

Summons.

ESSEX COUNTY: 10

THE STATE OF NEW
JERSEY TO PEASE
PIANO COMPANY, a cor-
poration.

(SEAL)

You are summoned to
answer the annexed com-
plaint of Simpson B.
Lyons, in an action at law
in the Essex County Cir-
cuit Court.

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AND take notice that unless you file your an-
swer to said complaint with the Clerk of said Es-
sex County Circuit Court at Newark within
twenty days after service upon you of this writ,
and the annexed complaint, and an affidavit of
merits within ten days after service upon you of
this writ, if required by law, the plaintiff may pro-
ceed in this suit, and judgment may be entered
against you.

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WITNESS, William S. Gummere, Judge of said
Circuit Court at Newark, this twenty-ninth day of
January, Nineteen hundred and eighteen.

JOHN H. SCOTT,
Clerk.

SCOTT GERMAN,
Attorney.

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COMPLAINT.

ESSEX COUNTY CIRCUIT COURT.

10	<p style="text-align: center;">SIMPSON B. LYONS, Plaintiff, vs. PEASE PIANO COMPANY, a corporation, Defendant.</p>	}	<p>Action at Law. COMPLAINT. (Filed Feb'y 3, 1918.)</p>
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The plaintiff, Simpson B. Lyons, residing at 238 Amherst Street, in the City of East Orange, Essex County, New Jersey, says that

20 1. On or about March 6, 1917, defendant employed plaintiff as manager of defendant's store at Newark, Essex County, New Jersey, for the period of one year from January 1, 1917, at a salary of \$2,600 per year, payable \$50.00 weekly, and plaintiff accepted said employment, and continued therein from that time until the dismissal herein stated.

2. Defendant, on or about May 19, 1917, before the expiration of said year, and while plaintiff was so continuing said service, wrongfully dismissed him from the same.

30 3. Plaintiff was at all times ready and willing to continue in said service until the expiration of said year, and at all times until said dismissal faithfully performed his duties as said manager, and performed all the terms and conditions of the contract of employment on his part.

4. Because of said wrongful dismissal, plaintiff has been deprived of his salary, which he would have received from being retained in said service, and he remained for a long time unemployed.

ANSWER.

5. No part of plaintiff's salary to which he was entitled from May 19, 1917, to January 1st, 1918, under the terms of said employment, has been paid.

Plaintiff demands as damages the sum of \$2,000, with interest on the unpaid installments of salary from the time when each fell due.

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SCOTT GERMAN,
Attorney of Plaintiff.

ESSEX COUNTY CIRCUIT COURT.

<p>SIMPSON B. LYONS, Plaintiff,</p> <p>vs.</p> <p>PEASE PIANO COMPANY, a cor- poration, Defendant.</p>	}	<p>Action at Law 20</p> <p>Answer.</p> <p>(Filed Feb'y 18-1918)</p>
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The defendant says:

FIRST DEFENSE:

1. He denies the truth of the matters alleged in the complaint.

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SECOND DEFENSE:

2. The defendant says that on February 28, 1917, it offered to engage the plaintiff, who had been for several years prior thereto manager of its store at Newark, New Jersey, as manager for the sum of \$50.00 per week, and for the further compensation of one per cent. of the net sales of said store over and above \$60,000.00. On March 1, 1917, plaintiff accepted the defendant's proposi-

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tion for employment, and entered upon such employment under the said contract. A copy of the letter by defendant to plaintiff, dated February 28, 1917, is annexed hereto and marked "A," and a copy of the letter from the plaintiff to the defendant, dated March 1, 1917, is hereto annexed and marked "B."

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3. The defendant was not satisfied with the services which were being rendered by the plaintiff as manager, and on or about May 11, 1917, notified the plaintiff that his services would not be required after May 19, 1917. The defendant paid the plaintiff in full for services rendered to May 19, 1917, and no services have been since rendered by the plaintiff to the defendant.

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CARRICK & WORTENDYKE,
Defendant's Attorneys.

A.

February 28, 1917.

Pease Piano Company,
57 Halsey St.,
Newark, N. J.

Gentlemen:

Attention of Mr. S. B. Lyons.

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(Personal)

Confirming our conversation of the 27th, we will pay you, from date, the sum of fifty (\$50.00) dollars per week, and authorize you to put on two additional salesmen, together with Mr. Ford who is now in your employ, and require you to do in net sales, sixty thousand (\$60,000) dollars, this to include talking machines and pianos.

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We also agree to appropriate the sum of twelve hundred (\$1200) dollars to be used for retail advertising purposes.

We also authorize you to pay Mr. Ford the sum of thirty-five (\$35.00) dollars per week as his drawing account.

We further agree to pay you one per cent. (1%) 10
on net sales of your store over and above sixty thousand (\$60,000) dollars.

We think that this matter is now fully covered and would recommend that you make a special effort to increase the business of the Newark store. We also recommend that you put on the two new men at as early a date as possible, advising us before hand, of course, as to their qualifications.

Very truly yours,

PEASE PIANO COMPANY, 20
Vice-President.

AWF:LC

B.

PEASE PIANO COMPANY

Newark, March 1, 1917.

(Received Mar. 5, 1917.)

(Pease Piano Co.)

New York Warerooms, 30
128 West 42nd Street,

Newark Warerooms,
57 Halsey St., Newark, N. J.

Pease Piano Co.,
Bronx, N. Y.

Attention of Mr. Fitzgerald.

Gentlemen:

Your letter of Feb. 28th, just received and after considering contents of same very carefully, desire

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to say, I will accept your proposition on salary for the writer, i. e. \$50 per week and 1% commission on net sales over \$60,000 made through our Newark store, this to include any and all sales, with the understanding my salary starts with the new year January 1, 1917, all our reports run from
10 January 1st to December 31st. I wrote a letter to Pease Piano Co. the first of the year regards this matter and shall expect same as stated above.

In reference to salesmen: I will do my best to get two or three, but I do not want to be held responsible if they do not make good as I do not see how I can advise you of their qualifications before we try them, if you expect this, I would suggest that you get them.

In reference to advertising: I note your appropriation of \$1200 for advertising for 1917, which is much less than years back however, we will act accordingly on same.
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In reference to Mr. E. J. Ford, I have taken up the matter of salary with him of \$35 a week and he will advise me what he decides to do.

I assure you I will do my best to increase the Newark business, and I know we can if the Company will give us the same attention and furnish us with the goods as they do New York and Brooklyn stores, which we have never received before,
30 then you must remember we are on a back street and not a main thoroughfare like the others and should be given some more thought in regards to advertising and help.

Again, if I am to manage Newark store I would ask your consideration in regards to some of my force.

Mr. Kohlasch, tuner and player man, you told me yesterday to increase from \$20 to \$22 which I
40 will do Saturday.

ANSWER.

Chas. M. Lyons, whom I shall use as salesman, tuner and repairer inside and outside, who is getting \$22, I would ask for \$26.

Burton C. Lyons, who has charge of books and collections is getting \$24, I would ask for \$30.

Lillian Crawford, stenographer, who is getting \$9, is asking for \$10 and I think she should have same. 10

As for the boy who has been in the music room and cleaning store, he is positively N. G. and he gets through Saturday. I am getting a man about fifty years old to take this position as a general utility man for about \$15.

By doing the above all will be made to feel better and will help push the business much harder and I feel confident the business will be greatly increased. 20

Trusting you will understand all, I remain,

Very truly yours,

PEASE PIANO Co.

S. B. Lyons.

SBL/B

P. S.—Will see you Tuesday at 42nd St. about 11:00 A. M.

L.

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 ESSEX COUNTY CIRCUIT COURT.

10	SIMPSON B. LYONS, Plaintiff, vs. PEASE PIANO COMPANY, a cor- poration, Defendant.	}	Action at Law. Reply. (Filed March 6, 1918.
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1. Plaintiff, replying to the second paragraph of the second defense of defendant's answer, says there is nothing contained therein that would preclude plaintiff from recovery for the cause of action contained in his complaint.

20 2. Plaintiff, replying to the third paragraph of the second defense of defendant's answer, says there is nothing contained therein that would preclude plaintiff from recovery for the cause of action contained in his complaint, and denies that the defendant had any justifiable cause to dismiss plaintiff as such manager, and the defendant is bound to him for the sum mentioned in his complaint.

30 SCOTT GERMAN,
 Attorney of Plaintiff.

NOTICE OF MOTION.

ESSEX COUNTY CIRCUIT COURT.

<p style="text-align: center;">SIMPSON B. LYONS, Plaintiff, vs. PEASE PIANO COMPANY, a cor- poration, Defendant.</p>	}	<p>Action at Law. Notice of Mo- tion. (Filed April 17-1918.)</p>	<p>10</p>
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To Scott German, Esquire, Plaintiff's Attorney:

Please take notice that on Friday, the 12th day of April instant, at two o'clock in the afternoon, at the Court House in the City of Newark, we shall apply to such judge of the Essex Circuit Court as shall then sit for the hearing of motions, to determine the question of law raised by the plaintiff's reply to the second defense of the defendant's answer in the above entitled action, viz: whether the contract of hiring set out in said second defense was by the week or for an entire year, in accordance with law and the rules of said Court, and upon the decision thereof, for such judgment or order thereon as may be just.

Dated, April 8, 1918.

CARRICK & WORTENDYKE,
Attorneys of Defendant.

ESSEX COUNTY CIRCUIT COURT.
No. 545—April Term, 1918.

SIMPSON B. LYONS,
Plaintiff,

vs.

PEASE PIANO COMPANY,
Defendant.

Action at Law.

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Transcript of shorthand notes of testimony, etc.,
taken in the above stated matter before Hon.
Willard W. Cutler, Circuit Court Judge, and a
Jury, at the Court House, Newark, New Jersey,
on Wednesday, June 19, 1918.

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APPEARANCES:

SCOTT GERMAN, Esq., for the Plaintiff.

CHARLES L. CARRICK, Esq., for the Defendant.

Jury called and sworn.

Counsel opened.

GEORGE A. SCOFIELD, sworn for the plain-
tiff.

