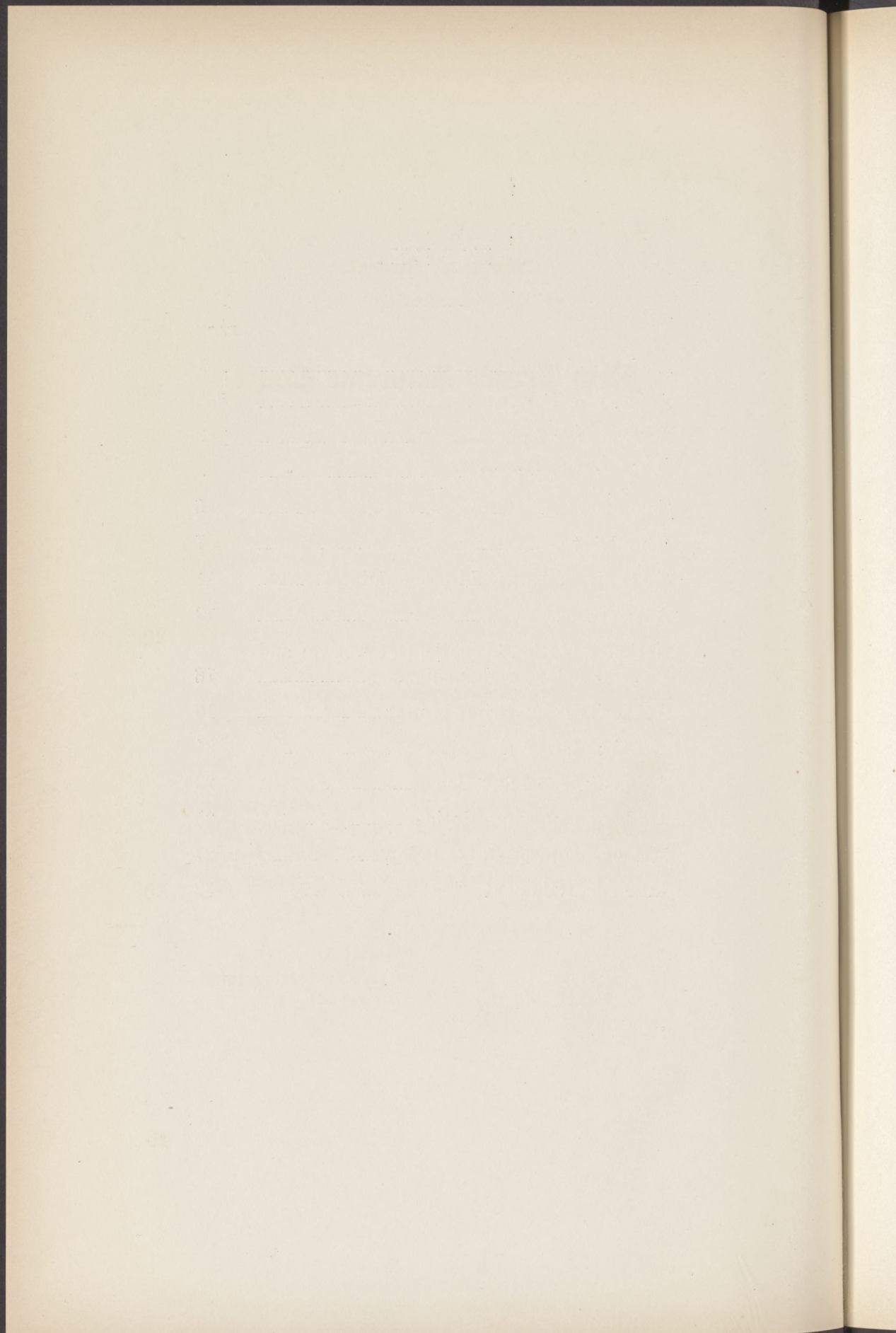


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Notice of Appeal.

(Filed February 6, 1932.)

New Jersey Supreme Court

10

LOUIS FINKELSTEIN,
Plaintiff,

vs.

HYMAN BRODSKY,
Defendant.

Action at Law.
Notice of Appeal.

20

To Lichtenstein, Schwartz and Friedenberg, Attorneys of Plaintiff, or to whom it may concern:

SIRS:

PLEASE TAKE NOTICE, that the defendant in the above entitled cause 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.

30

STUHR AND VOGT,
Attorneys for Defendant-
Appellant.

40

Affidavit of Service.

(Filed February 6, 1932.)

NEW JERSEY SUPREME COURT

10

LOUIS FINKELSTEIN,
Plaintiff,*vs.*HYMAN BRODSKY,
Defendant.Action at Law.
Affidavit.

20

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.:

ABRAHAM L. ROSENBERG, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am employed as a clerk by the law firm of Stuhr and Vogt, Esqs., counsellors-at-law.

2. On January 29th, 1932, I served a copy of notice of appeal upon the attorneys for the plaintiff in the above entitled cause, by delivering the same to John Kelley, Esq., an attorney employed by the said firm.

ABRAHAM L. ROSENBERG.

Sworn and subscribed to before me at Hoboken, N. J., this 29th day of January, A. D., 1932.

BERNARD S. WHITE,
Attorney-at-Law of New Jersey.

40

Grounds for Appeal.

(Filed April 23, 1932.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

LOUIS FINKELSTEIN,
Plaintiff-Appellee,

vs.

HYMAN BRODSKY,
Defendant-Appellant.

Action at Law.
On Appeal.
Grounds for
Appeal.

10

To Lichenstein, Schwartz & Friedenberg, Esqs.:

20

PLEASE TAKE NOTICE that the grounds from which the defendant in the above entitled action appeals from the judgment rendered by the Supreme Court in this case are as follows:

1. Because the Supreme Court erred in giving judgment to the plaintiff instead of to the defendant, in that:

A. It erroneously struck out the answer filed by the defendant herein on the grounds that the same was sham.

30

B. It erroneously struck out the answer of the defendant filed herein on the ground that the answer does not show any defense to the action.

C. It erroneously entered summary judgment in favor of the plaintiff against the defendant.

D. It erroneously excluded the affidavits submitted on the part of the defendant in evidence as violating the parole evidence rule.

40

STUHR AND VOGT,
Attorneys for Defendant-Appellant.

Affidavit of Service.

(Filed April 23, 1932.)

NEW JERSEY COURT OF ERRORS
AND APPEALS.

10

LOUIS FINKELSTEIN,
Plaintiff-Appellee,*vs.*HYMAN BRODSKY,
Defendant-Appellant.

Affidavit.

On Appeal.

Action at Law.

20

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.:

ABRAHAM L. ROSENBERG, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am employed as a clerk by the law firm of Stuhr and Vogt, Esqs., counsellors-at-law.

30

2. On February 26th, 1932, I served a copy of Grounds for Appeal upon the attorneys for the plaintiff in the above cause by delivering the same to John Kelley, Esq., an attorney employed by the said firm.

ABRAHAM L. ROSENBERG.

Sworn and subscribed to before }
me at Hoboken, N. J., this 26th }
day of February, A. D., 1932. }

BERNARD S. WHITE,
Attorney at Law of New Jersey.

40

Notice of Argument.

(Filed April 24, 1932.)

NEW JERSEY COURT OF ERRORS
AND APPEALS.LOUIS FINKELSTEIN,
Plaintiff-Appellee,*vs.*HYMAN BRODSKY,
Defendant-Appellant.

10

Action at Law.
On Appeal.
Notice of
Argument.

SIRS:

TAKE NOTICE, that the argument of the issue
joined in this cause before the New Jersey Court
of Errors and Appeals is to be held at the State
House in the City of Trenton, State of New Jer-
sey, on the third Tuesday of May, next, at eleven
o'clock in the forenoon or as soon thereafter as
said Court can attend to the same.

20

Dated: April 21st, 1932.

Yours respectfully,

STUHR AND VOGT,
Attorneys for Defendant-
Appellant.

30

To:

LICHTENSTEIN, SCHWARTZ &
FRIEDENBERG, Esqs., or to
whom it may concern.

Acknowledgment Of Service
Of Notice Of Argument.

Due and legal service of a copy of the within
notice on this 27th day of April, 1932, is hereby
acknowledged.

