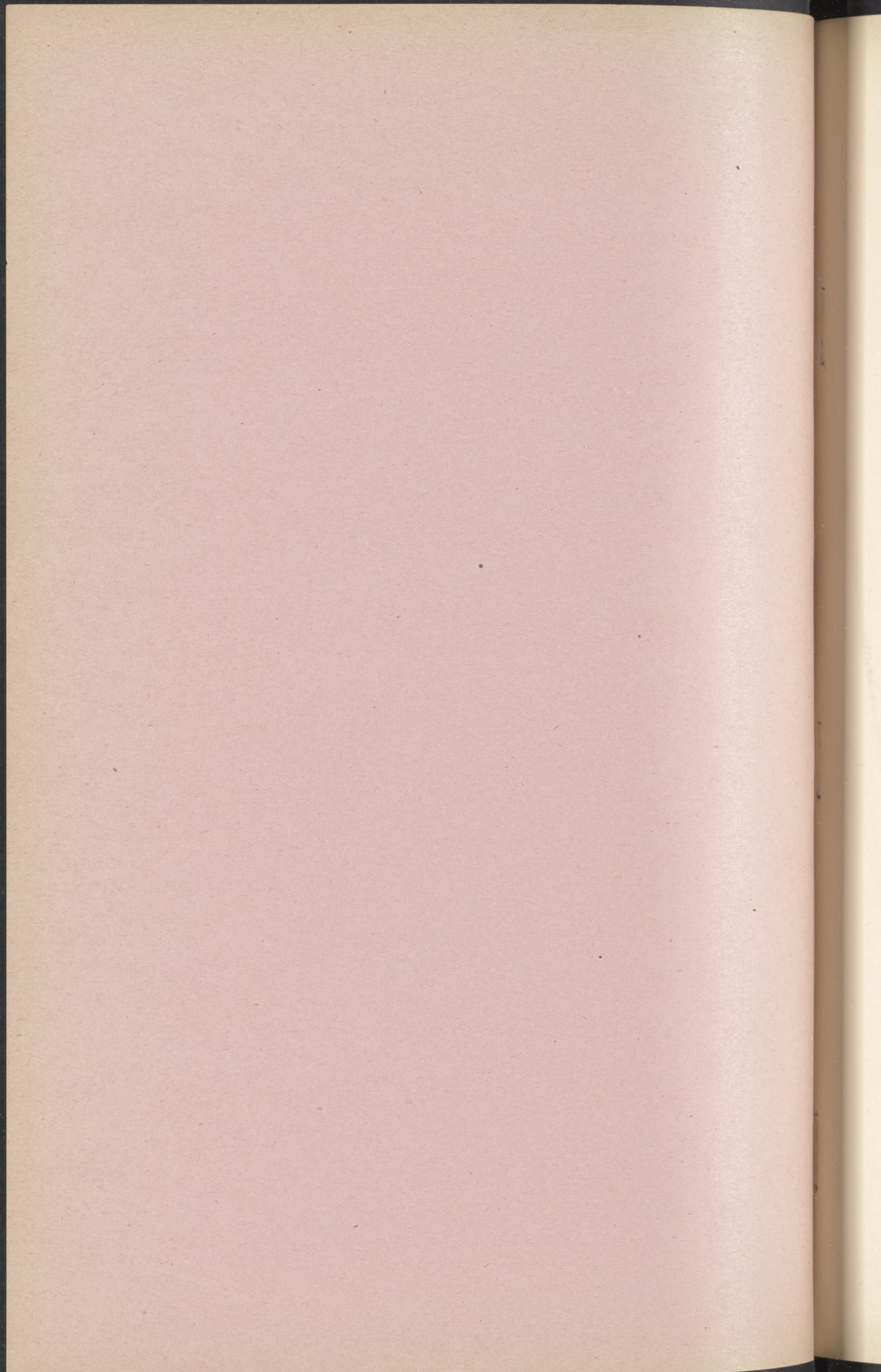

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Notice of Appeal.

(Filed March 18, 1929.)

Essex County Circuit Court.

LOUIS R. RADIN, Plaintiff, vs. JOHN J. CRERAN, Defendant.	Action at Law Notice of Appeal

10

To JOSEPH A. FUERSTMAN, Esquire,
Attorney for Defendant.

20

To WHOM IT MAY CONCERN:

SIR:

PLEASE TAKE NOTICE that the plaintiff in the above entitled cause appeals to the Court of Errors and Appeals as the last resort in all causes in New Jersey, from the whole of the judgment entered in this cause.

30

Respectfully yours,

DAVID BOBKER
Attorney for Plaintiff.

40

Grounds of Appeal.

(Filed April 18, 1929.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

LOUIS R. RADIN, Plaintiff-Appellant vs. JOHN J. CRERAN, Defendant-Respondent.	Grounds of Appeal

10

To JOSEPH A. FUERSTMAN,
Attorney of Defendant-Respondent.

20

TAKE NOTICE, that plaintiff's appeal to the Court of Errors and Appeals is based on the following grounds:

1. The Court erred in submitting to the jury the question of receipt of notice of protest by defendant.

2. The Court erred in submitting to the jury the question of alleged misrepresentations in connection with the note sued upon.

30

3. The Court erred in submitting to the jury the question of notary's diligence to ascertain defendant's address.

4. Plaintiff's motion for a direction of verdict in his favor, should have been granted for one or more of the following reasons:

A.—The pleadings filed in the case bar the trial Court from submitting the case to the jury.

40

B.—From the pleadings in the case, there was a legal presumption that defendant received notice of protest.

C.—From the pleadings in the case defendant was estopped from setting up any continued misrepresentations of facts at the time renewal notes were issued by defendant to the plaintiff. 10

D.—Proof is undisputed that when the last two renewal notes were issued, no representations were made by plaintiff upon which defendant, as endorser, relied.

E.—The defendant, by reason of renewing original note and making payments thereon, waived any fraud that did exist, and was estopped from setting up any alleged fraud perpetrations subsequent to 20 the issuance of the original note.

F.—The defendant failed to prove any damage resulting from the misrepresentation as set up in his answer.

5. The trial judge propounded the following questions to the jury:

> "1. Did the plaintiff misrepresent the income 30 and business done by the Lafayette Garage?
>
> 2. Did the holder of the note use reasonable diligence to ascertain the address of the defendant?
>
> 3. Did the notary use reasonable diligence to ascertain the address of the defendant?
>
> 4. Did the defendant receive notice personally?" 40

The jury failed to answer the above questions submitted to it by the trial judge.

David Bobker
Attorney of plaintiff-appellant.
Louis Klatzko
Of counsel with plaintiff-appellant.

10

Summons.

(Filed Nov. 8, 1926.)

The State of New Jersey—To Carl H. Miller and John J. Creran:

20

You are summoned to answer the annexed complaint of Louis R. Radin in an action at law in the Essex County Circuit Court. And take notice that unless you.

file your answer to said complaint with the Clerk of the Essex County Circuit Court, at Newark, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff 30 may proceed in the suit and judgment may be entered against you.

Witness, William A. Smith, Esq., Judge of the Essex County Circuit Court, at Newark, this 8th day of November, nineteen hundred and twenty-six

John H. Scott
Clerk.

David Bobker
40 Attorney.

Complaint.

ESSEX COUNTY CIRCUIT COURT.

LOUIS R. RADIN, Plaintiff, vs. CARL H. MILLER and JOHN J. CRERAN, Defendants.	Action at Law. Complaint.

10

Plaintiff, residing in the City of Newark, County of Essex and State of New Jersey, says that:—

1—He is the owner and holder of a certain promissory note, a true copy of which is attached hereto and made a part hereof and marked "A". Said note was presented for payment, upon date of maturity, at the Broad & Market National Bank, but said note was not paid.

20

2—On November 3, 1926, said note was protested for nonpayment, a true copy of said protest notice being attached hereto and marked schedule "B".

3—Said note was signed by Carl H. Miller and endorsed by John J. Creran, the defendants herein.

4—Demand has been made for the payment of said note but said demand has not been complied with.

30

Judgment will be claimed for $1498.86, representing principal amount of the note and interest to November 3rd, 1926, besides $2.36 for protest fees, and interest since November 3rd, 1926, and costs of suit.

DAVID BOBKER,
Attorney for Plaintiff.

40

Schedule "A".

$1476.23 NEWARK, N. J. August 3 1926

Three months after date I promise to pay to the order of Sol J. Wallach & Louis R. Radin FOURTEEN HUNDRED SEVENTY SIX and 23/100 DOLLARS
10
at Broad & Market National Bank of Newark

Value received
With interest at 6%

(signed) CARL H. MILLER

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

(Endorsed John J. Creran)

20

Schedule "B".

