4. He admits paragraph 4 of said complaint.

FIRST SEPARATE DEFENCE.

1. The defendant says that at the time of the execution of the note above mentioned, a chattel mortgage covering fixtures, then owned by this defendant was executed to the plaintiff in like amount, to secure the payment of the note which said chattel mortgage was recorded in the Register's office of Middlesex County, and is now in the possession of the plaintiff; and it was understood and agreed by and between the plaintiff and defendant at the time of said execution that the plaintiff would never demand, nor that the said note or chattel mortgage would ever bear interest.

2. Defendant further says that on or about July 20, 1916, he conveyed the fixtures covered by the chattel mortgage above mentioned to one David Wolfson, who assumed the payment of the above mortgage.

3. That on or about the 25th day of July Thomas Brown, an Attorney at Law of New Jersey, acting as agent for the aforesaid David Wolfson, tendered to the said Peter Breidt Brewery Company at their office, to the agent in charge thereof, the sum of $900. being the full amount due on said note and chattel mortgage, and that said tender was refused and the said plaintiff refused to accept payment thereof.

Exhibit "C" for Plaintiff

SECOND SEPARATE DEFENCE.

1. The defendant denies the making of any demand upon him by the plaintiff for the payment of the aforesaid sum.

2. The defendant hereby tenders payment of the aforesaid sum of $900. and is ready, willing and able to pay the same in this honorable court, at its direction.

3. Defendant further says that he is entitled to an assignment of the chattel mortgage executed to secure the above sum, upon the payment of the said sum of $900.

THIRD SEPARATE DEFENCE.

1. Defendant says that the said plaintiff falsely represented to the defendant that the amount due on the note and chattel mortgage was the sum of $900, that the plaintiff had reason to believe that the statement was false, and was made for the purpose of having the same acted upon by the defendant, and that the defendant, relying upon the same was misled thereby into adjusting accounts with his vendee upon that amount, to his damage, and therefore that the plaintiff is stopped from claiming any sum above the amount set forth in the above statement, to wit $900.

2. This defendant hereby tenders the payment of the said sum of $900.

HARRY CASTELBAUM,
Attorney of Defendant.

(Filed Aug. 25 1916)

Exhibit "D" for Plaintiff

The defendant answering the separate defences of the defendant denies each and every allegation contained therein.

JOHN J. STAMLER,
Attorney for Plaintiff.

I, William C. Gebhardt, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true transcript of the pleadings in the above stated case as the same remain on file in my office.

In testimony whereof I have set my hand and the seal of said court at Trenton, this twenty-fourth day of May, A. D. nineteen hundred and seventeen.

(Seal) WM. C. GEBHARDT, Clerk.

Exhibit "D" for Plaintiff.

NEW JERSEY SUPREME COURT.

PETER BREIDT CITY BREWERY COMPANY, a corporation, Plaintiff, vs. JACOB CASTELBAUM, Defendant.	Action at Law. Order Denying Rule to Show Cause Why a New Trial Should be Granted.

The above entitled cause was tried on the Tenth day of October, Nineteen Hundred and Sixteen, at the Union County Circuit with a Jury and judgment was entered in favor of the plaintiff and

against the defendant for the sum of Eleven Hundred and ninety-seven Dollars and sixty Cents ($1,197.60), the defendant not appearing when the cause was regularly called for trial.

After *entery* of the judgment the defendant applied to the Judge, holding the Union County Circuit, for a Rule to Show Cause why a new trial should not be granted on the ground that he had a good and just defence to the action on the merits; that thereupon the Court orally ordered that the plaintiff and defendant bring into Court on Saturday, the fourteenth day of October, Nineteen Hundred and Sixteen, the witnesses of the respective parties to give evidence on said application.

And it further appearing that the witnesses for the respective parties did appear before the Court on Saturday, the fourteenth day of October, Nineteen Hundred and Sixteen, and they were examined and cross-examined by the respective attorneys, and after considering the evidence presented, the Court being of the opinion that the defendant's evidence did not disclose a good cause of action upon the merits of the case;

It is, therefore, on this 24th day of October, Nineteen Hundred and Sixteen, on motion of John J. Stamler, of Counsel with the plaintiff, ORDERED, that the application for a Rule to Show Cause, made by the defendant, why a new trial should not be granted to him, be and the same is hereby denied with costs.

GEO. S. SILZER, *J.*

A True Copy,

WM. C. GEBHARDT,
Clerk.

Exhibit "E" for Plaintiff.

NEW JERSEY SUPREME COURT.

PETER BREIDT CITY BREWERY COMPANY

vs.

JACOB CASTELBAUM.

Action at Law. On Postea.
Entered October 17, 1916.

Damages	$1,197.60
Costs	50.16
	$1,247.76

JOHN J. STAMLER, Att'y.

I, William C. Gebhardt, Clerk of the Supreme Court of the State of New Jersey, do certify that the judgment, of which the above is a true statement, was cancelled of record November 24, 1916.

In testimony whereof, I have hereunto set my hand and the seal of said Court, at Trenton, this twenty-ninth day of May, A. D. Nineteen Hundred and Seventeen.

WM. C. GEBHARDT,
Clerk.

(Seal)

Exhibit "F" for Plaintiff.

No. 34 Perth Amboy, N. J., Nov. 23, 1916.

PERTH AMBOY TRUST COMPANY

Pay to the order of Peter Breidt Brewing Company or John J. Stamler, Atty.

Three Hundred and Seventy-Five 00/100 Dollars $375 00/100.

JACOB CASTELBAUM.

Safe Deposit

Vaults

Boxes From

$3 per year

(Stamped across the end of check "No Protest" and bearing endorsements on the back of same as follows: "Harry Castelbaum, John J. Stamler For deposit Atty. John J. Stamler. Pay to the order of Any Bank, Banker of Trust Co. All Prior Endorsements Guaranteed. No. 23, 1916. Union County Trust Co., 55-101 Elizabeth, N. J. 55-101 E. A. Faulks, Treasurer.)

Exhibit P1.

THOMAS BROWN
Attorney and Counsellor
at Law
308 State St. Perth Amboy, N. J.

Telephone 129—Cable Address "Brownlaw"

July 7, 1916.

To Jacob and Lena Castelbaum:

This is to certify that the Rubsam and Horrmann Brewing Co. has this day left in escrow with me the sum of $2,350, which said amount is to be paid out to the said Jacob and Lena Castelbaum by me upon the delivery of a bill of sale with warrant of title and lease, the terms of which are agreed upon, the lease to be a duplicate of the one now in my possession. THOMAS BROWN.

Exhibit D "1".

THIS INDENTURE made the eighth day of July One Thousand Nine Hundred and sixteen Between Jacob Castlebaum and Lena Castlebaum, his wife of the City of Perth Amboy, County of Middlesex, and State of New Jersey, parties of the first part, and David Wolfson, of the City of Perth Amboy, County of Middlesex, and State of New Jersey of the second part, Witnesseth, That the said party of the first part have Let and by these presents do grant, demise, and to farm let, unto the said party of the Second Part All of that store and cellar thereunder, together with seven living rooms

Exhibit D "1"

above said store, of the premises known as No. 351 Prospect Street, in the City of Perth Amboy, County of Middlesex, and State of New Jersey, with the appurtenances, for the term of five (5) years from the first day of July One Thousand Nine Hundred and sixteen, at the Yearly Rent or Sum of Six hundred dollars ($600.00) during the first year of said term payable in equal monthly installments of $50.00 in advance on the first day of each and every month, and the yearly rent or sum of Seven hundred twenty dollars ($720.00) for the remaining four years of said term, payable in equal monthly payments of $60.00 each, in advance on the first day of each and every month.

AND it is agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to re-enter the said premises, and to remove all persons therefrom.

AND the said party of the second part do covenant to pay to the said party of the first part, the said monthly rent as herein specified

IT IS FURTHER AGREED between the parties to these presents that the said party of the first part shall make all exterior repairs in and to said premises during the term of this lease, or any renewal or renewals thereof, at his own cost and expense.

IT IS FURTHER AGREED between the parties to these presents that the said party of the second part is to pay for all the water rents or water charges for water used on said premises, it being understood, however, that the said party of the first part is to pay each and every year the sum of fifteen dollars ($15.00) towards the payment of said water expenses and water charges.

IT IS FURTHER AGREED between the parties to these

Exhibit D "1"

presents and it is the essence of this lease, that the party of the second part, his heirs, executors, administrators, and assigns shall not or will not, remove, or transfer, or cause to be moved, removed, or transferred from said premises, the liquor license that now exists to sell liquor on said premises, during the term of this lease, or any renewal thereof, and it is further agreed that this covenant shall be likewise binding and controlling on any of the renewal or renewals of said license.