40

LICHTENSTEIN, SCHWARTZ & FRIEDENBERG,
Attorneys of Plaintiff-Appellee.

Summons.

THE STATE OF NEW JERSEY, TO HYMAN BRODSKY.

10 You are hereby summoned to answer the annexed complaint of LOUIS FINKELSTEIN in an action at law in the New Jersey Supreme Court, Hudson County.
 (L. S.) And take notice that unless you file your answer to said complaint with the Clerk of said court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, plaintiff may proceed in the suit and judgment may be entered against you.

20 WITNESS, WILLIAM S. GUMMERE, Esquire, Chief Justice of the said New Jersey Supreme Court, at Trenton, this 10th day of August, 1931.

FRED L. BLOODGOOD,
 Clerk.

LICHTENSTEIN, SCHWARTZ & FRIEDENBERG,
 Attorneys.

30

40

Complaint.

NEW JERSEY SUPREME COURT,
HUDSON COUNTY.

LOUIS FINKELSTEIN,
Plaintiff,

vs.

HYMAN BRODSKY,
Defendant.

10

Complaint.
Action at Law.

Plaintiff, residing in the City, County and State
of New York, complaining of the defendant, says
that:

20

FIRST COUNT.

1. On or about January 20th, 1921, plaintiff delivered to defendant the sum of \$2,500.00 as security against loss by the defendant by reason of the defendant's execution of two certain bail bonds or recognizances for one Samuel Cohen and one Sadie Cohen, respectively, in the Hudson County Court of Quarter Sessions, which bail bonds or recognizances appear of record in the office of the Clerk of Hudson County in Volume 19 of Records of Bail, pages 199 and 200.

30

2. At the time of the delivery of said sum by plaintiff to the defendant, as hereinabove set forth, the defendant promised and agreed with plaintiff to return said sum of money to plaintiff upon the discharge of the said bail bonds or recognizances hereinabove referred, after deducting the disbursements incidental thereto.

40

Complaint.

3. On or about June 3rd, 1931, said bail bonds or recognizances were discharged of record by order of the Hudson County Court of Quarter Sessions.

10 4. The defendant has made, had or suffered no losses by reason of the execution of said bail bonds or recognizances, and has made, had or suffered no disbursements incidental to the same or discharge thereof.

5. On or about June 3rd, 1931, and on several occasions thereafter, plaintiff demanded payment of said sum of \$2,500.00 from the defendant.

20 6. On or about July 8th, 1931, defendant paid plaintiff, on account of said sum, the sum of \$500.00, but the defendant has failed, refused and neglected, and still fails, refuses and neglects to pay the balance of said sum, or any part thereof.

Plaintiff demands as damages on this Count the sum of \$2,000.00, with interest on the sum of \$2,500.00 from January 20th, 1921 to July 8th, 1931, and interest on the sum of \$2,000.00 from July 8th, 1931, to date, together with costs of suit.

SECOND COUNT.

30 1. Plaintiff repeats each and every allegation contained in the First Count.

Plaintiff demands as damages on this Count the sum of \$2,000.00, with interest thereon from June 3rd, 1931, together with costs of suit.

THIRD COUNT.

40 1. On or about January 20th, 1921, plaintiff delivered to the defendant the sum of \$2,500.00, which sum the defendant agreed to return to the plaintiff upon the discharge of certain bail bonds

Complaint.

referred to in a receipt or agreement made and executed by the defendant, a copy of which is annexed hereto, made a part hereof and marked "Schedule A".

2. Plaintiff repeats the allegations contained in paragraph 3 of the First Count.

3. Plaintiff repeats the allegations contained in paragraph 4 of the First Count.

4. Plaintiff repeats the allegations contained in paragraph 5 of the First Count.

5. Plaintiff repeats the allegations contained in paragraph 6 of the First Count.

Plaintiff demands as damages on this Count the sum of \$2,000, with interest thereon from June 3rd, 1931, together with costs of suit.

FOURTH COUNT.

1. On or about January 20th, 1921, plaintiff delivered to defendant the sum of \$2,500 upon the express condition that the same was to be returned to the plaintiff by the defendant upon the discharge of two certain bail bonds or recognizances entered into by the defendant for one Samuel Cohen and one Sadie Cohen in the Hudson County Court of Quarter Sessions on said date, after deducting from said sum the disbursements incurred by the defendant in connection with such discharge. Said bail bonds or recognizances appear of record in the office of the Clerk of Hudson County in Volume 19 of Records of Bail, pages 199 and 200, respectively.

2. Thereafter, and on or about June 3rd, 1931, said bail bonds and recognizances were duly discharged of record by order of the Hudson County

Complaint.

Court of Quarter Sessions at the cost and expense of plaintiff.

3. Plaintiff repeats the allegations contained in paragraph 5 of the First Count.

10 4. Plaintiff repeats the allegations contained in paragraph 6 of the First Count.

Plaintiff demands as damages on this Count the sum of \$2,000, with interest thereon from June 3rd, 1931, together with costs of suit.

FIFTH COUNT.

1. Plaintiff sues for the sum of \$2,500 had and received by the defendant for the use of the plaintiff on or about January 20th, 1921.

20 2. On or about July 8th, 1931, the defendant paid to plaintiff, on account of said sum, the sum of \$500.

3. Plaintiff has demanded payment of the balance of said sum from the defendant, but the defendant has failed, refused and neglected and still fails, refuses and neglects to pay said balance, or any part thereof.

30 Plaintiff demands as damages on this Count the sum of \$2,000, with interest on the sum of \$2,500, from January 20th, 1921 to July 8th, 1931, and interest on the sum of \$2,000 from July 8th, 1931 to date, together with costs of suit.

LICHTENSTEIN, SCHWARTZ & FRIEDENBERG,
Attorneys of Plaintiff.

Schedule "A".

Office of
COUNTY CLERK
Hudson County, N. J.
Jersey City.

Received from Louis Finkelstein the sum of 10
Two thousand Five hundred dollars (\$2,500) as
security for bail bonds entered into by Hyman
Brodsky for Samuel Cohen and Sadie Cohen this
day which bail bonds aggregate \$18,500 in the
matter of the State *vs.* Samuel Cohen & Sadie
Cohen, charged with a crime in Hudson County,
N. J.

This money is to be returned to the said Louis
Finkelstein upon the discharge of the said bail
bonds from the record after all disbursements in- 20
cidental thereto are deducted.

HYMAN BRODSKY,
500 Broadway,
Bayonne, N. J.

January 20, 1921.

To the within named Defendant:

In case the within summons and complaint are 30
served upon you personally, then take notice that
if you intend to make a defense to this action,
you must file an affidavit of merits within ten
days from the date of service thereof upon you,
and must file your answer within twenty days
from the date of such service, and in default of
the filing of such affidavit and answer, judgment
will be entered against you.

LICHTENSTEIN, SCHWARTZ & FRIEDENBERG,
Attorneys of Plaintiff. 40

Answer.

(Filed September 20, 1932.)

10

LOUIS FINKELSTEIN,
Plaintiff,

vs.

HYMAN BRODSKY,
Defendant.

Action at Law.

Answer.

20

Defendant residing in the City of Bayonne, in
the County of Hudson and State of New Jersey,
by way of answer to the complaint filed herein
says that:

FIRST COUNT.

30

1. Defendant admits paragraph 1 of the first count.
2. Defendant admits paragraph 2 of the first count.
3. Defendant admits paragraph 3 of the first count.
4. Defendant denies paragraph 4 of the first count.
5. Defendant admits paragraph 5 of the first count.
6. Defendant denies paragraph 6 of the first count.

SECOND COUNT.

40

1. In answer to paragraph 1 defendant repeats each and every answer to the first count and makes them a part hereof as if expressly repeated herein.

Answer.

THIRD COUNT.

1. Defendant denies paragraph 1 of the third count.
2. Defendant admits paragraph 2 of the third count.
3. Defendant denies paragraph 3 of the third count.
4. Defendant admits paragraph 4 of the third count.
5. Defendant admits paragraph 5 of the third count.

10

FOURTH COUNT.

1. Defendant denies paragraph 1, except that part which states that the bail bonds and recognizances mentioned therein appear of record in the office of the Clerk of Hudson County in Volume 19, of records of Bail, pages 199 and 200, respectively.
2. Defendant admits paragraph 2 of the fourth count.
3. Defendant admits paragraph 3 of the fourth count.
4. Defendant admits paragraph 4 of the fourth count.