UNITED STATES OF AMERICA
State of New Jersey } ss.
County of Essex, City of Newark

On the 3rd day of November in the year of our Lord one thousand nine hundred and twenty-six, at the request of the Broad & Market National
30
Bank of Newark, I, GEORGE W. GROSS, Notary Public, duly commissioned and sworn, did present the original NOTE above annexed at the Counter of the BROAD and MARKET NAT'L BANK, Newark, N. J., Teller thereof in attendance and demanded payment of said NOTE which was refused. Whereupon, I, the said Notary, at the request aforesaid, did PROTEST, and by these presents do publicly and solemnly PROTEST, as well against the Maker and
40
Endorsers of the said NOTE as against all others

whom it doth or may concern, for exchange, re-exchange and all costs, damages and interests, already incurred and to be hereafter incurred for want of payment of the same. And thereupon I did serve notice upon the drawer and endorsers by putting the same on the last day aforesaid in the Post Office of the City of Newark, New Jersey, sealed up with the postage thereon prepaid and directed as follows, viz: 10

Carl H. Miller. .36 Lafayette St., Newark, N. J.
John J. Creran. . . .828 Broad St., Newark, N. J.
Louis R. Radin. . . .837 Broad St., Newark, N. J.
Sol J. Wallach. . . .837 Broad St., Newark, N. J.

Thus done and protested at Newark, New Jersey. In testimony whereof, I have hereunto set my hand and seal the day and year above written.

George W. Gross, Notary Public. 20

30

40

Affidavit of Merits.

(Filed November 12, 1926.)

ESSEX COUNTY CIRCUIT COURT

LOUIS R. RADIN, Plaintiff vs. JOHN J. CRERAN, Defendant.	Action at Law Affidavit of Merits

10

STATE OF NEW JERSEY }
County of Essex } SS

JOSEPH A. FUERSTMAN, of full age being duly sworn on his oath according to law, deposes and says: That he is the attorney of the above named Carl H. Miller and John J. Creran, the defendants in the above stated cause, and the affiant believes that the said Carl H. Miller and John J. Creran have a just and legal defense to the action on the merits of the cause.

20

JOSEPH A. FUERSTMAN

30

Sworn and subscribed to before me this 10th day of November, 1926.

CECELIA FRIEDMAN
A Notary Public of N. J.

40

Answer.

(Filed Nov. 29, 1926.)

ESSEX COUNTY CIRCUIT COURT.

LOUIS R. RADIN, Plaintiff, vs CARL H. MILLER and JOHN J. CRERAN, Defendants.	Action at Law. Answer.

10

Defendant, John J. Creran, residing at 98 Dover Street, Newark, New Jersey, answering separately, says: 20

He denies the truth of the matters contained in the Complaint.

FIRST DEFENSE.

Defendant alleges that his endorsement on the note is without consideration.

SECOND DEFENSE.

The defendant says that the note referred to in the plaintiff's complaint was given as a renewal note for another note in the sum of twenty-five hundred dollars originally given to plaintiff pursuant to an agreement made and entered into between the plaintiff, Louis R. Radin, Sol J. Wallach and Milton Lichtenstader as parties of the first part, New Lafayette Garage, Inc., party of the second part, and the defendant, Carl H. Miller, party of the third part that the parties of the first 30 40

and second part in said agreement mentioned did by virtue of said agreement sell or purport to sell a garage business and good will thereof, owned by the party of the second part, which is a corporation, the stock of which was owned entirely by the parties of the first part, the purchase price being Three thousand dollars, of which five hundred dol-
10 lars was paid on the execution of the agreement and the balance by the execution of a note, executed by the defendant, Carl H. Miller, and endorsed by the defendant, John J. Creran; that the sale of said garage business and good will thereof by the plaintiff, Louis R. Radin, and the other parties of the first part mentioned in said agreement to the defendant, Carl H. Miller, was entered into by the said Carl H. Miller, relying upon the representation
20 made by the plaintiff that the average monthly receipts from storage of cars in said garage for the year immediately preceding April 30, 1925 was Fifteen hundred dollars monthly, and that the average monthly sale of gasolene was six thousand gallons at a net profit of three and one-half cents per gallon, and that the monthly profit from oil was twenty-five dollars, and that the annual net profit for the preceding year was in excess of Twenty-five hundred dollars, whereas the defend-
30 ant, Carl H. Miller has since ascertained that the receipts from storage of cars in said garage business for the year preceding April 30, 1925 was not in excess of twelve hundred dollars per month, that the sale of gasolene during said year did not approximate the average of four thousand gallons per month, nor was the profit thereon three and one-half cents per gallon, and that the net profit from oil did not amount to twenty-five dollars
40 monthly; that the plaintiff wilfully represented the

receipts from storage, gasolene, oil and annual net profits and did falsely represent the same for the purpose and with the intent of deceiving the defendant and to induce him to purchase said business, and to enter into a lease at an excessive rental, of the garage wherein said business was located at 36-40 Lafayette Street, Newark, New Jersey, said plaintiff being an officer, director and stockholder in the Company which owned and controlled the garage building; that the defendant, Carl H. Miller has not been able to realize more than twelve hundred dollars monthly from the storage, nor has he been able to sell gasolene or oil in any such quantities as to realize the profit indicated by the plaintiff.

Third Defense.

Defendant did not receive notice of protest of the non-payment of said note.

Joseph A. Fuerstman
Attorney of defendants.

10 20 30 40

Reply.

(Filed October 29, 1927.)

ESSEX COUNTY CIRCUIT COURT.

10

LOUIS R. RADIN, Plaintiff, vs. CARL H. MILLER and JOHN J. CRERAN, Defendants.	Action at Law Reply

Plaintiff, replying to the answer filed herein, joins issue with all of the allegations therein set forth.

20

Plaintiff denies making the representations referred to in the answer filed in behalf of the defendants.

Plaintiff denies making the representations referred to in the first count of the counterclaim, denies the second count of the counterclaim and denies the third count of the counterclaim.

30

DAVID BOBKER
Attorney for Plaintiff.

40

Case.

ESSEX COUNTY CIRCUIT COURT.

February 27, 1929.

10

Louis R. Radin, Plaintiff, vs. John J. Creran, Defendant.	Action at Law

Before Hon. Worrall F. Mountain, *J.*, and a Jury. 20

For the plaintiff appears David Bobker.

For the defendant appears Joseph A. Fuerstman.

(Argument.)

A jury is called and sworn.

Mr. Bobker opens for the plaintiff.

Mr. Fuerstman opens for the defendant.

30

Louis R. Radin, plaintiff, sworn in his own behalf.

Direct-examination by Mr. Bobker:

Q. You are the plaintiff in this suit? A. I am.

Q. I show you this note with the endorsement of John J. Creran, and ask you if you are the holder of that note? A. I am.

Q. How much is due on that? A. $1476.23.

40

Q. Have you computed the interest to date? A. Yes, the interest is $229.31.

Q. Makes a total of how much? A. $1705.54.

Mr. Bobker: I offer the note in evidence.

Mr. Fuerstman: No objection.

(Note is marked Ex. P-1.)

10

Q. Do you know Mr. Creran's signature? A. Yes, sir.

Q. That is his signature on the note? A. Absolutely.

Cross-examination by Mr. Fuerstman:

Q. Do you mean to say that there is that much due you on this note, or have you been paid something, or is there an allowance you had to make to

20

Mr. Miller that has not been deducted in your statement you just made of the balance due?

Mr. Bobker: I object to the question. This is a suit between Dr. Radin and the endorser. The issue between Dr. Radin and Mr. Miller has already been determined.

The Court: You may ask him if that is the amount due on the note or whether something has been paid on it.

30

Q. Mr. Carl H. Miller was the maker of this note, was he not? A. Yes, sir.

Q. You sued Mr. Miller, did you not? A. Yes.

Q. Didn't Mr. Miller get an allowance on account of his note for storage? A. I don't know anything about that.

Q. You do not know? A. Not on that note.

Q. This is the only note you sued Miller on, isn't

40

it? A. That is the only note.

Q. You do not know whether Miller got an allowance or not, do you? A. For what?

Q. On this note, at the time you sued him, from the jury? A. I don't know anything about that.

Q. You don't know anything about the amount of the jury verdict against Miller? A. I do not.

Q. But you issued execution against Miller?

Mr. Bobker: I object. 10

(Argument.)

Mr. Bobker: I will stipulate that in the former suit a judgment was entered against Miller for a certain amount. Mr. Fuerstman has the figures and Dr. Radin probably does not know that from the execution of judgment anything was realized.

Mr. Fuerstman: I do not want to stipulate, I 20 want matters proved. I will not stipulate there was anything realized.