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Direct Examination by Mr. German:

Q. Mr. Scofield, what is your business? A. I am
the manager of the Behring Piano Ware Rooms,
New York City.

Q. Do you know Mr. Lyons, the plaintiff? A.
Yes.

Q. How long have you known him? A. Fifteen
or twenty years.

Q. Were you with the Pease Piano Company in
1910? A. Yes.

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Q. What were you? A. Secretary and Treasurer of the company.

Q. Who was president of the company? A. Mr. John D. Pease.

10 Q. Do you know anything about the engagement of Mr. Lyons for the Newark store? A. Yes. Mr. Lyons was in Trenton prior to that time with the Pease Piano Company and he was brought to Newark under a definite agreement.

Mr. Carrick: I object to this because we have here a specific contract in writing, the terms of which are stated definitely, and evidence of any former agreement which they may have had years before is not relevant to the issue which is here presented.

20 Mr. German: If your Honor please, it might be very relevant as showing how he started and—

The Court: I am going to allow the question. There is an objection made now that it is not in response to any question. You may strike it out, and I will allow you to ask the question what the situation was, but not to modify or change the terms of the contract.

Mr. German: Oh, no.

30 Q. Do you know what the arrangement with Mr. Lyons and the Pease Piano Company was for the year 1910, as manager of the Newark store? A. He was brought from Trenton to take the management of the Newark store here under a year's agreement of twenty-five dollars a week and a bonus at the end of the year on a percentage basis, which terms he fulfilled and got the salary and earned a substantial bonus.

40 Q. Did he continue thereafter in the employ of the company? A. Continuously up to the time I

SIMPSON B. LYONS—Direct Examination.

left the company and I guess up until the time this action—

The Court: Only what you know yourself.

The Witness: I know he was in the employ of the company until May, 1917, of last year.

Q. So far as you know, did Mr. Lyons faithfully perform his duties as manager? 10

Mr. Carrick: I object to that.

A. He was well thought of as a manager.

The Court: That is a conclusion.

The Witness: I am not definitely—

The Court: Wait. You may put the question in another form.

Q. What did Mr. Lyons do as manager of the store? A. He had full charge and conducted it at a profit as long as I was connected with the company. 20

Mr. German: That is all.

Mr. Carrick: No questions.

SIMPSON B. LYONS, the plaintiff, sworn.

Direct Examination by Mr. German:

Q. Mr. Lyons, are you the plaintiff? A. Yes, sir. 30

Q. How long were you in the employ of the Pease Piano Company previous to May, 1917? A. From the time I first went with them?

Q. Yes. A. I went with them in 1882 or 1883, somewhere around there. I have been with them almost steady; not all the time.

Q. You were employed with them as you say continuously or on and off? A. On and off. I had a factory a number of years.

Q. Now, coming right down to 1910 when you became manager of the Newark store—did you? A. Yes.

Q. —what arrangements did you have for that year?

10 Mr. Carrick: I object to the question, on the ground that it takes in the contract made in 1910, which has no bearing on this issue, founded on a written contract made in 1917.

The Court: How do you think it has any bearing?

Mr. German: It will come in later anyway, because Mr. Lyons will probably testify that following a custom which had existed theretofore, following his engagements, he waited until after the first of the year before he started new negotiations, and it will necessarily involve the beginning of his bargain.

20 The Court: I do not think what took place prior to 1910 is competent. It is too remote.

Mr. German: All right.

Q. You continued as manager of the Newark store until January first, 1917, did you? A. Yes, sir.

30 Q. What did you do, if anything, about arranging for your salary for the year 1917? A. Along about the sixth—

Mr. Carrick: Now, if you Honor please, I object to this. It seems to me that under the very well settled rules which we have upon the subject of written contracts, particularly in that great case of Judge Depue's that we are always referring to in 15 Vroom, that the evidence of preliminary conversa-

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tions or dealings which finally culminate in a written contract are held to be incompetent. Here as a result of correspondence or personal negotiations we come down to a definite proposition existing between the two parties in writing. The letter of February 28 and the letter of Mr. Lyons on March first make a complete contract, and whatever conversations occurred previous to that are incompetent unless it be for the purpose of in some way varying or altering the terms of the written contract which are definite and precise. 10

Mr. German: That is all very true, but, nevertheless, this contract is made up by a series of letters and verbal conversation, and the letters on their face show there was something else other than contained in these letters. 20

Last question read.

The Court: You may answer it. Take an exception.

The Witness: On or about January sixth or seventh I think I wrote a letter to the Pease Piano Company, attention of John D. Pease.

Q. (Showing witness paper) Is that the letter you refer to? A. Yes, sir; January sixth. 30

The Court: Show it to the other side.

Mr. Carrick: We produced it on their call.

Mr. German: I will introduce it.

Mr. Carrick: I object to that as being irrelevant and immaterial.

The Court: Let me see it, please. How do you think that throws any light on the subject? 40

Mr. German: Well, if the Court don't feel it will help—

The Court: I do not think it throws any light on the subject at all.

Mr. German: All right. I will not offer it, then.

10 The Court: The fact he wrote a letter about the salary may stand.

Mr. German: All right.

Q. About the salary for 1917? A. Yes, sir.

Q. Now, what was the next thing that happened? A. I was over to make my report to the Forty-second Street store in probably the early part of February. Mr. Pease says, "Your letter—"

20 Q. Wait a minute. Which Mr. Pease? A. Mr. John D. Pease.

Mr. Carrick: I object to this. It is in exactly the same line as the letter which has been written. It is a preliminary talk which is finally embodied in this written contract. I think it should be excluded, under the rule.

The Court: Who was Mr. Pease?

Mr. German: The President of the company.

30 Q. Who was Mr. John D. Pease? A. President of the Pease Piano Company.

The Court: Did you have a talk with him?

The Witness: I had a talk with him; yes, sir.

Q. What was the talk?

The Court: I do not think that is competent.

Mr. German: All right. We will let it go at that.

Q. What did you have a talk with him about?

Mr. Carrick: If your Honor please—

The Court: Generally, what was the talk?

A. He says, "Your letter—"

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Q. Never mind. What was the talk about? A. The general subject was about my salary for the year 1917.

Q. What was the next thing after that? A. The next thing was probably along about the twenty-seventh of February Mr. Fitzgerald—

Q. Who is he? A. He was then Vice President of the Pease Piano Company. He called me into one of the booths very confidentially—

Q. You had a talk with him? A. Yes.

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Q. What about? A. About my salary for the year 1917.

Q. What was the next thing? What was the next step? What did you receive, if anything? A. He said—

Q. Never mind that. What was the next that happened? A. The next thing after that I received a letter from him.

Q. (Showing Witness paper) Is this the letter you refer to? A. Yes, sir.

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Mr. German: That is the one you produced.

Mr. Carrick: That is a letter in the pleadings.

Q. You received the letter from Mr. Fitzgerald on February 28? A. I did.

Q. (Showing Witness paper) A. That is it.

Mr. German: It is addressed New York, February 28, 1917. Pease Piano Company,

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57 Halsey Street, Newark, N. J. Attention of Mr. S. B. Lyons. Personal. It is on the letterhead of the Pease Piano Company of New York.

Mr. German reads letter.

Letter marked Exhibit P-1.

10 Q. Now, there seems to be a mention here in these words: "And require you to do a net sale of \$60,000.00 including talking machines and pianos." Now, I will ask you to state if you will as to what time this \$60,000.00 referred to.

Mr. Carrick: I object to that. It seems to me the witness is now being asked to construe the terms of a written instrument, and that is for the Court to do. The parties have expressed the language and I do not think there is anything that requires any interpretation.

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The Court: You may see if there is anything in the reply that helps it out.

Mr. Carrick: I may say it unquestionably means by the year—over sixty thousand dollars worth of pianos by the year.

Mr. German: With that admission on the record that is sufficient.

30 Q. Now, the next item is, "We also agree to appropriate the sum of \$1200.00 to be used for advertising purposes."

Mr. Carrick: I do not know anything about that.

Mr. German: I will ask the witness to state, then, if he knows what that—

The Court: I do not think it is proper at this time. You have to show it was accepted. You simply have it offered now.

Mr. German: All right.

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SIMPSON B. LYONS—Direct Examination.

Q. In reply to that letter, what did you do, if anything? A. About the following day, I think about March first, I wrote a letter to Mr. Fitzgerald—Pease Piano Company, Attention of Mr. Fitzgerald—

Q. (Showing Witness paper) Is that the letter you refer to? A. Yes.

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Mr. German: I offer the letter of March first.

Marked Exhibit P-2.

Mr. German reads Exhibit P-2.

Q. Was that ink, under "P.S." there when you sent the letter? Is that your writing? A. Oh, yes; that is my writing.

Q. Well, what is the next thing that occurred regarding the agreement for this year? A. On or about the sixth day of March, as near as I can recall, Mr. Fitzgerald, Vice President of the Pease Piano Company, came into the Newark store.

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Q. Who was there? A. B. C. Lyons.

Q. Is he in court? A. Burton Lyons, yes.

Q. The gentleman here (indicating)? A. Yes. After shaking hands and talking over things of the day he said, "Mr. Lyons, we received your letter in regard to your salary and the company is perfectly willing your year shall start January first and you shall take out of the next voucher the difference in your weekly payments," which was about nine weeks.

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Q. Did you do that? A. I took it out on the tenth, the next Saturday and reported as my books will show.

Mr. German: Does counsel dispute that fact?

Mr. Carrick: That it was taken out?

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Mr. German: Yes.

Mr. Carrick: Oh, no.

10 Q. Then what happened, if anything? A. Then Mr. Fitzgerald, the Vice President of the company, went on to say, "Now, Lyons, we are putting on two good men." He says, "You ought to be able to do seventy-five to eighty thousand dollars worth of business with two good men and the extra things we are going to give you." And we talked over various things and that is all that happened.

20 Q. What was the next, in reference to the dates? A. Everything went along smoothly until about the seventeenth or eighteenth of May, when C. D. Pease, Secretary and Treasurer of the company, and Mr. Fitzgerald, Vice President of the company, walked in the store and after sitting down and talking over various things about three hours, Mr. Fitzgerald, about five o'clock, said, "Well, Mr. Lyons, we have made up our minds to make a change in the management of the store."

