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*Clerk's Certificate.*

SECOND DISTRICT COURT OF NEWARK.

I, JAMES E. GARRIGAN, Clerk of the Second District Court of the City of Newark, County of Essex and State of New Jersey, do hereby certify that the foregoing is a true copy of the record and proceedings in the case of Henry A. Bock vs. Gabriel Feigelson, held in the Second District Court of the City of Newark, County of Essex and State of New Jersey, as taken from the Second District Court Docket No. 248, page 97987. 10

Dated: April 23, 1932.

JAMES E. GARRIGAN,  
Clerk.

20

30

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*State of Demand.*

**SUMMONS.**

(Issued May 8, 1931.)

The defendant was duly summoned.

10

**STATE OF DEMAND.**

SECOND DISTRICT COURT OF THE  
CITY OF NEWARK.

|    |   |   |  |
|----|---|---|--|
| 20 | HENRY A. BOCK,<br><br><div style="text-align: right;"><i>Plaintiff,</i></div> <div style="text-align: center;"><i>vs.</i></div> GABRIEL FEIGELSON,<br><br><div style="text-align: right;"><i>Defendant.</i></div> | } | <i>On Contract.</i><br><br><i>State of</i><br><i>Demand.</i> |
|----|---|---|--|

Plaintiff residing in the Borough of Richmond, Staten Island, in the State of New York, says that,

30 1. Plaintiff sues upon a check made by the defendant to the plaintiff herein for the sum of \$500 on April 3, 1931, drawn upon the Essex Title Guaranty and Trust Company, a copy of which is hereto annexed, made a part hereof and marked "Schedule A."

2. The aforesaid check was presented for payment, but the same was not honored, same having been protested by the said bank.

40 3. There is due and owing upon said check the sum of \$500. no part of which has been paid by the defendant to the plaintiff herein.

*State of Demand.*

Plaintiff demands as damages the sum of \$500 plus costs.

(Sgd.) BRENNER & KRESCH,  
Attorneys of Plaintiff.

To the Within Named Defendant: 10

PLEASE TAKE NOTICE that the plaintiff hereby demands a trial on the return day as set forth in the summons hereto annexed.

(Sgd.) BRENNER & KRESCH,  
Attorneys of Plaintiff.

This is a certified copy now on file in the Second District Court of the City of Newark.

JAMES E. GARRIGAN, 20  
Clerk.

“SCHEDULE A.”

ESSEX TITLE GUARANTY AND TRUST COMPANY

No. 722 Montclair, N. J. April 3d, 1931

Pay to

the order of H. A. Bock \$500.00 30  
Five Hundred 00/100.....DOLLARS

(Signed) GABRIEL FEIGELSON  
(Endorsed) Henry A. Bock.

This is a certified copy now on file in the Second District Court of the City of Newark.

JAMES E. GARRIGAN,  
Clerk.

**SPECIFICATION OF DEFENSES.**

(Filed March 19, 1932.)

**SECOND DISTRICT COURT OF THE  
CITY OF NEWARK.**

|    |   |   |  |
|----|---|---|--|
| 10 | HENRY A. BOCK,<br><br><div style="text-align: right;"><i>Plaintiff,</i></div> <div style="text-align: center;"><i>vs.</i></div> GABRIEL FEIGELSON,<br><br><div style="text-align: right;"><i>Defendant.</i></div> | } | <i>On Contract.<br/>Specification<br/>of Defenses.</i> |
|----|---|---|--|

The following is a specification of defenses intended to be made by the defendant herein:

20

**FIRST DEFENSE.**

The defendant denies that the note set forth in the State of Demand herein was given for any consideration whatsoever.

**SECOND DEFENSE.**

The defendant denies that he is indebted to the plaintiff in any sum whatsoever.

30

**THIRD DEFENSE.**

That heretofore and on or about April 3, 1931, the plaintiff offered to sell to a certain Feigelson Bros. a store, fixtures, business and good will, then located at 9 Goffords Lane, Great Kills, Staten Island, New York, upon certain terms and conditions; and that the said Feigelson Bros. were to deposit with the plaintiff the sum of \$500.00 on account of the purchase price. That the defendant, at the request

40

*Specification of Defenses.*

of the aforesaid Feigelson Bros., and for their accommodation and convenience, drew to the order of the plaintiff the check referred to in the State of Demand herein. That thereafter the defendant, at the demand of, and as a result of notice to him by the aforesaid Feigelson Bros. to stop payment on the check aforesaid, did stop payment thereon. 10

## FOURTH DEFENSE.

That payment on the check mentioned in the State of Demand was stopped by defendant at the demand of, and upon notice to do so by Feigelson Bros., at whose instance, and for whose accommodation and convenience, the check herein was made to the order of the plaintiff. 20

## FIFTH DEFENSE.

1. That the defendant herein was duly notified by Feigelson Bros. aforesaid, that the plaintiff had made certain materially false and fraudulent misrepresentations to said Feigelson Bros. in connection with the offer to sell to them the store, fixtures, business and good will mentioned in the "Third Defense," in that the alleged income of the store and business was materially less than that represented by the plaintiff to said Feigelson Bros.; and falsely and fraudulently represented that plaintiff had arranged to obtain an extension of a certain lease covering the premises wherein the store, fixtures and business aforementioned, was located. 30

2. That the aforesaid Feigelson Bros. notified defendant of the facts and circumstances mentioned in the preceding paragraph "1"; and demanded and instructed the defendant to stop 40

*Specification of Defenses.*

payment on the check aforesaid, which defendant did.

(Sgd.) GEORGE H. ROSENSTEIN,  
Attorney for Defendant.

10 This is a certified copy now on file in the  
Second District Court of the City of Newark.

JAMES E. GARRIGAN,  
Clerk.

20

30

40

**NOTICE OF APPEAL.**

(Filed April 23, 1932.)

**SECOND DISTRICT COURT OF THE  
CITY OF NEWARK.**

|   |   |  |    |
|---|---|--|----|
| HENRY A. BOCK,<br><br><div style="text-align: center;"><i>Plaintiff,</i></div> <div style="text-align: center;"><i>vs.</i></div> GABRIEL FEIGELSON,<br><br><div style="text-align: center;"><i>Defendant.</i></div> | } | On Contract.<br><br>Notice of<br>Appeal. | 10 |
|---|---|--|----|

To Henry A. Bock or Brenner & Kresch, Times Building, Bayonne, New Jersey, his Attorneys: 20

Sirs:

TAKE NOTICE that the defendant, Gabriel Feigelson, hereby appeals to the New Jersey Supreme Court from the judgment in the Second District Court of the City of Newark, rendered in the above stated action on the 11th day of April, 1932.

(Sgd.) GEORGE H. ROSENSTEIN,  
 Attorney for Defendant. 30

This is a certified copy now on file in the Second District Court of the City of Newark.

JAMES E. GARRIGAN,  
 Clerk.

## DOCKET ENTRIES.

|    |  |   |  |
|----|--|---|--|
| 10 | HENRY A. BOCK,<br><div style="text-align: right; padding-right: 20px;"><i>Plaintiff,</i></div> <div style="text-align: center; padding: 0 10px;"><i>vs.</i></div> GABRIEL FEIGELSON,<br><div style="text-align: right; padding-right: 20px;"><i>Defendant.</i></div> | } | <i>On Contract.</i><br><br><i>Demand</i><br>\$500.00 |
|----|--|---|--|

432 Bloomfield avenue, Montclair.

Brenner & Kresch, plaintiff's attorneys.

George H. Rosenstein, defendant's attorney.

## PLAINTIFF'S COSTS.

|    |                      |         |
|----|----------------------|---------|
| 20 | Summons .....        | \$ 2.10 |
|    | Mileage .....        | .56     |
|    | Listing fee .....    | 1.50    |
|    | Attorney's fee ..... | 25.00   |
|    |                      | \$29.16 |
|    | Total Costs .....    | \$29.16 |

Summons issued May 8, 1931.

Returnable May 22, 1931.

Demand filed May 8, 1931.

Notice to restore filed November 16, 1931.

30 Specification of Defenses filed March 19, 1932.

Demand for Bill of Particulars filed March 19, 1932.

Summons returned as follows:

The said defendant not being found I served the within summons May 14, 1931, by leaving a copy thereof at his residence with a member of his family, above the age of 14 years, who was informed of its contents.

40

JAMES J. WHALEN,  
Sergeant-at-Arms.

*Docket Entries.*

1931

- May 22 This cause adjourned to June 10, 1931, and from time to time thereafter until March 30, 1932, when the plaintiff appeared and the defendant, and defendant offered in evidence a document signed by plaintiff. 10  
 Max Ferber appeared for the defendant, and the cause was partly tried, and carried over until April 11, 1932.

1932

- Apr. 11 The plaintiff and defendant appeared and the cause was tried and determined at this time, the following witnesses being sworn in behalf of the defendant: Samuel Feigelson and Gabriel Feigelson, the defendant, Frieda Lipschitz, a stenographer, was sworn. 20  
 Thomas Nolan was sworn in rebuttal. Henry A. Bock was sworn for the plaintiff.  
 The evidence being closed the Court rendered judgment in favor of the plaintiff and against the defendant in the sum of \$500 damages with costs, whereupon judgment is entered in favor of the plaintiff and against the defendant in the sum of \$500 damages with costs. 30

Apr. 23 Notice of Appeal filed.

Apr. 23 Appeal bond filed.

This is a certified copy now on file in the Second District Court of the City of Newark.

JAMES E. GARRIGAN,  
 Clerk.

40

*Henry A. Bock, for Plaintiff, Direct.*

**TESTIMONY.**

SECOND DISTRICT COURT OF THE  
CITY OF NEWARK.

|    |  |
|----|--|
| 10 | HENRY A. BOCK,<br><br><div style="text-align: right; padding-right: 20px;"><i>Plaintiff,</i></div> <div style="text-align: center; padding: 0 10px;"><i>vs.</i></div> GABRIEL FEIGELSON,<br><br><div style="text-align: right; padding-right: 20px;"><i>Defendant.</i></div> |
|----|--|

Before Hon. Louis R. Freund, Judge. March 30, 1932, and April 11, 1932.

Appearances:

20 For the plaintiff, Brenner & Kresch, Esqs., by  
A. Alfred Fink, Esq.

For the defendant, George H. Rosenstein, Esq.  
Stenographer duly sworn.  
Frieda H. Lipschitz, official reporter.

HENRY A. BOCK, plaintiff, witness on his own  
behalf, being first duly sworn according to  
law upon his oath testifies as follows:

30 *Direct examination* by Mr. Fink.

Q Mr. Bock, I show you what purports to be  
a negotiable check made by Gabriel Feigelson to  
you, in the sum of \$500.00.

The Court: Offer it in evidence. There  
is no affidavit denying it.

Mr. Fink: I offer it in evidence.

40 (Check marked "P. 1" in evidence.)

*Henry A. Bock, for Plaintiff, Cross.*

Q Is that check paid? A It is not.

The Court: How much is due on it?

Mr. Fink: \$500.00.

A \$500.00.

10

*Cross examination by Mr. Rosenstein, as follows.*

Q Is this your signature? (Showing paper to witness.) A It is; yes.

Mr. Rosenstein: I ask that be marked for identification.

(Paper marked "D. 1" for identification.)

Q Mr. Bock, you operate a store in Staten Island; is that right? A Right.

20

Q And on the third of April, 1931, you made a contract to sell that store; did you not? A Yes. The date is what?

Q Just answer my question. A It is, if that is the date on that piece of paper. It is the date; three days before Easter last year.

Q That is correct, is it? A That's right. (Looking at paper.)

Q And among other things that contract provided for a payment of \$500.00 on account; did it not? A For signing the contract; yes, sir.

30

Q And this check for \$500.00, upon which you are now suing, was given to you pursuant to that contract; isn't that right? A Yes; the date of the contract.

Q Now, this is the contract that you signed; is it not? A (Witness looking at paper.) This is a copy of the original, the same thing as the contract I hold.

40

*Motion for a Non-Suit.*

Mr. Rosenstein: This is the contract that was originally marked. I didn't know in the beginning as to whether I would be able to qualify the paper.

10 The Court: Is that instrument to which you are now referring marked for identification?

Mr. Rosenstein: It is, sir. I offer it in evidence, if your Honor please.

Mr. Fink: Objected to. It is not the original.

The Court: Objection sustained.

Q The contract that you made was between yourself as seller and Feigelson Brothers; isn't that right? A Yes, sir.

20 Q Now, the check upon which you are suing is a check of Gabriel Feigelson; isn't that right? A It is.

Q Your contract was with Feigelson Brothers; isn't that right? A It was.

Q And this is not a check of Feigelson Brothers, but of Gabriel Feigelson? A Yes, sir; it is one of the brothers.

30 Mr. Fink: That is the plaintiff's case, your Honor.

Mr. Rosenstein: I move for a non-suit, upon the ground of an improper joinder of parties.

The Court: He is not suing upon the breach of contract here. He is suing upon the instrument, the check itself. Motion denied.

*Max Ferber, for Defendant, Direct.*

MAX FERBER, witness on behalf of defendant, being first duly sworn according to law, upon his oath testifies as follows:

*Direct examination* by Mr. Rosenstein.

Q What is your business, Mr. Ferber? A 10  
A business broker.

Q Do you know the plaintiff—Mr. Bock? A  
Mr. Bock? Yes, sir.

Q Did you ever have any conversation with Mr. Bock about a certain check that was given, a check of Gabriel Feigelson to Mr. Bock? A I did.

Q Will you please tell us what you said to Mr. Bock, and what Mr. Bock said to you about that check. A I came to Mr. Bock when we had the contract, when Mr. Bock sold the store to Mr. Feigelson Brothers—Sam Feigelson and Louis Feigelson. At that time he told us he would give us a guarantee \$725.00 a week income. 20

Mr. Rosenstein: I offer in evidence the contract dated April 3, 1931, signed by Henry A. Bock and Feigelson Brothers and Sam Feigelson. 30

(Contract marked "D. 1" in evidence, previously marked "D. 1" for identification.)

Q Now, Mr. Ferber, did you have any conversation with Mr. Bock, the seller in this contract, about the contract? A Yes, sir.

Q And the transaction between Mr. Bock and Feigelson Brothers? A Yes, sir. I seen Mr. Bock in the middle of March last year, and then 40

*Max Ferber, for Defendant, Direct.*

I came over to Mr. Bock a few times. We talked over about the business, and he told me, "I want to sell the store," and he wanted for the store a certain amount, the price of \$18,000.00. Then he told me he wants \$18,000.00. I marked it down in the book. He told me he give  
10 me a rental of \$90.50 a month, and also an eight-year lease for the same rent which he had before, and he will give me a lease subsequent which the people can put in a fountain in the store. On these conditions we came over to buy the store.

Mr. Fink: I want to object to this.

The Court: It may be all stricken out. The terms are all merged in the eventual  
20 contract.

Q Now, were you present when the contract was made? A Yes, sir.

Q Now, did Mr. Bock say anything to you prior to the making of the contract as to what the income of the store was?

Mr. Fink: I object to it. Anything said to this man would not be binding on Mr.  
30 Bock or the other parties whatever.

The Court: Sustain the objection.

Q Did you have any discussion with Mr. Bock with respect to a sale by him of his store? A Yes; I did.

Q Now, did you tell him that you had anybody who was interested in the purchase of the store? A Yes.

Q Did you ask him what the price of his store was? A Yes; I did.  
40

*Max Ferber, for Defendant, Direct.*

Q Did you have a discussion with him? A I did.

Q In respect to the price? A Certainly.

Q Now, did you have a discussion with him in respect to the income of the store?

Mr. Fink: Objected to, for the same reason. 10

The Court: Sustain the objection.

Q You testified that you had a discussion with Mr. Bock? A Yes.

Q About the sale of his store? A Yes, sir.