The Court: I will admit that question.

Q. Do you know that execution was issued on the judgment? A. I don't know anything about those things.

Q. Why did you say under oath that there is $1476 due you? A. Because I never had received any money that is still due me. 30

Q. A claim was made against you for certain items in a former trial in which you sued Miller, isn't that so? A. Absolutely not, no claim was made against me, it was made against Mr. Wallach.

Q. Wasn't there a counterclaim against you in a previous action for certain items which you did not allow credit for on this note? A. I beg to differ with you: not against me. 40

Q. You were the only plaintiff in that suit, weren't you? A. Yes, sir, I presume so.

Q. Do you know what the jury's verdict was in that case? A. The jury's verdict?

Q. Do you know? A. Yes.

Q. What was the jury's verdict as to the amount due? A. I don't know the amount due, but the
10 jury's verdict was——

Q. Then, you do not know?

Mr. Bobker: I object.

The Court: Sustain the objection. If you want to know the amount of the verdict we can give it to you.

Mr. Fuerstman: Yes.

The Court: This man is the holder now in due course?

20 Mr. Bobker: He is one of the original payees of the note.

The Court: Very well. Proceed.

Q. Will you say under oath now——

The Court: I will not admit that. He is under oath.

George W. Gross sworn in behalf of the plaintiff.

30 Direct-examination by Mr. Bobker:

Q. What business are you in? A. Bank teller.

Q. Connected with what bank? A. New Jersey National Bank & Trust Company.

Q. In the month of August, 1926, what was the name of that bank? A. Broad & Market National Bank.

Q. Were you a notary public connected with the bank at that time? A. I was.

40 Q. I show you this note which is marked Exhibit

P1, and I ask you whether you have with you the original protest record covering the protest of that note? A. This is the original note and this is my original record (indicating).

Q. Is that your notice of the protesting and mailing? A. Yes, of mailing the protest notice.

Q. Page 496? A. Yes, sir. Book 24.

Q. This is your signature (indicating)? A. Yes, sir. 10

Q. I also show you this original protest notice. Did you sign that? A. I did.

Q. Is this record a copy of that notice? A. Yes, sir.

Mr. Bobker: I offer in evidence the original notice of protest on page 496, Book 24.

(Book is marked Ex. P-2.)

(Notice is marked Ex. P-3.) 20

Q. According to Exhibit P-3, the original certificate of protest you mailed a copy of a notice of protest to John J. Creran, No. 828 Broad street, New Jersey? A. Yes, sir.

Q. Where did you get that address from? A. From the files in the bank.

Q. In the month of August, 1926, was Creran connected with Morton & Company? A. As far as I know. 30

Mr. Fuerstman: I object.

Q. Do you know whether or not he was connected with Morton & Company? You say according to the bank records the address was 828 Broad street, Newark, New Jersey? A. Yes, sir.

Cross-examination waived.

[PLAINTIFF RESTS.] 40

John J. Creran, defendant, sworn in his own behalf.

Direct-examination by Mr. Fuerstman:

Q. How long have you known the plaintiff? A. Five years.

Q. Where did you first meet him? A. In his own garage on Lafayette street; the Lafayette garage.

10 Q. Will you please tell us whether you ever discussed with him the question of the purchase or sale of that garage. A. Yes, about April.

Q. The first time you did was when? A. Some time during the month of April, 1925.

Q. Tell us what was said.

Mr. Bobker: At this time I object on the following grounds: both Mr. Fuerstman and I in our opening to the jury referred to certain

20 papers and on April 30, 1925, a written contract was entered into between Dr. Radin and others, and Miller, the maker of the note. In the answer filed by Creran they referred to this agreement. Any conversations had between Creran or Miller, the maker of the note and Dr. Radin relating to the purchase of this garage business, have become merged in this contract. This contract speaks for itself, and

30 I admit that this contract is the document that should be considered by the jury. I furthermore at this time direct your Honor's attention to this situation: this man Creran is the endorser on the note. As a matter of law I say he cannot set up any fraud or misrepresentation that Dr. Radin is alleged to have practiced upon the maker of the note who bought this garage business.

40 (Argument.)

Mr. Bobker: There was a nonsuit granted in the last trial——

Mr. Fuerstman: I object to that and move for a mistrial; although granting that the allegation that the maker of the note has made up a certain kind of defense, I think that is prejudicial.

The Court: No. I will deny the motion. I am not interested in the last trial. What I am interested in now in the first place is I would like to know whether this man is an accommodation endorser. Is that agreed upon, or is that questioned? 10

Mr. Fuerstman: He is practically a principal in the transaction, and our contention is that the representations were made to him as well as to the maker of the note, in other words, the two parties are practically the same, the same allegation is made to the maker of the note as was made to the endorser to endorse the note. That is no surprise to Mr. Bobker because in a motion to strike out the defense and affidavits filed back in 1926 that very question was set up by way of affidavit. 20

(Argument.)

The Court: Isn't this the law? Assuming we inquire first as to whether a man is a bona fide holder or not, because that goes directly to the root of the matter. We know that the law is that there are three real defenses which are even good against a bona fide holder, and I do not suppose any of those three defenses will be raised in this case. That is, that there was an alteration of the contract or incapacity of the parties to contract or illegality of the contract. 30 40

Now, then, what defenses are left? The defenses that are left are defenses between the parties, for instance, the endorser on a note may have a defense against the endorser in a suit between them, and we will assume, among other things, there might be fraud, failure of consideration, but suppose the endorser on a
10 note, not being able to interpose the defense of failure of consideration or fraud, we will say, against the acts of the maker unless he can prove that he is a holder in due course, that is, he can say, for instance, to the maker of the note, "You cannot sue me, I am the second endorser on this note." It may be that the man who made this note did not give him anything for it, but I do not know anything about it.
20 But, suppose he does know about it, that destroys his position and permits the maker, we will say, or not the maker, but the payee; or I will put it this way, permits the endorser to recover from the payee, that is the personal defense and is supposed to be only urged between the immediate parties, but if a second endorser knows, for instance, that the note was given by the maker to the payee without consideration, he cannot then plead that, basing that on
30 knowledge that he should be entitled to recover against the maker because he has the knowledge. Now, this is an action brought by the payee, that is, one of the payees against an endorser. If there was a contract entered into and Dr. Radin and Mr. Miller, the maker, although he is out of it now, but Mr. Miller and Mr. Creran all had knowledge of this contract, and this note was the result of the contract we
40 are entitled to know what the contract was for the sake of discovering whether Miller should

pay it or not. A man to set up either of these defenses, particularly the personal defense, has to show both of two things, that he was a holder for value, and that he was a holder without notice. If he fails in either one of those two things I do not think he can recover. If there was a written agreement in which all these parties joined and this note arose out of 10 that agreement and Dr. Radin and Mr. Creran both had equal knowledge, I think we are entitled to know all about what happened, of course, not forgetting that we cannot change the terms of this agreement when it is put in as a defense.

Mr. Fuerstman. We say this, with regard to the statement, that we are attempting to alter the agreement. That we do not attempt to 20 alter the terms of that agreement one iota. What we do say is we were induced to enter into this agreement and into the making of that note by fraudulent representations of the plaintiff. We say that the plaintiff made certain representations which led us into giving that note which we would not have done except for those representations.

The Court: Very well.

Mr. Bobker: Your Honor overrules my objection? 30

The Court: Yes.

Mr. Bobker: I ask an exception.

Exception noted as ground of appeal.

The Court: The holder of the note after it was signed was the payee and the next thing he does, if he negotiates it, is to put his name on the back and apparently that was not done 40

in this case. Mr. Creran put his name on the back and it looks like he was an accommodation endorser.

I will let you show what happened.

Q. Tell the Court and jury about the first conversation you had with Dr. Radin. A. On or about April 15, 1925,—I had been storing my car
10 in there for two years—and Radin and another man by the name of Greenfield, I think, were parties in that business.

The Court: I would rather not have anything anterior to this contract.

Mr. Fuerstman: It has to be, for the reason this contract was made. In fact, this contract won't have a thing to do with this case because after all the only thing left now is the note,
20 and we say that the note was obtained as the result of fraudulent representations.

The Court: Was that a misrepresentation as it is alleged before or after the contract was made?

Mr. Fuerstman: Before the contract and at the time as part of that transaction.

The Court: Proceed.