Q. Who was there at the time? A. My son. I called him in as a witness.

30 Q. What is his name? A. B. C. Lyons. And Mr. Fitzgerald says, "Well, you have been in our employ a number of years. We are going to give you a check for two hundred dollars and ask you to resign." And I said, "I cannot do that. I feel I have got a yearly contract the same as I always had and I expect my year's salary." And finally I said, "I tell you what I will do. If you don't feel satisfied I will take a check for four hundred dollars and if I can get a job while that money lasts that pays as well as this I will relieve you of the contract. If I don't get a job that pays me as well I will hold you to whatever the difference

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is," and Mr. Fitzgerald, the vice president, said, "Well, you are looking for a scrap, and—"

Q. What further conversation did you have, if any, regarding this? A. No further conversation. I beg your pardon. He said "Well, I will take it up with H. D.—" that is the president of the company— "and let you know to-morrow," and left.

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The Court: Who is "H. D."?

The Witness: H. D. Pease, President of the Pease Piano Company.

Q. He had succeeded who? A. John D. Pease.

Q. What was the next thing that happened? A. Then I think on the twenty-first, on Monday, Mr. Fitzgerald, vice president of the company, came over to the store, to the Newark store.

Q. Was he alone? A. Yes.

Q. Who was present? A. Well, there was quite a number present at the time.

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Q. Was your son there? A. My son, B. C. Lyons was there, and all the store force.

Q. All right. Just state what took place? A. He threw a check down on the desk and he said, "There is a check for two hundred dollars. That is all J. D. will do."

Q. (Showing Witness paper) Is that the check referred to? A. Yes, sir. The signature is torn off.

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Mr. German: This check is produced by the defendant: I offer it in evidence.

Marked Exhibit P-3.

Mr. German: I will read the check.

(Reads same.)

Q. Well, did you receive the check? A. I refused to accept the check.

Q. All right. What did you say, if anything? A. He said I would take that or get nothing and

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he left the check lay on the desk for two or three days. He came over. I said, "Well, if you want me to quit, give me my discharge in writing," and he said, "I will bring it over to you in the morning," and he came over and said he forgot to bring it and he would bring it the next day. I said, "There is your check. I wish you would take care of it," and he said, "I don't want it," and the next day he came over and I asked if he had my discharge in writing and he said no, and furthermore I was not going to get any and I was discharged and he ordered me to take my books out and give up the keys to the store, which I refused to do.

Q. Then what happened? Was there a new manager? A. I am a little ahead of my story.

Q. Go back, then. A. The first Saturday he was over he said, "You will have a new manager Monday," and after Mr. Fitzgerald, the vice president, came in, Mr. George Smith (?) came in and Mr. Fitzgerald said, "You are discharged and everybody else is discharged." He said that to everybody that stood around there and there were several in the store and I went to them and told them to come back and see the new manager, which they did—or some didn't go back and of course, some did.

Q. Then what did you do about reporting at the store? A. I reported every morning at the store regularly.

Q. At what time? A. At my usual time, between eight and quarter after eight.

Q. And up to what time? A. Up until November 13th.

Q. What year? A. 1917.

Q. In the meantime did you receive any letter or communication from the company? A. Yes,

sir; I received a letter notifying me to remove my things out of the store.

Q. (Showing witness paper) Is that the letter?

A. Yes, sir.

Mr. German: I offer this letter in evidence, dated June 11, 1917.

Marked Exhibit P-4.

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Mr. German reads P-4 to the jury.

A Juror: Where was that letter addressed to him?

Mr. German: It was addressed to Mr. Lyons at 238 Amherst Street, East Orange. That was his residence.

Q. Before that had you written any letter to the Pease Piano Company? A. Yes, sir.

Mr. Carrick: If you have a copy of it you might show it to Mr. Fitzgerald. If it is a copy, we won't object to its being used.

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Paper handed to Mr. Carrick.

Q. Well, did you secure employment before the year was out? A. Yes, sir.

Q. Tell us where? A. Do you want me to start—

Q. Yes, start at the whole business and tell us. A. After I would report in the mornings at the store and found there was nothing for me to do I went out and looked for a job, to a number of piano houses, and searched around during June, July and August, the time they were putting on new men, and I could not secure any jobs, and I made arrangements with the Mahlon (?) Piano Company that if I sold any pianos I was to have a commission on them. Of course, through that time of the year their business is a little quiet, especially to a new man; and I had some stationery printed and cards

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and tried to do the best I could and I found it uphill business. During that time I sold one piano.

Q. How much commission did you get for that?

A. One hundred and eight dollars.

10 Q. What expenses did you have in making that sale, if any? A. Oh, during that time my expenses were \$150.00 for stationery and travelling around places I was working.

20 Q. What places did you go? A. I was to Trenton and Princeton and in Pennsylvania, my old stamping ground, where I used to work; and I was up through the Oranges and Montclair, Caldwell, Paterson and Passaic and wherever I thought I might pick up some business through people I might get in touch with, and I got a hundred dollars from the Mahlon Piano Company as my first commission on this sale.

Q. And you figured your expenses were at least \$150.00? A. I spent that, and I spent over fifty dollars additional to that in my travelling.

Q. Did you finally secure employment? A. I finally secured employment with the Aeolian Company on November 12th.

30 Q. At what salary? A. Twenty-five dollars a week. That is the best I could do; on the commission basis, with a drawing account of \$25.00 a week.

Q. Your employment was on the commission basis with a drawing account of \$25.00 a week? A. Yes.

Q. Did your commissions exceed the \$25.00 a week up to January first, 1918? A. No, they did not. I ran behind, to tell you the truth.

Q. Have you always been willing to serve the Pease Piano Company and carry out your contract? A. I sure have.

Q. Were there any other letters passed between you and the defendant company in relation to your employment before your discharge? A. Yes.

Q. Other than you have stated? A. After they refused to give me any discharge in writing I wrote a letter to the Pease Piano Company.

Q. Under what date? Do you remember? You have a right to refresh your memory by looking at a paper if you made it about that time. A. (After examining paper) Along about May 22nd. 10

Q. You wrote a letter to the Pease Piano Company—

Mr. German: I will ask counsel to produce the letter, as I called for it in my demand.

Mr. Carrick: We haven't any such letter; or, Mr. Fitzgerald does not find any. We have not made any search for that letter because we did not have our attention directed to it. Mr. Fitzgerald does not know of it. If he knew of it we would admit it anyway. 20

Q. Is this a copy of the letter you wrote? A. A copy made on the same sheet.

Mr. German: I offer this copy in evidence as made at the same time.

The Court: Let the other side see it first.

Mr. German: I did. 30

Mr. Carrick: We have seen it, but no demand has been made upon us to produce the original, so the foundation for secondary evidence is not laid.

The Court: Is that so?

Mr. German: Well, I will read the demand I gave Judge Carrick. "You are hereby required to produce at the trial of the above entitled cause" (reads) "and also any 40

and all other letters, writings, papers or documents showing any transactions or correspondence between the plaintiff and defendant of and concerning the matters at issue in this case." That is the best I could do.

10 The Court: I think you may offer secondary evidence.

Mr. Carrick: If your Honor please, so that my objection may be made, I understand the rule to be that in order to lay the foundation for secondary evidence it is essential that the side which is required to produce should be notified of sufficient particulars so that a search may be made, and our attention was not directed to anything of this kind and I therefore object.

20 The Court: I will allow it. I think that is sufficient.

Paper referred to is marked Exhibit P-5.
(Mr. German reads P-5.)

Q. Did you sign that letter? A. Yes, sir.

Q. Is there anything further you have to say about your hiring and discharge, other than you have stated? A. Nothing that I know of now.

Mr. German: That is all.

30 Cross Examination by Mr. Carrick:

Q. Mr. Lyons, as I understand, immediately after you were notified by Mr. Fitzgerald of your discharge you sought employment elsewhere in some similar business? A. I looked for employment in some similar business, yes, sir.

Q. This discharge is the 19th of May. Now, where did you go for employment? A. I think the first place I went was to the Fisher Piano Com-
40 pany in New York.

Q. Did you get employment there? A. No, sir.

Q. What employment did you seek at the Fisher Piano Company? What position did you seek there? A. Salesman.

Q. Then where did you go? A. Well, I cannot give you the exact route, but I think I went to the Baldwin people up on Fifth Avenue. That is the main office; and I was to the Howard people on Fifth Avenue, and to the Stults-Bauer, and I was to Miller & Hasting, on 41st Street, and I was to E. Lyon Company on 42nd Street, I think, and I was to a dozen other houses. I cannot give you the names. 10

Q. Mostly New York houses? A. Yes. Then I corresponded with houses in Easton and had men from Easton to see me; and I corresponded with the Packard people and companies in the West to see if I could ? an agency here, and in every case there was too much capital required. 20

Q. After a time you did establish an agency at 238 Amherst Street, East Orange. A. That was my home. I advertised from my home. I had stationery and cards printed.

Q. Under the name of S. B. Lyons and Sons? A. Yes.

Q. I show you a printed card which purports to be signed in the name of Simpson B. Lyons, and which is contained in an envelope which has been through the mail, and which is cancelled stamped, and addressed to Miss Florence M. Allen, 43 Tichenor Street, Newark, New Jersey, and ask you if that is a card that was sent by you to Miss Allen, with other people, notifying them of the establishment of this business in East Orange? A. That was when I took up the agency with the Mahlon Piano Company, yes, sir. 30

Q. Can you fix the date when you took up the agency of the Mahlon People? A. I am not positive, but I think it was the latter part of August, I am not sure about the date. Just what date it was, now, I could not tell you.

10 Q. This printed card which you have identified as having been sent out by you says that "Represents some of the most reputable manufacturers in the piano and musical instrument trade and solicits the opportunity of showing you these high grade instruments." A. Yes.

Q. What manufacturers of pianos did you represent at that time? A. The Stolts-Bauer, the J. C. Fisher—all on commission. If I sold a piano there I got a commission.

20 Q. You had an arrangement? A. Just a verbal arrangement. That was all.

Q. Now, did you have any commission arrangement with any of the musical instrument trade; that is phonographs, or anything of that sort? A. Why, through the Fisher people and Mahlon people. They carried talking machines.