Q Did you tell him what your business was? A Yes, sir.

Q And did you tell him that you could sell the store for him? A Yes, sir.

Q Now, what conversation did you have with him? Well, did he employ you to sell the store for him? A Yes, sir; he did. 20

*Examination by the Court as follows.*

Q Were you to receive a compensation for the sale of that store from him? A Yes, sir.

Q Was there an agreement between you and Mr. Bock as to compensation in the event that you obtained a purchaser? A Yes, sir; a verbal agreement. 30

Q An oral agreement? A Yes, sir.

Q That you were to be paid by him? A Yes, sir.

*Direct examination continued by Mr. Rosenstein, as follows.*

Q Now, subsequent to that you introduced the purchasers, Feigelson Brothers, to Mr. Bock; isn't that right? A Yes, sir. 40

*Max Ferber, for Defendant, Direct.*

Q And when Mr. Bock employed you to sell this store for him, did he make any statements to you about the income of his store? A Yes, sir; he did.

10 Q What did he say? A He said he is doing \$725.00.

Mr. Fink: I object to it. He is not the agent of the defendant.

The Court: He is the agent of the plaintiff. Overrule the objection.

Mr. Rosenstein: There is, of course, this further defense: That the check which was drawn was drawn by a party who was neither one of the Feigelson Brothers.

20 The Court: It makes no difference, so long as it was for a consideration. Consideration need not flow to the maker of the check, so long as the receiver of the check parted with the consideration to anybody.

30 Mr. Rosenstein: Now, may I at this time point out to your Honor this: We now have in evidence a contract between Bock, who is the plaintiff, and Feigelson Brothers, who are the other parties to this contract. The amount of the check and the check which is now in suit is a part payment under a contract between the plaintiff and Feigelson Brothers. The only privity of contract between the plaintiff and the defendant, Gabriel Feigelson, the maker of the check, arises out of the making of that check—and nothing else.

40 The Court: You are resting upon an erroneous hypothesis. You have by your cross examination indicated that the maker of this

*Max Ferber, for Defendant, Direct.*

check gave it on account of a contractual existence between this plaintiff and another; and the mere fact that there is no privity between the maker of the check and this plaintiff—the payee and maker—does not justify you in urging that there was no consideration from this payee to the maker, in view of the fact that the evidence so far indicates that the consideration for the giving of that check was the contract between Feigelson Brothers and this plaintiff. The consideration does not have to move to the party charged at all times. If you are going to urge that there was no consideration between the payee and the maker of the check, I will save a great deal of time for you. I don't agree with you. 10

I will rule against you on that, and say there is sufficient to indicate that there is consideration for the making of this check by this maker to this payee, in view of the fact that this check was given pursuant to the terms of a contract between the payee as one of the parties and third parties as the other. That is sufficient consideration, he having parted with consideration by having become party to a contract with another. That constitutes sufficient consideration. 20 30

Mr. Rosenstein: Then I respectfully except to your Honor's ruling.

The Court: You may have the exception.

Mr. Rosenstein: I might state as the ground of my exception:

Under Section 24 of the "Negotiable Instruments Act," the duty of showing a lack of consideration is purely a matter of af- 40

*Max Ferber, for Defendant, Direct.*

10 firmative defense. It is for me to show that nothing passed from the plaintiff to the present maker of a check who is now being sued; and if I show that, plaintiff cannot recover; the question of breach or performance being a matter purely between the parties to the contract and to which the present defendant is a stranger.

---

(Hearing continued on April 11th, 1932, as follows:)

20 Mr. Fink: At this time, your Honor, I want to object to any testimony relevant to the representation of any income, by reason of the fact that there is nothing mentioned of the income in the contract. Whatever negotiations took place prior to the time that they entered into this contract merged into the contract, and for that reason I think it is immaterial.

30 The Court: As to the transaction itself, you cannot read into the contract anything more than the contract itself bespeaks; but misrepresentation in inducing a contract is the defense.

Overrule the objection.

40

*Max Ferber, for Defendant, Direct.*

MAX FERBER, witness on behalf of defendant, having been sworn previously, testifies as follows:

*Direct examination (continued) by Mr. Rosenstein.*

Q Mr. Ferber, you testified that Mr. Bock, the plaintiff, made certain statements to you in respect to the income of the business? A Yes, sir.

Q That he authorized you to sell? A Yes, sir.

Q Now, will you please tell us, in your own way, exactly what Mr. Bock said to you? A About the middle of March I came in to Mr. Bock in Great Kills, and I found Mr. Bock wasn't there in the store, but a girl was in the store, and I asked, "Where is Mr. Bock?" and she said, "Mr. Bock said he will be here at four o'clock." I waited for him, and Mr. Bock came at four o'clock, and I asked him would he like to list the store with me for sale. So he said, "Yes." So I told him which stores I sold in Staten Island and proved it to him, and called up in Dongan Hills and Grant City; and finally he gave me the store for sale, and I asked him how much he was doing business. He told me \$725.00 plus the papers, \$12.00—he doesn't ring on the register. \$725.00 a week. He wants \$18,000.00 for the store; the rent he will give me a lease for eight and a half years, and if I produce him a buyer, he will sell the store. I sent him a couple of people before, and he didn't like it; and a fellow by the name of Feigelson came to see me, and I say I had a good store in Great Kills. We went to see it. Mr. Bock said he wanted \$18,000.00. Feigelson considering

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*Max Ferber, for Defendant, Direct.*

about two weeks—and we came April 3rd to Mr. Bock's house, about seven or seven-thirty in the evening, and Mr. Bock said, "To prove the income, and so on, I haven't the books right here in my house; but I have the books in the store, and if you come to the store in the morning, I will show you, we have \$725.00 a week."

When Mr. Feigelson wrote the contract, he gave Mr. Bock \$500.00 a check. That was April 3rd in the evening, and the 5th he called me at the office and he said I should come over. I said, "What's the matter?" and he said, "I looked over the books, and they proved that he does only \$525.00 or \$550.00 per week." I said, "Why don't you take the check from Mr. Bock, as long as he misrepresented you?" He said, "I asked Mr. Bock. He told me he will send me." I came to Mr. Bock, and I said, "I wouldn't say you misrepresented him on the sale. Perhaps you didn't know yourself; but I advise you to give the check back to the people."

*Examination by the Court, as follows:*

Q Do you keep a list of stores that you sell?

A Yes, sir.

30 Q Don't you in your listing set forth what they represent to be the income of the business?

A I do.

Q Where is that listing? A I haven't the books here. I can bring the books. I have it in the office.

Q Haven't you your listing here? A No, sir.

Q Didn't you know you were going to testify on that today? A I can bring the books.

*Max Ferber, for Defendant, Direct.*

Q What books? A Every store is listed on the books.

Q Did you put down on those books the income—the alleged income? A Certainly; yes, sir.

*Direct examination* (continued) by Mr. Rosen- 10  
stein, as follows:

Q Now, just tell us what Mr. Bock said to you in respect to the complaint made by Mr. Feigelson that the income didn't come up to \$725.00? A Mr. Bock told me, "Perhaps I didn't mean to misrepresent you people. I didn't look over my books. Maybe I did mislead you." I said, "You can't get so much money for \$525.00, if you said \$725.00." So I said, "The 20  
best thing would be, give him the check back." So he said, "All right; wait a minute." So I waited a minute, and then he went in in the back with his wife; and he said his wife told him he shouldn't give the check back. That was the end of it.

Q That concluded the conversation that you had with Mr. Bock? A Yes, sir.

Q Now, at the outset of your testimony you said that the commissions were to be paid by Mr. Bock? A Yes. 30

Q To you as broker? A Exactly.

Q Now, was any change made in respect to that? A Mr. Bock said he wants an end. He gives me so much and so much dollars. I will pay the commission. He let them adjust with them. So I said, "Adjust with Bock"—to adjust a certain end of the amount, and they shall pay me the amount. 40

*Max Ferber, for Defendant, Cross—Re-direct.*

Q Were you present when this contract was drawn? A Yes, sir.

Q Who drew it? A Mr. Bock.

Q The contract, you will notice, is in typewriting. Who typewrote it? A Yes, sir.

10 Q Who typewrote it? A Mr. Bock.

Q He has a typewriting machine in his place there? A Yes, sir; he has a typewriting machine in the house.

*Cross examination by Mr. Fink, as follows:*

Q Mr. Ferber, how do you know that the store does not take in \$725.00 a week? A Mr. Bock has an income written in the books.

20 Q How do you know? A His books don't prove it.

Q Did you see the books? A Well, Feigelson saw it.

Mr. Fink: I object to any testimony adduced before, on the ground it is hearsay.

The Court: It is purely hearsay. There is nothing before me yet to show that he does not take in \$725.00, even though there was such a representation.

30 Sustain the objection.

*Re-direct examination by Mr. Rosenstein, as follows:*

Q What, if anything, did Mr. Bock say to you about the income? A When he list with me the store, he says he does \$725.00 a week, plus the papers.

40 Q Now, what did he say to you—that is, what, if anything, did he say to you about the

*Max Ferber, for Defendant, Re-cross.*

income at the time that you asked for a return of the check?

Mr. Fink: I object, as immaterial, as being after the contract was entered into. It is not a representation that was relied upon.

10

The Court: This is now as to the actual income as distinguished from the alleged. I will overrule the objection.

A He told me, "I am very sorry." He says, "Perhaps I looked over my books myself. I didn't mean to misrepresent you; but that's what the books show. That is the income. I don't think there is \$725.00 income."

Q Mr. Bock said that to you? A Yes.

20

Q What did you do? A I told Mr. Bock, "As long as the income is not that, you admit yourself—give the check back." So I waited a minute.

*Re-cross examination by Mr. Fink, as follows:*

Q When did this conversation take place, Mr. Ferber? A About the 5th of April.

Q Who was present? A I was there, Mrs. Bock, and Mr. Bock, and Mr. Feigelson.

30

Q This is on the 5th of April, and Mr. Bock told you that he had misrepresented; that the store did not take in \$725.00? A Yes, sir.

Q When was the inspection of the books made? A That inspection was made on the 4th, in the evening; the 4th of April.

Q Did Mr. Feigelson, or did you learn at that time that the income was less than it was represented? A Mr. Feigelson called me up

40

*Samuel Feigelson, for Defendant, Direct.*

Saturday, the 5th, and he told me then that the income isn't there.

10 Q Then what did you do? A Then, when I came over and said to him, "Mr. Bock, you told me you would give Mr. Feigelson the books to look over, as you didn't have it in the house; now, according your books prove, it don't do the business"—he said, "I am very sorry; I didn't mean to misrepresent you. These books show \$550.00. That's what I do."

Q As a matter of fact, you don't know of your own knowledge whether they showed \$1,050.00 or \$550.00? A The books show that.

Q You don't know of your own knowledge? A I haven't seen the books.

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SAMUEL FEIGELSON, witness on behalf of defendant, being first duly sworn according to law, upon his oath testifies as follows:

*Direct examination* by Mr. Rosenstein.

Q Mr. Feigelstein, who are Feigelson Brothers? A Myself and my brother Louis.

30 Q Anybody else a member of that firm, excepting you and your brother? A No.

Q You entered into a contract on the 3rd of April with Henry A. Brock; did you not? A I did.

Q Is this the contract? (Showing paper to witness.) A This is the contract.

Q Mr. Bock signed your copy, and you signed his; is that right? A That's it.

40 Mr. Rosenstein: That, if your Honor please, is in evidence.

*Samuel Feigelson, for Defendant, Direct.*

Q Now, Mr. Feigelson, will you tell us, please, how you came to make this contract with the plaintiff, Mr. Bock? A Yes. I came one morning to the broker's office, Mr. Ferber, and he told me about the business. He knew I was looking for a store. He told me he has a very good store in Staten Island—Great Kills; so I looked at it once myself, and then I went with him on that April 3rd, and we drew the contract there. 10

Q Now, what, if anything, did Mr. Ferber say to you about the income of the store? A Mr. Ferber told me that that store was doing \$725.00 a week business; and not only that, there must be at least \$70.00 a week more, but he doesn't register on the register the sales of newspapers.

Q And as a result of that you went over to Staten Island? A I went over to Bock; yes. 20

The Court: Who told you that; Ferber?

A Mr. Ferber.

Q There was some discussion about the lease, too; was there not? A Yes; not until the time of the contract.

Q Now, I call your attention to the portion of the agreement which says that "The seller guarantees the present lease which runs to July 1, 1934, at \$90.50 per month, with an option to renew for five years at the same rent." A That's what he promised me. 30

Q Now, that was inserted in the contract? A In the contract.

Q Isn't that right? A Yes, sir.

Q Now, after that was inserted in the contract, did you have an interview with the land- 40

*Samuel Feigelson, for Defendant, Direct.*

lord in the presence of Mr. Bock? A The following morning.

Q Now, tell us what happened. A I don't remember the landlord's name, but he is only a few doors away from him on the same side of the street. As a matter of fact, from what I  
10 understand, he owns the whole block.

The Court: I don't want to know anything about that. I will not accept that as the best evidence.

Mr. Rosenstein: If your Honor please, the agreement says that the owner of the store had agreed to obtain a renewal for an additional five years—and that is the condition as contained in the contract.

20 The Court: You are going to come in with testimony of this man to the effect that the landlord said he would not give the renewal.

Mr. Rosenstein: In the presence of the plaintiff.

The Court: All right. Then, if the plaintiff takes the stand and denies it, I am left in the position where he says the landlord said it, and the plaintiff says the landlord didn't say it. It is not the best evidence. That is the reason why the rule of best evidence follows in the case, so it does not place the Court in the position where two people in conflict offer evidence that could have been overcome by the actual proof of the occurrence. It is against the rule of best evidence to permit a statement of another to go in as evidence where the original statement could be a part of the testimony. Supposing this man does testify, and the  
30  
40 landlord, if he takes the stand, says "No."

*Samuel Feigelson, for Defendant, Direct.*

They should be ready to prove that the plaintiff was ready, willing and able to perform. The burden of proving inability of the plaintiff to perform, where you deny payment of a check, or refuse payment of a check, is upon you.

It is not an instant where you are seeking performance. You are being sued upon a check. You are offering an affirmative defense, failure of consideration. There is a presumption of consideration, as far as you are concerned. In order to substantiate your affirmative defense, failure of consideration, attempting to show that you were ready, willing and able to perform, and that the plaintiff could not perform. You are attempting to prove it by testimony which is not the best evidence.

Mr. Rosenstein: With due respect to your Honor's construction of the best evidence rule, the rule has, as I see it, no application to the broad question directed at this time, for this reason, and which takes it out of the basic rule: That this witness is now being asked to give us a statement that was made in the presence of the other party, who is the plaintiff in this suit; and if the plaintiff, as your Honor puts it, contradicts that statement, an issue is presented which your Honor may determine on the factual question either one way or the other way; but the question, nevertheless, is there.

Now, supposing this plaintiff, if your Honor please, attempts such a conversation, he may. The plaintiff was present.

*Samuel Feigelson, for Defendant, Direct.*

10 The Court: He is a party. He is bound by it. It is already part of one contract; but it is quite apparent from your opening and the plaintiff's that that is a condition. Your opening was to the effect that the only defense was misrepresentation as to the income of the property; fraud at its inception. Now, do not let us get away from that. You are now alleging non-performance of the contract; inability to perform.

Mr. Rosenstein: If your Honor please, that is only one of them, as my case will develop.

The Court: I don't think so, according to your specification of defenses.

20 Mr. Rosenstein: Here it is. If your Honor will look at the fifth defense, that is covered. Here is my fifth defense:

"That the plaintiff falsely and fraudulently represented that plaintiff had arranged an extension of a certain lease covering the premises wherein the store fixtures and business aforementioned was located."