AND that at the expiration of the said term, the said party of the second part will quit and surrender the premises hereby demised, in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted.

IT IS FURTHER UNDERSTOOD AND AGREED, that this covenant is an essence of this agreement, and forms a license for the execution thereof, and pertains and is binding, whether the transfer or removal is attempted to be made from person to person or from place to place.

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

JACOB CASTELBAUM [L. S.]
LENA CASTELBAUM [L. S.]
DAVID WOLFSON [L. S.]

Witness as to
JACOB CASTELBAUM AND WIFE
GEORGE E. JENKINSON, JR.
THOMAS BROWN
As to Wolfson.

July 19th, 1916.

Exhibit D "1"

For and in consideration of the sum of one dollar ($1.00) to me in hand paid, and other good and valuable considerations, I do hereby transfer, set over and assign to the Rubsam & Horrmann Brewing Company, of Stapleton, Staten Island, New York State all my right, title and interest in and to the above lease, upon the condition, however, that the said Rubsam & Horrmann Brewing Co. shall not be responsible for the payment of the rent herein specified. It being understood and agreed that I am to continue the payments of said rent as specified in said lease.

DAVID WOLFSON [SEAL]

SIGNED, SEALED AND DELIVERED IN THE PRESENCE OF

THOMAS BROWN.

STATE OF NEW JERSEY, COUNTY OF MIDDLESEX, } ss.:

BE IT REMEMBERED, that on this twelfth day of July in the year of our Lord One Thousand Nine Hundred Sixteen before me, the subscriber an attorney at law of New Jersey personally appeared Jacob Castelbaum, and Lena Castelbaum, his wife who, I am satisfied are the lessors in the within Indenture of Lease named; and I having first made known to them the contents thereof, they did acknowledge that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

And the said Lena Castelbaum being by me privately examined, separate and apart from her hus-

Exhibit D "1"

band did further acknowledge that she signed, sealed and delivered the same as her voluntary act and deed, FREELY, without any fear, threats or compulsion of her said husband.

GEORGE E. JENKINSON, JR.,
Attorney at Law of N. J.

LEASE

JACOB CASTELBAUM, and
LENA CASTELBAUM, his wife.

to

DAVID WOLFSON

Dated July 8, 1916.

Received in the Clerk's Office of the County of Middlesex on the 24th day of July A. D., 1916 at 2:10 o'clock, in the afternoon and Recorded in Book 188 of DEEDS for said County, on pages 562, etc.

BERNARD M. GANNON,
Clerk.

THOMAS BROWN,
Attorney and Counsellor at Law.
308 State St., Perth Amboy, N. J.

July 24, 1916, 2:10 o'clock.

Exhibit D "2".

Telephone 1025 Mulberry Suite 611

HARRY CASTELBAUM
ATTORNEY AT LAW
Essex Building
31 Clinton Street
NEWARK, N. J.

August 9, 1916.

Thomas Brown, Esq.,
308 State St.,
Perth Amboy, N. J.

Dear Sir:

On Monday morning, of this week I called you up, and not finding you in, I left word that you should call me. I never received any call.

The Peter Breidt Brewing Company of Elizabeth have instituted suit for the recovery of the sum of $900. This occasioned me very great surprise as I was under the impression that you had paid these people their money. I, thereupon got in touch with Mr. Stamler of Elizabeth, who informed me that he had written a number of times to Mr. Wolfson asking for the money but he had never received a reply. I, thereupon communicated with the Rubsam & Horrmann Brewing Company, who have given me to understand that they are going to have the matter taken care of.

Will you please inform me at your earliest possible convenience just what steps you have taken towards paying this money, and also when you pay it, we are supposed to receive a chattel mortgage and a note. This is important because I must file an answer immediately if this suit is not adjusted, and it will be necessary for me to join in Mr. Wolf-

Exhibited D "1" (2nd)

son and the Rubsam & Horrmann Brewing Company, and I do not want to go to all this expense when there is no necessity for it.

Yours very truly,

HARRY CASTLEBAUM.

HC/AG

Exhibited D 1 (2nd)

Telephone 1025 Mulberry Suite 611

HARRY CASTELBAUM

ATTORNEY AT LAW

Essex Building

31 Clinton Street

NEWARK, N. J.

Thomas Brown, Esq.,
308 State St.,
Perth Amboy, N. J.

Dear Sir:

Mr. Stamler has been in touch with me, and has informed me that he will give you the cancelled chattel mortgage, upon your payment to him of the funds in your hands. Will you kindly do this?

Yours very truly,

HARRY CASTELBAUM.

HA/AG

Exhibit D "3":

Telephones: Long Distance-Local No. 18.

THE PETER BREIDT CITY BREWERY CO.

Brewers and Bottlers of

BREIDT'S PURE BEER, ALES AND PORTER

"As It Is Made In Germany"

D. F. Collins, Prest.

L. Breidt-Klein, Vice-Prest.

Jos. L. Nolte, Secy. & Treas.

Elizabeth, N. J., July 10, 1916.

Sold to Mr. Jacob Castlebaum

Chattel Mtge.	$900
Balance due License Acct.	130
	$1,030

[1265]

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

New Jersey Court of Errors and Appeals

JACOB CASTLEBAUM,
Plaintiff-Respondent,

vs.

DAVID WOLFSON,
Defendant-Appellant.

On Appeal.

Brief for Respondent.

The Facts.

This cause is on appeal from a judgment in the Supreme Court, Monmouth Circuit, on an agreement marked Exhibit A (case, p. 153), wherein the respondent agreed with the appellant, to convey a certain saloon business in Perth Amboy, in consideration of the sum of $2,500, receiving a certain amount on account, at the time of the drawing of the agreement. As part of the consideration for the purchase, the agreement continued, "subject to a mortgage of $950.00, now held by the Peter Breidt Brewery, which the said party of the second part agrees to assume, in addition to the consideration above named."

The appellant, who was party of the second part, entered into the business of this saloon, and paid the respondent $2,500, and left $900 in the hands of the appellant's attorney, the balance of the loan made to the appellant, by the Rubsam Horrman Brewery Company, who was to pay the amount due on the chattel mortgage to the Peter Breidt Brewery.

The holder of the chattel mortgage was not paid and sued the respondent herein and the

latter was obliged to pay and did pay upon the mortgage $354.76 over and above the $900, so left in the appellant's attorney's hands, in liquidation of the chattel mortgage.

The respondent thereupon sued the appellant for this amount, together with interest from November 27, 1916, to June 8, 1917, and recovered a judgment, which amounted to $370.13.

Point One.

The court properly admitted in evidence, the transcript of the pleadings and of the judgment, in the action of the Peter Breidt Brewing Company against the respondent.

The transcript of the pleadings was admitted in evidence on respondent's offer, and marked Exhibit C, for the plaintiff (case, p. 38, l. 13).

On appeal, appellant depends on grounds other than those raised at the time of the trial, to support his objection to the offer, which, of course, can avail him nothing on appeal. The only ground raised at the trial (case, p. 37, ll. 8 to 13), is not argued on this appeal, and appellant, therefore, has abandoned it.

We maintain, that the transcript of the judgment, Exhibit D. for plaintiff (case, pages 159 and 160), which might rather be termed, "an order denying a Rule to Show Cause, why a new trial should be granted," in the action wherein the present respondent was sued by the Peter Breidt Brewing Company on the Chattel Mortgage which the appellant herein had assumed, and which was foreclosed by reason of the appellant's act, as we shall afterwards point out, was also properly admitted in evidence. It is true that the judgment upon which

the respondent in this case applied for a Rule to Show Cause, at the Circuit, does not appear in Exhibit D, yet the transcript recites the judgment.

The appellant's objection to the offer, appears on page 40 of the case, lines 28 to 39. Appellant had lost the right to question the transcript of the pleadings, because it was properly admitted in evidence. At any rate, he cannot question it at this time, having failed on this appeal to argue the only objection raised at the time of the trial. It was only necessary to show that a judgment was rendered against this respondent at the suit of the holder of the Chattel Mortgage. Even if we assume for the sake of argument, that the Court erroneously admitted the transcript of the judgment, *the error was cured,* because, upon a subsequent examination of the plaintiff, he testified without objection by appellant's counsel, that a suit was started against him by the Peter Breidt Brewing Company, for the money due it, covering principal and interest on the Chattel Mortgage (case, p. 36, l. 18 to l. 23), and that the judgment was paid (case, p. 42, l. 33 to l. 40); that the appellant's attorney thereafter paid $900 left with him on deposit (case, p. 43, l. 16 to l. 20), *and respondent paid the balance of interest.* (Case, p. 43, l. 21 to l. 23.)