A. (Continuing.) Dr. Radin come out of the office
30 of the garage and stopped me and asked me if I knew anybody who would be interested in taking over a garage business, as he was a professional man, a dentist, and this garage business had interfered with his dental practice to the extent that it was not paying him to keep his dental office open—the odor of gas on his hands and clothes from handling the tickets and pumps and stuff ruined his dental business, and he could not afford
40 to give over that dental business, or if he could get

some one to take the garage—he said he had trouble with Greenfield now, and it was all straightened out by the court and left the garage on his hands, which he did not intend to have, so I told him that I did not know any one offhand, but if I knew of any one I would let him know. So, he saw me the following day and he asked me if I had found any one who was interested in it. 10 Well, my brother-in-law, who is in the automobile business, I spoke to him, providing it was a paying proposition. I said, "He hasn't any money." He said, "All he has to do is come down and take it off my hands." I said, "That seems all right, I will bring him down." I sent him down and he had a conversation with Dr. Radin.

Q. Were you present then? A. No. I sent him down to Dr. Radin, and my brother-in-law came 20 back to me and told me——

Q. Never mind that. As the result of what your brother-in-law told you did you go to see Dr. Radin? A. Yes, my brother-in-law came with me over to Dr. Radin.

Q. Tell us what happened then. A. I went over to Dr. Radin's office and he showed me two monthly statement sheets about two feet square and he had a stamp on them of a certified public accountant, and he said, "There was the average of the busi- 30 ness for storage in his garage for June, which is the slow month of the year, and December which was the final month of the year, the largest.

Q. (By the Court.) For June and December? A. Yes, and the June storage sheet showed $1300 and December storage sheet showed $1500.

Q. Net or gross? A. Gross storage, including parking; all storage. So, he said they were paying $1000 for rent from this garage, and that that 40

storage and the 6000 gallons gas they sold, and they got a refund from the Texas Company—I believe he had a Standard pump there also—of a cent a gallon because they sold over 5000 gallons of gas. So, in summing it all up on what he had shown us on these papers if he was supposed to be right, the business showed a net profit, after all 10 expenses were paid, of $2500 a year.

Q. (By Mr. Fuerstman.) Who did the summing up? A. Radin.

Q. Just tell us what he did and what he said. A. He said if the real man got in he could build up the business to a better position and there was the opportunity to make money. The price he was asking for the business was $3000. I told him that Miller did not have any money, so, he said, "Can't 20 he put up $500 to show good faith?" I said, "Yes, I will put it up for him." He said, "That is about all you will have to put up because the $2500 we will take over on a note spread over with a ten per cent. reduction. I guess that would run over three years, ten per cent. every three months, and you will have the surplus money that you can get your five out and I will get mine out." So, the proposition listened all right, so he explained it, so that we did not go into, I said, "We will think it over." 30 I talked it over and I said, "We will go down and look this thing over, and go down and look at the books, and we can talk to Radin." I had a lot of confidence in him at that time. He said, "You cannot look at the books because I have a manager on paying him $50 a week," he said, "If I lose that manager I would be lost. I would lose the whole business because I do not know anything about that business because if he got wise, the manager, 40 that I was going to sell this business he would quit

and then I would be in a terrible fix." I said, "Suppose you go down and get the books?" and he said, "All right, I will." So he did not go and we made an appointment for a later date. He did not get the books, he said, "They had gone to the accountant and they were gone, they are going to do some work on the books, check it up, maybe, for income tax;" one time he said that, so, we never saw the books, the only thing we saw was two 10 sheets of paper with the stamp of a certified public accountant and we bought the business strictly on Mr. Radin's representation. $1500 storage, 6000 gallons of gas with a refund of one cent a gallon of Standard, and he misrepresented the gas because the Standard paid him $50 a month rent.

Q. Was there anything else as to the capacity of the garage? A. The garage was to hold 125 cars and the most cars you could put in there at 20 capacity——

Q. I am asking you what he said. A. He said that the garage would hold 125 cars.

Q. Was any statement made as to any other thing as to the sale of parts, or oil or anything else? A. Yes, there were 6000 gallons of gas they were selling.

Q. (By the Court.) In a month? A. Yes. He had to sell over 5000 gallons in order to get a one per cent. refund which was $50 a month. 30

Q. (By Mr. Fuerstman.) Tell us how you came to endorse the note. A. Yes. On the business he said he would take $500 cash, and a note for $2500, so I was to put up $2500 cash at least, which was a deposit and which showed good faith on the lease, so, that I would put up the $2500 deposit on the lease and I put up $500 cash for Miller to take over the business, and then he would take a note from Miller. He said, "I think that will be all right. 40

I will have to take it up with the New York crowd," that is his partner, so, I said, "All right," and the very next day he was around, and he said, "That will be all right, but I was up to the bank and they wouldn't discount the note of Miller's, but Mr. Gardner, of the Broad & Market Bank, said he will gladly discount it if you will endorse it." I said, "I don't want to endorse the note." "I don't want to go in the garage business," so, he said, "I will
10 tell you. I need money badly myself. My father-in-law is a multi-millionaire, and I need it. He will not give it to me. I lost some money on the stock market and I will have to have some 'dough'." I said, "I don't want to endorse the note," I said, however, "From the way you tell about the business I will endorse the note," and, I said, "On the statements you tell me and your reports, if it is the truth, I will endorse the note."

20 Q. Did you discover what he told you was or was not the truth? A. Yes.

Q. When did you make the first discovery as to the truthfulness of his statement? A. We got organized down there and made the discovery on checking up about the time the second note was due. I believe possibly six months.

Q. What did you discover at that time? A. I discovered at that time that the storage on the average of six months was running about $1000 a
30 month.

Q. (By the Court.) As I understand it, the representation was that in June, the gross storage was $1300, in December $1500, and that the amount realized from gross storage, that was the statement and question I had in mind, whether that statement was false or not, not whether it was found subsequently that there was an average for six months.

Mr. Fuerstman: I think we will answer that
40 question and go further, as the testimony is

that while the sheets were taken out there was a direct statement that the business done was $1500 a month.

Q. (By the Court.) Did he state that to you? A. The average storage was that.

Q. (By Mr. Fuerstman.) You discovered such conditions in your business after it was operating while your brother-in-law was operating it? A. Yes. 10

Q. Did it or did it not compare favorably or equal the amount of business represented by Dr. Radin?

Mr. Bobker: I object. There was no representation as to future storage, indicating——

The Court: I will admit it.

Q. Answer the question. A. When we found that the business was only two-thirds of what it was 20 represented to be——

Q. (By the Court.) You mean you found out the business after you got it was that, or it had been that before you got it? I do not understand that this man represented that in the future it would be a certain thing, but at that time he represented it to be a certain amount, at the time you claim the misrepresentation. A. What I claim is the misrepresentation, he claimed the minimum was 30 $1300 storage and when we checked it over the storage was only $1000.

Q. Maybe you were not as spry as he was. Do you see the point? A. Yes, sir.

Q. If he told you the maximum was $1500 for storage for a certain month, that particular fact is a fact that you must try to prove; that that statement was not true. Now, you are sort of giving us testimony to show that after you got it it was not 40

what he said it was when he had it. That is not very helpful. As I understand it, you are trying to allege that he misrepresented the thing. He could not misrepresent a future condition, it would have to be something that was present. A. The books will show.

Q. (By Mr. Fuerstman.) The Court has directed
10 your attention to the fact that the future business has nothing much to do with the case. You found out that a certain condition of the business led you to talk to Dr. Radin again, is that it? A. Yes.

Q. Tell us what you said to Dr. Radin when you discovered the condition of that business, after it was operated by your brother-in-law for a while? A. I told him that he had misrepresented the business. In the first place, the garage would not hold
20 125 cars as he represented it would hold.

Q. Did you discover how many cars the garage would hold? A. Yes, he figured it out. If you put all the cars you could in there without moving any out, as dead storage, you could put in possibly ninety cars, but you could not do any business.

Q. If the cars were stored so they could be moved out in the regular course of business how many cars could you put in? A. You could not put in over seventy five in and do business.

30 Q. What else did you tell him? A. Well, I told him this garage did not hold the number of cars he stated, and he previously said that the storage on trucks averaged not less than $20 a truck, so we sent out some bills to the Wagner Van Company, who had seven trucks in there, of $70, $10 apiece, and I took that up to him and he said, "I made a special concession to them." So they left the garage even at that price at $10 a month for a truck.

Q. What else did you say to him in your first
40

talk with him after running the business? A. I told him the business is a failure, is misrepresented on the face of it.

Q. In what respect, did you mention the particulars? A. Yes, it was impossible to do business and pay the rent.

Q. Did you mention particulars? A. Yes, I called his attention to the gas. We sold half the amount he said he sold and I called his attention to the rate that he said he was receiving. 10

Q. What was said about the income from storage, if anything? A. On the income of storage he said——

Q. What did he say? A. I told him it was not within $500 of the average he quoted, so, he said, "Well, you can build up this storage and get it so that you can make more at the end of the year." 20 You haven't bought this business for thirty or sixty days," he said, "I sold it to you on the basis of the income I derived from it for this one year," and Mr. Miller being in that business can do better and, "he said," "You have to give it a trial for a year." That was after the six months' period. So I was in for $2500 on the lease and I tried it.