The Court: Oh, no. The contract does not say that. The contract says—

30 Mr. Rosenstein: The last provision of the contract.

40 The Court: That is a failure of performance, if you are going to rest upon it: "The seller guarantees the lease." That is not a fraudulent representation. The distinction between the specification of defenses and what you are attempting to prove is this: As you are now attempting to proceed, you are attempting to show failure of performance; aren't you?

*Samuel Feigelson, for Defendant, Direct.*

Mr. Rosenstein: I submit, if your Honor please, that I am trying to show two things: I am entitled under my pleadings to show, first, that there was a fraudulent misrepresentation in the inception of the contract. I have a right to prove that.

The Court: That is undenied.

10

Mr. Rosenstein: I am also showing, as I have alleged in my specification, that there was a fraudulent misrepresentation with respect to the terms of the lease.

The Court: No; that is not so.

Mr. Rosenstein: My specification says that the plaintiff represented that he had arranged to obtain an extension of a certain lease. The contract says that the seller also guarantees that the present lease will be extended for five years from 1934. Whether there was fraud in the inception of the contract, or whether the plaintiff misrepresented in respect to the extent of time that he will extend that lease—if we establish either one of those, we are entitled to a verdict for the defendant.

20

The Court: You are still not adhering to what I am saying to you. You allege in your specification that the plaintiff fraudulently represented that he had arranged to obtain a lease.

30

Mr. Rosenstein: Yes, sir.

The Court: The contract merely alleges: "To guarantee the present lease at \$90.50 a month, with an option for an additional five years at the same rental."

Mr. Rosenstein: Yes.

The Court: Now, that is an allegation.

40

*Samuel Feigelson, for Defendant, Direct.*

Mr. Rosenstein: Yes, sir.

The Court: That he has a lease with an option to renew for five years. That is what the contract reads.

10 Mr. Rosenstein: No. I respectfully differ with your Honor. He does not say that "I have a lease with an option to renew for five years." He says, "I guarantee that that lease will be renewed for an additional five years."

The Court: Oh, no.

20 Mr. Rosenstein: "The seller also guarantees the present lease to July 1, 1934, with an option to renew for five years." Now, your Honor will recall that I asked the broker—

30 The Court: Let the interrogatories alone. I don't know whether you cannot understand me, or I cannot understand you. You allege that the plaintiff said, "I have arranged to obtain a lease for five years." The contract reads, "The seller guarantees the present lease to July 1, 1934, at \$90.50 per month, with an option to renew for five years at the same rental." That language does not speak in the sound that you are attempting to sound. He does not say, "I have arranged to get you a lease for five years." He says he guarantees that he will give you a lease to July 1, 1934, with an option to renew the lease. Now, that means one of two things: Either that the present lease as it is, has an option to renew, or that he will undertake to get an option to renew; not that he has obtained an option to renew—unless it be the promise that the lease contained that.

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*Samuel Feigelson, for Defendant, Direct.*

If it is fraud at the inception, what you are attempting to do is to force in as a defense of fraud at the inception, language of the contract indicative of fraud at the inception. In order to do that, you allege that he represented that he had already arranged to obtain a renewal; and that testimony I cannot permit to go in; but I will permit testimony as to whether or not the present lease contains an option to renew, for this instrument must be construed against the plaintiff; and when the instrument reads, "The seller guarantees the present lease until 1934, with an option to renew for five years," I could construe that to mean that the lease contained a term, and they had an option to renew it for five years.

Mr. Rosenstein: I respectfully except to that part of your Honor's ruling where you state that under the terms of the contract you have construed it as a clause which is part of the lease as distinguished—

The Court: I don't quite understand your attitude in this thing. Does the present lease cover a period to July, 1934, with an option to renew for five years?

Mr. Rosenstein: So far as I understand, it does not.

The Court: Then, if it does not, this man may not recover; not on the theory of fraud at the inception, but failure of consideration. I don't agree with you that you can at this time reconcile your argument about fraud at the inception, with the contention that he stated that he was to obtain an option; because that would be changing the terms of his contract. His contract reads, not that

*Samuel Feigelson, for Defendant, Direct.*

he has arranged to obtain, but that he has a lease with five years' option.

10 Mr. Rosenstein: I think I see your Honor's point; and the only thing is, where you speak about the strict construction, in view of the plaintiff being the author of the instrument, it was that that I had in mind to talk about; but, of course, became unnecessary.

20 The Court: There does not seem to be any ambiguity. "The seller also guarantees." The term "guarantees" means only "sets forth"; does not mean guarantees performance. It means represents. The seller represents the present lease for \$90.00 a month, or that he has a present lease with an option to renew for five years. What is there to indicate that the seller states that he has anything else than the lease with an option for five years?

Mr. Rosenstein: The lease is in court, and I will ask for a production, and will serve the other side with a notice at once to produce.

30 Mr. Fink: You stated before that this portion of the contract was susceptible of two inferences; one, either that the present lease contained a period of time of five years plus an extension of five years, or that it contained a period of time up to 1934, and that the seller guaranteed that he would produce or get a five-year extension. I am ready to prove the latter. I have the landlord in court, your Honor.

40 The Court: The difficulty, though, is that these stationery men, when they try to be

*Samuel Feigelson, for Defendant, Direct.*

lawyers, turn out to be poor stationery men, too. That is a written instrument. "The seller guarantees the present lease to 1934, with an option to renew for five years." Now, the ordinary construction of that would be, the seller represents that he has a present lease until 1934, with an option to renew; wouldn't it? 10

Mr. Fink: Did you not say before, your Honor, that it is susceptible of two inferences?

The Court: Yes; and the interpretation most favorable to the one charged must be accepted. That is the rule.

Mr. Fink: At this time that is the position upon the offering of testimony by the landlord to the effect that he was ready, willing and able to extend this lease. 20

The Court: Let me do what we very often have to do in courts of law. I would say at this time that the contract itself sets forth in terms the representations as to the lease; that I will not permit testimony in any wise tending to alter or amend that particular angle of the transaction. You are endeavoring to offer testimony to the effect that the landlord said that he had already arranged for a five-year extension. I won't admit that, and will rule on the question as now stands. There is no question before us, excepting, "What happened?" 30

Mr. Rosenstein: I will withdraw the question, and stand on your Honor's interpretation of the contract, that construction being the construction of the Court; that there is a representation by the seller that the lease 40

*Samuel Feigelson, for Defendant, Direct.*

contained a renewal of the lease for five years.

10           The Court: That would be the construction that could be accepted in the nature of the language as it reads at this time. The contract reads that "The seller also guarantees the present lease to 1934, with an option to renew for five years at the same rental." I would say that a construction by me at this time of that particular language in the contract would be that the seller represented that he was in possession of the premises by virtue of a lease expiring definitely July 1, 1934, and containing therein an option to renew for a further five years at the same rental.

20           There is no ambiguity existing as to the word "guarantees." Under the circumstances existing it appearing that Bock was the scrivener—the author, you would call it—that construction would be the construction placed upon it.

Mr. Fink: May I say something, your Honor.

30           The Court: There is nothing to rule upon. I am merely, in ruling upon Mr. Rosenstein's question, stating that. If you want to address your remarks, you may do so.

Q Now, Mr. Feigelson, will you tell us, please, what, if anything was said by Mr. Bock to you and by you to him in respect to the income of the business? A Well, it was the following day—the day after we signed the contract. It was the day before Easter. He was very busy, and he couldn't show me the books until quite late

40

*Samuel Feigelson, for Defendant, Direct.*

at night; and when I looked over the books, I found there was about \$29,000.00 business there.

Q For how long a period? A For a year; and that, also, while I was there, I should say that he was ringing each individual sale of newspaper on the register. So I asked Mr. Bock; I said, "Mr. Bock, first of all, you said you weren't ringing newspaper sales, and that you weren't counting it as part of your business, and here you have only about \$550.00 a week instead of \$725.00." I said, "You haven't got the business that you said you had." 10

Q What did Mr. Bock say, if anything? A He says, "Well," he says, "I never give that a thought. That's what I thought I was doing. I didn't mean to misrepresent you, or anything like that," he says, "That's what I thought I was doing." 20

Q Did you ask for the return of the check? A Did I ask him for the return of the check? I did.

Q And what did he say to you? A He says, "Well, I will send it to you." He says, "Don't worry; don't get excited. It's all right. I am still good for \$500.00."

Q Now, the check that you gave to Mr. Bock was not your own personal check; was it? A No; it wasn't. I had no check account at that particular time. 30

Q Whose check was it? A My uncle's.

Q His name is Gabriel Feigelson? A Gabriel Feigelson.

Q He is the defendant? A He is the defendant.

Q Was he in any way interested in the purchase of the store? A Not in the purchase. 40

*Samuel Feigelson, for Defendant, Direct.*

He came around to see what I was buying—that's all.

Q He was not a party or in any wise financially interested in that transaction? A No; he just came to see what it looked like.

10 Q How did he come to give this particular check, this check; in place of your check?

Mr. Fink: I object.

The Court: I will allow it.

A As I said before, I had no check account at that particular time, and I had no cash to give him for deposit; and I asked him to do me a favor and make out a check for me.

Q He did that? A He did that; yes.

20 Q After you had this talk with Mr. Bock about the income, did you talk to your uncle, Gabriel Feigelson, about the check; say anything to him about it? A Yes, sir. I called up from there, and I told him business isn't there as represented. He says, "You wait there, and I will be down there during the day and see what Mr. Bock has to say about it."

30 Q You then had a talk with Gabriel Feigelson? A Then I called up my uncle, Gabriel Feigelson. I told him that the business I bought is not as I hoped it was, as he represented.

Mr. Fink: I object to that testimony, as not binding on the plaintiff.

The Court: Sustained. The conversation between him and another cannot be binding.

40 Mr. Rosenstein: Just a minute, if your Honor please. I am now talking of the conversation between him and the defendant about the check.

*Samuel Feigelson, for Defendant, Cross.*

The Court: That cannot be binding on the plaintiff.

Mr. Rosenstein: Withdraw the question.

Q As a result of the talk that you had with Mr. Gabriel Feigelson, what was done about that check? A He stopped it, as I ordered him. 10

*Cross examination* by Mr. Fink, as follows:

Q Mr. Feigelson, did you go to see the landlord of the premises? A At the landlord's office.

Mr. Rosenstein: Just a minute; your Honor has ruled on that.

The Court: No. I say, as the instrument now stands, that is the construction you may have. If there is a mutual mistake between the parties, even though expressed, it may be gone into. I have merely given you my construction of the instrument as it stands before you now. 20

Mr. Rosenstein: Withdraw my objection.  
(Last question read by stenographer.)

A I did, with Mr. Bock. 30

Q And what was the purpose of your visit to the landlord? A To verify the fact that he told me that he could obtain a longer lease.

Q So your thought, when this contract was drawn, was that he could obtain an additional extension of five years; is that so? A No, no. He told me—it wasn't really the fact that he was going to see the landlord about the lease. He wanted, first of all, to introduce me to the land- 40

*Samuel Feigelson, for Defendant, Cross.*

lord. That's what it was; and, secondly, to see what the lease was like.

Q Did you see the lease before you went to the landlord? A Did I see the lease before? No.

10 Q You said first that you went to see about the lease. Did you mean that? A I went up to see what kind of a lease it was. I will tell you why.

Q I don't want to know why. You didn't see the lease before then? A I didn't see the lease then.

Q Could you have seen it, or did you ask to see the lease?

Mr. Rosenstein: I object.

20 Mr. Fink: First part withdrawn.

A I didn't. It was very late at night, and he was going back to the store.

30 Q When this agreement was drawn, what was your understanding as to this clause: "The seller also guarantees the present lease to July 1, 1934, at \$90.50 per month, with an option to renew for five years at the same rent"? A I thought that he had an option. I thought that he had a lease and an option for five more.

Q Was it your thought that he had the option contained in the lease, or that he was to go to the landlord to obtain it? A I thought he had it. I thought he had an eight and a half year altogether. That was my opinion.

Q Did you understand that by this contract that you made? A Yes.

40 Q You insist that the reason why you were going to see the landlord the following day was

*Samuel Feigelson, for Defendant, Cross.*

to make his acquaintance? A Not only that. Should I tell you what else?

Q Yes. A We also spoke of a fountain. In the beginning I meant to put in a soda fountain, and Mr. Bock said he would speak to the landlord and see if he could put one in. The landlord told me he couldn't, as he had a soda fountain in the premises. 10

Q Did you ask the landlord whether or not this landlord would extend this lease for five years to him? A No.

Q Did this landlord say to you, "Yes, I will extend this lease for five years for the same rental"? A Did he what?

(Last question read by stenographer.)

A He did. 20

Q Why did he say that, if it was in the lease; if you know? A I don't know. I just spoke about it. We thrashed it out.

Q How did the subject come up? A I inquired if it was an eight and a half year lease or not, and he said it was.

Q The landlord said that it was an eight and a half year lease? A No; that it was an eight and a half year total.

Q Three and a half the remainder of the lease, and the balance a five-year extension? A Yes. 30

Q That is what he said? A Yes.

Q That is the way you understood it to be? A Yes.

Q That is the way you were satisfied to have it? A Yes.

Q Your statement before that you thought it was already part of this lease is not correct? A I am not saying that it was. 40

*Samuel Feigelson, for Defendant, Cross.*

The Court: He is not saying anything to the contrary now.

Q Were you satisfied with the transaction as it stood, when the landlord said, "I will extend this lease for five years at the same rental"? A  
10 I don't get that at all.

(Last question read by stenographer.)

A No; I understood that he would give me an eight and a half year lease for a total.

Q Five and three and a half is eight and a half? A Yes.

Q That is what you were getting? That is what the landlord said you were getting? A  
20 That's what I was satisfied with; yes.

Mr. Rosenstein: I don't know if the witness quite understands it.

The Court: He is not your witness now.

Q You don't know why the landlord should voluntarily have made this statement: "I will extend this lease for five years?" Are you positive it was not in answer to your question: "Will you extend this lease for five years?" A I  
30 never asked the landlord that question, because it was already in the contract; and I asked him if that was right, and he said it was.

Mr. Rosenstein: If your Honor will recall, none of my direct testimony bears on what this witness is now testifying to on cross. This is entirely outside of the scope of the direct, and I think, if counsel pursues this line, he is bound on that testimony as  
40 his witness.

*Samuel Feigelson, for Defendant, Cross.*

The Court: Not necessarily; because you are resting on the contract yourself in the defense. Although this witness is not a party to the suit, he is a party to the contract. It is his capacity in that contract that gives rise to the suit. I think it is proper cross. 10

(Last question and answer read by stenographer.)

Q Will you explain what you mean when you say it was already in the contract? A I had understood in the beginning it was an eight and a half years, and I asked the landlord if it was eight and a half, and he said it was.

Q Did Mr. Bock tell you that he had presently an eight and a half years lease? A Did Mr. Bock tell me? 20

Q Yes. A No; he didn't.

Q So your first impression was from the contract itself? A Yes.

Q What conversation, if any, did you have with the landlord about this five-year extension? A I asked him—I told him about the deal. He introduced me as the new owner—as the new respective tenant of his; and we spoke about the terms of the lease and how long it was. 30

Q And why did you speak with him about that, if you knew it was already in the contract? A Because we spoke about things in general; as I told you before, about the fountain.

Q I am not interested in the fountain. What I am getting at is this clause in the contract about the lease. A I asked him if it was so, that the man had an eight and a half year.

Q What did he tell you? A He said he had a three and a half year lease with an option of five years more. 40

*Samuel Feigelson, for Defendant, Cross.*

Q Did he tell you he had that in his lease already? A I don't know if he told me he had it in the lease already or not. He told me he had a three and a half year lease already with an option of five more.

10 Q Now, you say that the term Feigelson Brothers as signed on this contract means Samuel Feigelson and Louis Feigelson? A Yes.