The amount of the respondent's loss was proved without reference to the transcript, and the appellant made no objection to such evidence. The check with which the respondent paid his obligation was even admitted in evidence (case, p. 43, l. 28), Exhibit F for plaintiff, and no error is assigned in this Court on the admission of the check. It further appears that the cancellation of judgment, Exhibit E for

plaintiff (case, p. 161) was admitted in evidence, and no error is assigned in this Court on the admission of the certificate.

Clearly, the appellant's first point is without merit.

Point Two.

The trial court properly refused to permit the evidence of any conversation between the parties in regard to the payment of interest on the chattel mortgage, at the time the agreement was executed.

This ruling is based upon the familiar rule of evidence, that the terms of a written contract may not be varied or altered by parole evidence. The portion of the Bill of Sale, Exhibit A for plaintiff (case, page 153), which is involved in this question, reads as follows:

> "The above fixtures being subject to a mortgage of $950, now held by the Peter Breidt Brewery, which said party of the second part agrees to assume in addition to the consideration above mentioned."

The party of the second part is the appellant.

It cannot be questioned that the assumption of the Chattel Mortgage was unqualified. We claim it carries with it the liability to pay both the principal and interest. One New Jersey case in point is *Thompson* v. *Bird,* 57 Equity, page 175, cited in appellant's brief, in which case the vendee assumed the payment of a mortgage of $600, and the Court found as a matter of fact that there was no $600 mortgage and that what the vendee really assumed was half of a $1,200 mortgage on the premises, and secondly, ordered the vendee to pay interest on

the said $600 from the time he acquired title, clearly implying that the assumption of the mortgage carried with it the assumption of interest.

The assumption of a mortgage by the defendant is a covenant by him, *Huylers Executors* v. *Atwood,* 26 Equity, page 504. And the covenant to assume the payment of a mortgage implies the payment of accrued interest due thereon, *Shanahan* v. *Perry,* 130 Mass., page 460.

In the cited case, the plaintiff instituted an action on contract upon a covenant against encumbrances, in a deed from the defendant to the plaintiff, which deed contained the following clause:

> "This conveyance is made subject to a mortgage of $3,500, from said May E. Schofield, to Seth Clark, etc."

and a covenant that the premises was free from all encumbrances, except as aforesaid. After the execution and recording of the deed, the mortgagee demanded, and received from the plaintiff, $245 for interest which had accrued upon the mortgage before the date of conveyance. Plaintiff contended that the defendant's covenant was against all encumbrances in excess of $3,500. The Court said:

> "The mention in the defendant's deed to the plaintiff, of an existing mortgage of a certain amount, from a certain mortgagor, to a certain mortgagee, recorded in a certain book and page, in the registry, is only by way of description, and identification of that mortgage, which, to the extent of all is a single encumbrance; and that encumbrance is excepted out of the defendant's covenant."

The above case was followed in *Muhlig* v. *Fiske,* 131 Mass., page 110, at page 113:

> "The agreement to assume and pay the mortgage, includes the interest as well as the principal."

In *Johnson* v. *Nichols,* 74 N. W., 759, it was held:

> "One of the items of plaintiff's claim under the covenant of warranty, is $45.22, accrued interest * * * on the $800 mortgage referred to in the deed, in the following language, namely, 'subject to one existing mortgage of $800.'"

The Court held that the words were by way of description and not limitation of the amount due; and quoted with approval, the case of *Shanahan* v. *Perry,* 130 Mass., page 460. The words, "except an encumbrance of $1,500," are descriptive of the particular encumbrance excepted from the covenant of the deed, and not the amount which plaintiff was to pay. *Bankson* v. *Lagerlof,* 75 N. W., 661.

In 39 Cyc., at page 1603, in reference to an assumption by a vendee of an encumbrance, is this statement:

> "If the liability assumed is in the form of notes bearing interest, the purchaser must pay overdue interest, on such notes, as well as the principal."

citing *Sawyer* v. *Weaver,* 131 U. S., Appeals Appendix, 151, 24 L. Ed. 705.

The case under review is within the rules laid down in the above cited cases, because:

First. Covenants relating to real property and personal property are only distinguished insofar as to who may take advantage of them,

whether it is a personal covenant, or one running with the land.

SECOND. That while it is true all of the above cases arise from the payment by the vendee of accrued interest, and his attempt to recover same from his vendor, the principle must be the same in this case, for if, when the vendee sues, after paying the interest, and it is decided that it is part of his assumption, then, certainly, when the vendor, as in this case, sues, alleging the breach of the covenant on the part of the vendee, the principle must still remain the same.

The case under consideration clearly comes under the above rule for it will appear that the amount mentioned as the mortgage was merely by way of description, in that it was mentioned as $950, whereas the actual mortgage was $900.

Justice Parker, in ruling upon the motion addressed to the answer, determined that the assumption of the mortgage, carried with it, by implication of law, the assumption of payment by the appellant of the interest. His ruling (case, pp. 16 and 19), is amply supported by the above precedents.

Therefore, in finding as a matter of law that the assumption of the mortgage carried with it, by implication of law, the assumption of the interest both accrued and accruing thereon, we must next consider whether parole evidence is admissable to vary, change or alter that implication.

The admission of evidence offered under the guise of explaining the terms, etc. of the agreement, would only be a cloak to conceal the offer to vary the written instrument. Appellant's attorney practically admitted at the trial that the purpose of the offer was to vary the implication of law (case, p. 50, l. 30, to p. 51, l. 17).

The law in this state is well settled that such evidence is not admissible. In the case of *Bandholz* v. *Judge,* 62 N. J. L., p. 526, the plaintiff in error had made a contract with the defendant in error for him to erect a house, and in the contract Judge agreed to assume certain contracts for material already made by Bandholz. At the trial, evidence was allowed relating to conversations between the parties at the time of the signing of the agreement, as to the amount of the contracts, or estimates, so to be assumed.

The Court says at page 529:

> "This testimony was inadmissible and its submission to the jury was legal error which must lead to a reversal of the judgment and a *venire de novo.* The written agreement of the parties was unambiguous and its construction and interpretation was entirely for the Court. * * *
>
> If the writing did not truly express the real agreement the plaintiff's remedy was by reformation in Chancery. Nothing is better settled than that, in the absence of fraud or illegality, where a written agreement is complete on its face, oral testimony will not be permitted either to contradict it, *or to supply terms with respect to which the writing is silent,* and that the only criterion of the completeness of a writing as a full expression of the agreement of the parties is the writing itself."

And this Court in the case of *Grueber Engineering Company* v. *Waldron,* 71 N. J. L. at page 598 said:

> "Where the final letter in a correspondence shows that it was intended to embrace the whole agreement and to finally con-

> clude it, it is the only evidence of the contract, and oral testimony of what was said or done during the negotiations, or other letters written pending the negotiations, will not be permitted, either to contradict the final written contract, *or to supply terms with respect to which the writing is silent.* The rule is now so well settled in this state that it is axiomatic."

Another strong case in this state which seems to cover the situation under discussion is that of *Gibbs* v. *Cooper,* 86 N. J. L., p. 226, at p. 229. We maintain that this case, although not expressedly, holds that the legal implication of any word in an agreement, may not be varied by parole evidence, any more than expressed word.

The rule that no oral evidence is admissible to vary, change or alter the implication of law arising out of a contract is very clearly decided in numerous jurisdictions, one of the strongest cases being *Godkin* v. *Monahan,* 83 Federal, page 117. In this case the plaintiff agreed to cut and haul certain logs under a written contract which included, among other things, that the plaintiff was to bank the logs. Plaintiff could not find a place to bank them, and so did not carry out his written contract within the time specified. He then sued for the moneys due him, and on the trial, parole evidence was admitted to prove that prior to the making of the contract it was verbally agreed between the parties that the defendant should procure banking privileges. The Court says at page 119:

> "We declared the principle that the written agreement speaks conclusively the conclusion to which the parties to it have ar-

> rived, and all prior negotiations are merged in it, and *that where the language of an instrument has a settled legal construction, parole evidence is not admissible to* contradict that construction.

And at page 121, in speaking of the banking, says:

> "The requirement that it should be done demands of him the obtaining of a place where it might be accomplished as fully as did the contract require him to supply the axes by which the trees might be felled. It was clearly, therefore erroneous to permit evidence tending to establish a parole agreement by defendant before the signing of the contract that would be in direct contravention of any term of the contract, whether specified therein or implied by law."