Q. And you had an arrangement by which if you sold a phonograph— A. I got a commission on it.

30 Q. Now, you did make some sales for the Mahlon people, did you not? A. I did, yes, sir. I made one sale that I got a commission on.

Q. Don't you recall making another sale? A. Yes, sir, but I did not get any commission on it until this last April.

Q. But they did actually pay you later on? A. They paid me in April, yes, but that was not during the time I was out of work. I am only telling what money I earned.

Q. But you made a sale during the fall of two pianos? A. Yes; I made one sale I got something on, and the other sale I did not get anything on until this last April.

Q. Both sales were made before the 1st of January, 1918? A. Oh, yes.

Q. And on one you received \$108.00? A. No. **10**
\$100.00. \$8.00 I did not receive until April or—

Q. How much was the second amount you received? A. I am not sure. Somewhere around \$68.00 I think.

Q. So that you received altogether from the Mahlon people, \$168.00 for sales which you made for them during this period? A. Well, I do not know whether it was \$168.00, but it was somewhere about that. I am not sure just about the figure, you know. But you understand I did not get this commission until April after the sale was partly paid for. **20**

Q. You have stated that you had certain expenses about endeavoring to make these sales. What were those expenses? Have you got the items here? A. No, I did not keep any items at all.

Q. You were acting under legal advice from the time of this discharge. Didn't you understand it was necessary for you to keep a record of the expenses of your business? A. No, I did not have any— **30**

Q. You understood you were heading for a law suit when the year ran out? A. Yes, and if I tried to keep an account of all my expenses it would have been considerable.

Q. Didn't you keep any account of any expenses you had in canvassing for business? A. No, sir.

Q. So that what you said to us of the amount of **40**

your expenses in this business having exceeded \$100.00 which you got during the last year from the Mahlon people is merely your recollection of it, is it? A. That is all.

Q. Not based upon any account that you kept?

10 A. No; I did not keep any account of any of them at all.

Q. How long did you continue to canvass for the Mahlon Company, or Mahlon and Sons? A. Up until I got the position on the 12th of November, about the 12th of November, with the Aeolian Company. I was to the Aeolian Company for a job the first or second place after I left. I could not give you all the companies I was to. But they told me Newark would be taken care of later on, and they would make an arrangement for Newark, but at
20 the time there was nothing doing.

Q. After you were engaged by the Aeolian people upon this drawing account of \$25.00 and commission in excess of that if you should earn it, you did not do any work for the Mahlon people? A. No, sir.

Q. And you have had no other employment than you have stated? A. No, sir.

30 Q. And have received no money for any source for your services except from the Mahlon people, \$168.00 or thereabouts, and \$25.00 a week from the Aeolian Company from the 12th day of November, down to the first day of January, 1918? A. Yes, but I did not receive that \$68.00 in that time.

Q. No. I understand that. You got that later. But that is the fact? A. I received a hundred dollars, and what I got from the Aeolian Company is all the money I received from the time I left the Pease Piano people until I got the first week's salary from the Aeolian Company.

BURTON C. LYONS—Direct Examination.

Q. You have received no money from any other source except the Aeolian Company and the Mahlon Company? A. Only what I got from my wife to live on.

Q. I mean from your labors and services? A. No.

Mr. Carrick: That is all. 10

Mr. German: If your Honor please, Judge Carrick and I have figured up these amounts and after taking into consideration the hundred dollars Mr. Lyons says he received, the one hundred and fifty dollars he says he spent, counting the salary he would have received had he remained in the employ of the defendant company, less what he received from the Aeolian Company, the amount as Judge Carrick and I figure it is \$1,461.97, which includes \$28.00 interest. 20

The Court: I suppose there should be a credit of \$168.00.

Mr. German: Yes, and a hundred dollars he says he spent, that is for the jury to determine, under your Honor's proper charge.

By Mr. German:

Q. Has any part of this \$1,461.97 been paid to you? A. No, sir. 30

BURTON C. LYONS, sworn for the plaintiff.

Direct Examination by Mr. German:

Q. You are the son of the plaintiff? A. Yes, sir.

Q. And you were employed by the Pease Piano Company until recently? A. Yes, sir. 40

Q. Your father stated you were present about March 6th when Mr. Fitzgerald came over to the store? A. Yes.

Q. Were you there? A. Yes.

Q. Do you recall the conversation between Mr. Fitzgerald and your father? A. Yes, sir.

10 Q. State it? A. He says—

Q. Who? A. Mr. Fitzgerald, Vice President of the Pease Piano Company says "Lyons, we have received your letter in reference to salary for the year, and it is satisfactory to us to have your salary start January 1st. You can take the amount of the difference out of the next check that you receive." And "In reference to salesmen we feel the extra salesmen which we have told you to put on should increase the business in the store to at least seventy-five or eighty-five thousand dollars for the year." That is about all.

20 Q. Now, coming down to the time on May 18th or 19th, when Mr. Fitzgerald and Mr. Pease came over were you present at that conversation? A. Yes.

Q. State what you recall about that? A. I was in the front part of the store and my father was called in the back by Mr. Fitzgerald and Mr. Chauncey B. Pease, and my father called me in the back room, and stated he wanted me as a witness to what was said, and my father state that Mr. Pease and Mr. Fitzgerald wanted to dispense with his services or had requested his resignation, and that he would not resign. They offered him a check for \$200.00 which he—

30 Q. Did you see the check? A. I have seen it.

Q. I show you Exhibit P-3, and ask whether that is the check that you refer to? A. Yes, sir.

Q. The signatures are torn off? A. Yes, sir. I

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did not see the check at that time, but at that time they made him an offer stating they would offer him \$200.00; but it was not at that time I seen the check; it was after this. And he said he would not accept it, and my father said he would accept \$400.00 with the understanding that he step out as manager of the store and seek another position. If he found one that paid him as well, he would relieve them of their agreement and if not he would expect them to do as they stated in their letter. 10

Q. Then what was the next thing? A. That is about all I heard until the 19th of May, when Mr. Fitzgerald came over and told us on that day we were all through.

Q. Did he bring this check at that time? A. No. I seen that the following week.

Q. At any rate you saw the check? A. Yes, sir. 20

Q. Is that all you know about it? A. That is about all; yes, sir.

Mr. German: That is all.

Mr. Carrick: No questions.

Mr. German: The plaintiff rests.

The Court: I will now hear what you have to say about this contract.

Mr. Carrick: If your Honor please, I think this is a contract which under the ruling in our sister states is unquestionably a hiring at will, and enables either one of the parties to terminate the contract at his desire without reference to the time of the employment. The rule is stated quite different from the English rule where the rule has been that an indefinite hiring is presumed to be for a year; but Mr. Wood, in Wood on Master and Servant makes this statement of the law, and it is sustained by 30

not merely some of the leading New York cases, but also by cases from Delaware, Florida, Illinois, Indiana and Colorado. It is section 136 of Wood on Master and Servant, and says (reads).

10 Now, in our case of Beach vs. Mullin, with which your Honor is no doubt familiar, our Court said that in the absence of anything to characterize the hiring, a hiring by the month at so much a month is a hiring for that period of time. That seems to be somewhat different from the New York rule, and the general rule that where there is an indefinite hiring it is a hiring at will still prevails in all the other states, and while we have not passed upon that I think that is the prevailing English rule.

20 The language of the contract in this case, I think is very significant. The provision which was made by Mr. Fitzgerald, for the Pease Piano Company in so many terms says, "Confirming our conversation, we will pay you from date the sum of \$50.00 per week and authorize to put on two additional salesmen and require you to do a net sale of sixty thousand dollars" (reads).

30 In the reply to that on the following day, Mr. Lyons uses the same language, "Accept your proposition for the writer on salary, that is \$50.00 a week" (reads) "—with the new year, January 1, 1917." That was the only variance that was made in the acceptance, and it is undoubted that was accepted, and his salary was paid at that rate from the first of January, as the statement was made that was the time their 1917 fiscal year began.

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Now your Honor will observe there is only one possible ground of difficulty we have in this case. If he had stated he was to be employed at forty-five, fifty or sixty or any other amount per week, that would unquestionably be a hiring at will, and could be terminated by either one at any time. The only question that raises any doubt whatever is the reference to requiring him to do a net sale of sixty thousand dollars and agreeing to pay a commission for what he sells in excess of that, and I want to be entirely fair both with my friend and the Court, and it seems to me the reasonable construction to be put upon that language—and this is the question for your Honor, because it presents the whole contract in this instrument—it seems to me I ought to say that the contract was no different from what it would be if he had said \$60,000 per year. It is not \$60,000 per week, of course. The agreement states, “We employ you at \$50.00 per week. If in the course of a year your store sells more than \$60,000, that will indicate you are doing more than the minimum we have set for you, and we will pay you an additional one per cent.” But that does not change the character of the hiring. It simply fixes a premium upon his showing this surplus, provided he is there. It seems to me that the construction of that presents no real difficulty when we consider that the express agreement is by the week, so much per week, and requiring that he shall do a minimum amount, and setting that as a standard for him to which he must come up to, and if he got more than that he was

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to be paid more, provided he was in their employment at the time.

10 Now I have not been able to find in my search of the authorities the exact parallel of this language. It seems to me queer that we always strike something different than what the facts are, but I did strike a Maryland case where the defendant agrees to pay the sum of a thousand dollars, payable in monthly installments.

The Court: Where is that case reported?

20 Mr. Carrick: It is in 8 Maryland, 152, an old case decided in 1855. There is a case in our own state, the case of the Stamford Fisher Furniture Company, recorded in 43 New Jersey Law, 14 Vroom, 151, and there a corporation having a bookkeeper employed at \$12.00 a week adopted a resolution to increase his salary \$104.00 per annum, thus making his salary \$14.00, and the Court said the words "per annum" were used only to convey the amount of increase—I think that is the situation in this case. In this case there is an express agreement to make the employment so much per week. In this case the company was dealing with an old employee and wanted to be fair and offered an additional sum and that was rejected, and it seems to me, your Honor,—and I think we are within the cases in our own state, and the current of authority elsewhere that this was an employment by the week, and that the defendant was within its rights in making this discharge and is not liable for anything beyond paying up to the time when the discharge took place.