The Court: I don't think you need go into that. I have determined that, on the question of consideration to this defendant, the making of the contract by this plaintiff with others is sufficient consideration.

20 Q Now, then, Mr. Feigelson, how do you know that that store does not take in \$725.00 a week? A I looked over his books for the year.

Q When did you look over his books? A The following evening.

Q After the contract was signed, or before? A After.

30 Q And did Mr. Bock tell you that you could look at the books prior to the entrance into the contract? A He didn't have it at that time, although we were going into it. He didn't have it in his house, where we drew the contract.

Q When did the negotiations for the sale of this store take place; the first negotiations? A About two weeks before we contracted for it.

Q And what took place within those two weeks as to your gaining any knowledge as to the income of the store? A Nothing at all.

Q Did you stay in the store? A Not before we signed the contract.

40 Q You didn't stay in that store at all before you signed the contract? A No.

*Samuel Feigelson, for Defendant, Cross.*

Q How long did you stay in the store after you signed the contract? A Until the evening—I think just one day; the balance of the evening that we signed the contract and the following day.

Q Now, Mr. Feigelson, when you say that the books showed that the store did not take in \$725.00, will you tell the Court just what you mean and how you arrived at that conclusion? 10

A Yes. I looked over his books, and found that for the year of 1930 that Mr. Bock's business showed that he was doing \$29,000.00 a year.

Q What book did you find that from? A The sales book that he had a record of every day sales.

Q Describe the sheets that you gathered that fact from. A The sheets? 20

Q The sheets contained in the book? A Yes; white sheets.

Q What were the facts? What did they disclose? A The facts, it all depended on the time of the year, that he was doing \$525.00.

Q You testified you saw that there was a lesser income for the past year? It is that that I am interested in? A Yes, sir. There was only \$29,000.00 business. 30

Q How do you know that? A I looked it over, and added it up myself.

Q What did you add from? A I added it up of the sales from month to month for twelve months.

Q Did Mr. Bock tell you they contained all of his income? A Yes, sir.

Q You added it up yourself? A Yes, sir.

Q Wasn't it all added up for you? A No; it was added up for the end of the month. 40

*Samuel Feigelson, for Defendant, Cross.*

Q What did the end of the first month show?

A I am talking about the total for the year.

Q What did the end of the first month show?

A I don't remember. I know that the addition for the whole year was for \$29,000.00.

10 Q You don't know the totals, although the totals were in that book? A I don't remember it.

Q Did you take any record at all of them? Did you look at the totals? A I did.

Q And did the totals as they were in that book show an income of \$725.00 a week? A No.

Q How do you know? A Because at the end of the year there wasn't the business.

Q Did you add those totals? A I did.

20 Q Why did you say before you don't know what they were? A I told you I took the twelve months.

Q What was the total of all twelve months? A \$29,000.00.

Q Did you add them up yourself? A I did.

Q What did you add? A I added up the monthly figures.

Q The totals as they existed, or the totals that you got?

30 The Court: He said there were totals appearing on the books for each month.

A That's so.

The Court: And he took the aggregate of those twelve totals, and that was \$29,000.00.

40 Q Now, at that time did you make these calculations in your head, or did you transcribe

*Samuel Feigelson, for Defendant, Cross.*

them at all? A You mean did I write on a piece of paper?

Q Yes. A I did.

Q Where is the piece of paper? A I didn't bother with them. I threw them away.

The Court: Are those books in court. 10

Mr. Fink: They are not in court, your Honor.

Q Now, what year was that income for? A 1930, I guess.

Q Why do you say you guess? Don't you know? A That's what it is.

Q Did you look at the income for the year 1931 prior to the entering into this contract? A Yes. It was much less what this year was, because it was January and February. I grant it was much slower in that period. 20

Q Now, then, this representation that was made to you that the store did \$725.00 in business was made by Mr. Ferber; was it not? A At first by Mr. Ferber.

Q Mr. Bock didn't tell you that; did he? A He did.

Q When did he tell you that? A At the time that we signed the contract. 30

Q That he took in \$725.00? A That he took in \$725.00 a week.

Q Now, when you went to see Mr. Ferber, and when Mr. Ferber negotiated this contract with Mr. Bock, was he acting for you? Was he looking out for your interests? A I don't know. He must have been looking out. He just told me about the store. I don't know what interest he was looking out for. He was looking out for his commission—that's all. 40

*Samuel Feigelson, for Defendant, Cross.*

Q Do you know that in this contract there is a stipulation he wasn't to get any commission from the seller? A Yes. I can tell you how that was.

Q I am not interested in that. Was he looking out for your interest when he negotiated this contract? A I don't think it was only for me.

Q Was he acting for you? A I don't think so.

Q Don't you know? A I don't know.

Q He might have been?

The Court: Were you to pay him a commission?

A Yes; I was supposed to pay him for it.

Q You weren't going to pay a man a commission if he wasn't acting for you; were you?

A It was in a general way.

Q Will you answer the question, please?

Mr. Rosenstein: I think the witness is entitled to a fair opportunity.

The Court: The question is argumentative. The gist of the entire matter confines itself to the testimony of the conversation between this witness and the landlord as to whether or not the parties to the contract construed their own agreement. If this plaintiff by his conduct indicated that his construction of this agreement was to the effect that the lease only covered a period to 1934 and that he was endeavoring to get the option, their own construction of that contract will be accepted. The question as to representation of the income of the busi-

*Samuel Feigelson, for Defendant, Re-direct.*

ness will be but the testimony of the one party against the other, with no greater reason for accepting the veracity of one than the other; and the normal construction would be that, in the absence of representation in the contract. This witness could have included in the contract what he intended, as well as he included the other things in the contract. The more favorable construction would be there was no representation by these people as to receipts. I am merely telling you what I think the testimony is. 10

Mr. Fink: Am I to disregard any of the testimony?

The Court: I have merely indicated to you what matters will be of effect in determining. You may govern yourself accordingly in your examination. You will save a great deal of time. 20

Q Who was present at the time that the conversation between you and the landlord took place? A Mr. Bock.

Q And who else? A That's all.

Mr. Fink: That's all. 30

*Re-direct examination* by Mr. Rosenstein, as follows:

Q Now, Mr. Feigelson, when you went to the landlord with Mr. Bock, did you speak to the landlord about how long you could stay there as a tenant? A Yes.

Q It was your understanding, as you have testified, that you were to be there for five 40

*Samuel Feigelson, for Defendant, Re-direct.*

years after the expiration of the date in the present lease; is that right? A Yes; that's so.

Q And it was in order to verify that that you went with Mr. Bock to the landlord? A That's so.

10 Q And also to meet the landlord? A That's so.

Q Now, did you ask the landlord whether or not he would give you an extension for five years after 1934? Just answer my question. Now, the trouble with you is that you talk, but you don't listen to what you are saying. When you spoke to the landlord, did you ask him whether or not he would extend the lease for five years from 1934? A Yes; sure.

20 Q What did the landlord say to you? Now, give us the exact words, if you can remember them. A He says, "The best I can do for you," he says, "Is to give you a five-year lease, because all the other leases in the same year have leases to that length of time."

Q To 1934? A Yes; to that length of time.

30 Q Do I understand you right, or was that your understanding, that the landlord agreed or was willing to give you a five-year lease, but that it would run from the day that you were there, or from 1934? A No; from the date of the bill of sale.

Q From the date of the bill of sale. In other words, if the landlord executed a new lease, that lease would be for five years from the date of the bill of sale.

Mr. Fink: I object. He should let the witness testify.

40 The Court: He is merely repeating what the witness has said.

*Samuel Feigelson, for Defendant, Re-direct.*

Why did you have to discuss it with him, if your conception was that you were getting a lease which contained an unfinished term to 1934, with a five-year extension from that point?

A After a general discussion, we spoke of many things, also about the lease. 10

The Court: Did you learn from the landlord that the term of the lease was different from what you understood it to be under your contract?

A Yes; I did that.

Q Now, after you left the landlord, did you go along with Mr. Bock? A Yes; we went back to the store. 20

Q You then knew that the landlord wouldn't give a lease beyond five years from the date of the bill of sale? A That's right.

Q Now, did you then go back to the place of business? A To the store.

Q To the store? A Yes.

Q Now, what did you say to Mr. Bock, and what did Mr. Bock say to you about that guarantee of five years additional? A Well, that was the best he could do; he can't do any better. He can't help himself. That's what it is. 30

Q So what did you say to Mr. Bock? A Well, he was very busy that day, you know, and I repeatedly kept on asking for the books—I wanted to see what he is doing business. He was very busy, and he couldn't show it to me; but later on, towards evening, you know, he showed me the books. Then I had an idea that even if the— 40

*Samuel Feigelson, for Defendant, Re-direct.*

Mr. Fink: (Interrupting.) I object to this, as not responsive to the question.

The Court: Objection sustained.

10 Q So that you went back to see what the books would show, anyhow? A That's it; that's it.

Q So that, notwithstanding the lease provision, if the figures were all right? A I might have considered it yet; sure. That's the idea.

Q You were never shown the lease; were you? A No.

Mr. Rosenstein: I will ask for the production of the lease, which I understand is in court, if your Honor please.

20 Mr. Fink: I can enter into a stipulation that the lease contains a provision that the term thereof shall extend until 1934, and that it does not contain a five-year option. Is that satisfactory?

Mr. Rosenstein: And contains no representations whatsoever in respect to any option.

Mr. Fink: Right.

30 Q Was Mr. Bock present when you figured up the books for a year back? A Yes, sir.

Q My question was: Was Mr. Bock present when you figured up the books for a year back? A He gave me the book, and told me to figure it up myself; he was too busy.

Q Did you talk to him after you figured the book up? A Yes.

40 Q As near as you can, give me the exact words used to Mr. Bock? A Yes. I said, "Mr.

*Samuel Feigelson, for Defendant, Re-direct.*

Bock, look here. Your business doesn't show the business you say you are doing. Only last year you only done \$525.00 business. That doesn't show the \$725.00 that you said." I said, "You don't register up the newspaper business. That is \$70.00 a week." I said, "You are about \$200.00 less than you said you are doing." 10

Q Now, what did Mr. Bock say to you? Give us the exact words that he used.

Mr. Fink: This is already in the testimony.

The Court: He has definitely stated to this Court. You are asking him to say now, "Bock said, 'I didn't mean to mislead you.'" I have heard him say that. 20

Why didn't you, if you were so certain that he said to you that his business was so much, insist that it be put in a written instrument? Why did you put up a \$500.00 check without the most important thing put in?

A I had no more idea that man was out to deceive me. 30

The Court: Why did you take a receipt altogether?

A It's a matter of form. He is a broker. He typewrote it. He said, "Here is one for you, and one for you." That's all there is to it.

Q You didn't bring your books, did you? A No.

*Gabriel Feigelson, for Defendant, Direct.*

GABRIEL FEIGELSON, defendant, witness on his own behalf, being first duly sworn according to law, upon his oath testifies as follows:

*Direct examination by Mr. Rosenstein.*

10           Mr. Rosenstein: In order to clear up one legal ruling that your Honor has made: Your Honor has ruled, first, that the Court has construed the word "guarantee" to be "represent"; and that, unless the lease contained a provision for renewal, there would be a failure of consideration.

                  The Court: No; I don't say that at all. I say that I construe the language of the agreement to mean that the plaintiff represents that he has a lease to July 1, 1934, with an option for renewal for five years.

20

Q Mr. Feigelson, you are the defendant? A Yes.

Q You drew this check for which you are now being sued? A Yes, sir.

Q Are you in any way connected with Feigelson Brothers? A My nephew.

Q I mean, are you connected with them in a financial way or a business way?

30

                  The Court: I have already ruled, and if that is what you are attempting to put in testimony on now, it will be a useless gesture. I have already ruled that the giving of this man's check to Bock was for a consideration, which was an entering into a contract between Bock and his nephews. Don't let us go any further into that. I have ruled on the same question the last time the matter was on trial.

40

*Thomas Nolan, for Plaintiff in Rebuttal, Direct.*

Mr. Rosenstein: I respectfully take exception to your Honor's refusal to permit me to offer this testimony.

Q You stopped payment on that check? A Yes, sir.

10

Mr. Rosenstein: May I, for the purposes of the record, show at whose instance he stopped payment?

The Court: Yes; you may.

Q Why did you stop payment on that check?

A My nephew asked me to stop payment on it.

Q Who is your nephew? A Samuel Feigelson.

Q Did he tell you why? A Yes.

20

Q What did he say?

The Court: No, no. I enter an objection on my own part.

Mr. Fink: No questions.

Mr. Rosenstein: I rest.

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THOMAS NOLAN, witness on behalf of plaintiff, being first duly sworn according to law, upon his oath testifies as follows, in rebuttal: 30

*Direct examination by Mr. Fink.*

Q Mr. Nolan, you are the landlord of the premises in which the store of Henry A. Bock is located; is that right? A At Great Kills, Staten Island.

40

*Thomas Nolan, for Plaintiff in Rebuttal, Cross.*

*Examination* by the Court, as follows:

Q Mr. Nolan, will you tell us what occurred in your presence between Mr. Feigelson and Mr. Bock. Were they both in your presence? A Shall I tell you the whole story leading up to it?

10 Q Only those matters at which Mr. Feigelson was present. You cannot go beyond that. A Mr. Bock and Mr. Feigelson came to my place—I believe it was about the 4th of April last year; and Mr. Feigelson asked me if it was true that Mr. Bock—if I would give Mr. Bock an extension of five years over and above the present lease if he bought the store.

20 Q Who asked you that? A Mr. Feigelson; and I told him I would either do that or consummate the present lease, if Mr. Bock was satisfied, and draw a new lease covering the five years and the rest of the term of the present lease. He also asked me if he might put in a soda fountain, which I told him I couldn't let him do, which I had a tenant at the present time. I had given him rights in the same block, and I couldn't let him put in a soda fountain. With that they left. That's all that was said.

30 *Cross examination* by Mr. Rosenstein, as follows:

Q Mr. Nolan, do you remember what time of the day it was that they came over to see you?

A I have in my mind it was in the afternoon. I don't know the exact time.

Q They came over to your office; isn't that right? A Mr. Bock and Mr. Feigelson.

Q Both of them—Feigelson and Mr. Bock? A That's right.

40 Q And the conversation of the gentlemen commenced immediately in respect to the terms

*Thomas Nolan, for Plaintiff in Rebuttal, Cross.*

of the lease? I suppose you had some exchanges before that; didn't you? A Well, the only exchanges we had was, Mr. Bock said, "This is the gentleman, Mr. Feigelson, who was going to buy my store." Mr. Bock and I had had a previous conversation.

Q What I want to do is to get a correct picture of what happened at that time. After that you have had other things to think about, since that time, and this happened about a year ago? A About that. 10

Q And you remember talking about some other holdings that you have in the immediate neighborhood?

Mr. Fink: Objected to, as immaterial.

The Court: It is part of the conversation. I will allow it. 20

A Only in so far as the soda fountain matter was concerned. I don't know of any other.

Q Well, what was said at that time about the terms of the leases of the other tenants in the property that you had there?

Mr. Fink: I object to that, as immaterial. 30

The Court: He may answer it. Anything relating to the conversation at that time is permitted.

Mr. Fink: But it must be limited, I understand, to the issue here.

The Court: Not at all. It is part of the conversation. This is cross examination.

Q I want you to give me the best recollection that you have. A I said that I had another 40

*Thomas Nolan, for Plaintiff in Rebuttal, Cross.*

tenant that had the rights of a soda fountain in the block, and that I couldn't give it to Mr. Feigelson.

10 Q And there was something said at that time—was there not—about the period of time that the leases for some of the other tenants in the property ran; do you remember that? A No; none of the other tenants' leases were discussed.

Q And don't you recall saying something to the effect that, well, you would make a five-year lease from that time on, because you didn't want it to run beyond the period of other tenants?