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FIFTH COUNT.

1. Defendant denies paragraph 1 of the fifth count.
2. Defendant denies paragraph 2 of the fifth count.
3. Defendant denies paragraph 3 of the fifth count.

40

Answer.

FIRST SEPARATE DEFENSE.

10 1. On or about January 20th, 1921, plaintiff delivered to defendant, the sum of \$2500 as set forth in the complaint herein, as security for bail bonds entered into by defendant, Hyman Brodsky, for Samuel Cohen and Sadie Cohen on said date, aggregating \$18,500.00 in the matter of the *State vs. Samuel Cohen and Sadie Cohen*, charged with a crime, which matter was then pending in the Hudson County Court of Common Pleas.

20 2. It was agreed at the time of said delivery of said sum between the plaintiff and the defendant that the said sum was to be returned to the plaintiff upon the discharge of said bail bonds from the record after all disbursements incidental thereto were deducted.

30 3. It was further agreed by and between the said parties that a premium of 3% of the amount of said sum of \$18,500 was to be charged by the defendant against the said sum of \$2500 and a premium of 1% of the amount of said sum of \$18,500, for each and every year after the first year, was to be charged, by said defendant against the said sum of \$2500 until such time as the said bail bonds were discharged from the records and it was further agreed by and between said parties that the said premium charges were to be considered as disbursements incidental to the discharge of said bail bonds in accordance with the receipt given by the defendant to the plaintiff, a true copy of which is annexed to the complaint and marked Schedule "A".

40 4. On or about June 3rd, 1931, said bail bonds or recognizances were discharged of record by order of the Hudson County Court of Quarter Ses-

Answer.

sions, the total amount of premium chargeable by the defendant against the said \$2500 is the sum of \$2,012.50.

5. On or about July 8th, 1931, defendant paid plaintiff the balance of \$500 then due to the plaintiff, after deducting all the aforesaid premiums charged against said sum, the sum of \$500.00 being in final and full payment of said sum.

10

SECOND SEPARATE DEFENSE.

1. Defendant repeats all the allegations contained in paragraphs 1 and 2 of the first separate defense.

2. At the time of delivery of said sum, it was mutually agreed between said parties, said plaintiff and defendant, that the said defendant was to charge against said sum of \$2500 as one of the disbursements incidental to said bail bonds, and their discharge, a reasonable annual premium in consideration of the defendant's being surety on the said bail bonds, amounting to \$18,500, and that such reasonable annual premium was to be charged against said sum of \$2500 during the entire period that said bail bonds remained in full force and effect, and until discharged of record by order of the Hudson County Court of Common Pleas.

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30

3. The reasonable premium for said bail bonds is the sum of 3% per annum on the full amount of said bail bonds, for the first year during which they remain in full force and effect, and the sum of 1% per annum during all subsequent years.

4. Said bail bonds were in full force and effect until June 3rd, 1931, on which date they were discharged of record by order of the Hudson County Court of Quarter Sessions.

40

Answer.

5. The total amount of premium chargeable by the defendant against the said \$2500 is the sum of \$2,012.50.

10 6. On or about July 8th, 1931, defendant paid plaintiff the balance of \$500 then due to the plaintiff, after deducting all the aforesaid premiums charged against the said sum, the said sum of \$500.00 being in final and full payment of said sum.

STUHR AND VOGT,
Attorneys for Defendant.

**Notice of Motion to Strike Out Answer
and for Summary Judgment.**

20

NEW JERSEY SUPREME COURT,
HUDSON COUNTY.

30

LOUIS FINKELSTEIN,
Plaintiff,
vs.
HYMAN BRODSKY,
Defendant.

Action at Law.
Notice of Motion
to Strike Out
Answer
and for Summary
Judgment.

To:

HYMAN BRODSKY, defendant,
and/or
STUHR AND VOGT, Esqs., his attorneys.

40

PLEASE TAKE NOTICE, that on Friday, October 9th, 1931, at 10:00 o'clock in the forenoon, or as

*Notice of Motion to Strike Out Answer and
for Summary Judgment.*

soon thereafter as counsel can be heard, at the Court House, Jersey City, N. J., we shall apply to the Honorable Henry E. Ackerson, Jr., Circuit Court Judge, sitting as Supreme Court Commissioner, or to such other Judge then and there sitting in such capacity, for an Order striking out the Answer filed by the defendant in the above-entitled case, and for Summary Judgment in favor of the plaintiff and against the defendant, on the following grounds:

(a) Said Answer is sham.

(b) Said Answer is frivolous.

(c) Said Answer does not set forth facts sufficient to constitute a defense to the allegations contained in plaintiff's Complaint.

(d) Said Answer is filed for the purpose of delay.

AND TAKE FURTHER NOTICE, that, at the time of the arguing of said motion, the annexed affidavits will be presented and read in support thereof.

Dated: September 30th, 1931.

LICHTENSTEIN, SCHWARTZ & FRIEDENBERG, 30
Attorneys of Plaintiff.

Affidavits Supporting Motion.

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

10

LOUIS FINKELSTEIN,
Plaintiff,

vs.

HYMAN BRODSKY,
Defendant.

Action at Law.

On Motion, &c.
Affidavits.

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STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.:

LOUIS FINKELSTEIN, of full age, being duly sworn according to law, upon his oath deposes and says:

30

1. On or about January 20th, 1921, I delivered to the defendant the sum of \$2,500.00 in cash, as security against loss by the defendant, by reason of his execution of two certain bail bonds or recognizances, one for Samuel Cohen and one for Sadie Cohen, respectively, in the Hudson County Court of Quarter Sessions. Said bail bonds or recognizances appear of record in the Office of the Clerk of Hudson County in Volume 19 of Records of Bail, pages 199 and 200.

40

2. At the time of the delivery of said sum of money by me to the defendant, the defendant promised and agreed to return said sum of \$2,500.00 to me when said bail bonds or recognizances were discharged and after deducting disbursements incidental thereto.

Affidavits Supporting Motion.

3. No other charges were to be made against me or against the sum which I deposited purely as security. No talk whatever was had about premiums or compensation to the defendant for his execution of the bail bonds or recognizances, and I am informed and believe that all these premiums or compensation for bail were paid by Samuel Cohen, one of the parties for whom the bail was given. The only agreement between said Hyman Brodsky and myself was as set forth in a receipt from said Hyman Brodsky to me, dated January 20th, 1921, and given at the time that I delivered to him the said sum of \$2,500.00. A true copy of said receipt is annexed to the Complaint and is also annexed hereto, marked "Schedule A". 10

4. On many occasions, commencing in 1926, I called upon Hyman Brodsky, the defendant, at his home and at his office, asking him to return my money. The defendant always put me off and delayed me by stating to me that he could not return the money because the bail bonds were not cancelled as yet, and that they still stood of record, despite the fact that the conviction of Samuel Cohen and Sadie Cohen had been reversed on appeal, and they had never been brought to trial again. On these occasions, the defendant promised me that he would make arrangements to have the bail cancelled, and that when this was done, he would return my money to me. These promises and delays continued until on or about June 3rd, 1931, when said bail bonds or recognizances were discharged of record. At the time said bail bonds were discharged of record, or at any other time, prior to subsequent thereto, the said defendant, Hyman Brodsky, had no expenses or disbursements on account of, or in connection with, said bail bonds, or the discharge thereof, and suffered 20 30 40

Affidavits Supporting Motion.

no loss or damage whatsoever by reason of his execution of said bail bonds.

5. On or about June 3rd, 1931, and on other occasions thereafter, I have demanded payment of said sum of \$2,500.00 from the defendant.

10 6. On or about June 8th, 1931, the defendant, Hyman Brodsky, paid on account of said sum \$500.00, but has failed, refused and neglected, and still fails, refuses and neglects, to pay the same, or any part thereof.

20 7. When said sum of \$2,500.00 was deposited with the defendant by me, as above set forth, the defendant received and was to hold the same merely as security and was not to use or appropriate the same unto himself. Said defendant stated at the time of receiving said money that he would place it on deposit as a fund of money separate from his own and that I would, at the time of repayment, receive interest thereon.