This rule of law has been uniformly followed in the Federal jurisdiction, and is the rule in many other jurisdictions. *Boehm* v. *Lies,* 18 N. Y. Suppl. 577.

Warren v. *Wheeler,* 8 Metcalf 97.

It is, of course, conceded that if fraud was alleged or charged, that then the above rule would not apply, but at no part in the trial was fraud charged and the appellant, in his brief admitted there was no fraud in the inception of this agreement.

Therefore all of the cases cited by appellant under this point, in which fraud or the prevention of fraud was the reason that the evidence was admitted, clearly are not applicable.

It is to be noted, also, that the contingent liability to pay interest, *was created and incurred by the act of the appellant,* in that he un-

derstood that if he changed beers, the interest would be charged. (Case, p. 134, ll. 10-15.)

The case of *Disbrow* v. *Crawford,* 3 Harrison, p. 325, mentioned by the appellant, is not in point, because of the illegality of the contract.

Other cases cited by the appellant refer to notes. Of course, the signature on the back of a note does not indicate any one liability, and therefore, to explain the liability does not vary the instrument.

Appellant also cites the case of *Aerickson* v. *Rogers,* 75 Atl., p. 513. In that case, actual fraud was proven, which created an estoppel by conduct against the vendor. The Court in deciding the case, at page 516, referred to this fact and said that the estoppel was the only question to be determined.

We therefore submit that there is no merit in the appellant's second point.

Point Three.

The motion for a non-suit, on the ground that the plaintiff's case disclosed an accord and satisfaction was properly denied.

The case of *Rose, trading, etc.,* v. *American Paper Company,* 83 N. J. L., p. 707, cited by the appellant lays down what we think is illustrative of the entire doctrine of accord and satisfaction, for at page 709 the Court said:

> "The party seeking to settle for a less sum than is claimed to be due must, by his words or conduct when making the offer, clearly inform the other of what is sought and expected. The transaction must be such that the condition is as plain as the tender, so that the acceptance of the tender

> will involve the acceptance of the condition. In other words, the tender and the condition must be incapable of serverance, for otherwise the inference will not be drawn that the acceptance of the tender involves the acceptance of the condition. Whether a tender is accompanied by such acts and declarations as are necessary on its acceptance to constitute an accord and satisfaction must, of course, be determined from the facts of each particular case. If the evidence is conflicting, the question is to be determined by a jury."

The testimony in the plaintiff's case relied upon and set forth in this point by the appellant as showing an accord and satisfaction clearly does not satisfy the rule above cited, for at no place does it appear that the respondent did at any time accept the sum of $900 upon condition that he waive any claim he might have against the appellant for interest and on the contrary the testimony of Harry Castlebaum upon cross examination shows quite the opposite. There is some testimony (case, page 62, ll. 20 to 40) wherein appellant's attorney refers to a letter written by Mr. Castlebaum to the appellant's attorney, respecting the payment, by the appellant's attorney, of the $900 for the mortgage, and this witness, the respondent's attorney, says that this letter was an addition to a certain oral conversation between the parties. (Case, p. 62, ll. 28 to 38.) Then follows:

> Q You wanted me to do that, didn't you, you wanted me to send the $900 to Stamler and to get the mortgage, didn't you? A Certainly.
>
> Q And you were satisfied for me to get the cancelled mortgage, endorsed for can-

cellation, if I would pay the $900? A *I wasn't satisfied.* The $900 was laying in your hands for three months and we were unable to get that money out of your hands without the cancelled mortgage, and we had an execution against us and in order to pay off the execution I said that I would advance the $375 and pay off the mortgage, and the only way we could get rid of the execution was by using the $900 and I instructed you to pay over the nine hundred dollars under those conditions, and I told Mr. David Wolfson that I was going to sue him if he didn't pay the balance, and he made an arrangement with me to go to the Peter Breidt Brewing Company....."
(Case, page 63, ll. 10 to 29.)

This clearly shows that the respondent in requesting the appellant's attorney to apply the moneys in his hands to the payment of the mortgage the appellant assumed to pay notified the appellant at the same time, that he would look to him for the interest which respondent was at that time forced to pay out.

The further contention on the part of the appellant that the testimony in the plaintiff's case showed an accord and satisfaction by the acceptance of a check of $2,350 made by the Rubsam-Horrman Brewing Company, is not borne out by the testimony cited by him, because it nowheres appears therein that the respondent, in accepting the check for $2,350, was informed by the appellant that the acceptance of it had any relation to the payment by the appellant of the chattel mortgage, but to the contrary it shows that the payment of the chattel mortgage was the duty of the appellant (case, page 35, ll. 10 to 30); (case, page 96, ll. 28 to 34).

It further appears, in the cross examination of the respondent, conclusively, that he did not accept in payment of appellant's obligations, a check of $2,350 and another check of $900.

> Q And didn't you give orders to Mr. Voss, or state to him that you would accept in settlement of this chattel mortgage check of the Rubsam-Horrman Brewing Company in the sum of $2,350, one check, and the other check for $900? A *I didn't* accept the $900. (Case, page 53, ll. 18 to 23.)

The Mr. Voss referred to, as will appear by the evidence, was a representative of the Rubsam-Horrman Brewing Company.

> Q Didn't you give orders to Mr. Voss, and tell him that you would accept in payment of Wolfson's claim, a check in the sum of $2,350, check of the Rubsam-Horrman Brewing Company, and another check for nine hundred dollars? A *No.*
>
> Q Didn't you say also, or order me, as the attorney for the Brewing Company, to send the check for $900 to the Peter Breidt Brewing Company in settlement of their claim? A No. (Case, page 53, ll. 23 to 31.)

On cross examination, the respondent further testified:

> Q Didn't you take, in settlement of your claim against Wolfson in this case, a check from the Rubsam-Horrman Brewing Company, in the sum of $900, that you instructed to be paid to the Peter Breidt Brewing Company? A No. (Case, page 56, ll. 1 to 30.)

Q Did you adjust your matters with Wolfson by the payment of a check of the Rubsam-Horrman Brewing Company, or money from that company? A No. (Case, p. 57, ll. 7 to 10.)

Q When you were at my office, about July 7th, didn't you and Mr. Wolfson have a dispute or conversation about the interest on this mortgage, and didn't you tell him that all you owed was $900 on the mortgage? A No. (Case, page 57, ll. 16 to 20.)

Q Didn't you accept the $900 as the principal of this mortgage? A No, sir. (Case, page 58, ll. 1 and 2.)

Q Wasn't that Bill of Sale delivered because you were satisfied with the check of Rubsam-Horrman Brewing Company that was to go to pay the Peter Breidt Brewing Company? A No, sir. (Case, page 59, ll. 12 to 16.

The cross examination of respondent's son, also expressly negatives the contention that the $2,350 check was accepted as an accord and satisfaction of respondent's claim against appellant.

Q When you brought that statement down, you wanted the $900, didn't you? A No, sir, I asked for the check for $2,350.

Q Didn't I say to you, then, and didn't you accept the check for $2,350 and deliver the bill of sale and the lease, upon condition that you were to get the cancelled chattel mortgage from the Peter Breidt Brewing Company? A Oh, no.

Q You did leave the bill of sale and the lease, didn't you? A Yes.

Q And you took the $2,350? A Yes.

Q You knew, then, that by delivering that bill of sale the agreement was consummated, didn't you? A Yes, sir.

Q And you knew when that $900 was to be paid over? A I took the check for $2,350 because of the statement being made, and you having the money, I understood that there would be enough money to pay and that there was no danger in taking the money.

Q *So that the $900, as I understand, was in settlement of the Peter Breidt account as between you and Wolfson?* A No.

Q You so understood it when you saw this statement? A I took the $2,350 because we thought there was enough money there to pay the chattel mortgage, that we would not incur any liability.

Q And you adjusted your matters with Wolfson accordingly, didn't you? A By adjusting matters with Wolfson, I mean.

Q But didn't you? A No, not if you call that adjusting matters. (Case, page 68, l. 23, to page 69, l. 18.)

Q Were you at the office later than that? ("later than that" refers to a date later than July 7th). A I was at your office when I received the check for $2,350, and I was at your office when we made the adjustment so that you would send the check to the Peter Breidt Brewing Company to cancel that judgment. (Case, page 70, l. 38, to page 71, l. 4.)

The testimony in the case also shows that what was meant by an adjustment of accounts with the appellant, was that the respondent refused to settle the transaction unless he was sure

that the money was there to pay all encumbrances (case, page 64, l. 30, to page 65, l. 9). In other words, the respondent did not wish to pass title unless he thought he was sure that the appellant had procured enough money to pay his obligations, and that such an act does not constitute an accord and satisfaction is too obvious for any further argument.