Mr. Fink: I object to the question, as leading.

The Court: It is cross examination.

20 Mr. Fink: He wants this witness to tell what he has in mind.

The Court: No; he is asking if he said something along those lines.

A As I told his Honor, that Mr. Bock and Mr. Feigelson asked me if I would give a five-year extension over and above the present lease—which I agreed to do.

30 Q Yes; you have told us about that. A Yes.

Q I am trying to get the background of the discussion. I want you to try to help us to get at the truth of the thing. A I don't know what you want to know.

40 Q What I have in mind particularly is what you said, if you know, about not wanting this lease to run beyond the other leases that you had in the neighborhood there. A No; it was no bearing at all on the other leases.

*Thomas Nolan, for Plaintiff in Rebuttal, Cross.*

Q What, if anything, did you say? A Nothing concerning the other leases.

Q Do you mean that you told these people, if he bought the store, you would give him a what? A An extension of five years over and above the present lease.

Q And to whom did you say that? A To Mr. Feigelson and to Mr. Bock. I was addressing my conversation to Mr. Feigelson. He was the gentleman who was talking to me. They were standing in front of my desk. 10

Q After that conversation was concluded, was anything further said about that? A Just exchanged greetings, and left. That was all.

Q When have you talked with Mr. Bock about this case? A Yesterday.

Q Is that the first time he spoke to you about it? A Yes. 20

Q And you are quite friendly with Mr. Bock; are you not? A Well, I know Mr. Bock for probably twelve years.

Q You would like to see him win? A No; I am not interested. I was asked to come here as a witness, and I have come. I am not interested in whether he wins or loses.

Q You came here at Mr. Bock's request; isn't that right? A Yes; that's correct. 30

Q Where do you live? A Great Kills—Oakwood, rather. That is two miles from Great Kills.

Q That is in the State of New York? A Yes; Oakwood Heights.

Mr. Rosenstein: That's all.

*Henry A. Bock, for Plaintiff in Rebuttal, Direct.*

HENRY A. BOCK, plaintiff, having been sworn previously, recalled to the stand, testifies in rebuttal on his own behalf, as follows:

*Direct examination by Mr. Fink.*

- 10 Q Mr. Bock, it has been testified to that you drew the contract that is now in discussion. Did you draw that contract at the dictation of somebody else? A Yes.

Mr. Rosenstein: I object to that, if your Honor please.

- 20 The Court: That does not change the degree of responsibility. What difference would it make—a contract by him to agree to sell—if someone were coaching him?

Mr. Fink: I want to bring out the fact that the scrivener had the contract most strongly against him. I want to show that he did this at the dictation of Mr. Ferber, who was acting as the agent for the buyer.

The Court: There is a doubt in my mind whether he was an agent for the sale of the store, if not for the purchase of the store. You need not go into that.

- 30 Q Mr. Bock, on the day that this contract was entered into, did the buyers of this store look at your books prior to the time that this contract was made? A They did.

- 40 Q And what discussion was had, at the time that they were looking at your books, between you and Mr. Feigelson with relation to the income? A Why, I laid out all my books before them. I told them that my receipts were something in the neighborhood of \$700.00, and before

*Henry A. Bock, for Plaintiff in Rebuttal, Direct.*

they signed the contract they had all my books, receipts, bills, everything laid before them, which they went through.

Q Mr. Bock, did you ever represent to anybody that your store took in \$725.00 weekly?

A I did not.

Q Did the Feigelsons look at your books for the year 1930? A They did.

10

Q What do your books for the year 1930 show with relation to the income? A It showed \$29,000.00.

Mr. Rosenstein: I object to that, if your Honor please, because the books speak for themselves. Are they here?

Mr. Fink: They are not here; but the defense testified from the books without their being here.

20

The Court: I will permit it. He made an inspection in behalf of the defendant. It is apparently corroborative of what you state, anyhow.

Q You stated that you took in how much? A \$29,700.00 in the stationery line, and I kept separate record of newspapers, which I took out \$6,200.00.

30

Q Did you show the Feigelsons the records showing the income as to the newspapers? A Absolutely.

Q And they saw that amount in those records; is that right? A They added them up.

Mr. Rosenstein: I object to what they saw. How does he know what they saw?

Mr. Fink: I withdraw the question.

40

*Henry A. Bock, for Plaintiff in Rebuttal, Direct.*

Q You showed them that income; did you not?

A I did.

Q Now, then, was there any discussion at all as to the income after they had looked at the books? A They were satisfied with what I showed them, what they figured out to be the  
10 weekly income from looking through my books.

The Court: Did they ever say anything to you about the reason for not going through with the transaction?

A Never heard a word.

Q How long after they looked at your books did they sign this contract? A On the completion of going through the books at my house,  
20 the contract was drawn and dictated by Ferber, and typewritten by me.

Q This contract was drawn at night? A Somewhere around seven or eight o'clock.

The Court: What discussion was there on the lease?

A I guaranteed them to get another five years on the lease.

30 The Court: Did you tell them you had a five-year option on the lease, or you were going to get it?

A I didn't tell him—I told them my lease expired in 1934, and that I spoke to my landlord, and he would guarantee me another five years at the same rent, which I put in my contract.

Q You accompanied Mr. Feigelson to Mr. Nolan's office? A I did.  
40

*Henry A. Bock, for Plaintiff in Rebuttal, Cross.*

Q Did you hear Mr. Feigelson ask Mr. Nolan whether or not it was true that he was granting an extension of five years? A He did.

Q What did Mr. Nolan say to that? A He would.

Mr. Rosenstein: I object. We have had the testimony of Mr. Nolan. 10

The Court: I don't think you need to go any further with this witness.

*Cross examination by Mr. Rosenstein, as follows:*

Q Mr. Bock, you never knew Feigelson Brothers before this transaction came up; did you? A No.

Q Your first meeting with them was through Mr. Ferber; is that right? A No. 20

Q When did you first meet them? A I first met Mr. Gabriel Feigelson on a Sunday morning, and about four or five days—we couldn't do any business on Sunday morning; we couldn't agree on a thing. About four or five days after, Mr. Ferber comes in.

Q Now, just a minute. Stop. When Mr. Ferber came to you and asked you for permission to list your store—you remember that, don't you? A I do. 30

Q And at the time that he had that conversation with you, was there any talk between you and Mr. Ferber about the terms of the sale, or the proposed sale, or any proposed sale? A I can answer that best by saying he had a client—

Q (Interrupting.) Wait a minute. Answer my question, and my question to you is: Was there or was there not any discussion between 40

*Henry A. Bock, for Plaintiff in Rebuttal, Cross.*

you and Mr. Ferber in respect to the terms of the store which you proposed to sell? A No positive terms.

Q There was no discussion of any kind?

A No discussion or positive terms.

Q Was there any discussion of any kind?

10 A No.

Q None? A No.

Q Did you mention the price? A I mentioned the price I wanted; yes.

Q Did you mention the period of time that your lease was to run? A No.

Q Did you mention the amount of business that your store was doing? A The amount? No.

20 Q Were you asked the amount of business your store was doing? A Approximately; yes.

Q Now, please make your answer responsive. I asked you whether you were asked what the income of the business is? A I was asked.

Q Mr. Ferber asked you that question; did he not? A Yes; he did.

Q Do you remember telling him that the income was about \$700.00? Is that right? A In the neighborhood of \$700.00; yes.

Q Per week? A Per week.

30 Q And this contract was signed on April 3rd? A I think it is the 4th on there; is it not?

Q Look at it. A (Looking at paper.) April 3rd; yes.

Q Was this contract signed in the daytime or at night? A In the evening.

Q And did you see Mr. Feigelson the next day? A Feigelson? All day. All day till I closed up.

40 Q Did Mr. Feigelson say anything about the income of the business? A He did not.

*Henry A. Bock, for Plaintiff in Rebuttal, Cross.*

Q He didn't ask you at all? A Didn't ask me at all.

Q Never had any conversation with Mr. Feigelson about the income of the business? A Absolutely not.

Q You are sure about that? A Positive.

Q That is as true as everything else that you have testified? A That is absolutely the truth. 10

Q Then you want the Court to believe that this man came to buy your store—

The Court: (Interrupting.) You see, there is a conflict now to what he said before. He has just answered now, and I am convinced the witness does not get the full understanding of your question. There is a confusion as to whether the discussion was as to when he was in charge of the store for a day or prior thereto. 20

(Last four questions and answers read by stenographer.)

A That was after the contract was signed; the next day.

The Court: That is what I gathered he meant when he answered that question, because your questions at that point were for a period after the contract was signed. 30

Q But you did have a conversation with Mr. Feigelson before you signed the contract; did you not? A Absolutely.

Q Did he ask you then how much the business was producing? A We went over the figures at that time.

Q Answer my question: Did he ask you then how much the business was producing? A 40

*Henry A. Bock, for Plaintiff in Rebuttal, Cross.*

I answered before, in the neighborhood of \$700.00.

Q And that was your answer to his question?

A That was my answer.

10 Q Do you remember that you did not include in that the newspaper income? A That's wrong.

Q Where are the books? A I got them home.

Q You knew that this case was going to be tried today; did you not? A I did.

20 The Court: There seems to be no difference between the testimony of both parties as to what the books disclosed. You allege they disclosed \$29,000.00, and he does. He says there is a separate account for the newspapers, which is \$6,000.00 per year.

Q As a matter of fact, when you commenced to ring up on the register your newspaper items, do you remember having a conversation with Mr. Feigelson about that? A I didn't ring them up at that time.

30 Q When did you ring it up? A I keep it separate, and then make a separate entry at night. Every night my book comes open, and I make two entries; one for the regular entries, and one for the newspapers.

Q You say your books show \$6,000.00 on the newspapers? A \$6,200.00.

Q Why didn't you produce your books here this morning? A I wasn't asked for it, and didn't think—

40 Q (Interrupting.) You knew this case was on for trial?

*Henry A. Bock, for Plaintiff in Rebuttal, Cross.*

The Court: Probably he is in the same position you are. You might have had them here if you wanted them.

Mr. Rosenstein: If your Honor please, I might have had them here by subpoena, and might not have had.

The Court: You might have given him notice to produce as a party to the suit. I think you are going to a great deal of labor unnecessarily. I am fully satisfied what occurred, from the testimony as far as it has gone.

10

Q Do you remember the incident—do you not, Mr. Bock—when you were asked to give back that \$500.00 check? Do you recall that?

A I wasn't asked by any of the gentlemen. I remember the incident of being asked.

20

Q By whom? A By Mr. Ferber.

Q What did Mr. Ferber say to you? A He said—I told him the check was stopped. He wanted to bet me \$50.00 or \$100.00 that the check wasn't stopped. That was exactly the words.

Q What did you say to Mr. Ferber? A I told him I wouldn't give up the check; that was all there was to it. He couldn't understand what was the matter with those men, that they were crazy to get the store; that he never saw such crazy men. Then I disregarded him, and he went out of the business.

30

Q Do you remember during the day going in the rear of the store for a while, and then coming back and saying you wouldn't give up the check? A I do.

Q Tell us about that. A He followed me in the back of the store to talk. I didn't want to

40

*Henry A. Bock, for Plaintiff in Rebuttal, Cross.*

talk about it in the store. There was enough damage done.

Q He waited outside, and you came back and told him? A Who waited outside?

10 Q He did? A He went in back of the partition, so there would be no conversation in the store.

Q Do you remember Mr. Ferber saying to you that the income was one of the important items in the store? A No.

Q Never had any talk about the income? A No; I don't know the reason yet.

Q You heard Mr. Ferber testify that the income was admitted by you to be in the neighborhood of \$500.00; is that true? A I heard him testify that; yes.

20 Q And as a matter of fact, didn't you say that it was not your intention to mislead these people—that you didn't know yourself what the store was bringing? A No. I make up my own income tax. I know what I bring in.

Q Did Mr. Gabriel Feigelson, whose check you received, ever receive anything from you? Did you ever deliver anything of any value to Mr. Gabriel Feigelson, the maker of the check? A No.

30 Q You had no transaction with him of any kind? A As far as receiving the check is concerned, he was supposed to be one of the brothers. That's all that I knew.

Q But as far as Mr. Gabriel Feigelson is concerned, you had no transaction with him, except as to the arising of the check? A And he was present at the signing, and he did all the additions, as well as the other brother.

*Defendant's Motion for Direction of a Verdict.*

Mr. Rosenstein: That is the defendant's case. I could produce two or three to repeat some of this testimony. I don't think it is necessary.

The defendant rests; and I move for a directed verdict for the defendant, upon the ground, first: That from the evidence it is apparent that, so far as the individual defendant, Gabriel Feigelson, is concerned, there has been no consideration to sustain the giving of the check which is now the subject matter of the suit. 10

I move for a directed verdict, for the following ground: That the representation in the contract that the lease carried with it a provision of an additional five years from the date of the expiration of the lease under its terms is untrue; and that, in order that that may furnish a basis for recovery by the plaintiff, there must be in the possession of the plaintiff a writing of equal dignity to that of the lease, which limits the term of the lease; and that, in the absence of a writing an authentic writing under which the plaintiff could modify or change that lease, there has been a failure of performance on the part of the plaintiff. 20

I move for a directed verdict upon the further ground that the mere possession of the check by the plaintiff in itself furnishes no proof of consideration, except as an evidence of an indebtedness, and that, while there may be a presumption of consideration in respect to a check, that presumption has been rebutted by the evidence; and that therefore it devolves upon the plaintiff to prove consideration and to establish its case by a fair preponderance of the evidence—and that was not done. 30

*Defendant's Motion for Direction of a Verdict.*

I move for a direction in favor of the defendant, upon the ground, also, that the factual matters brought out are of a quality that, if a verdict is found in favor of the plaintiff, there is not sufficient evidence to sustain such a verdict, and such a verdict should be set aside; and I  
 10 base that especially, if your Honor please, upon the authority of *Eckel v. Eckel*—if my memory is right, 27 Atlantic 49 Equity; that a failure on the part of a person in the possession of books, memoranda, records in evidence should convey the inference and is permissive of the inference that their production would be of disadvantage to the party failing to so produce them.

20 *By the Court*, as follows:

It is for you prove that. You allege that those books indicate an income less than they stated represents the income of the business. It is your burden, when alleging fraud, to prove it. Fraud must be affirmatively established. It is you who assert the books indicate less than the amount represented, and that burden is yours. I question that failure to produce documentary proof may give rise to an inference that proof  
 30 would be contrary to the allegations of that proof, as such failure is chargeable to you.

On the first and third grounds I will deny your motion for the reasons that I have already stated.

On the second ground I will deny your motion. Of course, I am satisfied that the parties to the contract, the prospective purchasers, not only had ample opportunity to inspect the records of income, but did actually inspect the records of  
 40

*Defendant's Motion for Direction of a Verdict.*

income before they entered into this contract; that they found it to be the amount that they stated. It indicates \$29,000.00. Of course, that is corroborated by the plaintiff as to this amount. The plaintiff did state that the paper business brought in approximately \$7,000.00. I don't think that he said it excluded newspaper business. That was included. 10

I am satisfied that the purchaser not only had the opportunity, but did make the inspection of the books—and he knew that.

As to the contract, with reference to the nature of it: I am satisfied that that is the expression of the agreement between the parties, to the effect that the lease, so far as is fixed term was concerned, expired in 1934, and that the plaintiff here undertook, as a condition precedent to his performance, to obtain a further extension of five years; that he stood ready, willing and able to obtain that. There was failure on the part of the prospective purchasers to consummate. 20

There will be judgment for the plaintiff.