30 8. There is now due to me from the defendant the sum of \$2,000.00, together with interest on the sum of \$2,500.00 from January 20th, 1921 to July 8th, 1931, the date of the \$500.00 payment on account, and interest on the sum of \$2,000.00 from July 8th, 1931, to date. I believe that there is no defense to this action.

LOUIS FINKELSTEIN.

Sworn to and subscribed before me }
this 26th day of September, 1931. }

ALMA CASTELLO,
A Notary Public of New Jersey.

Schedule "A".

Office of
COUNTY CLERK
Hudson County, N. J.
Jersey City.

Received from Louis Finkelstein the sum of Two 10
thousand Five Hundred Dollars \$2,500.00 as se-
curity for bail bonds entered into by Hyman
Brodsky for Samuel Cohen and Sadie Cohen this
day, which bail bonds aggregate \$18,500 in the
matter of the State *v.* Samuel Cohen and Sadie
Cohen charged with a crime in Hudson County,
N. J.

This money is to be returned to the said Louis
Finkelstein upon the discharge of the said bail 20
bonds from the record after all disbursements in-
cidental thereto are deducted.
Jan. 20/21.

HYMAN BRODSKY
500 Broadway
Bayonne, N. J.

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Affidavit of Samuel Cohen.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.:

SAMUEL COHEN, of full age, being duly sworn according to law, upon his oath deposes and says:

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1. I reside in the City, County and State of New York, and am one of the persons referred to in the complaint filed in this cause for whom the defendant executed certain bail bonds or recognizances which appear of record in the office of the Clerk of Hudson County, in Volume 19 of Records of Bail, pages 199 and 200.

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2. When the defendant executed said bail bonds on or about January 20th, 1921, the plaintiff, Louis Finkelstein, delivered to the defendant, Hyman Brodsky, the sum of \$2,500.00 in cash. This money had, prior to this time, been deposited by said Louis Finkelstein as cash bail for myself and my wife, Sadie Cohen, and was at that time returnable to said Louis Finkelstein, as my trial was ended, and I was in the custody of the Sheriff, or his deputies. Said sum of \$2,500.00 was delivered to the defendant, Hyman Brodsky, by the plaintiff merely as security, and it was agreed that the same would be returned to the said Louis Finkelstein by Hyman Brodsky upon the discharge of said bail bonds from the record. At the time of said agreement, and on or about January 20th, 1921, said Brodsky executed a receipt and delivered the same to said Louis Finkelstein.

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3. At the time said Brodsky delivered said receipt to said Louis Finkelstein, he, the said Hyman Brodsky, promised Louis Finkelstein that he would lose nothing by depositing this money as security with the said Brodsky, and that he, the

Affidavit of Samuel Cohen.

said Brodsky, would keep the fund separate and that it would draw interest.

4. The said bail bonds given by the defendant, Hyman Brodsky, for myself and my wife, Sadie Cohen, herein referred to, were discharged of record on June 3rd, 1931, and the said Brodsky was completely released from his obligation, and suffered no losses or disbursements in connection therewith.

5. I am informed that the plaintiff, Louis Finkelstein, has demanded the return of his money from the said Hyman Brodsky, and that the said Hyman Brodsky has paid \$500.00 on account thereof, and that the said Hyman Brodsky now claims to be entitled to the balance as premium or compensation for executing and furnishing said bail. This is untrue, and it was never intended that Finkelstein should pay any compensation to Brodsky for the furnishing of said bail, or that said fund deposited by Finkelstein with Brodsky should be used for premiums or compensation. The deposit was merely made with Brodsky as security for him. The fact is that I had made arrangements with Brodsky for the execution of said bail bonds or recognizances before said security was deposited by the plaintiff, Louis Finkelstein, and Brodsky had agreed with me that the total charge for the furnishing of the said bail would be \$500.00. I paid to said Hyman Brodsky for the execution of said bonds, the following premiums or compensation: \$300.00 at the time said bonds were executed, \$100.00 about a week later, and about two months later, the defendant, Hyman Brodsky, called upon me in New York and stated to me that he intended to surrender me back into the custody of the Sheriff. I asked him

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Affidavit of Samuel Cohen.

not to do this without giving me an opportunity to obtain new bail, and he stated to me then that he would continue the bail until my case and that of my wife's were disposed of, if I paid him the \$100.00 which I still owed him and another \$100.00 in addition. I thereupon paid said Brodsky the
 10 sum of \$200.00, which made a total of \$600.00, or \$100.00 more than he had originally agreed to charge me for the execution and continuance of said bail.

6. About two weeks after this last payment of \$200.00, I negotiated for a new bond, and offered to substitute a new bond in place of that given by the defendant, Hyman Brodsky, so that he could be relieved. Brodsky stated to me that this pro-
 20 cedure was unnecessary, and that he would want no further money, premium or compensation for the execution of said bond, and that he would not call upon me for any further payment, and that there would be no further payments demanded therefor.

SAMUEL COHEN.

Sworn to and subscribed before me }
 this 26th day of September, 1931. }

30 RICHARD W. GUTHEIL,
 A Notary Public of New Jersey.

Service of a copy of the within notice of motion is hereby acknowledged this 1st day of October, 1931.

40

 Attorneys of Defendant.

Affidavit Opposing Motion.

NEW JERSEY SUPREME COURT,
HUDSON COUNTY.

LOUIS FINKELSTEIN, Plaintiff,	Action at Law.	10
<i>vs.</i>		
HYMAN BRODSKY, Defendant.	Affidavit of Defendant Opposing Motion to Strike Out.	20

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.:

20

HYMAN BRODSKY, of full age, being duly sworn according to law, upon his oath deposes and says that:

1. On or about January 20th, A. D., 1921, plaintiff delivered to me the sum of \$2500.00 as set forth in the complaint herein, as security for bail bonds entered into by myself for one Samuel Cohen and Sadie Cohen, on that date, aggregating \$18,500.00 in the matter of the State *vs.* Samuel Cohen and Sadie Cohen, who were charged with a crime, which matter was then pending in the Hudson County Court of Common Pleas.

30

2. It was agreed at the time of said delivery of said sum between plaintiff and myself that said sum was to be returned by me upon the discharge of said bail bonds from the records after all disbursements incidental thereto were deducted by me.

40

Affidavit Opposing Motion.

3. It was further agreed by and between the said plaintiff and myself that I was to charge a premium of 3% of the amount of said sum of \$18,500.00. Said 3% was to be charged against the sum of \$2500.00, and a premium of 1% of the amount of said sum of \$18,500.00 for each and every year after the first year, which amount was to be charged against the said sum of \$2500.00.

4. It was further agreed by and between the plaintiff and myself that said premiums charged were to be considered as disbursements incidental to the discharge of said bail bonds, in accordance with the receipt given by myself to the plaintiff, a true copy of which the plaintiff has annexed to the complaint and marked Schedule A.

5. It was not until June 3rd, 1931, that said bail bonds and all recognizances were discharged of record, by order of the Hudson County Court of Quarter Sessions, and the total amount of premiums chargeable by myself against the said \$2,500.00 at that time was the sum of \$2,012.50.

6. On or about July 8th, 1931, I paid the plaintiff the balance of \$500.00 then due to him after deducting the aforesaid premiums charged against said sum, this sum of \$500.00 being the final payment of said sum and accepted by him as such.

HYMAN BRODSKY.

Sworn and subscribed to before }
me at Hoboken, N. J., this 22nd }
day of October, A. D., 1931. }

DOROTHY DRACH,
Notary Public of New Jersey.

Memorandum of Court Below.

(Reported 10 A. D. Rep. (Misc.) 55.)

**NEW JERSEY SUPREME COURT,
HUDSON COUNTY.**

LOUIS FINKELSTEIN,
Plaintiff,

vs.

HYMAN BRODSKY,
Defendant.

Memorandum.

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ACKERSON, S. C. C.:

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This matter comes before me upon a motion to strike out the defendant's answer upon the grounds that it is sham, frivolous, does not set forth facts sufficient to constitute a defense and is filed for the purpose of delay.

The complaint is in five counts and seeks to recover from the defendant the sum of \$2,000 with interest, alleged to be the balance of \$2,500, delivered by the plaintiff to the defendant on January 20, 1921, as security against loss by the defendant by reason of the execution by him of two certain bail bonds or recognizances, aggregating \$18,500, for Samuel Cohen and Sadie Cohen in the Hudson County Court of Quarter Sessions.