Exhibit C. nor Exhibit D. 2 (case, page 168), do not state what the appellant claims they do.

A further disposition of appellant's claim that there was an accord and satisfaction proven at the end of respondent's case is this; that the obligation to pay the mortgage and interest thereunder was one which the appellant was legally bound to do under his covenant in the agreement of sale. It must therefore follow that to have an accord and satisfaction by reason of which respondent agreed to waive any rights he might have had to have the appellant do what he was legally obligated to do, there must be consideration to the respondent. And nowhere in the respondent's case is there the slightest evidence for doing that, which the appellant claims is an accord and satisfaction on the part of the respondent, that is, the acceptance by him of the check of $2,350. All that respondent had to do to be entitled to that money was to produce a lease and a bill of sale Exhibit P. 1 (case, page 163), and even if respondent had made such an agreement as is contended by the appellant, it would be unenforceable for lack of consideration. In this connection we beg to refer to the case of the *Board of Chosen Freeholders* v. *Veghte,* 7 N. J. L. J., page 145. Veghte was the county collector, and appropriated money for his own use. Upon investigation, Veghte sent a communica-

tion to the Board in which he offered to pay the said sum of money. The Board of Chosen Freeholders, by a resolution, accepted it. Thereupon suit was instituted against Veghte for the interest due upon the amount of money. The Court held that Veghte was liable for the interest, even though the Board had accepted the principal.

Even assuming, however, that the motion to non-suit should have been granted at the close of the plaintiff's case, nevertheless, all the necessary evidence to make the accord and satisfaction a question of fact clearly appears in the cross examination of the appellant's witnesses.

We therefore submit that the appellant's third point is also without merit.

Point Four.

The questions involved under this point, have been hereinbefore argued.

Point Five.

The excerpt of the court's charge quoted in this point, correctly follows the rule of law as laid down in many cases cited in this brief, and followed by Justice Parker in the motion to strike out certain defenses in the answer.

The rule of law enunciated by Justice Parker was correctly decided under the many cases cited under Point Two of this brief and it therefore follows that there was no error in the Court's charge in following the rule.

In this same reason it is argued that the Trial Court erroneously charged the jury that

the facts were practically undisputed. The Court's charge in this respect is entirely correct, because, if the ruling as to parole evidence and implications of law were correct, the facts remain uncontradicted, as the plaintiff below had testified.

After this statement by the Court in his charge, and beginning at page 144, l. 15 of the case, the Court thereupon took up the question of accord and satisfaction, which was the only question left for the jury to pass upon.

With regard to the amount of $354.76 not being proven by the plaintiff as the proper amount due, we beg leave to refer to the argument hereinbefore appearing upon this very same point. All other exceptions were abandoned by appellant.

There is absolutely no merit in any of the points raised by the appellant, and we respectfully submit that the judgment under review should be affirmed in all respects.

Respectfully submitted,

ISIDOR KALISCH,
HARRY CASTLEBAUM,
Attorneys of Respondent.

New Jersey Court of Errors and Appeals

JACOB CASTELBAUM, Plaintiff-Appellee, vs. DAVID WOLFSON, Defendant-Appellant.	On Appeal from Supreme Court.

BRIEF FOR APPELLANT

STATEMENT

This cause is on appeal before this Court from a judgment in the Supreme Court, resulting from a suit tried before a Judge and Jury in the Monmouth Circuit, on an agreement marked Exhibit A (Case 153), wherein the appellee of the first part, agreed with the appellant of the second part, to convey a certain saloon business in the City of Perth Amboy, together with the stock of liquors and cigars.

The sale was to be made subject to the following condition (Case, 153):

> "Subject to a mortgage of $950.00 now held by the Peter Breidt Brewery, which the said party of the Second part agrees to assume in addition to the consideration above named."

The appellee, who is the party of the first part to this agreement was sued by the Peter Breidt Brewery,

and was obliged to pay interest and costs on the Chattel Mortgage referred to in the foregoing provision of the agreement, and thereupon the appellee brought an action in the Supreme Court to recover from the appellant the moneys which he claimed to have paid, and the costs and expense above the principal sum of the chattel mortgage.

Judgment was given in favor of the appellee in the sum of $370.13 (Case 31).

To the original complaint filed in the cause below, the appellant objected in point of law (Case, p. 12) that the defendant was not liable for the interest due on the Chattel Mortgage nor the promissory note mentioned in the first count of the complaint (Case, 6 & 7).

The objection in point of law to the first count of the complaint was heard before Justice Parker at Chambers and his ruling appears in the form of an order:

> "That the assumption of the said mortgage therein referred to, carries with it by application of law the assumption of payment by the defendant, of interest both accrued and accruing thereon."

The objection which is made to this ruling by Justice Parker, is one of the grounds of appeal in this cause.

At the trial of the cause, the trial judge permitted the attorney for the appellee to read an offer in evidence as proof of the judgment which was recovered by the Peter Breidt Brewery, a transcript of the proceedings in the trial had between the Peter Breidt Brewery and the appellee. (Case, p. 37-41 and 155).

The appellant relies upon the admission of this testimony and the offer and admission of the transcript of

the pleadings, as not being material and evidential proof of the judgment, if any, that was recovered by the Peter Breidt Brewery.

At the trial of the cause, the appellant endeavored to prove by cross-examination of the plaintiff, and by the offer of evidence on the part of the defendant, the conversation that took place between the defendant and the plaintiff at the time Exhibit A was made, in regard to the assumption or payment of interest. The trial Court ruled against the defendant on these points (Case, 44 to 53 inclusive).

That the payment of the Chattel Mortgage was to be made upon the production of a statement by the Peter Breidt Brewing Company (Case, p. 35). This statement was furnished (Exhibit D-3, page 170) which showed the sum of nine hundred ($900.00) dollars due on the mortgage and no claim for interest.

The plaintiff testified (Case 55) that he had settled with the defendant for the sum of nine hundred in satisfaction of the chattel mortgage, and Harry Castelbaum who represented the appellee in the making of the agreement referred to in the suit below, admitted a written order made by him, requesting the nine hundred dollar check of the Rubsam Horrmann Brewing Company paid in settlement of the Chattel Mortgage (Case, p. 62); that the nine hundred dollar check of the Rubsam Horrmann Brewing Company was paid and the mortgage was endorsed and delivered up for cancellation (Case, 70-71).

The same witness for the plaintiff further testified that he accepted the Rubsam Horrmann Brewing Company's check of $2,350.00, acting as attorney for the plaintiff below, because he thought the other check of nine hundred dollars of the Rubsam Horrmann Brewing Company would satisfy the chattel mortgage, and

that the Rubsam Horrmann Brewing Company checks were accepted as an adjustment of the accounts between the plaintiff and the defendant (Case, p. 68-69).

This witness further testified (Case, p. 64-65) that he did not rely upon the financial integrity of the appellant (Case, p. 55) and that he adjusted the accounts with the appellant because of the checks of the Rubsam Horrmann Brewing Company (Case, p. 65).

POINT I.

THE COURT ERRED IN ADMITTING IN EVIDENCE AND PERMITTING TO BE READ TO THE JURY A TRANSCRIPT OF PLEADINGS TO PROVE A JUDGMENT.

The appellee below for the purpose of proving the judgment obtained by the Peter Breidt Brewing Company against him and as the measure of damages sought to be recovered from the appellant, offered in evidence a transcript of the pleadings in a case between the said Brewery and the appellee. (Case, p. 38 to 42, also Exhibits "C" and "D" for plaintiff.)

If the appellant was at all liable, proof of the damages sustained by or judgment recovered against the appellee because of the appellant's default or failure, was most important and material and the admission of improper proofs on this point was prejudicial to the appellant.

The reading of the transcript by the appellee's counsel was in the nature of hearsay and the proceeding it related to was not binding on the appellant as he was not a party thereto. It did not show a judgment final entered against the appellee; therefore, the reading of it to the jury was a self serving declaration.

Jones on Evidence Second Edition, Section 620, 637, has this to say on HOW TO PROVE a judgment:

> "Before any document, whether original or a copy can be received in evidence of a judicial proceeding, it must in general, appear that the record or entry of such proceedings has been finally completed," a transcript of minutes extracted from the docket of a court is not admissible to prove a judgment nor is a memorandum furnished by the Clerk of the Court showing the substance of a judgment competent.

The transcript offered and read in evidence in the trial below for the purpose of proving a judgment obtained against the appellee was not admissible as it was incomplete and not final in that it did not show a postea and rule for judgment, and did not show a judgment final entered of record.