*By Mr. Rosenstein.*

If your Honor please, I take an exception. Your Honor has denied my motions categorically, and I have taken my exceptions categorically. 30

*Certificates of Stenographer and Judge.*

## CERTIFICATE OF STENOGRAPHER.

I, Frieda H. Lipschitz, a stenographer duly appointed to report stenographically the evidence given before the Second District Court of the City of Newark, in the case of Henry A. Bock, plaintiff, v. Gabriel Feigelson, defendant,

10 Do HEREBY CERTIFY that the foregoing is a true and correct transcript of the evidence given on the 30th day of March, 1932, and the 11th day of April, 1932, before Honorable Louis R. Freund, Judge of the Second District Court of the City of Newark, in said matter.

Dated, April 23, 1932.

FRIEDA H. LIPSCHITZ.

20

## CERTIFICATE OF JUDGE.

I, Louis R. Freund, Judge of the Second District Court of the City of Newark,

Do HEREBY CERTIFY the foregoing transcript in the case of Henry A. Bock, plaintiff, v. Gabriel Feigelson, defendant, as the State of Case for appeal in the above-stated cause.

30

Dated, April 25, 1932.

LOUIS R. FREUND.

40



*Exhibit D. 2.*

The said purchase price of Seventeen thousand dollars includes Goodwill, Merchandise, Fixtures and Lease which are all to be sold free and clear. The incoming beginning April 3rd 1931 shall belong to buyers and the buyers shall assume all bills for merchandise coming in on and after

10 April 3rd, 1931.

The final settlement and drawing of bill of sale shall take place not later than April 9th, 1931. The seller shall also excused from paying any commission to brokers.

The seller also guarantees the present lease to July 1st, 1934 at \$90.50 per month with an option to renew for five years, at the same rent.

HENRY A BOCK (L. S.)

FEIGELSON BROS. (L. S.)

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SAM FEIGELSON (L. S.)

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## SPECIFICATION OF ERRORS.

## NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

|   |   |   |    |
|---|---|---|----|
| HENRY A. BOCK,<br><i>Plaintiff-Respondent,</i><br><i>vs.</i><br>GABRIEL FEIGELSON,<br><i>Defendant-Appellant.</i> | } | <i>Action<br/> at Law.</i>  | 10 |
|   |   | <i>On Appeal<br/> from Second<br/> District<br/> Court of the<br/> City of<br/> Newark.</i> |    |
|   |   | <i>Specification<br/> of Errors.</i>  | 20 |

The following is a specification of the determinations of the District Court with which appellant is dissatisfied in point of law.

1. The respondent failed to establish a prima facie case in the court below.

2. The record fails to disclose any evidence or proof upon which the court below based its determination.

3. The appellant received no consideration for the check sued upon, the testimony showing that on April 3, 1931 the firm of Feigelson Bros., in which the appellant was in nowise connected, entered into a written contract with respondent to purchase the latter's stationery store. The contract called for payment of \$500.00 by Feigelson Bros., on account of the purchase price. Feigelson Bros., having no bank account of their own, requested appellant to draw his check for \$500.00 to the order of respondent, which he did.

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*Specification of Errors.*

Subsequently, appellant was instructed by Feigelson Bros. to stop payment on said check, and he did so. The appellant was a mere conduit in the transaction, in no way a party to the contract, and a stranger thereto.

- 10 4. The court below erred in holding that this appellant, a third party, was liable to respondent, the testimony showing (a) that no consideration passed from respondent to appellant for the check in question; (b) that appellant, Gabriel Feigelson, was wholly unconnected with Feigelson Bros., the proposed purchasers; (c) that the issue of the check to respondent's order was solely at the request of Feigelson Bros., for their sole accommodation and convenience; (d) that this appellant stopped payment upon said  
20 check at the request of, and upon notice from said Feigelson Bros. to so do; (e) that it affirmatively appears from appellant's testimony and respondent's own admissions that respondent neither gave, nor did the appellant ever receive any consideration whatsoever for the check in controversy.

30 The question of breach or performance of the contract between respondent and Feigelson Bros. is a matter solely between those parties; and the undisputed testimony conclusively demonstrates that appellant was in no way connected with, and was an entire stranger to the aforementioned contract.

- 40 5. The court below erred in entering judgment against the appellant, the testimony being undisputed, that (a) a contract was entered into between respondent and Feigelson Bros., obligating the latter to pay to the former \$500.00; (b) the appellant, Gabriel Feigelson, is a third party

*Specification of Errors.*

and a stranger thereto; (c) that he received no benefit therefrom; and, (d) there was neither forbearance nor waiver by respondent of any of his rights against Feigelson Bros. The check given by this appellant to respondent was therefore unenforceable as against this appellant.

6. The court below erred in finding for the respondent, in that, the check in suit, if anything, was given by appellant, Gabriel Feigelson, for the debt of Feigelson Bros. Said debt was neither discharged nor extinguished, and no consideration moved from respondent to this appellant, who was but a mere conduit in this transaction.

7. The court below erred in finding that there was a consideration to the appellant, and in permitting respondent to recover on the check herein, in that, there was no privity of contract between respondent and this appellant except as a result of respondent's possession of the check in suit; and the proofs were undisputed that no consideration whatever passed from respondent to this appellant.

8. By the terms of the contract entered into between respondent and Feigelson Bros., the former represented and guaranteed to the latter, an extension of a certain written lease therein mentioned for an additional five years from July 1, 1934, the expiration date therein provided. The lease being in writing, and the respondent representing and guaranteeing to affect a change therein, the respondent must, in order to recover, have been possessed of a writing of equal dignity to that of the lease, permitting such change therein; and the testimony being undisputed that respondent had no such writing, and

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*Specification of Errors.*

that none existed authorizing a change or modification of said lease, the respondent has not performed the contract on his part, and has failed of performance. There being no evidence upon which the court below could find that the respondent was authorized or empowered to change the terms of that lease, the court erred in allowing respondent to recover.

9. That the court below erred in refusing to grant appellant's motion for a direction of a verdict in favor of the appellant at the close of the entire case.

GEORGE H. ROSENSTEIN,  
Attorney of Defendant-Appellant.

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**OPINION.**

Filed May 3, 1933.

NEW JERSEY SUPREME COURT.

No. 432, October Term, 1932.

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|  |  |  |
|--|--|--|
| <p>HENRY A. BOCK,<br/> <i>Plaintiff-Respondent,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>GABRIEL FEIGELSON,<br/> <i>Defendant-Appellant.</i></p> |  |  |
|--|--|--|

Submitted October Term, 1932; decided  
1933.

20

On appeal from the Second District Court of  
the City of Newark.

Before Justices Trenchard, Case and Brogan.

For the defendant-appellant, George H. Rosen-  
stein, Esq.

For the plaintiff-respondent, Brenner &  
Kresch, Esqs. (Samuel E. Kresch, of counsel.)

*Per Curiam.*

30

On April 3, 1931, the plaintiff below entered  
into a contract with Feigelson Brothers to sell a  
stationery store in Staten Island for the sum of  
\$17,500.00. This contract signed by Henry A.  
Bock, as vendor, Feigelson Brothers and Sam  
Feigelson, as vendees, called for a down pay-  
ment of \$500.00. The defendant below, who is  
the appellant here, Gabriel Feigelson, was not a  
member of the vendee group, but was the maker  
of a check for \$500.00 which was given to the

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*Opinion of Supreme Court.*

plaintiff as the initial payment. Bock endorsed the check, presented it at the bank and found that payment had been stopped. Suit was brought upon the check and judgment for the full amount recovered by the plaintiff.

10 Feigelson appeals on two grounds. First, that there was lack of consideration as to him and, secondly, breach of guaranty on the part of the respondent. There is no merit to either point. Certainly it was sufficient consideration that the plaintiff obligated himself to sell his business. When the defendant below gave his check to the plaintiff, the plaintiff was bound to carry out the terms of the contract and sell his business to Feigelson Brothers for the agreed sum. The  
20 appellant cannot say that there was no consideration for that payment. That question has been disposed of, and adversely to his contention, many times. *O'Toole v. O'Toole*, 158 Atl. 337; *Penbrook Trust Co. v. Wiegand & Co.*, 100 N. J. L. 353.

The second point that there was a failure of respondent's guaranty is also without merit. The agreement between the parties provides, "The seller also guarantees the present lease to  
30 July 1, 1934, at \$90.50 per month with an option to renew for five years at the same rent." It was admitted by the plaintiff that the lease he had at the time of the agreement contained no provision for a five year renewal option. This failure on the part of the plaintiff would not avail the defendant. The only one that could complain about that breach would be Feigelson Brothers, who were the purchasers. Then, too, this covenant in the agreement was a condition subsequent. The Court, sitting without a jury,  
40 found that the plaintiff's covenant was to obtain a

*Opinion of Supreme Court.*

five year lease when desired. It is apparent that the plaintiff was not afforded much opportunity to obtain this renewal since the check in question, dated April 3, 1931, was, when presented on April 6, 1931, dishonored.

The judgment of the Court below will be affirmed with costs.

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**RULE OF AFFIRMANCE.**

**NEW JERSEY SUPREME COURT.**

|    |   |   |   |
|----|---|---|---|
| 10 | HENRY A. BOCK,<br><i>Plaintiff-Respondent,</i><br><br><i>vs.</i><br>GABRIEL FEIGELSON,<br><i>Defendant-Appellant.</i> | } | <i>On Appeal.</i><br><br><i>Rule of</i><br><i>Affirmance.</i> |
|----|---|---|---|

20 This cause coming on to be heard at the October Term, 1932 and being argued by Samuel E. Kresch, of counsel for the respondent and George H. Rosenstein, of counsel for the appellant, and the Court having considered the same, and being of the opinion that the judgment of the Second District Court of the City of Newark should in all things be affirmed,

It is ORDERED that the judgment as entered heretofore be in all things affirmed with costs, and that the record and the proceedings be remitted to the Second District Court of the City of Newark, and there to be proceeded with according to the law and practice of said Court.

30 Entered May 8, 1933.

On motion of

BRENNER & KRESCH,  
Attorneys of Plaintiff-Respondent.

SAMUEL E. KRESCH,  
Of Counsel.

NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

|   |   |   |    |
|---|---|---|----|
| HENRY A. BOCK,<br><i>Plaintiff-Respondent,</i><br><br><i>vs.</i><br><br>GABRIEL FEIGELSON,<br><i>Defendant-Appellant.</i> | } | <i>Action<br/> at Law.</i><br><br><i>Notice<br/> of Appeal.</i> | 10 |
|---|---|---|----|

To: Messrs. Brenner & Kresch, attorneys for plaintiff-respondent.

Sirs:

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PLEASE TAKE NOTICE that Gabriel Feigelson does hereby appeal to the Court of Errors and Appeals in the last resort in all causes from the whole of the judgment entered by the New Jersey Supreme Court on the 8th day of May, 1933, affirming the judgment of the Second District Court of the City of Newark, entered on April 11, 1932.

Yours respectfully,

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GEORGE H. ROSENSTEIN,  
Attorney for Defendant-Appellant.

Dated: May 17, 1933.

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## GROUND OF APPEAL.

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

|    |   |   |   |
|----|---|---|---|
| 10 | HENRY A. BOCK,<br><i>Plaintiff-Respondent,</i><br><br><i>vs.</i><br><br>GABRIEL FEIGELSON,<br><i>Defendant-Appellant.</i> | } | <i>Action<br/>at Law.</i><br><br><i>Ground<br/>of Appeal.</i> |
|----|---|---|---|

20 Defendant-appellant writes the following ground of appeal in this cause upon appeal taken thereon from the New Jersey Supreme Court to the New Jersey Court of Errors and Appeals:

1. That the said New Jersey Supreme Court erred in all respects in affirming the judgment entered on the 11th day of April, 1932, in the Second District Court of the City of Newark.

GEORGE H. ROSENSTEIN,  
Attorney for Defendant-Appellant.

30 Dated: May 17, 1933.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

## New Jersey Court of Errors and Appeals

|   |   |  |
|---|---|--|
| HENRY A. BOCK,<br><i>Plaintiff-Respondent,</i><br><br><i>vs.</i><br><br>GABRIEL FEIGELSON,<br><i>Defendant-Appellant.</i> | } | <i>Appeal from<br/> the<br/> Supreme<br/> Court.</i> |
|---|---|--|

### BRIEF ON BEHALF OF APPELLANT.

(Italics ours unless otherwise stated.)

#### Statement.

This is an appeal from a judgment entered in the New Jersey Supreme Court on the 8th day of May, 1933, affirming a judgment in the sum of \$500.00 entered on the 11th day of April, 1932, in the Second District Court of the City of Newark, in favor of the plaintiff, upon a verdict found by Hon. Louis R. Freund, District Court Judge, without a jury.

#### Facts.

The suit instituted in the District Court was based upon a check drawn by appellant to respondent's order in the sum of \$500.00 (Ex. P. 1—S. C. 71), under the following circumstances:

On April 3rd, 1931, Samuel Feigelson and his brother, Louis, trading as Feigelson Brothers, made a contract in writing with respondent for the purchase of the latter's stationery store located in Great Kills, Staten Island, New York. The price agreed upon was \$17,000.00 payable

as therein provided:—"Five hundred dollars with signing of this agreement which is hereby acknowledged as a deposit \* \* \*." (Ex. D. 1—S. C. 71.)

The Feigelson Brothers had no bank account of their own (S. C. 35, ll. 30 and S. C. 36, ll. 13-16), and so one of the brothers, Samuel, requested their uncle, Gabriel Feigelson, the appellant, to do them "a favor and make out a check for" them to respondent's order (S. C. 36, ll. 18-20), and appellant did so. Shortly thereafter, Feigelson Brothers, who were not parties to this litigation, instructed appellant to stop payment on said check. The check having been drawn for *their* sole accommodation and convenience, and at *their* request, payment was likewise, at *their* request, stopped.

*Appellant had absolutely nothing to do with the contract or transaction between Feigelson Brothers and respondent. He was no party thereto. He was in no way interested therein, and a stranger thereto (S. C. 35, ll. 39-40 and S. C. 36, ll. 1-3). That is undisputed. In response to the following question on cross examination, respondent himself admitted it (S. C. 66).*

Q "Did Mr. Gabriel Feigelson, whose check you received, ever receive anything from you? Did you ever deliver anything of any value to Mr. Gabriel Feigelson, the maker of the check?"

A "No."

Plainly, appellant was but a mere conduit in the transaction.

*It is to be borne in mind that the state of demand is based upon a simple action on a check between the immediate parties.*

The testimony is conclusive (a) that appellant, Gabriel Feigelson, was in nowise connected with the Feigelson Brothers, the proposed purchasers (S. C. 24, ll. 26-30), (b) *that the check drawn to respondent's order was solely at the request of the Feigelson Brothers as a favor to them, for their sole accommodation and convenience* (S. C. 36, ll. 13-20); (c) that payment thereon was stopped by appellant at their request, and upon notice from them to do so; (d) *that this appellant is but a third party and an entire stranger to the transaction between the Feigelson Brothers and respondent.* (See Samuel Feigelson's testimony and respondent's admission of no consideration). (S. C. 66, ll. 25-30); (e) that there was no forbearance, and respondent at no time waived his rights against Feigelson Brothers, if any; (f) *that the obligation of the Feigelson Brothers, if any, to respondent, by virtue of the contract, was neither discharged nor extinguished.*

So far as this appellant is concerned, the absence of consideration to support the check is uncontroverted and beyond debate. Appellant urged throughout the trial, that the question of breach or performance of the contract (Ex. D. 1) was a matter purely between the parties thereto, and to which contract appellant was a stranger (S. C. 17, 18). That no privity existed between appellant and respondent (excepting merely as a result of possession of the check), was not only established by the defense, and ad-

mitted by respondent, *but recognized by the Trial Judge himself in the expression:*

“\* \* \* the mere fact that there is no privity between the maker of the check and this plaintiff—the payee and maker—.” (S. C. 17, ll. 3-6).