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It is alleged that said money was to be returned to plaintiff upon the discharge of said bail bonds from the record after all disbursements incidental thereto had been deducted, as set forth in a written document, referred to as "receipt", of which the following is a copy:

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Memorandum of Court Below.

10 “Received from Louis Finkelstein the sum of Two thousand five hundred dollars \$2,500.00 as security for bail bonds entered into by Hyman Brodsky for Samuel Cohen and Sadie Cohen this day which bail bonds aggregate \$18,500, in the matter of the State *vs.* Samuel Cohen & Sadie Cohen charged with a crime in Hudson County, N. J.

 This money is to be returned to the said Louis Finkelstein upon the discharge of the said bail bonds from the record after all disbursements incidental thereto are deducted.”

20 It is further alleged that said bail bonds or recognizances were discharged of record on June 3, 1931, and that defendant has not had, suffered or sustained any losses or disbursements by reason of said documents or the discharge thereof, but that defendant after returning \$500 on July 8, 1931, has failed and refused to deliver the remaining \$2,000 to the plaintiff.

30 The defendant has presented his affidavit in opposition to this motion and therein admits the deposit of the \$2,500 as security for the aforesaid bail bonds and the execution and delivery at that time of the so-called “receipt”, hereinabove set out, and also admits that the bail bonds were discharged June 3, 1931, and that he returned \$500 to the plaintiff on July 8, 1931. The only reason alleged in defendant’s affidavit for not returning the balance of said deposit, amounting to \$2,000 is the assertion that at the time of the delivery of said deposit of \$2,500 to the defendant it was agreed, using the language of the affidavit:

40 “That said sum was to be returned by me upon the discharge of said bail bonds from the records after all disbursements incidental thereto were deducted by me. It was further

Memorandum of Court Below.

agreed by and between the said plaintiff and myself that I was to charge a premium of 3% of the amount of said sum of \$18,500. Said 3% was to be charged against the sum of \$2,500 and a premium of 1% of the amount of said sum of \$18,500 for each and every year after the first year, which amount was to be charged against the said sum of \$2,500. It was further agreed by and between the plaintiff and myself that said premiums charged were to be considered as disbursements incidental to the discharge of said bail bonds, in accordance with the receipt given by myself to the plaintiff, a true copy of which the plaintiff has annexed to the complaint and marked Schedule A. It was not until June 3rd, 1931, that said bail bonds and all recognizances were discharged of record, by order of the Hudson County Court of Quarter Sessions, and the total amount of premiums chargeable by myself against the said \$2,500 at that time was the sum of \$2,012.50.”

The defendant conceded on the oral argument, and expressly concedes in his brief, that the alleged agreement to charge premiums for the bonds against the deposit was made orally and contemporaneously with the delivery of the aforesaid sum of \$2,500 as security and the delivery of the alleged “receipt”.

It is apparent, therefore, that the validity of defendant’s contention as a defense depends upon whether the writing which was given by the defendant to the plaintiff on January 20, 1921, and above set forth, is a bare receipt, as claimed by the defendant or whether it is a contract. If it is the former, then the aforesaid oral agreement respecting premiums could be received to amplify the receipt. *Joslin v. Giese*, 59 N. J. L. 130; *Otis*

Memorandum of Court Below.

Elevator Co. v. Stafford, 95 N. J. L. 79. If the writing is a contract, then the aforesaid oral agreement could not be received to add to or alter the terms thereof. *Naumberg v. Young*, 44 N. J. L. 331.

10 The first paragraph of the writing is plainly an acknowledgment of the receipt of money, but the last paragraph makes it something more than that. It reads as follows:

20 “This money is to be returned to the said Louis Finkelstein upon the discharge of the said bail bonds from the record after all disbursements incidental thereto are deducted.” Here we have an agreement to repay the money upon the happening of a certain event, and this makes the receipt contractual in form and exclusive of other evidence as to the terms of the contract that it contains. *Katcher v. American Express Co.*, 94 N. J. L. 165.

It follows, therefore, that in as much as the defendant suffered no losses and has had no disbursements incidental to the discharge of said bail bonds from the record the defendant has no defense to this action.

30 It may not be amiss to observe that even if the alleged oral promise of the plaintiff to pay premiums by having them deducted from the security money were made after the written agreement in question it would still be ineffectual as a defense because made without consideration. The defendant having already executed the bonds would suffer no detriment, and of course there would be no benefit to the plaintiff.

40 It follows, from what has been said, that in as much as the defendant cannot legally show any oral agreement for premiums to be deducted from the security money, the entire answer based

Memorandum of Court Below.

thereon is sham, and does not show any defense to this action and should be stricken out.

The plaintiff having properly supported his complaint by competent affidavits, I recommend that summary judgment be entered in favor of the plaintiff and against the defendant for the sum of \$2,000 with interest thereon from June 3, 1931.

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HENRY E. ACKERSON, JR.,
Supreme Court Commissioner.

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Rule for Judgment Final.

NEW JERSEY SUPREME COURT,
HUDSON COUNTY.

10

LOUIS FINKELSTEIN,
Plaintiff,

vs.

HYMAN BRODSKY,
Defendant.

Action at Law.

Rule for Judgment
Final.

20

This matter being brought before the Court by Lichtenstein, Schwartz & Friedenberg, attorneys of plaintiff, and it appearing that an order has been made striking out defendant's answer and recommending that judgment be entered in favor of the plaintiff and against the defendant for the sum of \$2,000.00, with interest thereon from June 3rd, 1931, together with costs to be taxed, said order having been made by Henry E. Ackerson, Jr., Supreme Court Commissioner.

30

It is, on this 16th day of January, 1932, ORDERED that summary judgment be entered in favor of the plaintiff and against the defendant in the sum of \$2,000.00, together with interest thereon from June 3rd, 1931, in the sum of \$70.00, making a total of \$2,070.00, together with costs to be taxed.

LUTHER CAMPBELL,
Supreme Court Justice.

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New Jersey Court of Errors and Appeals

LOUIS FINKELSTEIN,
Plaintiff-Respondent,

vs.

HYMAN BRODSKY,
Defendant-Appellant.

Action at Law.

On Appeal.

BRIEF OF DEFENDANT-APPELLANT.

Statement of Facts.

On or about January 20th, 1931, plaintiff-respondent delivered to defendant-appellant the sum of \$2,500.00 in cash, the receipt whereof was acknowledged by an instrument signed by the defendant-appellant and which is "Schedule A" annexed to the complaint herein, and which instrument reads as follows:

"Office of
COUNTY CLERK,
Hudson County, N. J.
Jersey City.

Received from Louis Finkelstein the sum of Two thousand five hundred dollars (\$2,500.00) as security for bail bonds entered into by Hyman Brodsky for Samuel Cohen and Sadie Cohen this day, which bail bonds aggregate \$18,500 in the matter of the State *v.* Samuel Cohen and Sadie Cohen, charged with a crime in Hudson County, N. J.

This money is to be returned to the said Louis Finkelstein upon the discharge of the said bail bonds from the record after all disbursements incidental thereto are deducted.

Jan. 20/21

HYMAN BRODSKY,
500 Broadway, Bayonne, N. J."

The complaint alleges that the said sum of \$2,500.00 was delivered to the defendant-appellant as security against loss by reason of his, the defendant-appellant's execution of certain bail bonds and recognizances for one Samuel Cohen and Sadie Cohen, respectively, in the Hudson County Court of Quarter Sessions, and further alleges that at the time of the delivery of said sum the defendant-appellant agreed to return the same when the said bail bonds and recognizances were discharged, after deducting the disbursements incidental thereto, and further alleges that no disbursements or loss by reason of the execution of the said bail bonds or recognizances were sustained by the appellant.

It is also alleged and admitted by both parties that said bail bonds were duly cancelled on June 3rd, 1931, and that no loss or disbursements were entailed in the discharge of the said bail bonds, nor was any loss sustained under the said bail bonds or recognizances.

It is further alleged and admitted by both parties that the sum of \$500.00 was repaid to the plaintiff-respondent on July 8th, 1931, after the discharge of said bail bonds and that the defendant-appellant has refused any further payment.