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40 The Court: I will hear what you have to say, Mr. German.

(Mr. German replied.)

The Court: I think this is a yearly contract. I think that is the only construction to put on it. The salary starts with the new year, January 1st, 1917. The reports run from January 1st to December 31st. There was an appropriation for the year, he contends to be paid for the year. I think the only fair construction is that is a hiring by the year at \$50.00 a week, with a commission of one per cent. provided the business amounts to \$60,000 during the year. That is what I think this contract means. Have you any defense to put in? 10

Mr. Carrick: If your Honor please, we rest, but for the purpose of the record, I will now ask for a direction of verdict for the defendant upon the same grounds I urged on the non suit. 20

The Court: Yes, and I refuse it, and you may take an exception.

Mr. German: I ask your Honor to direct a verdict to the plaintiff.

The Court: Can I do that, unless you gentlemen agree to the amount? There is the question of \$168.00, and the question is how much he shall be allowed for the expenses. 30

Mr. Carrick: I think there is a jury question there.

Mr. German: Well, all right.

Mr. Carrick: You will allow me to take an exception to the refusal to non suit?

The Court: Yes, certainly, take an exception to both.

Mr. Carrick: I had in mind if your Honor thought that was the correct practise, 40

whether it might not be well to take the jury's verdict and certify the question. That is an open question in this State and it will go up on a very narrow question.

10

The Court: Well, the evidence is so narrow in this case. If it was a large amount of evidence I would certify it, but it would not cost much to put the evidence in.

Mr. German: So far as the \$168.00 is concerned, I think that is a jury question, and I am willing to have your Honor submit it to the jury on that question.

The Court: Do you gentlemen desire to say anything to the jury?

Mr. Carrick summed up for the defendant.

Mr. German summed up for the plaintiff.

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Charge.

The Court (CUTLER, J.).

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Gentlemen of the Jury: Under our law the duty of construing a written contract rests with the Court and not with the jury, and in this case the Court has construed it to be a yearly contract; so that the plaintiff is entitled to recover the wages for the year less the amount that he has been paid, and also less any amount that he earned or could have earned during the time that he was not actually serving the defendant as its employee.

It is admitted by counsel that the amount that would be due for wages, deducting the amount he earned as commissions, will amount to \$1,461.97. In addition to that he received \$100 for commissions on sales and \$68.00 received for a sale made

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during the year for which the defendant is entitled to credit; so that the total amount due from the defendant to the plaintiff at this time, if anything, would be \$1,293.97; and if there was any amount that he expended for expenses in the sales it should be added to that amount, for he is entitled to deduct from the amount of commissions he received the amount that he actually expended in making the sales. 10

You cannot guess at it. You must be governed by the evidence in the case. If you are not satisfied this plaintiff actually kept an account of that and is guessing at the amount, you cannot make any deductions. But if you find from the evidence he had certain expenses and he is positive what the amount is, then you should deduct that from the \$168.00 and the amount would be \$1,461.97 less the difference between the amount he received for commissions, \$168.00 and the amount he expended, and that would be your verdict. 20

Take the case and decide it that way. The question is simply the amount that is due from the defendant to the plaintiff and it is \$1,461.97, less \$168, first deducting from \$168 any amount of money that he expended for his services during the time he was earning that commission, if anything. 30

A Juror: What is the amount?

The Court: \$1,461.97, and \$168 would come out from that sum less the amount of money he expended, if anything, for the expenses.

Another Juror: Can we deduct from that \$168 what we think he might have spent?

The Court: No. It is his place to give it to you with positive proof, and if he has failed to satisfy you he spent it, that is his own fault. The other 40

side are entitled to have him come in court and show what his expenses actually were.

Another Juror: Your Honor, the commission—he might have received between sixty thousand dollars and—

10 The Court: There is no evidence that he is entitled to any commission. Neither side have shown that the sales amounted to more than sixty thousand dollars.

The Juror: The \$150, he has to bring figures here to show he spent that money?

The Court: No. You must be satisfied that he has spent that money.

The Juror: If we believe him?

The Court: Yes; if you believe he has spent it. He says he has spent \$150. If you believe that is
20 the amount you should allow it.

JUDGMENT FOR PLAINTIFF.

ESSEX COUNTY CIRCUIT COURT.

SIMPSON B. LYONS, Plaintiff,	}	Action at Law Verdict by a Jury Judgment for plaintiff	10
vs.			
PEASE PIANO COMPANY, Defendant.			

Amount	\$1443.97
Costs	53.23

Amount	1497.20
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SCOTT GERMAN, Attorney of Plaintiff.

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This action was tried before Judge Willard W. Cutler, with a jury at the Essex County Circuit on June 9th, A. D. 1918.

The cause having been heard and submitted to the jury they return their verdict as follows:

They find in favor of the plaintiff, Simpson B. Lyons and assess the damage against the defendant, Pease Piano Company at the sum of Fourteen hundred forty-three dollars and ninety-seven cents.

30

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of Fourteen hundred forty-three dollars and ninety-seven cents and costs which are taxed at the sum of fifty-three dollars and twenty-three cents, making in the whole the sum of Fourteen hundred ninety-seven dollars and twenty cents.

Judgment entered and signed, June 19th, 1918.

WM. S. GUMMERE,
Judge.

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Exhibit P-3.

PEASE PIANO CO.
LEGGETT AVE. AND BARRY ST.
BRONX, NEW YORK CITY.

No. 1819

Newark, N. J. May 2, 1917.

ESSEX COUNTY NATIONAL BANK

10

Pay to the order of S. B. Lyons.....

Two Hundred 00/100.....Dollars

\$200.00

—————
In full settlement of all claim (Signature torn off)

20

Exhibit P-4.

New York, June 11, 1917.

Mr. S. B. Lyons,
238 Amherst St.,
East Orange, N. J.

Dear Sir:

You have neglected to remove your desk and work bench from the warerooms at 57 Halsey Street, Newark, N. J. Will you kindly give your attention to this and have same removed as early as possible; otherwise we will be obliged to have same placed in storage for your account.

30

Very truly yours,

PEASE PIANO COMPANY,

A. W. Fitzgerald,

Vice-President.

AWF:LC

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Exhibit P-5.

57 Halsey St., Newark, N. J.

May 22, 1917.

Pease Piano Co.,
Barry St. & Legett Ave.,
Bronx, N. Y.

10 Gentlemen:

Your Vice President, Mr. A. W. FitzGerald notified me last Saturday, that your company had decided to discharge me, and everybody in the store. I told him that I had a written contract with your company as manager of the Newark store which did not expire until January 1st next, at \$50 a week. He later asked me to give up the keys, which I refused to do until your company so notified me in writing, and the cause of your desiring to break the contract. He then stated that he would do so on the following Monday. He came over again Monday but did not bring any such paper.

20 He offered me your company's check dated May 21st, 1917, for \$200, which he stated was for four weeks salary, and on which check was written the words "in full settlement of all claims." I refused to accept this check, telling him that I intended to hold you to your contract.

30 Mr. FitzGerald told me that Mr. George E. Smith would take charge Monday the 21st, and that he had been appointed manager of the Newark store.

Mr. FitzGerald came over to the store to-day and again told me that I was discharged, and that your company would not give any discharge in writing. He demanded that I remove my desk and other effects from your store, and deliver the keys to him, which I refused to do until I had received

in writing from you a notice that you had terminated my contract.

This is to notify you that I intend to hold you to your contract dated February 28, 1917, and that I am willing to continue as your manager under the terms of that contract, and that I will report to your store daily until you notify me in writing that I am discharged as your manager, and the reason therefor. 10

I am very much surprised at your action, in view of the long and faithful service I have rendered to your company.