Continuing (ll. 6-15), the Court below said further (erroneously, we submit), that

“does not justify you (appellant) in urging that there was no consideration from this payee to the maker in view of the fact that the evidence so far indicates that the consideration for the giving of that check was the contract between Feigelson Brothers and this plaintiff” (S. C. 17).

Not only is the record barren of any proof that the *specific check of this particular maker induced the making of the contract, but the evidence is directly opposite.* Moreover, appellant *was* justified, and it *was* his legal right to urge the fact of no consideration from payee to maker. To have foreclosed appellant from that defense, was error (S. C. 17 and again at S. C. 52, ll. 30-40). The learned Trial Court found consideration when there was none.

The next proposition urged below, was the provision in the contract (Ex. D. 1) by the terms of which respondent guaranteed to the Feigelson Brothers “the present lease to July 1st, 1934, at \$90.50 per month with an option to renew for five years at the same rent.” *It was stipulated in open Court (S. C. 50) that the aforesaid written lease terminated in 1934; and contained neither a five-year option, nor any representation whatsoever in respect to any renewal.* Said lease neither contained a five year renewal option, nor was respondent possessed of a writing of any kind empowering such a change therein. This fact, likewise, is beyond dispute or cavil.

Clearly, the consideration for the contract, D. 1, failed—respondent failed to perform.

The Court below assumed to find that respondent "stood ready, willing and able to obtain" an extension of five years (S. C. 69, ll. 20-25). But upon what does that assumption rest? The record is barren of any evidence to sustain such a finding. *Possession by respondent of a writing equal in dignity to that of the lease, was a condition precedent essential to performance.* The landlord was not obligated to extend the lease. He bestowed no legal authority upon respondent to vary its terms. On the contrary, the landlord always retained, and never surrendered, his unquestioned legal right to refuse a modification of the lease at any time.

It is important to examine the provision in the contract (D. 1), reading:

"The seller also guarantees the present lease to 1934, with an option to renew for five years at the same rental."

This clause was construed by the Trial Judge to mean:

"I would say that a construction by me at this time of that particular language in the contract would be that the seller represented that he was in possession of the premises by virtue of a lease expiring definitely July 1, 1934, and containing therein an option to renew for a further five years at the same rental.

There is no ambiguity existing as to the word 'guarantees.' Under the circumstances existing it appearing that Bock was the scrivener—the author, you would call it—that construction would be the construction placed upon it" (S. C. 34, ll. 20-26).

At page 52 (S. C. ll. 17-21) the Court below repeated:

“I say that I construe the language of the agreement to mean that the plaintiff represents that he has a lease to July 1, 1934, with an option for renewal for five years.”

Respondent's counsel proposed to offer “testimony by the landlord to the effect that he was ready, willing and able to extend this lease” (S. C. 33, ll. 28-33), but the Court said:

*“You are endeavoring to offer testimony to the effect that the landlord said that he had already arranged for a five-year extension. I won't admit that \* \* \*.”*

This is good law—and the ruling a correct one. *But in deciding the issues, however, the learned Court below not only discarded its previous views and ruling, but reversed its position completely.* Notwithstanding the 1934 expiration date in the lease, the Court proceeded to hold:

“\* \* \* that the plaintiff here undertook as a condition precedent to his performance, to obtain a further extension of five years; that he stood ready, willing and able to do that” (S. C. 69, ll. 21-23).

At the conclusion of the trial, appellant moved for a directed verdict upon the grounds (a) that there was no consideration for the check in suit; (b) that the representation in the contract that the lease provided for an additional five years from July, 1934, was untrue; (c) that respondent possessed no written authority to change the terms of the lease, resulting in a failure of performance; (d) that the presumption of consideration for the issuance of the check was conclusively rebutted; and (e) that respondent has not only failed to sustain the burden of proof, but failed utterly to produce any proof of consideration whatsoever.

## POINT I.

Appellant was a third party and stranger to the transaction. The check drawn by him was without consideration, hence, *nudum pactum*.

The contract (D. 1), was exclusively between respondent and the Feigelson Brothers. That is undisputed. Its breach or performance, therefore, is a matter strictly between those contracting parties. Appellant was no more than a conduit. The drawing and stopping of the check in suit were at the sole request and instruction of the Feigelson Brothers. Respondent had absolutely nothing to do with appellant. They were strangers to each other. As to the contract, appellant was likewise a stranger. If as a result of the contract, the Feigelson Brothers became liable to respondent—that was a matter solely between those contracting parties. *As between respondent and appellant, no privity whatsoever existed, except as a result of mere possession of the check.* That no consideration ever passed from respondent to appellant is not only undisputed, but admitted (S. C. 66, ll. 25-29). In bills and notes consideration is presumed; but in this case, that presumption has been conclusively rebutted. The burden of proof was then respondent's. He not only failed to sustain it, *but offered no proof of consideration whatsoever.* It is an elementary principle of law that as between immediate parties to a bill or note, consideration may be inquired into. Inquiry having disclosed an absence of consideration, appellant's check to respondent's order was but a naked promise—*nudum pactum ex quo non oritur actio.*

As to respondent's rights, if any, against the Feigelson Brothers, there was neither waiver

nor forbearance. His claim, if any, against them, was neither discharged nor extinguished. In words singularly applicable, 8 Corp. Jur. Sec. 357, p. 221, says:

“The debt of another becomes a sufficient consideration for a bill or note *if the original debtor is discharged by it, \* \* \**”

The foregoing principle is also stated in “Elliott on Contracts,” Vol. 4, Sec. 3401, pp. 620, 621, in unmistakable language:

“A note given by one person for the debt of another *must be for the discharge or extinguishment of such debt, or be supported by other new consideration moving from such other or from a third person to the maker, as the mere debt of another will not support the note of a stranger to the debt.*”

In *Broom's Legal Maxims*, (7th Am. Ed.), 745, 752, the direct assumption of another's debt, supported only by such consideration, is deemed a *nudum pactum*.

Joyce, in his work, “Defenses to Commercial Paper,” Vol. 1, (2nd Ed.), Sec. 376, p. 502, says:

“NOTE OF THIRD PERSON.—While the giving of a note of a third person by a debtor to a creditor, *when it is agreed between the parties that such note shall be taken in payment of the indebtedness*, operates to discharge the debt, yet where a third party, subsequent to the time of incurring the debt, and a stranger thereto, promises to pay such debt, such promise is unenforceable, *such third party not having requested the loan and not having received any benefit therefrom, nor the payee having been injured, and there being no agreement between the debtor and the payee that such third person should give any note, nor between such third person and the debtor, the debtor being in no way a party to the transaction, and no forbearance on the creditor's part being shown.*”

Moreover, it is utterly immaterial whether this appellant's check was given before, at, or after the contract between respondent and the Feigelson Brothers. *The particular check in question did not induce the making of the contract.* The contract did not require, *nor was it ever any part of said contract,* that the specific check in suit was to form any part of the transaction. Respondent was under no compulsion to accept it. He could have insisted upon cash, or a certified check. *Upon taking the check of a stranger, however, he took it subject to all contingencies inherent thereto. The principal obligation, if any, under the contract, was that of the Feigelson Brothers, and not the appellant.*

In the case at bar, likewise, *it was never agreed* between the parties to the contract (D. 1) that this appellant's check was to be taken in payment of any indebtedness springing from that contract. *The record is utterly barren of any proof that the specific check, of this particular Appellant, induced or had anything to do with the making of this contract. The evidence is directly to the contrary.*

A careful search of the authorities in this State has failed to reveal a decision in point. However, the question of a stranger's liability on notes given for the debt of a third party, was considered in the recent case of *Mutual Life of Illinois v. McKinnis*, (1929) 15 S. W. (2d) 935. The Court held that notes executed to cover the debt of a third party are *without consideration where the liability of the third party remained unchanged, the liability of such third party not being extinguished in the absence of an express contract to that effect.*

Another case directly in point is that of *Gilbert v. Wilbur*, 72 Atl. 868, 869, decided by the Supreme Judicial Court of Maine:

“We are unable to perceive wherein the plaintiff is aggrieved by this order. *Here was no agreement of defendant with plaintiff, nor credit given the defendant as a part of the bargain between plaintiff and the minor (Sawyer v. Fernald, 59 Me. 500-503); no discharge or extinguishment of the minor's indebtedness as in Seymour v. Prescott, 69 Me. 376, and neither forbearance to sue, nor an agreement therefor, the note being payable on demand (Paine v. Caswell, 68 Me. 80, 28 Am. Rep. 21; Thompson v. Gray, 63 Me. 230; Lambert v. Clewley, 80 Me. 480, 15 Atl. 61; Moore v. McKenney, 83 Me. 80-86, 21 Atl. 749, 23 Am. St. Rep. 753), nor novation (Hamlin v. Drummond, 91 Me. 175, 39 Atl. 551), nor any new consideration.*”

The whole question may be resolved to this single proposition. Let us assume that appellant's check was returned because of “insufficient funds,” or, was dishonored for any other like reason. “Can respondent enforce his claim against the Feigelson Brothers for the \$500.00 in question?” The answer being “Yes,” it follows that the judgment of the District Court must be reversed.

## POINT II.

Respondent's guaranty and representation of a five-year extension of the lease mentioned in the contract between the Feigelson Brothers and Respondent, was untrue. Respondent failed to perform. The consideration failed.

The contract (D. 1) between the Feigelson Brothers and respondent guaranteed

“the present lease to July 1st, 1934, at \$90.50 per month with an option to renew for five years at the same rent.”

It was admitted by respondent, and stipulated in open court (S. C. 50, ll. 17-29) as follows:

Mr. Rosenstein: I will ask for the production of the lease, which I understand is in court, if your Honor please.

Mr. Fink: I can enter into a stipulation that the lease contains a provision that the term thereof shall extend until 1934, and *that it does not contain a five-year option.* Is that satisfactory?

Mr. Rosenstein: And contains no representations whatsoever in respect to any option.

Mr. Fink: Right.

Obviously, the representation of an “option to renew for five years at the same rent,” was untrue. In construing that clause, the Trial Court itself held it to be a representation by respondent that he held “*a lease expiring definitely July 1, 1934, and containing therein an option to renew for a further five years at the same rental.*” As to the word “*guarantees,*” the Court below said “*there is no ambiguity existing. Under the circumstances existing it appearing that Bock was the scrivener—the author, you would call it—that construction would be the construction placed upon it*” (S. C. 34, ll.

20-28). Retaining this construction the Trial Court repeated it (S. C. 52, ll. 16-20), saying: "*I say that I construe the language of the agreement to mean that the plaintiff (respondent) represents that he has a lease to July 1, 1934, with an option for renewal for five years.*" It is important to note that when **Respondent's Counsel** proffered "testimony by the landlord to the effect that he was ready, willing and able to extend this lease" (S. C. 33, ll. 20-23), the Court below ruled (correctly) that it was inadmissible, saying: "*You are endeavoring to offer testimony to the effect that the landlord said that he had already arranged for a five-year extension. I won't admit that \* \* \**" (S. C. 33, ll. 28-34). In arriving at its decision, however, the Court below took a directly opposite position. While on the one hand it held that such testimony is inadmissible, it proceeded to find, nevertheless, "that the plaintiff (respondent) here undertook, as a condition precedent to his performance, to obtain a further extension of five years; that he stood ready, willing and able to obtain that" (S. C. 69, ll. 22-24).

The lease in question containing no such renewal option; and respondent possessing no written or legal authority of any kind to insert such an option in the lease, the case was barren of any evidence to sustain that finding; and the Court below erred in assuming to make it.

## POINT III.

The decision of the Supreme Court that the check was based upon a legal consideration, has no support either in the facts or in the cases cited.

The Supreme Court in its opinion (S. C. 77, ll. 37-39), recognizes the fact to be, that appellant was a stranger to, and in no way interested in the contract between respondent and the Feigelson Brothers. He "was not a member of the vendee group," states the opinion, which then goes on to say (S. C. 78, ll. 15-18): "When the defendant below gave his check to the plaintiff, the plaintiff was bound to carry out the terms of the contract and sell his business to Feigelson Brothers for the agreed sum." This is clearly erroneous; for, as a matter of law, the respondent *was not bound to sell his business* to the Feigelson Brothers upon the failure of the check to clear. When payment on the check was stopped, the consideration (as to respondent) failed, and he *was, therefore, not under any obligation to sell his business.*

The Supreme Court, as authority for precluding the appellant from showing the absence of consideration respecting the check in suit, cites in its opinion the cases of *O'Toole v. O'Toole*, 10 Misc. 159, and *Pennbrook v. Wiegand & Co.*, 100 N. J. L. 353 (S. C. 78, ll. 18-23). Neither of these cases is applicable to the questions presented on this appeal; nor do they support the proposition for which they are cited.

In the *Pennbrook v. Wiegand* case, the Wiegand Co. executed two notes, leaving the payee's name blank. These notes were afterwards delivered to a certain White Finance Co., who agreed to

give the proceeds to the maker. The Wiegand Co. did not get the proceeds. Subsequently, a certain Paxtang Co., got these notes from another finance company, called the Mutual. The notes were filled out complete and regular when the Paxtang Co. purchased them. Later on, the Paxtang Co. sold these notes to the Pennbrook Trust Co., who brought suit thereon. The Court held the Pennbrook Trust Co. to be a holder in due course. In the case at bar, we have only a simple suit on a check between the immediate parties. Neither the facts nor the reasoning in the Pennbrook case bear any analogy to the instant case.

The O'Toole case deals with a situation where a husband and wife were joint makers—there was a “lending of credit.” In the case at bar, *appellant's credit was neither sought or ever relied upon by the respondent.*

### CONCLUSION.

1. The undisputed elements in this case being: (a) that Appellant was a total stranger to the transaction between Respondent and Feigelson Brothers; (b) that the check drawn to Respondent's order by Appellant was solely at the request of Feigelson Brothers and was likewise stopped at their request; (c) that Respondent waived no right, nor suffered any forbearance as against Feigelson Brothers; (d) that the obligation of Feigelson Brothers, if any, to the Respondent, as a result of the contract, was neither discharged nor extinguished; and (e) that Respondent was under no legal obligation to sell his business to Feigelson Brothers upon the failure of the Appellant's check to clear, the judgment of the Supreme Court affirming the judgment of

the Second District Court of the City of Newark should be reversed and judgment rendered in favor of the Appellant.

2. Respondent's guarantee and representation of a five-year extension of the lease mentioned in the contract being untrue, it resulted in a failure of performance and consideration on the Respondent's part; and should lead to a reversal of the judgment appealed from.

Respectfully submitted,

GEORGE H. ROSENSTEIN,  
Attorney for Defendant-Appellant.

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in favor of the Appellant.

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tion of a five-year extension of the lease term  
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reversal of the judgment appealed from.

Respectfully submitted,  
GEORGE H. ROSENBERG  
Attorney for Respondent-Appellant.

Very truly yours,  
George H. Rosenberg  
Attorney for Respondent-Appellant

EXHIBIT

The following exhibits are submitted in support of the Respondent's motion for judgment on the pleadings:

1. A copy of the lease agreement between the parties.
2. A copy of the Respondent's purchase order.
3. A copy of the Respondent's invoice.
4. A copy of the Respondent's correspondence with the Appellant.
5. A copy of the Respondent's financial records.
6. A copy of the Respondent's tax records.
7. A copy of the Respondent's bank statements.
8. A copy of the Respondent's credit reports.
9. A copy of the Respondent's insurance policies.
10. A copy of the Respondent's other relevant documents.

## New Jersey Court of Errors and Appeals

HENRY A. BOCK,  
*Plaintiff-Appellee,*

*v.*

GABRIEL FEIGELSON,  
*Defendant-Appellant.*

On Appeal from  
the Supreme Court

### BRIEF ON BEHALF OF PLAINTIFF-APPELLEE

#### Facts

On April 3rd, 1931, plaintiff entered into an agreement with "Feigelson Brothers" to sell to the latter a stationery store located in Great Kills, Staten Island, New York.