The record of a judgment is the best evidence of it and the rule of "best evidence" applies in this case.

Jones on Evidence, Second Edition, Section 200. (See also 17, Cyc. 320.)

POINT II.

THE TRIAL COURT ERRED IN OVERRULING THE OFFER OF EVIDENCE TO PROVE WHAT CONVERSATION WAS HAD BETWEEN THE PARTIES REGARDING THE PAYMENT OF INTEREST ON THE CHATTEL MORTGAGE AT THE TIME THE AGREEMENT WAS EXECUTED.

Reasons on appeal numbered 3, 4 and 6 are intended to be argued under this point.

The appellant, at the trial of this cause in the Court below, prepounded the following question on cross-examination, to the appellee (Case, p. 2).

> "Was nothing said about the interest at the time of the execution of the agreement with Wolfson?"

The purpose of this question was to show that at the time that the agreement (Exhibit A of plaintiff) Case, 153, was signed, the plaintiff and defendant had a conversation in regard to the interest on the mortgage that was to be assumed as part of the consideration of the purchase price, and the appellant made a further offer of evidence along this line for the same purpose, as follows:

> "Mr. Brown: I might say, in order to save time, that I have several questions to put to this witness now in regard to the conversation that was had at the time of the execution of this agreement—I mean the agreement under date of December 27—as to what interest, if any, or what part of the interest, if any, should be assumed or paid by the defendant, and if your Honor overrules the same—
>
> "The Court: Yes, I am inclined to do that and an exception is granted as to the offer.
>
> "Mr. Brown: I will make the offer later of now while the witness is here.
>
> "The Court: You now ask to examine this witness along these lines?
>
> "Mr. Brown: Yes.
>
> "The Court: And the court overrules your request and an exception to that ruling will be noted."

and again a further question propounded to the appellant on direct examination (Case 102):

"Q. And was there anything said at the time —this is to get it on the record—was there anything said at the time this agreement was executed by you, or about the time that you signed it, in regard to the interest on the Peter Breidt Brewing Company's mortgage?

(Objected to.)

The Court: The answer yes or no it not permissible unless the next question is asked as to what was said. So I will sustain the objection to this question and an exception will be noted.

(Objection noted for plaintiff as ground of appeal.)

The Court evidently ~~overlooked~~ ruled these offers of evidence on the ground that it would vary the terms of the written agreement (Case 44-53).

It is contended by the appellant that the Court erred in overruling this offer ~~in~~ of evidence, for the reason that it would not vary the terms of the written instrument, but it would explain the manner in which the consideration was to be paid, by showing that the arrearages of interest was not assumed by the appellant as part of the consideration, and Exhibit A (Case 153) being silent as to the assumption of interest and the parties having a conversation relating there to it was the conversations of the assumption of interest that was competent in legal evidence.

It was competent:

a. On the ground that it would show how the consideration was to be paid and whether or not it included the assumption of interest, the agreement being silent on this point;

b. It was competent for the parties not to contradict or vary the terms of the written agreement, but simply to explain how it was to be carried out;

c. It was competent on the further ground to show the complete agreement between the parties;

d. That if any interest was due by implication of law or otherwise, according to the terms of the agreement, it was waived by the appellee.

Jones on Evidence, Second Edition, Section 668 (475), is an authority to the effect that if a Bill of Sale, Release or other written instrument fails to state the ENTIRE CONSIDERATION, the same may be shown by parole.

As a general rule a recital of a written instrument as to the consideration is not conclusive and it is always competent to inquire into the consideration or show by parole or extrinsic evidence what the real consideration was. The consideration may be shown to be less or more than appears in the agreement (17 Cyc. 648 to 653).

In the case at bar, it was properly shown, although the agreement referred to the assumption of a mortgage and was silent in regard to the assumption of interest accrued, that it was competent to show by parole evidence that the parties had a conversation about the interest that might be due on the mortgage.

Indeed, if the rule was not so there would be much deceit and fraud practiced.

The trial court was evidently of the impression that parole evidence could not be admitted in the case at bar because fraud was not pleaded. There was no fraud at the time of making the agreement. The fraud and deceit, if any, was committed by the plaintiff by

bringing his action against the defendant; consequently, although the pleadings did not charge, in so many words, the plaintiff with being guilty of fraud or deceit, nevertheless, they did raise the issue "whether the appellant assumed any interest that might be due on the mortgage."

This was inquiring into the consideration of the agreement for the assumption of the interest was part of the consideration, if it was to be paid; consequently, it was competent to show that all that was assumed was the mortgage and not the interest that accrued.

There is no question ~~but~~ that the evidence would be admissible in a Court of Equity. (Obrien vs. Paterson Brewery Company, 61 Atl. 437), and there is no question that if the defense set up in the pleadings was that of fraud and deceit practiced by the plaintiff, that the parole evidence would be admissible. (Batura vs. McBride, 48 Vroome, 779), but these exceptions to the general rule of parole evidence, effecting a written agreement, does not exclude the admission of the parole evidence, where it is intended to explain how the agreement is to be carried into effect, or what the real consideration of the agreement was, or that the exclusion of such evidence would effect a fraud upon the defendant's rights.

My opponent will, no doubt, rely upon the case of Nunberg vs. Young, 44 N. J. Law, page 331, which is a case that marks out a large number of exceptions to the rule of parole evidence effecting written agreements; it does not, however, cover the case at bar.

In the case of Willis vs. Fernald, 33 Law 206, was held that parole evidence given not to contradict or vary the terms of a written agreement, but simply to explain how it is to be carried out, is lawful. That was a case that was brought on an attachment on

common counts, including an account for interest, and including also an account for three thousand dollars due on a promissory note, which promissory note contained the provision "provided that all debts and liabilities against the steam-propeller, Richard Doane, until May 1st, shall be paid and cancelled." The pleas were non-assumpsit; payment and notice of a set-off.

It appeared that certain debts and liabilities were incurred by an owner previous to the one who was made party to the suit. The question then arose as to whether the provision "provided that all debts and liabilities until May 1st shall be paid and cancelled" included debts and liabilities incurred by the original owners of the boat.

The Court held that parole evidence was admissible to show how the money due on the note was to be applied, and whether or not it included the original debts and liabilities.

In the case of Disbrow vs. Crawford (3 Harrison, page 325), which was an action upon a promissory note. It was there determined that it was competent for the defendant to prove by parole testimony, that at the time of giving the note, it was agreed that the drawer should pay more than legal interest.

It is true that this case may come under the exception touching the illegality of a contract, but this case also indicates that where it would be a fraud to permit the collection of illegal interest, even though it was not set out in the pleadings. If the promissory note was silent upon the amount of the interest, it would appear from this case, it was competent to show that it was more or less than the legal rate or that there wasn't any interest at all to be paid.

It is competent to show whether or not the real consideration for the agreement was paid even though the

proof is by parole evidence and does not show the same consideration as mentioned in the contract. (Oliver vs. Phelps, 21 N. J. Law, page 597.)

If the actual agreement between the parties regarding the interest was that the defendant below was not to pay the interest, and the Court admitted parole evidence, and that fact was believed by the jury, the plaintiff could not recover on the principal of estoppel (Becker vs. Becker, 250 Illinois, 117, Afl. Annotated cases 1912, page 279) such evidence would tend to prove the plaintiff had waived the interest or that he had discharged or released the defendant from the payment of interest. (Becker vs. Becker Supra.)

Such parole evidence would not vary the terms of the written contract; in fact the contract would remain entirely unchanged except as to that element regarding the consideration, that is to say, what was the agreement between the parties concerning the payment of interest on the mortgage?

Parole or other extrinsic evidence was permitted to show that a party to a contract has waived the benefit of or become estopped to assert his rights under some or all of the provisions in his favor in the agreement. (17 Cyc. page 692).

Admitting for the sake of the argument of this point, that the assumption of the mortgage did carry with it the assumption of interest, even though the agreement was silent about the interest, the payment of interest in that case would be payable by implication, and parole evidence would therefore not be effecting a written instrument, but the implication that would arise from the meaning of the word assume.

It is lawful to show by parole evidence the true nature of a contract from that which the law would imply. (Watkins vs. Kilburn, 26 Law, page 84.)

If there is any difficulty as to the application under the surrounding circumstances of the words written in the contract, the actual contract between the parties can be shown by parole evidence. (Wright vs. N. Y. & Hudson Railroad Co., 37 Law, page 1.)

It is not necessary to plead fraud in a case in order to produce parole evidence effecting a written instrument; it is sufficient to introduce evidence of what the true contract is between the parties, in order that a fraud may not be committed. Such a course prevents circuity of action.