Q. At any rate, you let the matter then run on for a year? A. Six months. 30

Q. You renewed certain notes as they became due? A. Each three months, yes.

Q. At the time of renewals was there any talk or conversation about the business again? A. Yes, we complained of the business.

Q. What was his answer to that? A. He said that at the end of the year we would really know just how we stood on the business because it was a seasonal business. He said "At the end of the 40

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year you will be able to tell exactly how you stand." "Then," he says, "I am going to help you out."

Q. Now, at the end of the year did you ascertain whether your business—what your business was for that previous year at least, your brother-in-law's business? A. Yes.

Q. As the result of what you found did you go 10 to see Dr. Radin? A. Yes.

Q. Did you tell him what you discovered? A. Yes.

Q. What did you tell him? A. I told him that the business instead of bringing in $2500 profit to pay off this note, that there was a deficit of $2500 and that I was not going to continue in the business or on the lease. So, he said, "Well, I tell you. You give me another note and I will take this up in New 20 York and I will see what I can do about it. I think I can fix it up and get the rent reduced so that you can make out."

Q. Did he say how much he would get the rent reduced? A. $200.

Q. $200 what? A. A month, to make up the deficit.

Q. At the time the original transaction was entered into and a note given was the lease also signed 30 for the premises? A. All the signing was done at one time, the lease, contract and note.

Q. The amount of the lease, was that based upon the representations as to the amount of business?

> Mr. Bobker: I object. If there is a lease it should be offered. There is no allegation in the answer claiming the procurement of the lease on the theory of fraud.

40 (Argument).

Q. This lease (indicating) that was signed at the time of the note, is that the lease Dr. Radin referred to when he said he would get you a reduction of $200 a month. The lease that was signed at the time of this note? A. Yes.

Q. That is the lease (indicating)? A. Yes, sir.

Q. It was on the promise that he would get a reduction of that $200 you signed this renewal? 10

Mr. Bobker: I object to the question as leading.

The Court: Admit it. A. Yes, sir.

Q. It was on the promise that he would get a reduction of $200 that you signed this renewal and that is the note put through at that time? A. Yes.

Q. Did he at any time obtain a reduction for you before this note was due? A. No. 20

Q. Or your brother-in-law? A. No.

Q. Or at any time while your brother-in-law was in charge of that business? A. No, he never obtained a reduction.

Q. There was a reduction made some time later to other people in the business? A. Yes, the rent was brought down to $600.

Q. After the business was sold to some one else? A. Yes.

Q. You were not interested any more except 30 that your security was there? A. Yes, that is all.

Q. Now, when you discovered at the time that you came to see him about this, after the year was up, and you had your business sized up, what did he say with regard to what he had done, the business he had done the previous year in that place? A. He said we had done more business than he did, so I said, "Well, you didn't say that when you sold us the business," he said, "What are you cry- 40

ing about? You lost about $1000." He said, "I dropped $16,000 in that business." I said, "Well, if you had told me that when you were following me around the street to take this business off your hands I certainly would not have went in to try and help you get your $16,000 back. I would let you get it back yourself in the business." So, he said, "You are in, and you will pay." I said, "I

10 will pay, if I have to," and as yet haven't had to pay on the note.

Q. In the month of November, 1926, was your place of business or your residence at 828 Broad street, Newark, New Jersey? A. No, sir.

Q. Did you have anybody there in that building on that day? A. No, sir.

Q. Or at any time thereafter? A. No, sir.

Q. (By the Court.) You had no office there?

20 A. We had an office there until July of that year.

Q. July, 1926? A. Yes. The office was on the ground floor facing the First Church, Morton & Company, and since then the building has been dismantled.

Q. Did you ever receive a notice of protest of this note? A. I never received it.

Cross-examination by Mr. Bobker.

30 Q. You are a member of the firm of Morton & Company, are you not? A. Yes.

Q. An officer and director? A. Yes.

Q. Morton & Company had a place of business at 828 Broad street, Newark, New Jersey? A. Yes, sir.

Q. For how long? A. They were on the ground floor one year.

Q. Did Morton & Company have a bank account with the Broad & Market National Bank? A. Yes,

40 sir.

Q. And a certain card was left there by you at the bank on which it was set forth that your address was 828 Broad street, Newark, New Jersey?

Mr. Fuerstman: I object. This is the address of Morton & Company he is asking about.

The Court: I will admit it.

10

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. I don't know about the signature card. There must have been some card there, but I don't know what was on it.

Q. (By the Court.) You mean a signature card on which his name appeared?

20

Q. (By Mr. Bobker.) Wasn't there a signature card with your name thereon as an officer of the Morton Company? A. Yes.

Q. Didn't you set forth on that card that the address was 828 Broad street? A. No, the address might have been 45 Clinton street where we were operating at the time. We only signed one card when we opened up the account.

Q. You were at 828 Broad street, for one year? A. Yes.

30

Q. Didn't you have your office there at 828 Broad street for five years before you moved down on the street floor? A. We were one year on the second floor and one year on the ground floor.

Q. You were in that building for two years? A. Building, yes.

Q. When did you move to the other address? A. Where we are now?

Q. Yes. A. About July 1st.

40

Q. 1926? A. Yes.

Q. You do not open up all of your mail, do you? A. All that is addressed to me.

Q. Did you ever receive mail with your address on addressed to 828 Broad street, directed to you at the new address? A. I don't know.

Q. You don't know. You do not recall whether
10 you did or not? A. I did not personally. I did not get that mail.

Q. How long have you been in the building business and in the real estate business? A. I never was in the real estate business.

Q. The building business. A. Since 1911.

Q. After you negotiated with Dr. Radin on behalf of your brother-in-law for the purchase of this business a contract was prepared as referred to by
20 you on your direct examination, is that right? A. There was a contract, yes.

Q. That contract was prepared and signed on April 30, 1925? A. I believe about that time.

Q. I show you this paper and I ask you whether or not this is your brother-in-law's signature? A. I don't know his signature.

Q. You do not know Miller's signature? A. I wouldn't swear to his signature. He is here and
30 he can testify to that himself.

Q. Do you know his signature? A. No.

Q. You never saw his signature? A. Yes, but I wouldn't say that was his.

Q. Did you ever see this paper dated April 30, 1925?

Mr. Fuerstman: You mean that particular paper?

Mr. Bobker: You have a duplicate, you can
40 use that.

A. This is the contract to purchase the business.

Q. Yes. A. Sure, I saw that.

Q. You saw that contract? A. Yes, sir.

Q. You were present when your brother-in-law signed the contract? A. It was in your office. He may have went up and signed with me, or later, I don't know. There were a couple of trips made to your office. 10

(Contract is marked P-4 for identification.)

Q. This paper, P-4 for identification, is dated April 30, 1925. About how many times prior to the time of this contract did you see Radin and discuss with him the purchase of this garage business? A. Before the garage business was purchased?

Q. Yes. A. Possibly ten times, ten or fifteen times. 20

Q. So, you did make some investigation as to the merits of this business, did you not. A. I didn't make any investigation at all.

Q. Did you advise your brother-in-law to purchase this business on the strength of those two statements that Radin showed you? A. The two statements that Radin showed me and the continuous pleadings for me to take the business off his hands through my brother-in-law daily. He 30 was waiting at the garage every morning when I came in with my car.

Q. You asked him to sell the business to your brother-in-law because your brother-in-law was not doing anything, and you wanted to take care of him? A. I could take care of him without doing anything.

Q. You wanted to. A. No, I did not. He is the man who approached me, and followed me to 40

the Central depot four mornings in a row to sell me that business.

Q. He is the man who forced you to sign this note? A. Yes, by his lying. He is the man, he is the champion.

Q. When is the first time you endorsed this note for $2500? A. At the time of the signing of the
10 lease, contract and note.

Q. That was May 3, 1925, is that right? A. Maybe April 30th.

Q. When did you again talk to Dr. Radin about these so-called misrepresentations, that is, when after you endorsed this note the first time? A. The first time was about three months after my brother-in-law had taken possession.

Q. That brings us down to about November 3, 1925. Now when after that did you talk to Dr.
20 Radin about these misrepresentations? A. The misrepresentations I spoke to him about at the end of the three months was the Wagner Van Company pulling out of there. I didn't know what the storage was until Miller showed me these storage accounts and seven trucks for $70.

Q. Dr. Radin did not guarantee that all the cars and trucks would stay in that garage, did he? A. No, if they pulled them all out that would be Mil-
30 ler's hard luck, but when he said that the lowest price storage was $20, and I found out it was $10, I immediately took it up with him.