The purchase price was \$17,000, of which \$500 was to be paid upon the signing of the contract, \$13,500 when settlement and bill of sale were to be made and drawn and the balance to be paid within a year (Exhibit D-1, Case, p. 71).

Upon the signing of the contract, Gabriel Feigelson, the defendant-appellant, gave his check to plaintiff for \$500, pursuant to the terms of the contract. *At that time, it was plaintiff's understanding that Gabriel Feigelson was one of the*

*Feigelson Brothers making the purchase.* Plaintiff had no knowledge that the check was given by the defendant as an accommodation maker (Case, p. 61, ll. 22-27; p. 66, ll. 31-39).

On April 6, when the check was presented to defendant's bank for payment, the bank refused to honor it, because the maker thereof ordered payment stopped (Case, p. 53, ll. 9-20).

Suit was thereupon brought by plaintiff, the payee-holder of the check, against defendant, the maker of the same, and the trial resulted in a verdict for plaintiff for \$500.

At the trial, much time was taken by defendant in an effort to prove misrepresentation of the store's income as a ground for avoiding the instrument. Defendant has apparently abandoned that defense, as his brief contains no mention of it.

## POINT I

**Plaintiff was a holder in due course. Lack of consideration cannot be urged as a defense therefor.**

That the payee of an instrument may be a holder in due course thereof, is now settled in this State.

*Pennbrook Trust Co. v. Wiegand*, 100 L. 353;

*Maurer v. Hahn*, 107 L. 338.

In the latter case, the Court of Errors and Appeals said in 105 L. 494:

“But, we do not approve the view of the author of the opinion that a payee cannot be

a holder of a note in due course within the meaning of the Negotiable Instruments Act, and, that 'a note is not negotiated to its payee.'

"This Court has held the contrary view in *Pennbrook Trust Co. v. Wiegand & Co.*, 100 N. J. L. 353, 359.

"The language of section 30 of the Negotiable Instruments Act (3 Comp. Stat., p. 3738), leaves no room for doubt as to what is meant by an instrument negotiated. It declares, 'an instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof; if payable to bearer it is negotiable by delivery; if payable to order it is completed by delivery.'

"The word 'negotiated' in the statute is used in the sense of the word 'transferred.' Furthermore, section 52 of the Negotiable Instruments Act (3 Comp. Stat., p. 3741), in defining a holder in due course declares:— 'A holder in due course is a holder who has taken the instrument under the following conditions: I. That it is complete and regular upon its face; II. That he became the holder of it before it was overdue and without notice it had been previously dishonored if such was the fact; III. That he took it in good faith and for value; IV. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.'

"Thus, it becomes quite clear that 'a holder in due course' may be the payee of the instrument negotiated to him."

The check in question is complete and regular on its face (Exhibit P-1, Case, p. 71). It was never overdue, nor was it ever previously dishonored. Having bound himself by written contract to sell his business, the plaintiff undoubtedly was

acting in good faith in accepting the check, and for the same reason he parted with value. Plaintiff likewise satisfies the last prerequisite of a holder in due course in that at the time the check was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the maker (Case, p. 61, ll. 22-27; p. 66, ll. 31-33, 36-39). Not only is that statement substantiated by the plaintiff's testimony, but the entire state of the case may be searched in vain for any statement by defendant or anybody testifying for him that he informed plaintiff of the fact that he was signing the check as accommodation maker at any time before or at the making and delivery of the check. All of defendant's testimony on that point is to the effect that he was a stranger to the contract, *but nowhere is there any testimony by him that he communicated that fact to the plaintiff*. Surely, the burden was on him to so inform the plaintiff, who had no other way at his immediate disposal to ascertain that fact.

Plaintiff being a holder in due course, the defense of lack of consideration cannot be raised as to him. (Comp. Stat., p. 3738, Sec. 28.)

“28. Absence or failure of consideration:—Absence or failure of consideration is matter of defense as against any person not a holder in due course; and partial failure of consideration is a defense *pro tanto* whether the failure is as ascertained and liquidated amount or otherwise. (P. L. 1902, p. 589).”

## POINT II

**Whether plaintiff is or is not a holder in due course defendant is liable on the instrument, there being sufficient consideration therefor.**

The terms of the agreement called for the payment of \$500 upon execution thereof. Upon the strength of the payment of \$500 to plaintiff he entered into a contractual relationship with Feigelson Brothers, binding himself to sell his business for \$17,000. Had the check not been given to plaintiff, he would not be obliged to carry out the terms of the contract. Once having accepted the check, however, he was bound by the contract. Had he failed to carry out his agreement, he would have subjected himself to a suit for breach of contract.

Consideration is sometimes defined as being a benefit to the promisor or a detriment to the promisee.

*Sherman v. Stern*, 93 N. J. E. 626.

Granted that the promisor, the maker of the check in this case, received no benefit, nevertheless, the plaintiff, the promisee, incurred a detriment, *i. e.*, an obligation to sell his business. That constitutes legal consideration.

It is also held by our New Jersey courts that the consideration must flow from the promisee, *but that it need not move to the promisor.*

*Headly v. Levitt*, 65 E. 748;

*Holt v. U. S. Sec. Life Ins. Co.*, 74 L. 795;

*Krouse v. Palmer*, 89 N. J. E. 220.

The facts of this case fall directly in line with the above statement. Bock's obligation to sell his store ran to Feigelson Brothers, not to the maker of the check, but so long as Bock, the payee, did incur an obligation running to Feigelson Brothers, that constituted sufficient consideration to bind defendant.

In the case of *O'Toole v. O'Toole*, 158 Atl. 337, the Court said,

“\* \* \* Although the defendant Sally E. O'Toole may have become a joint maker for the accommodation of her husband, nevertheless *it is settled that a signature for accommodation is supported by a consideration moving to the accommodated party.* A party to a note who has received no value himself may nevertheless become liable to a holder for value. This principle is applicable alike to the maker and indorser of a note by way of accommodation. *Crothers v. National Bank of Chesapeake City*, 158 Md. 587, 149 A. 270; *Polhemus v. Prudential Realty Co.*, 74 N. J. Law 570, 576, 67 A. 303; 3 Comp. St. 1910, p. 3738, Sec. 29.”

Section 29 of the Uniform Negotiable Instruments Act is as follows:

“29. Accommodation signer; liability:—  
An Accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person; such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party (P. L. 1902, p. 589).”

The above language has complete application to the facts of this case. To permit defendant to evade liability on the instrument would strike a serious blow at the purpose of the Negotiable Instruments Act—the free negotiability of commercial paper.

Appellant's brief is replete with authorities from other States, as well as excerpts from textbooks. The legal propositions as stated therein are correct, but they are wholly inapplicable to the facts of this case.

In all of the cases cited by appellant, *the contract or debt was already in existence when the new promise to pay was made.*

In the present case, the check was given pursuant to the terms of the contract and at the same time that the contract was signed. The plaintiff accepted that check as the payment called for in the contract, thereby binding himself to all the terms thereof.

The very citation from Joyce in his book, "Defenses to Commercial Paper," Vol. 1 (2nd Ed.), Sec. 376, p. 502, which is set out by defendant in his brief, points out that distinction clearly:

"NOTE OF THIRD PERSONS—While the giving of a note of a third person by a debtor to a creditor, when it is agreed between the parties that such note shall be taken in payment of the indebtedness, operates to discharge the debt, yet where a third party, SUBSEQUENT TO THE TIME OF INCURRING THE DEBT, and a stranger thereto, promises to pay such debt, such promise is unenforceable, such third party not having requested the loan and not having received any benefit therefrom, nor the payee having been injured, and there being no agreement between the debtor

and the payee that such third person should give any note, nor between such third person and the debtor, the debtor being in no way a party to the transaction, and no forbearance on the creditor's part being shown."

### POINT III

#### **Plaintiff did not misrepresent the terms of the lease.**

The portion of the contract in dispute is as follows:

"The seller also guarantees the present lease to July 1st, 1934 at \$90.50 per month with an option to renew for five years, at the same rent" (Case, p. 72, ll. 15-18).

Plaintiff testified that he represented to the purchasers that the lease expired in 1934; that he had spoken to his landlord, and that the landlord had guaranteed to give him a five-year extension at the same rental, and it was this that he put into the contract (Case, p. 61, ll. 25-37).

That the purchasers also understood the clause in question to incorporate the plaintiff's representation cannot be seriously doubted. Defendant's specifications of defenses contain a tacit admission of that fact (Case, p. 5, ll. 32-36), and the testimony of Samuel Feigelson contains an actual admission of it (Case, p. 37, ll. 32-34). Defendant's only complaint was that plaintiff was not in a position to obtain the extension, and his representation was for that reason false. It was this that defendant came to the trial prepared to show (Case, p. 26, ll. 15-24).

It was only when the learned trial Judge had apparently ruled that the construction of the clause was that the lease itself contained a five-year option, that defendant's counsel abandoned his allegation that plaintiff misrepresented that he could obtain the extension (Case, p. 33, ll. 35-40).

The learned trial Judge later elucidated his position, however, when he pointed out:

“The Court:—*I say, as the instrument now stands*, that is the construction you may have. If there is a mutual mistake between the parties, even though expressed, it may be gone into. I have merely given you my construction of the instrument as it stands before you now” (Case, p. 37, ll. 20-29).

It may be true that the contract was inartistically drawn, but the trial Judge properly found that it was the expression used by the parties to carry out their mutual understanding that the fixed term of the lease expired in 1934 and that the plaintiff undertook to obtain a further extension of five years.

Whether or not plaintiff was ready, willing and able to obtain the extension thereupon became a question of fact. In the light of the testimony of the landlord himself, that he granted the five-year extension, it can hardly be seriously argued that the trial Court committed error in holding that the plaintiff was ready, willing and able to do exactly as he represented (Case, p. 53, ll. 30-38; p. 54, ll. 1-29).

It is a familiar and elementary rule that the finding of the trial Judge, sitting in the capacity of Judge and jury, will not be disturbed on appeal where there is any evidence to sustain it.

*Dobbins v. McIntire*, 5 Misc. 836, 138 Atl. 466.

Regarding the clause, not in the light in which it was intended, however, and regarding it merely as it stands in the contract, the purchaser's action in repudiating the agreement on the ground that the lease did not contain the five-year extension, was unwarranted and premature.

It will be noted that the contract contains the following clause:

“The final settlement and drawing of bill of sale shall take place not later than April 9th, 1931.”

The chronology of events, therefore, was as follows:

On April 3rd, 1931, the contract was made and check executed. On April 5th, 1931, defendant ordered payment stopped and the purchasers repudiated the contract.

April 9th, 1931, was to be the last day for making final settlement and drawing the bill of sale.

According to the agreement, the plaintiff *guaranteed* the present lease to July 1st, 1934, at \$90.50 per month, with an option to renew for five years at the same rent.

The common meaning of the word “guarantee” as used in the contract means “To promise or warrant the performance of.”

Funk and Wagnalls' Practical Standard Dictionary, page 512.

A promise is not necessarily a representation. A representation must be of a present existing fact or a past fact, whereas a promise may be and usually is with reference to a future event.

The obligation of the plaintiff, therefore, under the contract was to have a lease with a term that expired July 1st, 1934, and an option to renew for five years.

Plaintiff had, however, until April 9th, 1931, the last day on which settlement and drawing of bill of sale was to be made, to produce such a lease. The purchasers having repudiated the contract on April 5th, they failed to give the seller an opportunity to deliver such a lease, and they thereby breached the contract themselves. Such repudiation dispensed the plaintiff from his part of the agreement.

*Holt v. United Security Life Ins. Co.*, 74  
N. J. L. 795, at page 801.

### CONCLUSION

For the reasons above stated, plaintiff respectfully urges that the judgment entered in the New Jersey Supreme Court on May 8, 1933, affirming the judgment entered on April 11, 1932, in the Second District Court of the City of Newark, be affirmed.

Respectfully submitted,

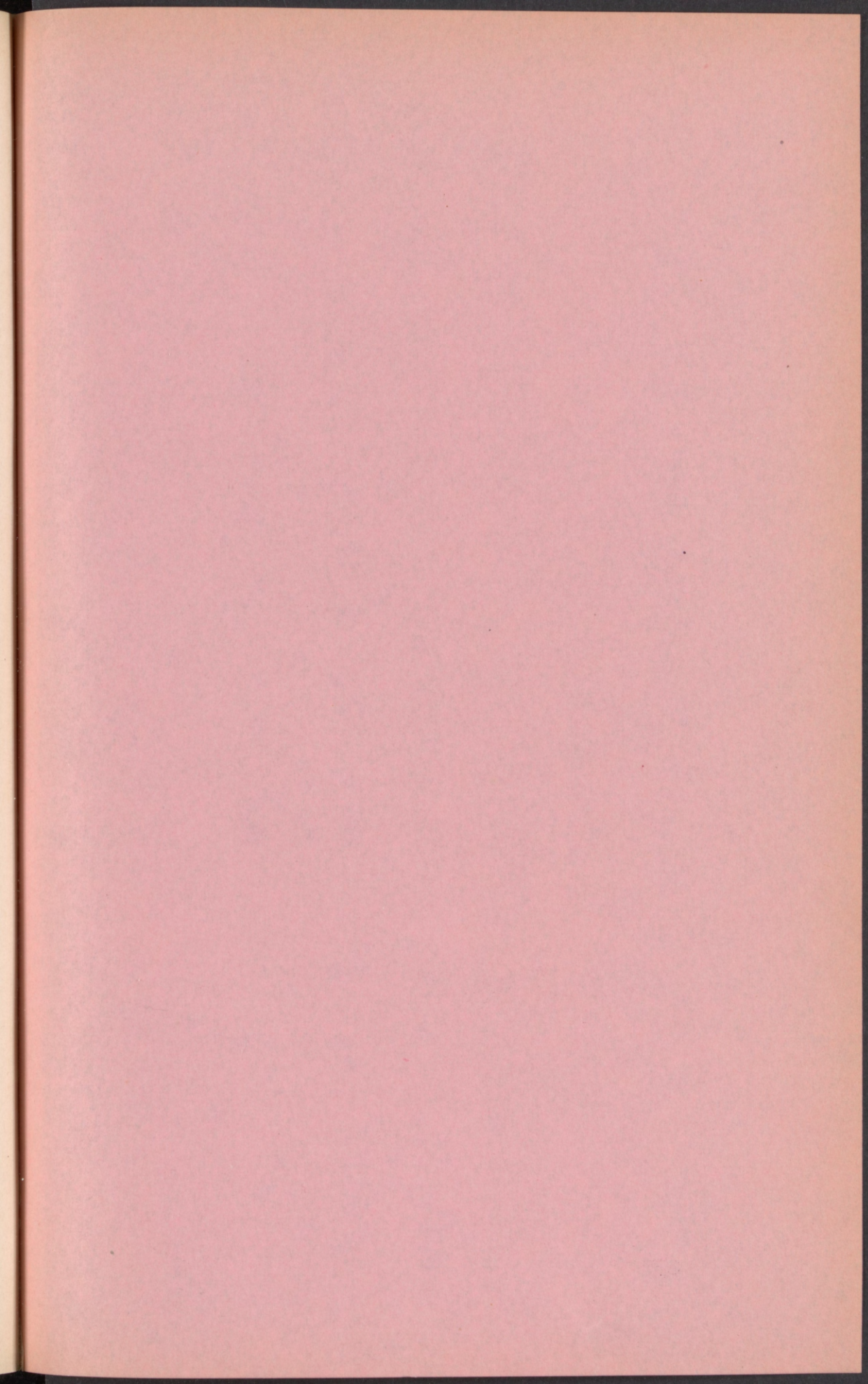
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