Chief Justice Beasley, in the case of Brewster vs. Brewster, 38 Law, page 121, which was an action brought upon a promissory note, and there was no fraud pleaded, but evidence was introduced to show that the plaintiff's contention would be fraudulent if he prevailed in his contention, the court said in such cases "it will be perceived that the contract is permitted, in substance, to be amended so as to conform to the agreement of the parties, expressed in honest terms, etc. The practical effect is to let the agreement stand, and to eliminate its fraudulent element. That is precisely the offer in the present case. The contention sought to be introduced was, that the terms of the agreement, so far as related to the note in question, were fraudulently introduced, the representation being that the note had been taken up. By the force of such proof, the operation of the agreement would have been circumscribed, so that the instrument would have been rendered inefficacious with respect to its ingredient. It is clear that the justice of the case is thus reached. The agreement in this case comes in collaterally, but the opportunity to defeat it, in whole or in part, must, in such a juncture, be the same as it would be in a suit founded on the covenant. Suppose this note had been paid by the defendant, and he had then sued the plaintiff for a breach of this contract, in not taking

up the paper, can there be a doubt that the present imputed fraud would have been then admissible as a defence? A recission of a contract, on the ground of fraud, is indispensable only when the design is to vacate its entire obligation; and it does not occur to me that there is any instance in which it may not be defeated on the same ground, in any part of it, when by so doing full justice to both parties can be done. This doctrine is the natural result of the opposition of the law to the circuity of action. If the present plaintiff could be defeated in his effort to redress the fraud practiced upon him, by showing the infirmity in the instrument now interposed, he could, after such repulse, accomplish precisely the same end by an action founded in the deceit. Such indirection in the remedy would be always inconvenient, and, many times, ineffectual."

The case of Batura against McBride, 77 N. J. Law, page 781, which was a case decided in this court, the substantial issue in controversy related to the falsity of defendant's statements communicated to the plaintiffs, upon the strength of which the plaintiffs claimed they were induced to purchase property of the defendant, at the price of $6500.00. The averments of the plaintiff's declaration were to the effect that the defendant, intending to deceive and defraud the plaintiffs, had falsely and fraudulently represented to them that the property produced a rental of $142.00 a month, when in fact it produced but $132.00 per month. The agreement for the sale of property in that case contained this provision "the premises are conveyed subject to a Lease on the corner store, held by Geo. Weidenmayer of the City of Newark." The agreement, therefore, was silent as to the amount of rent.

This court in passing upon the refusal of the trial court to admit evidence to show the conversation be-

tween the parties at the time of the agreement, has this to say:

> "It will be conceded that the propounded questions were clearly material and admissible in support of the plaintiff's declaration, unless the answers called for might have tended either to contradict or vary the terms of the written contract for the purchase of the property entered into between the parties.
>
> Upon turning to this contract, which was introduced in evidence and is printed in full in the record before us, it is apparent that it is entirely silent upon the subject sought to be inquired into, i. e., the amount of the rental payable under the lease in question."

A case in which parole evidence was admitted whether accrued interest was to be paid upon a mortgage assumed, is the case of Aerickson vs. Rogers, 75 Atl, page 513. This was a case in which the mortgagor gave a note to the mortgagee on "back" interest which was permitted to run for several years, the mortgagor then contracted to convey the premises subject to the mortgage, the purchaser knowing nothing of the "back" interest. When the conveyance was about to be made to the purchaser, the mortgagee asked him what he was going to do about the back interest and the purchaser then asked the mortgagor concerning the interest, and the mortgagor said that he would fix it up; thereupon the purchaser accepted the conveyance. Thereafter the purchaser asked the mortgagor if the interest was fixed up, and he answered "Yes."

The purchaser of the property in turn signed an agreement for sale and referred to the mortgage being assumed, without anything being said as to the interest.

The court held in that case parole evidence was admissible to show whether or not the interest had been assumed, since "it clearly explained what the agreement left in obscurity.

POINT III.

THE COURT ERRED IN REFUSING TO NON-SUIT ON THE MOTION OF THE DEFENDANT.

The Plaintiff testified (Case 35) that the arrangement in regard to the settlement of the chattel mortgage was for the attorney of the plaintiff to bring a statement of the Peter Breidt Brewing Company, and whatever that shall be, they shall pay, meaning the defendant shall pay; that there was a nine hundred dollar check of the Rubsam Horrmann Brewing Co. left with the attorney of the Rubsam Horrmann Brewing Co. for the payment of the chattel mortgage (Case 35 and 36); that there were two checks of the Rubsam Horrman Brewing Co. left to be applied for the account of the defendant, one in the sum of $2350.00 and one aforesaid in the sum of $900.00; that the $900.00 check was to satisfy the Peter Breidt Brewing Company's chattel mortgage.

The plaintiff testified as follows: (Case page 35 and 36)

"Q. At the time that you went up to the office of Mr. Brown to close this transaction what arrangement, if any, did you make with reference to paying off this chattel mortgage?

A. The arrangement was I did refuse to take—

Q. I show you a paper dated July 7, 1916, purporting to be a receipt from Thomas Brown that he is holding the sum of $2350 for you and ask you

if that refreshes your memory as to what happened at the time?

A. At the time they was supposed to pay to the Peter Breidt Brewing Company the mortgage and pay me mine.

Q. On the 7th of July did you get your money or not?

A. No.

Q. Why didn't you get your money on the 7th of July?

A. Because I wanted to pay first to the Peter Breidt Brewing Company.

Q. Do I understand that you wanted to see that the chattel mortgage was paid first?

A. Yes, sir.

Q. What arrangement was made, if any, with reference to the payment of that chattel mortgage?

A. The arrangement was that my attorney shall bring the bill from the Peter Breidt Brewing Company, and whatever that will be they shall pay.

Q. Was there any moneys left for the payment of that chattel mortgage?

A. Yes, sir; $900.

Q. In whose hands?

A. In Thomas Brown's. There was $900 left in Thomas Brown's hands.

The same witness further testified (Case 59) that he left everything to his son, who was his attorney, to settle for him.

Harry Castelbaum, a witness for the plaintiff, (Case 68-71) testified that he brought the statement from the Brewing Company, and relying upon the statement furnished by the Brewing Company, he delivered the Bill of Sale, which he thought consummated the deal. He took the Rubsam Horrmann Brewing Co. check for $2350 and considered the entire deal consummated, as the Rubsam Horrmann Brewing Company

check of $2350 was paid and a further check of $900 of the Rubsam Horrmann Brewing Co. was intended to satisfy the chattel mortgage. He took the $2350 because he thought there was enough money there to pay the chattel mortgage, and HE ADJUSTED HIS ACCOUNTS WITH WOLFSON ACCORDINGLY. That he made an affidavit of such adjustment in a suit in the Court of Chancery, wherein the appellee was a party (Case 59). This witness testified as follows:

"Q. And so it was the Rubsam Horrmann money that was to adjust this account, meaning the Chattel Mortgage account?

A. Yes, sir.

Q. When you went there that day with the $2350 and left the lease and the bill of sale from your father, as his attorney you thought the whole thing was adjusted?

A. And that you would pay the chattel mortgage.

Q. With the money that you were satisfied was sufficient in amount?

A. At that time."

The same witness (Case 74-75) testified that there was a dispute as to whether or not interest might be demanded by the Peter Breidt Brewing Co.; that the plaintiff did not care very much about the financial integrity of David Wolfson, and the plaintiff refused to carry out the transaction unless he was sure that the money was there to pay out all the encumbrances.

Exhibit C for the plaintiff, beginning page 157, shows that the check of the Rubsam Horrmann Brewing Co. of $900 was accepted in settlement of the chattel mortgage claimed.

Exhibit G, page 69, which is also marked Exhibit D-2, page 168, shows further that the sum of $900 was

an acceptable accord and satisfaction to the plaintiff below in payment of the Breidt chattel mortgage.

(Case 70-71) this witness further testified:

"Q. Were you at the office later than that?

A. I was at your office when I received the check for $2350 and I was at your office when we made the adjustment so that you would send the check to the Peter Breidt Brewing Company to cancel that judgment.