The defendant-appellant in his answer alleges that the instrument, heretofore more fully set forth, constituted a receipt for the said moneys and that it was orally agreed at the time of the delivery of the said sum of \$2,500.00, that said sum was to be held as security for the premiums

accruing on the said bail bonds, and that a sum in the amount of 3% of the sum of \$18,500.00 for the first year, and a sum in the amount of 1% of said sum of \$18,500.00 for each and every year subsequent to the first year that the bail bonds remained on the records and undischarged, were to be the disbursements to be made by plaintiff-respondent. And the defendant-appellant further alleges that the said sum was to be returned after the discharge of said bail bonds from the record after all disbursements to be made by the plaintiff incidental and accruing up to the time of said discharge were deducted by defendant-appellant from the said sum, and that the aforesaid premium rate was to be considered and understood to be disbursements to be made by the plaintiff incidental to the discharge of the said bail bonds.

The answer further alleges that the total amount of the bail bonds upon which the defendant-appellant was surety was the sum of \$18,500.00 and that the aforesaid premium rate was a reasonable one; that the oral contract between the parties, the exact nature of which is sought to be proved by parol, was one whereby the said sum was put up as security primarily for the payment of the premiums.

Upon a motion made to strike out the defendant-appellant's answer on the ground that it was sham, frivolous and did not set forth facts sufficient to constitute a defense, the matter was duly heard before the Honorable Henry E. Ackerson, Jr., Judge of the New Jersey Supreme Court, Hudson Circuit, then sitting as Supreme Court Commissioner, who thereupon recommended that summary judgment be entered in favor of the plaintiff-respondent and against the defendant-appellant for the sum of \$2,000.00, with interest thereon from June 3rd, 1931, on the ground that the said answer disclosed no defense to the action,

in that it sought to introduce a contemporaneous oral agreement tending to vary and alter the terms of the alleged written agreement evidenced by the aforesaid receipt, and that under the parol evidence rule the same was inadmissible.

Final judgment was thereupon entered upon a rule for judgment signed by the Honorable Luther A. Campbell, Justice of the New Jersey Supreme Court and the defendant-appellant has thereupon appealed to this Court.

This appeal is from the whole of the judgment entered in the Supreme Court and is based upon the contention of the defendant-appellant that the Supreme Court erred in striking out the answer of the defendant-appellant and entering final judgment against the defendant-appellant and in ruling that the facts alleged in the answer were inadmissible in that they violated the parol evidence rule and in holding that the receipt assigned by the defendant-appellant was a contract of such a nature as to exclude evidence of the facts alleged in the answer.

POINT ONE.

Where a writing, though contractual in form, is incomplete or ambiguous on its face, parol evidence is admissible to supply the omission.

It is well settled that

“parol or extrinsic evidence of the understanding of the parties in respect to the construction of a written instrument is usually held admissible to explain that which would otherwise be ambiguous.”

22 C. J., pp. 1180 and 1190.

The Court in *Stephens-Adamson Mfg. Co. vs. Bigelow*, 84 N. J. L. 585, judgment affirmed, 86 N. J. L. 707, states:

“*Naumberg vs. Young*, 15 Vroom 331, is in point upon this question which holds that the written agreement, *if complete*, is the only evidence of the contract between the parties, and that parol evidence * * * is admissible only *where the writing is not complete and does not purport to cover the whole contract.*”

In *Naumberg vs. Young*, above cited, the Court holds on page 335:

“except where fraud or illegality has been set up, parol evidence of an agreement not expressed in writing is competent only where the writing contains only a part of the contract.”

In *Crane v. Elizabeth Library Association*, 29 N. J. L. 305, the court holds:

“Where an entire verbal contract has been entered into and in part execution of its terms written papers have been signed by either of the parties, which on their face are fragmentary and do not purport to be an entire and complete contract, the parol contract is not held to be merged in them but may, notwithstanding their existence, still be proved.”

and it is further, beyond dispute, true that

“a deed or other writing should be construed with reference to the actual state of the subject matter at the time of its execution, and for that purpose extrinsic evidence may be submitted to place the court or jury in the position of the parties at the time of executing the instrument and thus enable them to intelligently interpret the language used.” 22 C. J., p. 1181.

That the instrument under construction in this case is incomplete and inadequate as a contract, the defendant-appellant feels is discernible by mere inspection. It is not signed by the plaintiff-respondent nor is there any consent or promise on his part to permit the money deposited to be used for any purpose and therefore exhibits no mutuality on its face. It is very loosely executed without seal or witness, and makes no statement that it is given pursuant to verbal agreement between the parties, and as such surely was not intended to represent a final and binding contract between the parties. Instead it begins by an acknowledgment of the receipt of the moneys. It has a general expression of the use to which the money is to be applied and with a time fixed for the repayment of the same.

It is a fundamental theory of jurisprudence that in the proper construction of contracts, the court will lend itself to the enforcement of the intention of the parties as evidenced by their agreement. Before the court can determine the intention of the parties, it must necessarily carefully observe the transaction at hand as well as the status of the participants.

In this case, the instrument evidences a transaction whereby moneys were deposited as security to a bondsman in a criminal action.

It is common knowledge that such bondsmen are customarily well paid for their services and universally adopt means for the proper protection of their premiums.

It is a further fundamental rule that in the construction of any instrument, that such intention must be derived not from any one part thereof, but from the entire instrument.

"Schedule A" annexed to the complaint herein says that the moneys deposited were put up as "security for bail bonds". It might be well

in this connection to note that it does not say that the moneys were deposited as security for loss under such bail bonds but the terminology is much more general in scope.

The second paragraph states that the money was to be returned upon the discharge of the said bail bonds "after disbursements incidental thereto" are deducted. There is nothing further to show that the latter clause means after disbursements *incidental to the discharge* are deducted or whether it means disbursements incidental to the *bail bonds* are deducted.

Construing the entire instrument and the fact that the first paragraph recites that the money is given as "security for bail bonds", it would seem that the entire "Schedule A" has as its primary subject the words *bail bonds*.

It is, the defendant-appellant feels, quite evident from the reading of the instrument in question that the purpose of the deposit of \$2500.00 was, as the instrument specifically states, security for *bail bonds*, and the defendant-appellant, therefore, argues that the second paragraph intends that from said sum there should be deducted all disbursements incidental to the bail bonds. If this is so, nowhere in the instrument is there found any explanation as to what is meant by disbursements incidental to the bail bonds, nor to what extent these moneys were to be applied as "security for bail bonds".

However, since necessarily some time for the determination of the amount to be deducted from this sum is inevitable, the second paragraph fixes as the time of reckoning such day as the discharge of the bail bonds was effected.

Construed in this light, the words "security and disbursements" are ambiguous and meaningless, without evidence dehors the instrument, and as such opens the door for the admission of ex-

trinsic evidence so as to enable the court to properly construe the true meaning of the terminology employed by the parties in accordance with their intentions.

Any other construction would, the defendant-appellant feels, make the transaction between the parties preposterous. Can it be contended that \$2500.00 was deposited as security for disbursements incidental to the discharge of the bail bonds when such disbursements could not possibly exceed a few dollars? If so, the plaintiff-respondent would have deposited \$2500.00 for a number of years to secure an expenditure of at most a few dollars, as she must have been aware. Could it be that the defendant-appellant insisted upon such a deposit to secure disbursements which the interest on a small part of the deposit would amply satisfy?

The very statement that the moneys were deposited as "security for bail bonds" in itself is sufficiently ambiguous as to warrant explanation. The words taken by themselves cannot sufficiently enlighten the court as to the extent to which such moneys were to be applied as security and parol evidence should be admissible to explain the intention of the parties in employing those words and to show to what extent such moneys were to be used as security.

It is interesting to note that no satisfactory explanation of the meaning of these words was given by the plaintiff-respondent in these proceedings.

It might also be well to note in this connection that the plaintiff-respondent is compelled, as a matter of necessity, from lack of an express statement in the instrument in question, to put his own construction upon the words, "security for bail bonds" and contends that this means security against loss by reason of the defendant-appellant's execution of the bail bonds. The mere fact that a

construction must be sought for outside of the four corners of the instrument, is sufficient to disclose its ambiguity and the fact that it is incomplete.

It also occurs that a deposit of \$2500.00 could not be a reasonable indemnity for loss under such bail bonds and the court should assume that the parties acted reasonably, but on the contrary it appears that \$2500.00 was a reasonable deposit as security for the payment of premiums.