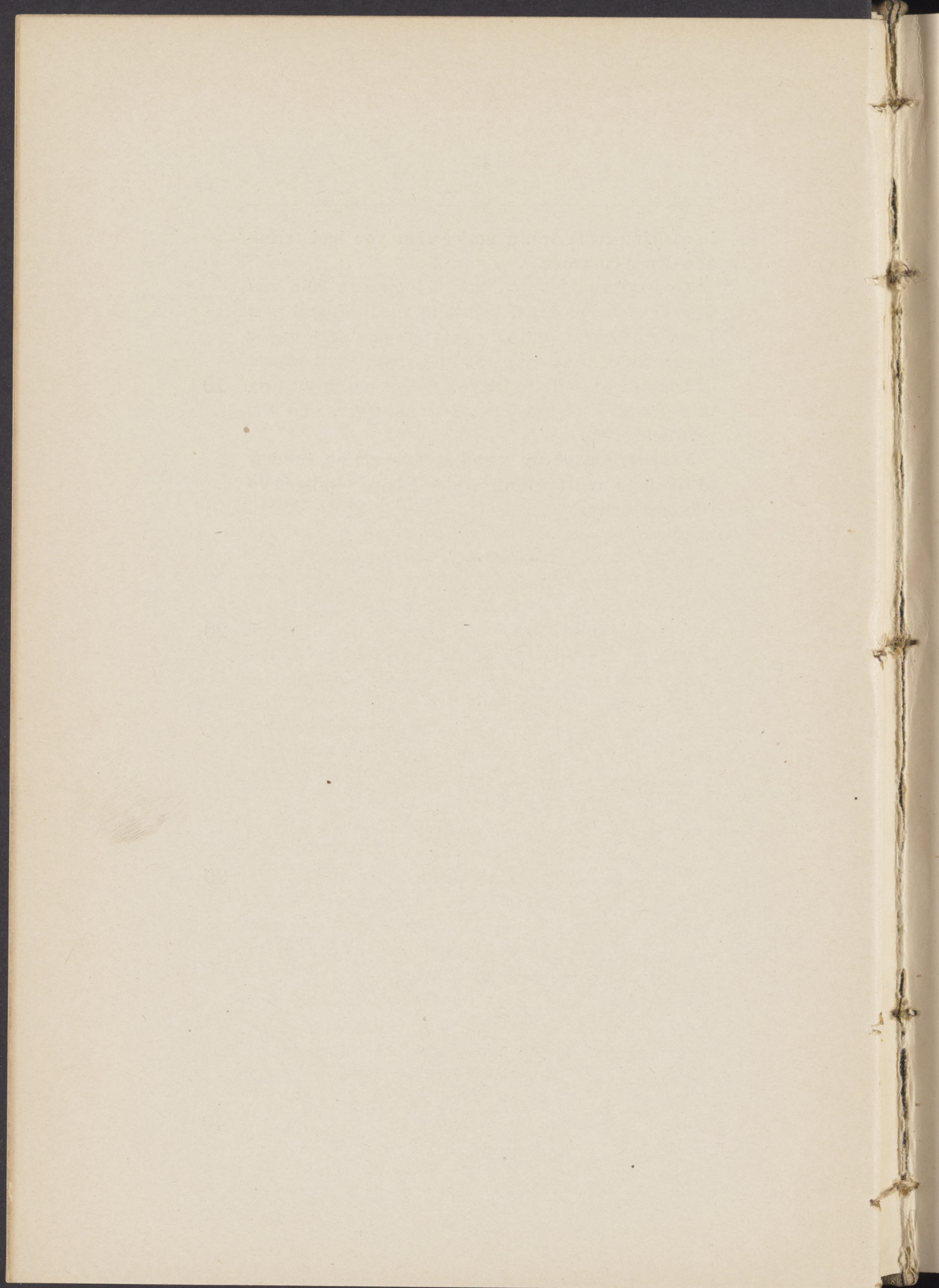
Yours truly,

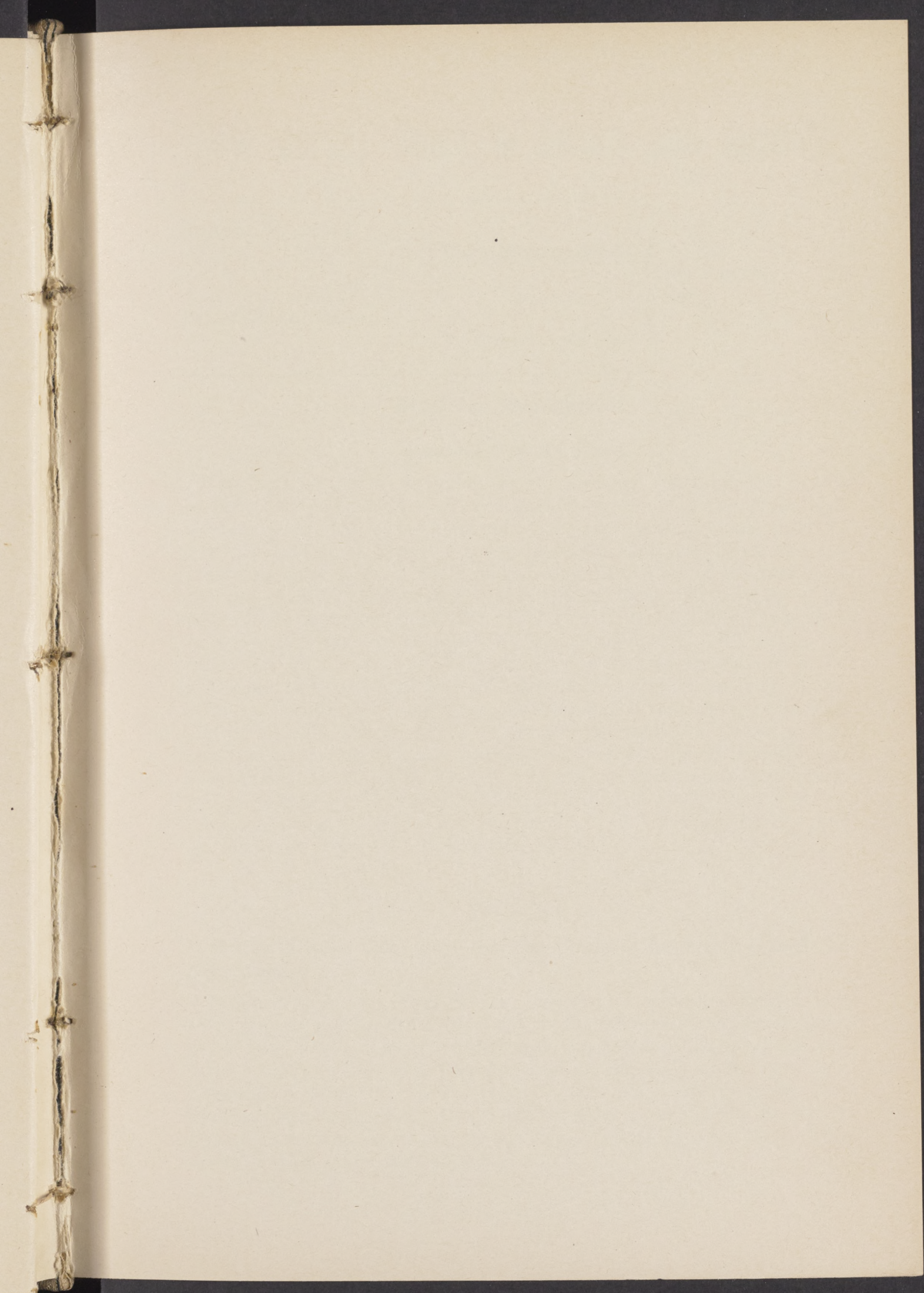
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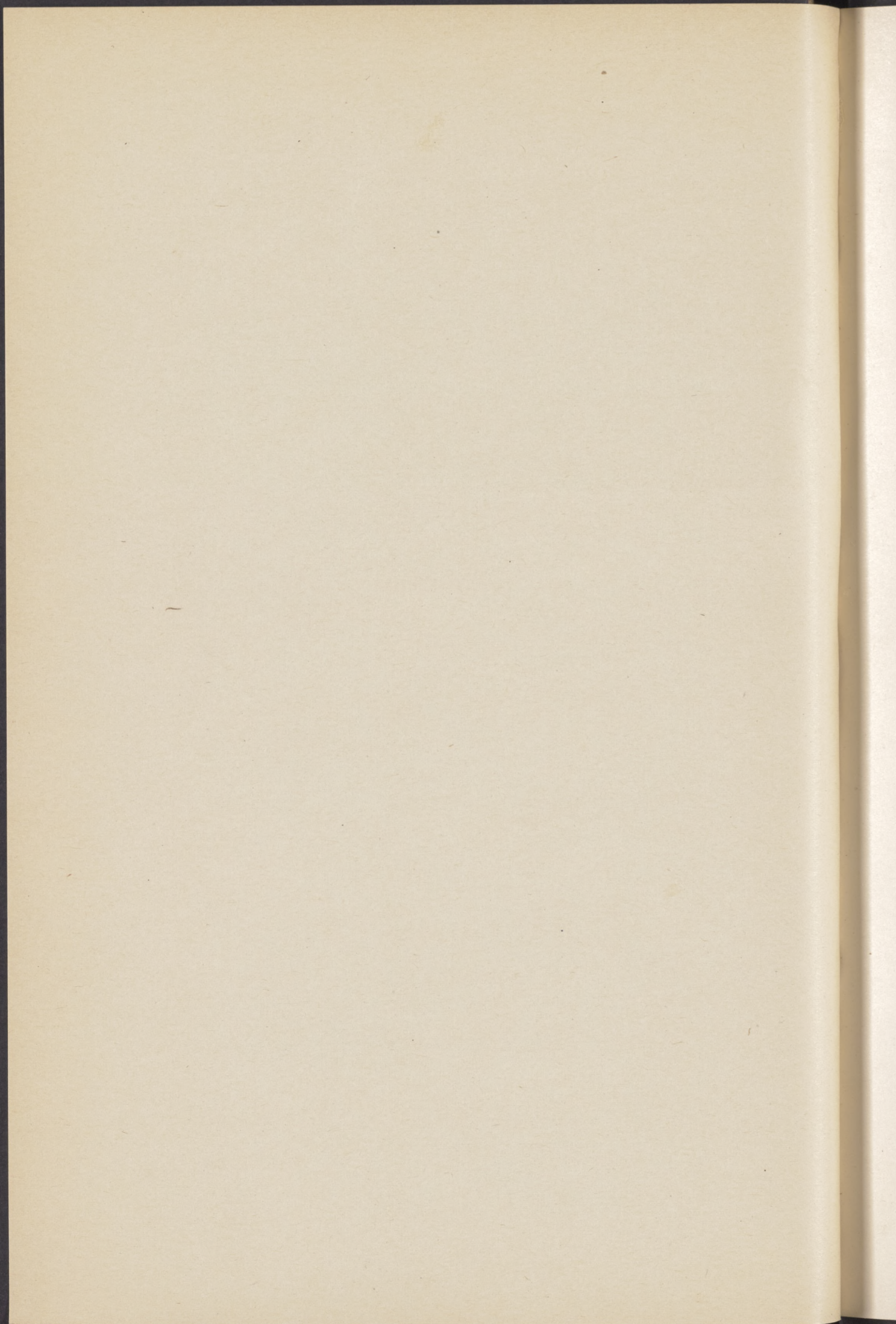
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New Jersey Court of Errors and Appeals

SIMPSON B. LYONS,

Plaintiff-Respondent,

vs.

PEASE PIANO COMPANY,

Defendant-Appellant.

*On Appeal,
&c.*

Brief for Respondent.

Statement of the Case.

The facts set out by appellant in its brief are substantially correct so far as they appear, but in addition thereto the evidence shows that the respondent had been employed by the appellant as manager of its Newark store since 1910, his engagement for that year being under a yearly contract at \$25 a week, and a bonus at the end of the year on a percentage basis, and that he continued in the employ of the company, as its manager, until May, 1917 (case, pp. 12, 13 and 14); that he wrote a letter to the appellant about January 6, 1917, about his salary for 1917 (case, pp. 15 and 16), and that in his talk with the president and vice-president of appellant company, shortly thereafter, concerning his salary, respondent testified that the general subject of his talk was about his salary for the year 1917 (case, p. 17), and that on March 6th the conversation between Mr. Fitzgerald and respondent, Mr. Fitzgerald said: "Lyons, we have received your letter in reference to salary for the year, and it is satisfactory to us to have your salary start January 1st * * *." (Case, p. 19. See testimony of Burton C. Lyons, case, p. 32.)

POINT I.