Q. Tell the Court and jury when is the next time you talked to Radin about these misrepresentations he is alleged to have made? A. On the next note, say six months later.

Q. That brings us down to February, 1926? A. Yes.

40 Q. When was the next time you again talked

to Radin about these misrepresentations? A. At the end of the year.

Q. That was August 3, 1926? A. Well, the end of the year from the time.

Q. The original note of $500 was August 5, 1925? A. Yes.

Q. At that time you again talked to him about these alleged misrepresentations, is that correct? A. At that time. 10

Q. Between August, 1925, and August, 1926, did you make any efforts or attempt to get the old books of the Lafayette Garage for the purpose of finding out whether or not the misrepresentations for June and December were true or untrue? A. How could I examine the books; Radin never gave them to us?

Q. So, you simply base your complaint upon the fact that Miller did not do very much business in that garage and that because some of the trucks and cars pulled out, is that right? A. No. 20

Q. Why did you go back and complain to Radin? A. Because Radin told me that we were doing more business than he did.

Q. Do you know how much Radin and Miller's expenses were in connection with that garage business? A. The same thing.

Q. Did you ever examine his books to find out how much his expenses were? A. Miller's? 30

Q. No, Dr. Radin. A. I never saw Dr. Radin's books.

Q. Dr. Radin was charged $1000 and you were charged $800? A. The landlord told us Radin never paid it.

Q. That property belonged to Radin and his father-in-law in the form of a corporation, didn't it? A. I believe so. 40

Q. You paid less rent than what was charged to him by the corporation? A. I paid less rent and Radin said he paid the corporation.

Q. Then, the expenses were not the same. A. Well, they may have been more on the rent.

Q. As a matter of fact, you do not know, do you? A. I don't know whether Radin paid $4000 or
10 $1000. He said $1000, but he never proved to me that he paid $1000.

Q. You told the Court and jury that Miller's and Radin's expenses were the same? A. Yes, sir.

Q. Do you still want to stand on that statement? A. Yes, insofar as the garage business was concerned.

Q. You did not check up how much Dr. Radin drew from the business? A. Only what he told me.

20 Q. You did not check up what his employees received in that business? A. I did not have to. Miller's books for employees and that manager included——

Q. Was Miller in the garage business ever before? A. He worked for the Dodge Company in their garage.

Q. Did he ever conduct a garage business himself? A. I do not think so.

Q. How old was he at the time when he took over
30 this garage? A. I don't know how old he is now. It is only a few years ago. Thirty, say.

Q. He never conducted a garage business himself prior to taking over this garage business, had he? A. Not that I know of.

Q. Isn't it a fact that you told Dr. Radin that the garage business fell off because Miller did not attend to it and was away from the business a great deal? A. No.

40 Q. You did not? A. No.

Q. You were not at the garage all the time. You were occupied with your own business, which was a pretty large and expensive business, weren't you? A. I came in the garage every day with my car. I always parked there.

Q. Going back to August, 1926, when the year was up. Was that the last time you talked to Dr. Radin about these misrepresentations? A. When the note was—— 10

Q. That was a year after you signed the note. A. I think we spoke of the misrepresentations up until the time the garage was turned over to Paul Ruesen, I guess.

Q. You testified on direct examination that you complained about these alleged misrepresentations after six months had gone by and you then complained to Radin at the end of a year for the purpose of finding out what the entire period of the year averaged. That was your direct examination, and that this left the situation insofar as these books are concerned. Isn't that so? Let me put it this way. The first note was signed on May 3, 1925. One year thereafter would bring it down to May 3, 1926. You testified on direct examination that you talked to Radin about these alleged misrepresentations after the first six months had expired and that you again talked with him after the year was up which brings us down to May, 1926, is that right? A. That's right. 20 30

Q. Between May, 1925, and May, 1926, the original $2500 note had been renewed and reduced according to this contract four times? A. That's right.

Q. In August $250 was paid and you again endorsed the note and renewed it, is that right? A. Yes, sir. 40

Q. Then, in November, the note was again renewed and $250 was paid off again, or $225. A. When are you starting on the note. Coming up for the second note?

Q. You paid ten per cent. off on the second note? A. Yes, each three months, yes.

Q. Then, after the year was up, which brought 10 us down to May, 1926, there was another ten per cent. paid off, and you again endorsed the note and renewed the note? A. Yes, sir.

Q. Then, the following three months which brought us down to August 3rd, 1926, you again paid off ten per cent. or, rather, Miller paid off ten per cent. and you again endorsed the note? A. I endorsed the note for three months until this note went bad.

Q. So, that the last endorsement, the last time 20 it brought us down to this note which is the subject matter of this suit? A. Yes, sir.

Q. Tell the Court and jury why, if you had ascertained the facts in connection with it, with these alleged misrepresentations, that Dr. Radin made at the expiration of six months and then at the expiration of a year or in May, 1926, why you continued paying this note and reendorsing this note down until the 3rd day of August, 1926. A. At the end 30 of the six months' period Radin was going to go in there and show Miller how to pull this out. He went in and went over the books with Miller, and he was going to go out and bring us business, Radin. All right, he strung it along, so that at the end of the year, he said, "You won't take one penny less, you will come out on top, and I will see to it about it." As I was in for $2500 on the lease, the purchase price of the business was $3000, I couldn't walk 40 out and sacrifice $6000 and I had Miller like a

drowning man grabbing for a straw, and at the end of the year when we did not materialize or come through I gave him, or reduced one note, and he was going to get it fixed up with the other partners, he was one of the directors or something, I don't know, I never met any of his other partners, only this man, and he was going to get it fixed up and I told him, I said, "If it is not done when this note becomes due then it will not be paid." Then it was not done and the note was not paid. 10

Q. After the year was up you would again re-endorse the note on the strength of Radin's promise to step into the garage and show Miller how to run the business? A. No, he done that at the end of the six months, he went over the books.

Q. So, after you endorsed and renewed that note at the expiration of six months on the strength of Radin's promise to go in the garage and help Miller? A. Yes. 20

Q. Why did you again reendorse and renew the note at the expiration of the year, if Radin had not carried out his promise to that effect? A. He said the business was based on a yearly income and not on a month, and he would bring it around at the end of a year, that Miller would not lose anything.

Q. At the end of the year you had ascertained that apparently Miller had lost money in that business and you also knew that Dr. Radin did not go in there, in the garage and help Miller, in other words, he did not carry his promise into effect and I will ask you again why did you reendorse the note at the end of the year? A. He did go around to people to have people bring storage in the garage. 30

Q. Isn't it a fact that Miller did not know how to run that business and you tried to save your 40

neck, and for that reason you refused to pay the note? A. No.

Q. This business was sold, for what Miller paid for it, wasn't it? A. No.

Q. Didn't you sell that business to Ruesen for $3000? A. We gave it to him.

Q. For how much money? A. Nothing.

10 Q. Nothing for the business? A. No, I got the money from my security, and advanced Ruesen $1200 to pay the back rent.

Q. How much money did you get from Ruesen? A. I didn't get any money from Ruesen.

Mr. Fuerstman: I do not think that is material.

Mr. Bobker: It was developed on direct-examination that he sold the business, and I

20 have a right on cross-examination to question him as to what he got for the sale.

The Court: I do not think that is material.

Q. How many square feet are there in that garage? A. I never measured, I don't know.

Q. Do you know if there are 12,000 square feet in that garage? A. I don't know.

Q. How many average square feet did you let in the garage for the storage of cars and trucks?

30 A. I don't know anything about a public garage.

Q. You testified that this garage contained not more than seventy cars. A. Well, we had forty cars in there and we lined them up at one time in the garage in a chalk line and put them across and lined them up on the other side in comparison with a few cars, you could only get that number of cars there.

Q. You yourself went down there and made that

40 test? A. Yes.

Q. You could not get any more than seventy cars in there? A. You could get possibly seventy-six cars, is all that you could put in that garage.

Q. When you first testified you said you could get seventy cars in there, then you testified that you could get seventy-five and you say seventy-six. Just what do you mean? A. Well, you could get ninety in there if you could put them in and took them out. You go through the aisle, the driveway. 10

Q. When did you make these tests? A. I guess after the first year when we decided the thing was not what it should be.

Q. What part of the first year, the early part of the first year when the garage was taken over in May, 1925. About when did you make that test? A. Say a year after, when I got after Radin on this stuff. 20

Q. A year after it dawned on your mind to make a test and find out how many cars could be stored in this garage, is that right? A. I never had occasion to have the garage filled with cars.