Plaintiff-respondent cites the case of *Katcher v. American Express Co.*, 94 N. J. L. 165. In that case, plaintiff contracted with the defendant for the remittance of certain money. The court held, that the writing plaintiff received was more than a receipt, it was a contract.

The soundness of this decision upon its facts is not questionable. Unfortunately, however, the facts of the case sub judice do not lend themselves to the rule of law enunciated in the *Katcher* case. In the latter the receipt was part of a printed form which contained the following significant sentences (page 167):

“This receipt is issued subject to the following express conditions:

It is understood and agreed by and between the person who accepts this receipt and the American Express Company, that the acceptance of this receipt by such person shall bind him to the following provisions. . . .”

In other words, the receipt not only contained words of contractual import but in addition it was expressly provided that these words should be the sole criterion of contractual liability between the parties.

In view of the foregoing, the defendant-appellant feels and requests this court to find that the writing before the court in no way indicates, in

the language of Dean Wigmore, that the jural acts of the parties were embodied in a single memorial and that evidence of the facts alleged in the answer were properly admissible in support thereof.

POINT TWO.

The writing before the Court is merely a receipt for the sum of \$2,500.00 delivered by plaintiff-respondent to defendant-appellant, and as such the parol evidence rule is not applicable.

Under the preceding point, it was conceded for the sake of argument, that the writing contained words of contractual import worthy of consideration. It must be observed, however, that the so-called contractual elements, if any, are meaningless. As was already urged the sum of \$2500.00 is palpably inadequate as security and could not have been intended as such and as there are no disbursements to be made in discharging the bail bonds from record, that paragraph is merely "padding".

Being merely a receipt the parol evidence rule is not applicable. This is well settled by numerous cases of which *Joslin v. Giese*, 59 N. J. L. 130 and *Otis Elevator Co. v. Stafford*, 95 N. J. L. 79, are a few.

It is submitted that plaintiff-respondent's position may be approached from either of the two angles considering the writing. As a contract its utter incompleteness and ambiguity opens the door to the admission of parol evidence to supply the elements lacking.

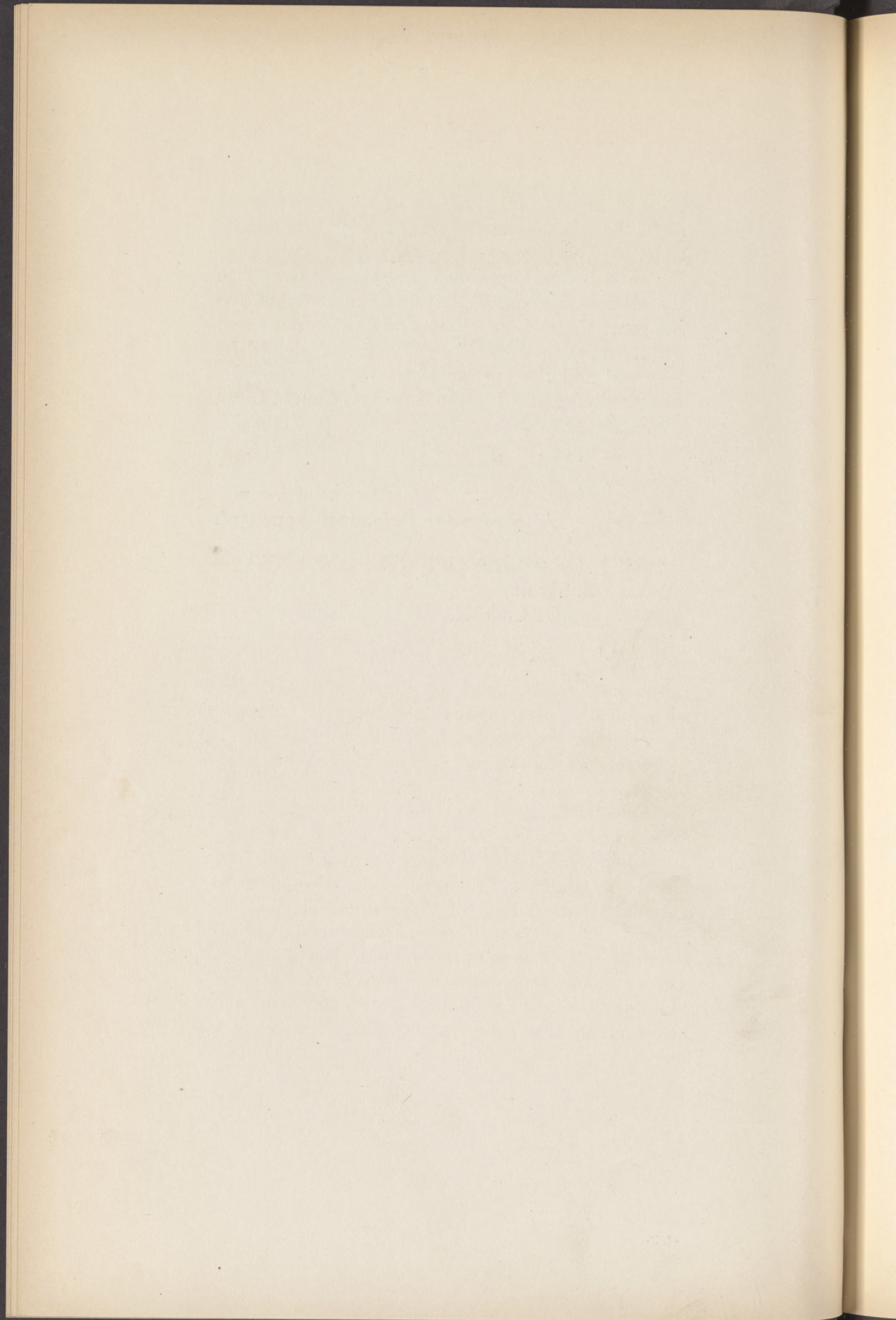
* Treating the writing in its logical and legal effect it is merely an acknowledgment of the re-

ceipt of money and evidence of a parol evidence as to the use this money was to be put, is admissible.

The defendant-appellant therefore submits to this Honorable Court that the judgment of the Supreme Court is erroneous on the grounds and for the reasons heretofore stated and should be reversed and the answer of the defendant-appellant heretofore filed in the Supreme Court should be permitted to stand and the motion to strike out the same upon the grounds set forth be denied.

Respectfully submitted *Stuhr & Vogt*
 STUHR & VOGT,
 Attorneys for Defendant-Appellant.

William S. Stuhr
 WILLIAM S. STUHR,
 Of Counsel.



New Jersey Court of Errors and Appeals

LOUIS FINKELSTEIN,
Plaintiff-Respondent,

v.

HYMAN BRODSKY,
Defendant-Appellant.

Action at Law.

On Appeal.

BRIEF OF PLAINTIFF-RESPONDENT.

Facts.

The facts as set forth in appellant's brief are substantially correct and need not be further dwelt upon, except as to one point omitted; namely, the affidavit of Samuel Cohen (Record, pp. 22, 23 and 24). This affidavit sets forth in substance that said Cohen paid to appellant, Brodsky, more than the agreed amount of premiums on the bonds in question, and said affidavit has at no time in this proceeding been controverted by the affidavit of defendant-appellant, or anyone. This circumstance becomes material in the light of appellant's present contention that the sum of money involved in this action was to pay him for the same premiums on the same bonds mentioned in said affidavit of Cohen.

POINT I.

The writing before the Court is a contract and is within the operation of the parol evidence rule.

We will address ourselves to Point II of appellant's brief in the first instance and establish that the instrument in question is a contract, and not merely a receipt, as contended by appellant.

The second paragraph of said writing reads as follows:

"This money is to be returned to the said Louis Finkelstein upon the discharge of the said bail bonds from the record after all disbursements incidental thereto are deducted.

(Signed) HYMAN BRODSKY,

500 Broadway,

Jan. 20/1921

Bayonne, N. J."

Here, clearly, is an agreement and contract to repay the money upon the happening of a certain event signed by the defendant-appellant. It is admitted by both sides, and the court below notes in the opinion filed, that the event, to wit, the discharge of the bail bonds, has occurred and that the defendant-appellant has had no disbursements (Record, p. 30, l. 22).