It would have been error for the Court to have non-suited the respondent.

Because, if for no other reason, appellant's counsel conceded that there was a jury question in so far as the \$168 was concerned (case, p. 37, line 30), but even without this concession of counsel the evidence clearly presented a jury question on this part of the case (see *Loveland v. McKeever Bros., Inc.*, 101 Atl. 377), and it would have likewise been error if the Court had directed a verdict for the appellant, because the case was in the same condition when both sides rested. (See same case, p. 378.)

POINT II.

The respondent's contract with the appellant was for a year, and he was entitled to compensation for that period.

If there was nothing else in the contract except that part of the correspondence which states that appellant would pay respondent from date \$50 per week, and the written reply of respondent that he would accept appellant's proposition at a salary of \$50 per week, respondent might have difficulty in successfully claiming that the hiring was for a year, but as was said by Depue, J., in *Beach v. Mullen*, 5 Vroom 343, 344, 345, "The reservation of wages payable monthly or weekly will not control the contract so as to destroy its entirety *when the parties have expressly agreed for a specified term for a year*. But if the payment of monthly or weekly wages is the ONLY CIRCUMSTANCE from which the duration of the contract is to be inferred, it would be taken to be a hiring for a month or a week."

The special circumstances relied on by respondent and the evidence to be considered in connection therewith are:

(a) That respondent originally had been engaged for a year at \$25 per week, with a commission payable at the end of the year, and so far as the evidence shows he had continued in the employ of appellant at the same place, in the same capacity, continuously since that time, and down to the time of his discharge in May, 1917 (case, pp. 12-13).

(b) That when respondent desired to make arrangements for his salary for the year 1917, his conversation with the president and the vice-president of appellant company related to his salary for that year. He expressly so testified (case, p. 17).

(c) Respondent was required to do a business in net sales of \$60,000. This was conceded by appellant's counsel to mean \$60,000 for the year 1917 (case, p. 18, line 25).

(d) The understanding was that respondent's salary started from January 1st, 1917, as all his reports ran from January 1st to December 31st (case, p. 6, and in this connection see testimony of respondent, case, p. 19, lines 25, &c., and of Burton C. Lyons, case, p. 32, line 11, &c).

(e) Appellant also agreed to appropriate \$1,200 to be used for retail advertising purposes (case, p. 5). It is self-evident that this did not mean \$1,200 a week, but must necessarily have been \$1,200 a year, because the respondent in his reply of March 1st, 1917, to appellant's letter of February 28th, says: "I note your appropriation of \$1,200 for *advertising for 1917*, which is much less than years back. However, we will act accordingly on same" (case, p. 6, line 20).

(f) Appellant was to pay respondent one per cent. on net sales of store over and above \$60,000. This, of course, referred to one per cent. on sales of \$60,000 for the year 1917 (case, pp. 5 and 6), and admission of appellant's counsel that \$60,000 referred to meant by the year (case, pp. 18-35).

g. By the act of the appellant company through its vice-president, when, according to respondent's testimony on p. 20, he asked respondent to resign: Why resign, if the hiring was only by the week?

If the hiring was only by the week, why was it necessary to require the respondent to do \$60,000 worth of business a year. Why wasn't it specified that he was to do so much a week; that he was to be allowed so much per week for advertising, and that his commission was to be on net sales per week; and if the hiring was not for a year, but only at will, why wasn't a clause inserted in the contract that upon a certain specified notice by each party to the other the contract could be abrogated? Why the extra allowance of 1% at the end of a year if the hiring was not for a year?

The evidence is conclusive that the engagement of respondent was for a year, and his discharge before the expiration of that time was a breach of the contract.

See *Jones v. Manhattan Horse Manure Co.*, 103 Atl. 984, and the following cases therein cited:

Beach v. Mullin, 34 L. 343.

Stanford v. Fisher Varnish Co., 43 L. 151.

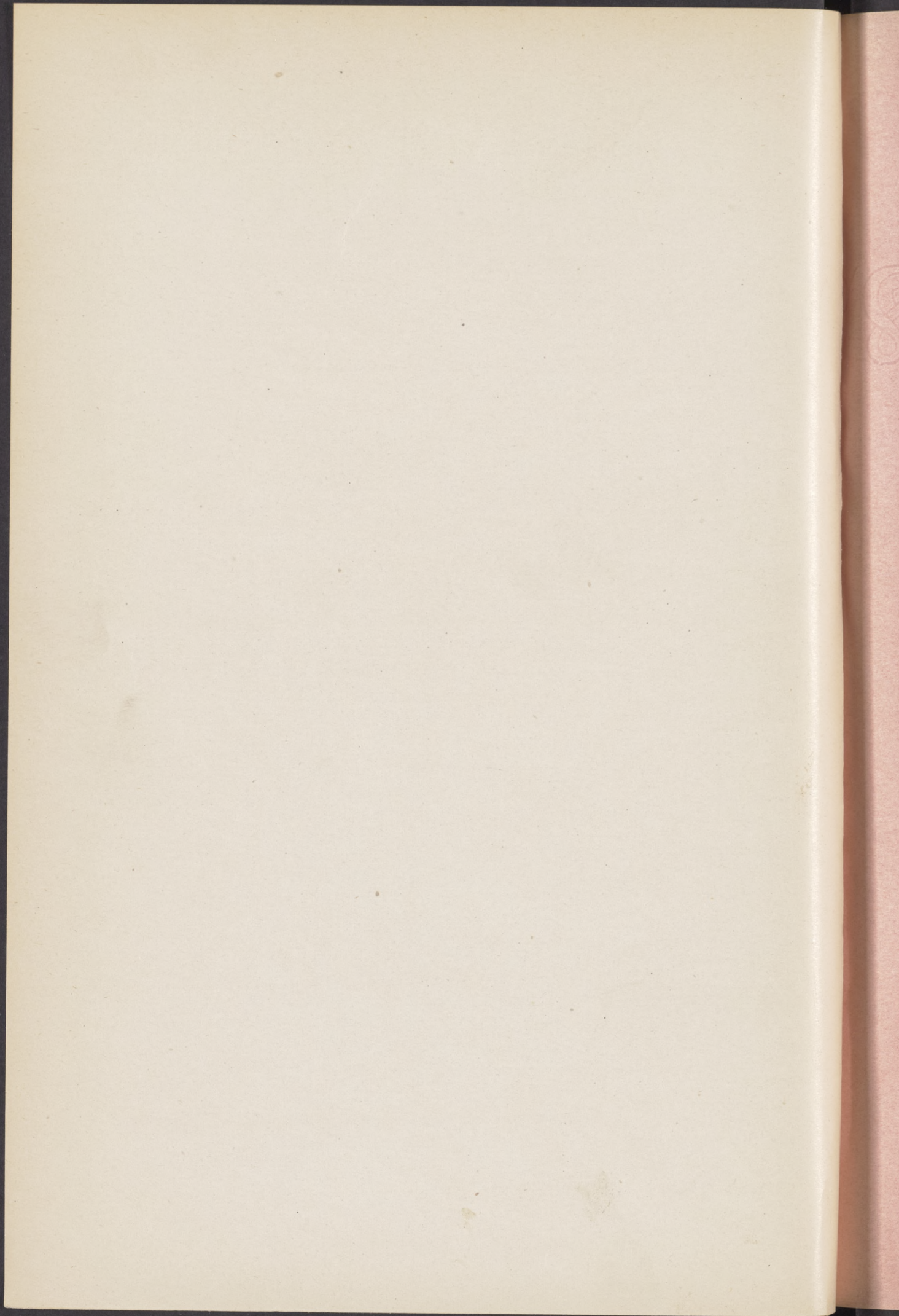
Larkin v. Hecksher, 51 L. 133.

Passino v. Brady Brass Co., 83 L. 419.

The construction and effect of the contract was a matter of law for the Court, as there were no extrinsic disputed facts, and appellant's counsel admits the construction of the written instrument was for the Court (case, pp. 18-35). *Downs v. N. J. Fid. & Plate Glass Ins. Co.*, 103 Atl. 205.

The Trial Judge was right in assuming that the construction of the contract was a matter of law for the Court, and there was no error in this respect, nor in his submission of the case to the jury, and respondent respectfully submits that the verdict of the jury should be sustained.

SCOTT GERMAN,
Of Counsel with Respondent.





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New Jersey Court of Errors and Appeals ¹⁰

SIMPSON B. LYONS, Respondent,	} On Appeal From Essex Circuit Court.
vs.	
PEASE PIANO COMPANY, a cor- poration, Appellant.	

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BRIEF FOR APPELLANT.

Facts.

The respondent had been employed by the ap-
pellant for several years as manager of its store
in Newark, N. J. (*Case*, page 14, lines 1-3). On
or about January 6, 1917, the respondent wrote a
letter to the appellant about salary (*Case*, pages
14-16). Early in February he had some talk on
the same subject with the president of the appel-
lant company (*Case*, page 16), and in the latter
part of that month with the vice-president of the
appellant (*Case*, page 17, lines 11-22). This was
followed by the appellant's letter, Exhibit P, 1
(*Case*, pages 4-5, Schedule "A"), dated February

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28, 1917, addressed to the respondent, the pertinent parts of which follow:

10 “Confirming our conversation of the 27th, we will pay you, from date, the sum of fifty (\$50.00) dollars per week, and authorize you to put on two additional salesmen, together with Mr. Ford who is now in your employ, and require you to do in net sales sixty thousand (\$60,000) dollars, this to include talking machines and pianos. * * *

 We further agree to pay you one per cent. (1%) on net sales of your store over and above sixty thousand (\$60,000) dollars.’ * * *

20 To this letter the respondent replied in writing, under date of March 1, 1917 (Exhibit P 2, *Case*, pages 5-7, Schedule “B”) from which we quote:

30 “Your letter of Feb. 28th just received, and after considering contents of same very carefully, desire to say I will accept your proposition on salary for the writer, i. e., \$50 per week and 1% commission on net sales over \$60,000 made through our Newark store, this to include any and all sales, with the understanding my salary starts with the new year, January 1, 1917, all our reports run from January 1st to December 31st. I wrote a letter to Pease Piano Co. the first of the year regards this matter, and shall expect same as stated above.”
* * *

 The parties dealt with each other thereafter in accordance with the terms of this correspondence, the modification stipulated for by the respondent that his salary should start with January 1st, be-

ing complied with by the appellant (*Case*, page 19, line 25; page 20, line 3).