Q. You knew right along that Miller was losing money there, and you complained at the end of six months. Did you make a test at that time to find out if Radin told you the truth? A. We didn't have to make a test. We had plenty of room for the cars. 30

Q. Assuming you did make the test at the end of the first year, and you found out about Dr. Radin's allegation that the garage would hold 125 cars was untrue, please tell the Court and jury why you again endorsed the note and made a payment and then reendorsed the note and made a payment. Why you didn't stop then and there and say to Mr. Radin, "Radin, you misrepresented the storage capacity to me and I won't reendorse the note"? 40

A. Why, because he was going to get us a reduction in the rent.

Q. Was he going to enlarge the garage storage space? A. No, he was going to reduce the rent $200 a month and with the new business Miller made there he could have made up his deficit of $2500 the first year.

Q. Did you really expect to have your brother-in-law buy a business for $3000 with a net return of $2500 per annum, or eighty-two per cent. of the investment? A. It looked very good from the Doctor's story, and I bought it on his story.

Q. Don't you know as a business man that you cannot buy a business with a net return of eighty-two per cent. for $3000? A. That $2500 was cash.

Q. You thought you could do it? A. Yes, where there is labor involved.

Q. Did you take the lease that has been referred to before in your testimony, and this contract, to another attorney in his office before it was signed? A. Yes.

Q. Who did you take those papers to? A. To a fellow named Kiel.

Q. He was in the Kinney building? A. Yes.

Q. After you took the papers over there you and Miller came back to my office to sign up this lease and agreement. A. Some time later, not that day.

Q. Did you tell Kiel about these alleged representations that Dr. Radin had made to you before the contract was signed? A. No.

Q. Did you tell him about these alleged representations that Dr. Radin made before you signed this contract? A. No, I did not.

Redirect-examination by Mr. Fuerstman:

Q. In your talk with Dr. Radin at the time of his promise to have the rent reduced, what did he say

with regard to the profit he had made the previous year? A. His profit?

Q. As to whether he had made any profit the previous year as represented to you? A. He said he did not make any profit, that he lost $16,000 in that business.

Q. What did you say? Did you refer back to his previous promise. A. Yes. 10

Q. Just what was said about that? A. He said I should take the loss without crying about it, because it was a small amount to cry over, five or six thousand dollars and he had dropped $16,000 in there.

Recross-examination by Mr. Bobker:

Q. I show you this card of the Broad & Market National Bank. Is that your signature? A. Yes, that is my signature. 20

(The bank card is marked P5 for identification.)

Vito Fresolene sworn in behalf of the defendant.

Direct-examination by Mr. Fuerstman: 30

Q. What business are you in? A. Garage business.

Q. Where is your business located? A. 339 Clinton place, Newark.

Q. Is that your own business? A. Yes.

Q. How long have you been in the garage business? A. Over fifteen years.

Q. Do you know where the Lafayette Garage is? A. Yes. 40

Q. Where is it? A. On Lafayette street between Mulberry and Broad.

Q. Were you ever connected with that garage? A. I was the manager there.

Q. When was your last connection with that garage, when did you cease your connection? A. I
10 think in March, 1924.

Q. About a year before this transaction? A. I don't know whether it was 1924 or 1925.

Q. Now, then, do you know what the capacity of that garage is? A. Well, the garage is in the rear of four large stores 80 foot wide by 125 feet deep, and is about 10,000 square feet.

Q. How many cars, are you able to tell from your experience, does it hold? A. Yes.

Q. How many cars could be parked there while
20 carrying on the garage parking business? A. At one time a car, you put two rows of cars twenty-five to the row on either side, and you put eighteen cars on account there was a stand there, that is thirty-six cars, thirty-six cars, thirty-six and forty, about seventy-six, and in the middle aisle there is just enough room for cars to pull out.

Q. Is it possible to store 125 cars there in the regular course of business in that garage? A. You
30 cannot do it, because there is only one entrance. If there were cars put in the center it would be difficult to get them out.

Q. If there was another entrance to the garage it might be possible to do so? A. It would be possible, yes.

Q. At the time when you worked in the garage, who was the owner of the garage? A. The only one I knew was Dr. Radin and Mr. Wallach, his
40 father-in-law.

Q. Was the garage in the hands of a receiver at that time? A. Yes.

Q. Can you tell us what business the garage did, what storage business, that garage did at the time during the last month you were there? A. The only business I seen in that time was mostly of day parking and even at that only fifteen trucks and a very few pleasure cars. 10

Q. Was that the way the business was done during the time you were there? A. Yes.

Q. Did the business ever bring in as much as an average of $1500 while you were there?

> Mr. Bobker: I object to this as calling for a conclusion unless the witness knows. The books are the best evidence.
>
> The Court: I do not think the books are the best evidence. I will admit it. 20

Q. Did that garage ever bring in an average of $1500 a month during the year that you were there, for storage? A. I don't see how it could.

Q. Did it or didn't it? A. Not that I know, no.

Q. What was the average that was brought in for storage during that year? A. It would be much less than $1000, because there is no steady cars there, it is more like commercial cars in the evening and a few trucks in the day time, or parking of cars. 30

Q. You say it could be less or more? A. It could be less, not more.

Q. Was that your experience during that year? A. Yes.

Q. Recall, if you know, how much gas was being sold per month on an average while you were there? A. I think it was less than 5000 gallons a month, much less. 40

Q. Did that continue right down to the time you left the place? A. Yes, sir.

CROSS-EXAMINATION BY MR. BOBKER:

Q. You were not there from March 24 until March '25, were you? A. I don't remember just the date, it was some time in 1924, I know.

10 Q. You testified that you started working there in March, 1924. A. I am not sure about that.

Q. You are giving us this information pertainisg to the years 1923 and 1924, are you not? A. It is either 1924 or 1925, I know it was very shortly before Mr. Miller took the garage.

Q. How long before? A. I think a few months before.

Q. You were the mechanic there, weren't you?
20 A. Manager and mechanic.

Q. Didn't they have a manager there by the name of Smith? A. No, that was after I left.

Q. Did you ever measure the size of this garage?
A. I think—I believe I did.

Q. Did you, or did you not? A. Well, you can see the width, you don't have to measure it.

Q. Is the garage 80 by 150, or 80 by 125? A. There is stores in front of the garage, I mean from the stores back to the garage is 125 feet, the build-
30 ing is 180 feet.

Q. You did not take exact measurements of that garage, did you? A. Well, from my experience of the size of the garage, I am pretty close to it.

40

Evelyn Brendler sworn in behalf of the defendant.

Direct-examination by Mr. Fuerstman:

Q. You are employed by Mr. Creran? A. Yes, sir.

Q. And you are also employed by Morton & Company? A. Yes, sir.

Q. At that time did you have charge of the books for the garage, that is, during the year 1925 from April on? A. Yes, sir. 10

Q. After Miller got into it? A. Yes, sir.

Q. Will you tell us from the books as to how much money was received for the storage of cars during the year April, 1925, to April, 1926?

Mr. Bobker: That is objected to as immaterial. This refers to some representation Dr. Radin made at the garage prior to the sale. Anything Miller did at the garage at that time is entirely irrelevant. 20

Mr. Fuerstman: After Mr. Miller went to Dr. Radin and told him he had done so much business, Dr. Radin said, "The business I refer to did not depend on each month, but how much you did for the whole year. You go ahead and run the business a year and then you will have reason to complain, but you will find that your business will be more than what mine was for the previous year." The statement was made by Mr. Creran that he did lose a great deal, but how much he did not testify to, because in fact, the young lady would be able to give us the exact amount, unless the Court thinks the exact amount is not material. I will not press the question. 30

I will withdraw the witness. 40

The Court: Is your question directed as to how much Mr. Miller did?

Mr. Fuerstman: For one year.

The Court: You will connect that up by testimony of Mr. Creran that he stated that Dr. Radin told him that business was more than he had done, if so, I will allow it.

10 Mr. Fuerstman: Yes.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. What was the total amount of business done for that year for storage? A. The monthly average?

Q. No, not the monthly average, but the total for

20 that year for twelve months from April 30th or May 1st, 1925, to April 30, 1926? A. It was approximately $14,000.

Q. Was it less or more than fourteen? A. Probably less.

Cross-examination waived.

Adjourned to Wednesday, February 28, 1929, at ten o'clock, A. M.

30

40

ESSEX COUNTY CIRCUIT COURT.

February 28, 1929.

SECOND DAY

Continued pursuant to adjournment.

Present, counsel as before stated.