In the case of *Katcher v. American Express Co.*, 94 N. J. Law 165, this court dealt with a receipt given by an express company for certain moneys which were to be transmitted to Russia. The receipt is set forth in the court's opinion, and in that case, as in this, the defendant acknowledged receipt of the money. In the *Katcher* case, the defendant agreed to transmit the money to Russia.

In this case, the defendant-appellant agreed to repay plaintiff-respondent at the happening of a certain event. Therefore, in both cases, the defendant not only acknowledged receiving the money, but contracted with respect thereto. This court, in dealing with the writing in the *Katcher* case, treats it as a contract rather than a mere receipt, and says, through PARKER, J., at pages 166, *et seq.*:

"It is not pretended that plaintiff was in any way deceived as to its contents, and we think all the evidence is in accord that what he wanted was to send to Tese Kaczier, his wife, in Russia, not \$194.50, but a thousand rubles; *and that the receipt itself was contractual in form and exclusive of other evidence as to the terms of the contract that it contained.*" (Italics ours.)

In the case of *Wagner v. Marcus*, 288 Pa. 579; 136 Atl. 847, the Pennsylvania Supreme Court, in reviewing a judgment for the plaintiff below, had before it for consideration the following writing:

"Scranton, Nov. 20/23.

"Received check of \$5,000.00 on County Savings Bank (No. 3958) which I agree to use to purchase all the rights, titles and interests of L. D. Smith & Harry Decker and W. L. Hill in the Spring Brook Sand Co. Should such interest be impossible to acquire, I agree to surrender said check to the drawer, N. Wagner, within 30 days.

"ADOLPH MARCUS."

In affirming said judgment, the court unanimously said, at page 848 of 136 Atl. Rep.:

"In reaching our conclusion we have not overlooked the rule that the interdiction of parol evidence to vary or contradict written instruments does not apply to mere receipts. 22 C. J. 1135. If the paper in question were a mere receipt it could not be given contractual inviolability; but it is much more than a receipt; by its very terms it is a written agreement: 'I agree to use (the check) to purchase,' etc. 'I agree to surrender said check to the drawer,' etc. The fact that it is signed by only one of the parties to the transaction makes no difference, of course, on the score of its being a contract (6 R. C. L. 641; 13 C. J. p. 305); it was a unilateral contract (1 Williston on Contracts, Sec. 13; 13 C. J. p. 247)."

To the same effect, see *Union Storage Co. v. Economy Distilling Co.*, 94 Pa. 126; 45 Atl. 48.

POINT II.

Parol evidence of any prior or contemporaneous promise not contained in the writing before the Court is not admissible.

We have demonstrated under Point I that the writing under consideration is a contract, and this being so, the alleged oral agreement could not be received to add to or alter the terms thereof, since it is conceded by defendant-appellant to have been made contemporaneously with the delivery of the money to the defendant-appellant, and the delivery of the writing in question to the plaintiff-respondent (Record, pp. 14, 15 and p. 29, l. 23). *Naumberg v. Young*, 44 N. J. Law 331.

Defendant-appellant concedes the soundness of the foregoing rule of evidence, but now contends that the contract under consideration is incomplete or ambiguous on its face. He devotes Point I of his brief to this contention.

It would be well here to note that defendant-appellant made no contention below that the writing in question was incomplete or ambiguous. As shown by his answer and affidavit, and by the memorandum of the court below, he merely asserted that there was a further agreement *oral* and *contemporaneous* respecting the application of the \$2,500.00 deposit (Record, pp. 14, 15 and p. 29). He ought not now be heard to assail the said writing as incomplete or ambiguous. *De Blasi v. Higgins*, 8 N. J. Misc. 22; *Manufacturers Land & Improvement Co. v. Camden*, 81 N. J. Law 413.

However, to consider the law with respect to this new contention, we find that the contract in question is complete and clear in all its terms. It acknowledges the receipt of the sum of \$2,500.00, and contains a clear and unequivocal agreement to return the same to the plaintiff-respondent on the happening of a certain event after deducting disbursements. It is conceded that the event has occurred and that there were *no disbursements*. There is no ambiguity. Appellant contends in his brief (p. 8) that respondent went beyond the terms of the contract in alleging that a deposit was made "as security against loss." This, of course, is not so, as the allegation was merely one of the legal effect of the instrument in question, and the court's attention is called to the fact, overlooked by the defendant-appellant, that this very allegation is admitted in defendant-appellant's answer (Record, p. 12, ¶ 1).

In making the contention that plaintiff-respondent was to pay the premiums to defendant, and that the language of the contract in question could be taken to mean that, the defendant-appellant forgets completely that the affidavit of Samuel Cohen (Record, pp. 22, *et seq.*) sets forth that he, Cohen, has already paid and overpaid, the full amount of the premiums contracted for, and *this affidavit has remained undenied throughout this entire proceeding.*

Defendant-appellant cites two cases for the proposition that parol evidence will be admitted where the writing is incomplete. In one, *Stephens-Adamson Mfg. Co. v. Bigelow & Swain*, 84 N. J. Law 585 the contract was incomplete *on its face*, one of the terms having been left blank; and in the other, *Crane v. Elizabeth Library Association*, 29 N. J. Law 302, we find that the court excluded the parol evidence that was offered and said, *at pages 305 and 306:*

“Where an entire verbal contract has been entered into, and in part execution of its terms, written papers have been signed by either of the parties, which on their face are fragmentary, and do not purport to be an entire and complete contract, the parol contract is not held to be merged in them, but may, notwithstanding their existence, still be proved. *Park v. Miller*, 3 Dutcher 340, and cases there cited; 2 Pars. on Con. 75; *Miller v. Travers*, 8 Bingham 244; *Sanderson v. Piper*, 5 Bing. N. C. 425; *Potter v. Hopkins*, 25 Wend. 419; *Barnes v. Perrine*, 9 Barb. 219; 3 Cow. & Hill’s note to Phil. Ev., note 295, and cases there cited.

“If parol evidence was admissible in this case, I am not able to see in what cases it is

to be excluded. The writing was intended to be complete and to embody the whole agreement. It was not a part execution of an entire parol agreement which preceded it, and which the parties did not intend to supplant by the writing. Whatever uncertainty there may be in its term was the result of carelessness in the drafts made, and is not caused by intentional incompleteness."

It is clear, therefore, that the rule of law contended for by the defendant-appellant applies only in those cases where the writing contains only a part of the contract and the same is incomplete on its face and by its terms. *Naumberg v. Young, supra.*

It is respectfully submitted that neither the rule of *Naumberg v. Young*, nor the applicability thereof to the instant case can be successfully challenged, and to permit the defendant-appellant, who prepared and signed the contract in question, to show by parol an alleged contemporaneous and oral agreement or arrangement, and thereby add to or alter the terms of the writing, would put an end to the security that contracting parties intend to have when they express, in writing, the terms of their bargain.

There is no allegation in the answer or affidavits of fraud or false or fraudulent representations by the plaintiff which might take the case out of the operation of the rule, nor could there be any contention that such alleged oral promise was a collateral agreement on a subject distinct from that to which the written agreement relates. In short, there is no allegation or proof before this court sufficient to bring the case within any

of the exceptions to the doctrine excluding parol evidence, as enunciated by the *Naumberg* case, *supra*.

POINT III.

If the alleged oral promise to pay the premiums in question were made after the written agreement, it would be without consideration and unenforceable.

The court below, in ruling on the motion to strike the answer, stated in its opinion (Record, p. 30, l. 27, *et seq.*) :

"It may not be amiss to observe that even if the alleged oral promise of the plaintiff to pay premiums by having them deducted from the security money were made after the written agreement in question it would still be ineffectual as a defense because made without consideration. The defendant having already executed the bonds would suffer no detriment, and of course there would be no benefit to the plaintiff."

We feel that this point need not be further discussed, in view of the fact that appellant does not in his brief contend that the alleged promise was made subsequent to the making of the written agreement in question. Further than this, the notion that there was any agreement that plaintiff-respondent was to pay premiums seems clearly to be sham in the light of the undenied affidavit of Samuel Cohen that he paid and overpaid the full amount of the premiums which defendant-appellant was to receive for his execution of the bail bonds (Record, p. 22).

The judgment for the plaintiff in the Supreme Court should therefore be affirmed.

Respectfully submitted,

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