The appellant, conceiving that the contract of employment was at will, or by the week, shortly prior to May 19, 1917, notified the respondent that his services were no longer required, and paid him to May 19th. The respondent sues for the balance of the year 1917, claiming to have been engaged for a year, less the net amount which he had earned in other employment during that period. The trial court construed the contract to be a hiring for a year, leaving to be settled by the jury only the amount which the respondent had earned in other employment during the portion of the year remaining after his discharge. A verdict was returned for \$1,443.97 (*Case*, page 41).

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POINT I.

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Under the prevailing American rule, a hiring such as here shown is terminable at the will of either party.

A statement of the prevailing law upon this point, which has been cited with approval in many of the state decisions, is made as follows in *Wood on Master & Servant*, Sec. 136:

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“With us the rule is inflexible that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is on him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches

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that it was for a day even, but only at the rate fixed for whatever time the party may serve."

Such is the law in New York State:

10 "The effect of a general contract of hiring, no time being specified, varies in different jurisdictions. In England it is presumed to be a hiring for a year, regardless of the nature of the service, unless there is a custom relating to the subject, and it appears that the contract was made with reference to the custom" (citing cases). "In some states a stipulation as to the method of payment, such as weekly, monthly or yearly, is held to denote the period of service contracted for (*Tatterson vs. Suffolk Mfg. Co.*, 106 Mass., 56; *Franklin Mining Co. vs. Harris*, 24 Mich., 116; *Beach vs. Mullin*, 34 N. J. Law, 343). In this state, the rule is settled that unless a definite period of service is specified in the contract, the hiring is at will, and the master has the right to discharge and the servant to leave at any time."

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Watson vs. Gugino, 204 N. Y., 535, 541 (1912, *Vann, J.*).

30 So in a case where the plaintiff had been placed in charge of the defendant's real estate department at a salary of \$5,000 beginning in 1881, had been paid at the rate of \$6,500.00 a year from January 1, 1883, under an arrangement made in February, 1883, and in February, 1884, the salary had been increased to \$10,000 payable from January 1, 1884, at which salary he had continued to serve the defendant until his discharge April 30, 1892. The Court quotes the above citation from *Wood on Master and Servant*, and says:

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“The decisions on this point in the lower courts have not been uniform, but we think the rule is correctly stated by Mr. Wood and it has been adopted in a number of states. *Evans vs. St. L., I. M. & S. Ry. Co.*, 24 Mo. App., 114; *Finger vs. Brewing Co.*, 13 Mo. App., 310; *De Briar vs. Minturn*, 1 Cal., 450; *Haney vs. Caldwell*, 35 Ark., 156, 168; *Prentiss vs. Ledyard*, 28 Wis., 131. 10

It follows, therefore, that the hiring of the plaintiff was a hiring at will and the defendant was at liberty to terminate the same at any time.”

Martin vs. N. Y. Life In. Co., 148 N. Y., 117 (1895, *Bartlett, J.*)

The subject is exhaustively treated in a note to *Warden vs. Hines*, 25 L. R. A. (N. S.), 529, a case on error to the Circuit Court of the U. S. for the Eastern District of Virginia, collecting and discussing the cases on the subject of a hiring at will. The general result seems to favor the proposition that a hiring at a salary by the year, or any other specified time, is a mere hiring at will, although there are many cases to the contrary. This examination of the cases is supplemented by the note to the case of *Reasnor vs. Watts R. & Co.*, 51 L. R. A. (N. S.), 629, a West Virginia case. The editor states that the recent cases show a tendency apparently toward the rule that a hiring at so much per year, month or week, is, in the absence of other circumstances controlling its duration, an indefinite hiring only, terminable at the will of either party. 20 30

POINT II.

The rule announced by our Supreme Court makes this a hiring by the week.

10 In the case of *Beach vs. Mullin*, 34 N. J. L. (5 Vr.), 343, 344, the rule is thus stated by Mr. Justice Depue:

20 “The reservation of wages, payable monthly or weekly, will not control the contract so as to destroy its entirety, when the parties have expressly agreed for a specified term, as a year. But if the payment of monthly or weekly wages is the only circumstance from which the duration of the contract is to be inferred, it will be taken to be a hiring for a month or a week. *The King vs. Birdbrooke*, 4 T. R., 245; *The King vs. Newton Toney*, 2 T. R., 453, per *Buller, J.*; *The King vs. Inhabitants of Mitcham*, 12 East, 351.”

30 The offer by the appellant, and the acceptance by the respondent both specifically name the compensation of “\$50 per week,” so that unless there are other circumstances or conditions indicating some different term mutually agreed upon, the respondent’s employment was by the week only, and his discharge was justified. What are the other circumstances or conditions upon which the respondent relies?

On the trial it was urged by respondent’s counsel that the statement of the appellant’s offer that it would “require you” (Mr. Lyons) “to do in net sales, sixty thousand (\$60,000) dollars” (*Case*, page 4, line 35), and the further promise to pay

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him "one per cent. (1%) on net sales of your store over and above sixty thousand (\$60,000) dollars" (*Case*, page 5, line 10), and the terms of the acceptance by the respondent, viz, "\$50 per week and 1% commission on net sales over \$60,000" (*Case*, page 6, line 4), and stipulating that "my salary starts with the new year, January 1, 1917, all our reports run from January 1st to December 31st" (*Case*, page 6, line 8), indicate that the parties contracted for a year's engagement. This view prevailed with the learned trial court, and the appellant's motions for a non-suit and the direction of a verdict were refused, to which rulings exceptions were prayed and granted (*Case*, page 37, lines 26 and 35). In this, the appellant respectfully insists, there was error. 10

The agreement for additional compensation by a payment of a percentage over the minimum amount of sales fixed, does not alter, by necessary or natural implication, the very definite language which the parties selected to express their agreement. They are presumed to have known that, in law, an agreement at so much "per week" was a hiring for the term of a week. No doubt neither expected that the relation would cease at the end of one week. There are few weekly contracts which are actually terminated at the end of the first week. But they chose to bind themselves only for a week, if the interest or inclination of either suggested that the relation be severed. The offer of a commission upon sales as an additional compensation, was an incentive to faithful service by the employee in return for increased sales, and consequent increased profits for the employer. It was, no doubt, implicitly contingent upon the relation continuing throughout the business year, which Mr. Lyons in his letter of acceptance specified as the calendar year, for which 20 30 40

logous case:
 St Brewery Co v.
 190 N. J. L. (15 Sum.)
 Er. A. Kalisch, J.)

10 their reports run. This is not inconsistent with the power reserved to either party to terminate the contract at the end of any week. Such provision is not uncommonly expressed in contracts which are for a year or term of years, but contain an option to either party to terminate the hiring by a prescribed notice. Thus in *Mayer vs. Goldberg* (1902), 116 Wisc., 96 (92 N. W., 558), where the yearly contract of a salesman provided for monthly salary and expenses and a commission of 5% on all sales over \$24,000.00, and stipulated that either party might cancel the contract by giving ten days' notice, but that at the close of that period "the accounts should be settled on the same basis as tho the full year had elapsed," the salesman, on the contract being terminated before the end of the year, was held to be entitled to commissions on all sales in excess of \$2,000 a month.

20 So in *Jenkins vs. Long* (1855), 8 Md., 132, where the defendants agreed to pay plaintiff a salary of \$1,000, payable in monthly installments of \$50 each, "if he sold for them to such parties as they shall approve, \$40,000 during the year, and for all sales above that amount (deducting bad and doubtful debts) 2 per cent. additional." Right to dismiss on month's notice. Held, that the equitable construction of this contract was that if defendants dismissed plaintiff before the end of the year, the latter was entitled to compensation in proportion to the amount he was to have received for the whole year, including both the contingent compensation, and the proportionate part of \$1,000, provided his sales for the fraction of the year were at the rate of \$40,000 per annum, deducting bad debts.

30 In the case of *Stanford vs. Fisher Varnish Co.*, 43 N. J. L. (14 Vr.) 151 (S. C., 1881), *Parker, J.*, a corporation having a bookkeeper employed at

\$12.00 per week adopted a resolution to increase his salary "\$104.00 per annum, thus making his salary \$14.00 instead of \$12.00 per week." The court said the words "increase per annum" were used only as a mode of computation, not to extend the hiring for a year. The weekly wages only were increased, the term of hiring was not extended.

In the case at bar, it is not as if the parties had agreed upon the compensation at a weekly rate and a yearly commission, all to be paid at one time. Such would have made an entire contract which could not be discharged otherwise than by a year's service on the part of the employee, and payment for the full year by the employer. No such thought appears ever to have been in the minds of the parties. The salary was paid weekly, as being earned by the service of the prior week. Apparently the proportionate part of the minimum sales was not exceeded for the period which the respondent actually served, as no claim is made on that head.

Nor does the language of the letter of acceptance indicate that the respondent had in mind at that time that he was closing an engagement for a year. In addition to the outstanding fact that he accepted in the same terms the appellant's proposition for a salary "per week," the language used to date the new salary from January 1, 1917 was not such as he would have selected had he been speaking of what he then understood to be a contract for a year. He does not say "my year to begin with the new year January 1, 1917," or "My old contract ended with the old year," as he naturally would have done if such were the understanding. He gives as a reason for starting his new salary January 1st that "all our reports run from January 1st to December 31st," and that he had written the appellant about the matter the first of the year. This language

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aptly expresses the idea of one who was getting a raise in his weekly salary, and wanted it to date from the time when new business arrangements are ordinarily made, particularly as he had then broached the subject to his employer. It does not indicate that the respondent then had in mind that he was engaging himself for a year. His repetition
10 in his acceptance, of the words "\$50 per week," indicates most conclusively that both parties were then dealing with an engagement by the week.

The hiring was, in law, by the week, and the appellant's motions for a non-suit and the direction of a verdict should have prevailed.

CARRICK & WORTENDYKE,
Attorneys of Appellant.

20 CHARLES L. CARRICK,
of Counsel.

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