Q. With the understanding that the chattel mortgage should be surrendered, duly endorsed for cancellation?

A. You already had the chattel mortgage in your possession."

The posture of the proof of the plaintiff's case being as above recited, the defendant moved for a non-suit on the grounds:

a. that according to the testimony there appeared to have been an accord and satisfaction between the plaintiff and the defendant (Case 71-73);

b. that the giving up of the chattel mortgage duly endorsed by the Peter Breidt Brewing Company to the defendant, at the order of the plaintiff, was a parole accord and satisfaction and the chattel mortgage being an instrument under seal, the delivery of it to the plaintiff, acted as a release;

c. that the delivery of the chattel mortgage, a payment of $900 and the delivery of the Lease, and of the Bill of Sale, was an entire and consummated act and was the accord made. The satisfaction was the sale that was extended to the plaintiff;

d. that it appeared by the testimony the plaintiff relied upon the two checks of the Rubsam Horrmann Brewing Company and that they received the checks

or had them credited to their account as an accord and satisfaction.

There having been some dispute about the amount due the Peter Breidt Brewing Company, and the dispute being an honest one, and the parties having settled upon the amount of $900.00 as being the amount of money to be paid in settlement of the Peter Breidt Brewing Company mortgage such payment acted as an accord and satisfaction.

Becker vs. Smith & Co. (86 N. J. Law, 631)
Rose vs. American Paper Co. (83 N. J. Law, 707)

There was an accord and satisfaction in this case between the plaintiff and the defendant, because the plaintiff relied upon and accepted the Rubsam Horrmann Brewing Company checks in settlement of the accounts of the defendant below, and particularly the check in the sum of $900 in settlement of the chattel mortgage dispute. The plaintiff having relied upon the checks or credit of a third party, the consideration of the accord and satisfaction was the checks of the Rubsam Horrmann Brewing Company.

Jackson vs. Pennsylvania R. R. Co. 66 N. J. Law, 322.

The plaintiff was further stopped to bring his action against the defendant because the breach that he complains of, that is to say, the failure to pay the Peter Breidt Brewing Company their interest, was induced and caused by the acts of the plaintiff in ordering and agreeing to adjust the account of the Peter Breidt Brewing Company for the $900.00 check of the Rubsam Horrmann Brewing Company.

This was, therefore, a parole in accord and satisfaction, where the plaintiff induced the breach, and he was stopped from grounding his action caused by his own breach.

The Peter Breidt Brewing Company having surrendered and given up their chattel mortgage for the payment of $900.00, the surrender and the chattel mortgage on the order of the plaintiff acted as a release. (Reynolds vs. Silver, 17 N. J. Law, 279).

If a creditor comes to a settlement with his debtor and accepts the principal, leaving the whole or part of the interest unpaid, he cannot recover it because by his own accord and accepted satisfaction it has been relinquished. (Corpus Juris I, page 546).

(American & English Annotated Cases 1913-E beginning 597)

(A. & E. Annotated Cases 1913-E, page 586)

The acceptance of the principal sum due with the understanding that it is to be a full discharge of all claims constituted an accord and satisfaction and bars an action for implied interest.

(Bennett vs. The Coal Co., 40 R. L. A. New Series, page 588)

From the foregoing authorities it is evident that the Court erred in refusing the motion of a non-suit made by the defendant at the close of the plaintiff's case below.

POINT IV.

THE TRIAL COURT ERRED IN REFUSING THE FIRST, SECOND, THIRD, AND FIFTH, REQUESTS TO CHARGE MADE BY THE DEFENDANT.

The first request to charge was made on the authorities relied upon under Point II in this brief.

The second, third and fifth requests to charge was made on the authorities relied under Point III. in this brief.

POINT V.

THE COURT ERRED IN CHARGING THE JURY WITH THE ASSUMPTION OF THE ASSIGNMENT OF SAID MORTGAGE, WHICH CARRIES WITH IT BY IMPLICATION OF LAW THE ASSUMPTION OF PAYMENT, BY THE DEFENDANT, THE INTEREST, BOTH ACCRUED AND ACCRUING.

Under this point may be considered the 8th and 9th reasons entitled "further reasons on appeal."

The Trial Court evidently charged the jury that the assumption of the mortgage carried with it by implication of law, the interest both accrued and accruing, because of the ruling of Justice Parker on the objections in point of law, in the original answer in this cause to the original complaint filed in this cause, which can be found on pages (Case 6 to 8) wherein it refers to Exhibit A (Case 153) as being the agreement upon which the defendant assumed not only the principal of the mortgage, but also the interest.

Objections in point of law were taken to this construction of Exhibit A (153) in the original answer (See case 12).

A motion came on to be heard before Justice Parker at Chambers, and he decided that the assumption of the mortgage therein referred to, carries with it by implication of law, the assumption of payment of the interest by the defendant, both accrued and accruing thereon.

There is not a case exactly in point, in this State where the clause is similar to the one in Exhibit A (Case 153) which read as follows:

> "Subject to a mortgage of $950.00 now held by the Peter Breidt Brewing Company, which the said party of the second part agrees to assume in addition to the consideration above named."

The case of Thompson against Bird, 57 Equity, page 175, is a case where reference was made to a mortgage of $1200 on a certain tract of land, and two parcels of said land were sold by the mortgagor under conveyance wherein each grantee assumed the payment of a certain mortgage for $600.00 on the parcel conveyed, although there was no mortgage for $600 on either of said parcels. In that case there was $115.05 interest due on the $1200 mortgage.

The court held that although there was no mortgage of $600 on either of said properties, the assumption of the grantees is equivalent to an assumption to pay $600 of the mortgage on the whole tract.

And it appears further that the interest or other charges were directed to be charged to the lands remaining in the mortgagor.

In the case at bar, the Peter Breidt Brewing Company mortgage was not for the sum of ~~$[illegible]~~ 950

The case of Thompson vs. Bird is a case in equity, but it shows the construction that was placed by the Courts of this State upon the terms of assuming a mortgage where the amount is incorrectly specified and nothing said as to interest.

In one or two States of the Union, including Massachusetts, it would appear that the rule in those States

is that the assumption of a mortgage carries with it both accrued and accruing interest.

In the case under discussion, however, the parties never intended that the accrued interest should be assumed by the defendant below.

Both the plaintiff and the defendant fully understood and agreed that there was but $900 due on the mortgage, and that is another reason why the testimony to show what conversation took place at the time of the execution of Exhibit A between the parties, is very material, which proof the defendant was precluded from the consideration of the jury as referred to under Point III.

The provision above mentioned, therefore, in Exhibit A, relating to the assumption of the mortgage, was not a matter of general reference to the mortgage, but it was the agreement of the parties according to all the evidence in the case, that the amount to be assumed was the principal of the mortgage, although it was referred to as $950.00, the actual amount was $900.00.

The plaintiff and his attorney, Harry Castelbaum, fully understood that $900 was the amount to be assumed and paid by the defendant and no more. (See Exhibit D-2, 168) and the plaintiff, through his attorney authorized that the $900 be paid to the Peter Breidt Brewing Co., and that the mortgage be delivered up for cancellation (Exhibit D-1, Case page 169).

The plaintiff stated that he accepted his check of the amount of moneys that were to be paid to him, believing that $900.00 was the amount assumed by the defendant, both according to his agreement and the statement that he was furnished by the Peter Breidt Brewing Company.

(See Case 36) copy of the statement of the Peter Breidt Brewing Company, showing the amount due on the chattel mortgage (Exhibit D-3, 107).

It was an error, therefore, for Justice Parker to rule at Chambers, that the provision contained in Exhibit A, p. 153, carried with it not only the principal of the mortgage, but also accrued and accruing interest.

The appellant here contends that the proper ruling should have been to sustain the objections in point of law.

The trial court, no doubt, followed the ruling of Justice Parker, and because of Justice Parker's ruling, did not permit the jury to pass upon the point whether or not the accrued interest was assumed by the defendant.

The charge and the ruling were prejudicial to the defendant's case, for the reason that it was plainly the intention of the parties, to the agreement, according to their conduct and their conversations that took place, that $900 was to be assumed by the defendant and no more, and that all of the facts, including the conversations, should have been left to the jury, and for them to decide as to whether or not the interest was assumed.

The trial court likewise erred when it charged the jury as follows:

> "Gentlemen, the facts which the plaintiff in this case relies upon to make his case are practically undisputed."

for such a charge to the jury amounted to a direction of a verdict.

The Court again erred when it charged the jury (Case 145) that upon failure to pay the interest on

the mortgage, he assumed such additional expenses as were incident to his failure, that is, such as the expense of the collection of the amount due upon the chattel mortgage, which interest and expense of collection, which the Court said was admittedly $354.76.

There is no admission that the plaintiff was entitled to recover that amount, if he was entitled to recover anything as there was no proof of the judgment recovered by the Peter Breidt Brewing Company against the plaintiff, as to the amount of damages that he sustained.

For the foregoing reasons, it is respectfully submitted that the judgment entered against the defendant in the Supreme Court, be set aside.

THOMAS BROWN,

of Counsel with Defendant.