Carl Miller sworn in behalf of the defendant. 10

Direct-examination by Mr. Fuerstman:

Q. Where do you reside? A. 98 Dover street.

Q. You are related to Mr. Creran? A. Yes, brother-in-law.

Q. Do you know Dr. Radin? A. Yes, I do.

Q. When did you first meet him? A. I met him about the 20th of April, 1925.

Q. Can you tell us whether at that time or at any subsequent time after that you discussed anything with him about the Lafayette garage? 20

Mr. Bobker: I renew my objection to the introduction of any evidence pertaining to conversation or negotiations leading up to the entering into this contract that was referred to during the examination. I direct your Honor's attention to the fact that in the answer filed by Creran they refer to an agreement which embodies the terms of the 30 sale of this business, and I submit that this contract is the best evidence and should be offered and produced.

(Argument.)

The Court: I will admit it.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal. 40

Q. What was that conversation? The first conversation you had with Dr. Radin about the garage. A. I went up to Dr. Radin's office and Dr. Radin said to me that Mr. Creran had asked him to explain to me the proposition of the garage.

Q. How did you happen to go up to Dr. Radin's office? A. Mr. Creran told me to go up, that he 10 had spoken to Dr. Radin about me. I get up there and Dr. Radin said that it was a wonderful proposition, that a fellow of my type ought to be able to make at least $90 to $100 a week there. I told him that I had been with the Bonnell Motor Company as assistant service manager and he said, that if I could make it go—"You, with your experience, ought to make a wonderful thing out of it." I said, "I will have a talk with my brother-in-law this afternoon and we will go into the details." I went up 20 to my brother-in-law's office and after lunch I went up to Dr. Radin's office with my brother-in-law. Dr. Radin brought out two sheets, one was dated June, 1924, and the other was dated December, 1924. The June sheet showed a storage of $1300 and showed the expenses and a profit of $200 a month, and an item where the manager had been receiving $40 a week, and he said, to me, "Now, if you take this manager out of there, after you get used to the 30 clientile, that will be $90 to $100 a week for you that you can make there." The December sheet showed $1300 storage and we figured out where——

Q. When you say "we" who do you mean? A. Dr. Radin, Mr. Creran and myself, where it would be an average of $1500 storage all year around, because June was supposed to be the slowest month, and December the best month. I said to him, "Well, how about the books?" He said, "The books 40 are down at the garage and I don't want to go

down there after them, and I do not want anyone to go down there, because I do not want the manager to know that I am trying to sell, because if this deal falls through I will be without a manager and I won't know what to do about the business," so, he said, "I have known your brother-in-law quite a long while and I am a reputable dentist here in the city, you certainly take my word for some of it." So, Mr. Creran and I went home and we talked this thing over many hours, and I said to Mr. Creran——

Q. Never mind that. You cannot tell us what you told Mr. Creran. In your talk with Dr. Radin was that all that was said, what you have given us, by Dr. Radin, about the business? A. No, sir.

Q. Tell us any other conversation in which any other statements were made by Dr. Radin and what those statements were before you signed the contract. A. There was a parking station between Broad street and the garage and I told Dr. Radin that that parking station was doing the garage a lot of harm, and he said, "I happen to be a particular friend of the Rollin boys, that is, the building company, and they told me they had planned to build a fight arena there in the spring and that parking station will not be there." That sounded good.

Q. Did that ever materialize? A. No, that parking station is still there.

Q. Was that all that was said by Dr. Radin. What was said, if anything, about profits that he had made, before the contract was made? A. He said——

Q. Tell us when the conversation took place. A. Dr. Radin said to me that the reason he was selling this garage was because he was in the dental

business and he would have to go down to the garage to check up and when he got back to the office he had odors from gas on him which his patients objected to and that he would not sell the garage to anybody, but wanted a responsible party in this garage and he felt that as I was the brother-in-law of Mr. Creran that we were responsible
10 enough to take over the proposition and he also would personally solicit business for us from his friends to increase the volume that was there; that he had spoken to L. Bamberger & Company, and L. Bamberger & Company had told him they would store some of their trucks there.

Q. I asked you if anything was said to you relative to profits the previous year, the amount of profit? A. Yes, he said that he was making $200 a month clear, above the manager's wages and all
20 expenses in the garage.

Q. Was anything said about gas, the monthly gas sales? A. He said that there were 6000 gallons of gas sold, that is, the average monthly, and that the rate of profit on the gas was 3½ cents per gallon, and he said that the trucks, the rental from the trucks in there was an average of $20 a truck, and a touring car $16.50.

Q. Now, did you at any time ascertain whether
30 that was or was not a fact as to his having made a profit the previous year? A. I did.

Q. From whom did you ascertain that? A. I ascertained that from the bill book, the second month I was there. The first the bills were made out with storage in advance, the gasoline from the previous month and washing. Dr. Radin went down to the garage with me on March 1, 1925, and took the bills up to his office, and said that he
40 wanted to make out bills so I could receive the stor-

age due me from the various customers, and that would help me along for the month. He took the book and I never got the bill book until he was able to receipt the bills. The second month is when we received the bill book to make up my own bills, and when I billed the storage I found there was only $970 storage at the time in the garage.

Q. This was in—— A. June 1, 1925. 10

Q. Now, then, did you ascertain as to any other condition of the business as to sales of gas? A. Yes, gasoline only ran about 3000 to 3500 gallons per month.

Q. (By the Court.) You mean after you took it over or after he had it? We want to know whether this statement of his was true or not. We are not interested in before you took it over.

Q. (By Mr. Fuerstman.) After you had ascertained certain conditions in this business did you go and see Dr. Radin and say anything to him about it? A. Yes. 20

Q. What did you tell him? A. I told Dr. Radin that the storage was no where near what he said it was. I told him that I found the garage would not hold the number of cars that he said it would, and the gas business was not what he said it was.

Q. You haven't told us what he said about the number of cars. A. He said the garage would hold 125 cars. 30

Q. What else did you tell him, if anything? A. I told him that I did think that place could go, and he said to me, "You bought this thing on a yearly basis, you cannot tell by one month's business what you are going to do. You may do $900 worth of storage here now but you could have $2000 worth in December, where I only had seventeen hundred dollars.

40

Q. What did you say to that? A. I was willing to wait.

Q. Did you talk to him again after a later time? A. Yes, sir, I spoke to him when the first note was due and I took the renewal up to him with a check. I told him that there had not been any increase, and that what he told me was not as it should be, before the purchase of the business.

10 Q. What did he say? A. He said "Well, you can't tell anything yet, you have to be patient and see when the year comes around how you make up. When the year is up you will see that you are going to come out on top."

Q. After the year was up did you see Dr. Radin? A. Yes.

Q. At that time did you ascertain the amount of the business?

20 Mr. Bobker: I object.

The Court: Sustain the objection.

Q. What did you say to Dr. Radin? A. I told Dr. Radin that I was going into a loss of about $2500 a year.

Q. And—— A. Dr. Radin said that I keep this manager who was in the garage in so I could get used to the customers.

Q. Never mind about the manager. You are tell-
30 ing us now what you told Dr. Radin. What did Dr. Radin tell you. You told him that you were running it at a loss. Did you have any figures with you at that time? A. No, sir.

Q. Did you at any time see him when you had your figures with you and show him what you had done for the year? A. I went over the books once, that was when the second note was due.

Q. I am now talking about after the year was
40 up and you went to see Dr. Radin, then. At that

time did you have some figures with you as to the amount of business you had done? A. I didn't have the figures with me at the end of the year, but I took the figures up to him possibly a month or two, that is fourteen months after I had been in the business.

Q. That is the occasion I am referring to. Did you show him those figures? A. Yes.

Q. What did your figures show as to the amount 10 of cost you had?

Mr. Bobker: I object to this entire line of questioning relating to this business this man did subsequent to the sale of the garage because it is immaterial.

(Argument.)

The Court: I will strike it out if it is not connected up. 20

A. I went up to Dr. Radin with these figures, and Dr. Radin said, "I cannot see how"——

Q. First of all, what did the figures show that you showed Dr. Radin? A. The figures I showed Dr. Radin showed the rent, the amount of gas that was sold, the amount of storage that was in the garage.

Q. Yes. A. The amount of oil that was being sold, and the amount of washing, day parking and 30 transient business.

Q. Anything about the profits for that year? A. It showed a loss, no profit.

Q. Can you indicate each item what it would show as to the cost for that year? A. The first month——

Mr. Bobker: I object. Counsel is not complying with your Honor's suggestion and request. 40

The Court: You had better ask him what Dr. Radin said when he saw these figures.

Mr. Fuerstman: Withdraw the question.

Q. What did Dr. Radin say when he saw these figures? A. He said to me, "I cannot see how it is you cannot make it go, paying $800 rent, when my rent was $1000 a month," but I found out that
10 the $1000——

Q. Never mind what you found out. Is that all he said about the figures? A. No.

Q. Tell us what he said about the figures. A. He said he was going to try and get us a reduction of rent to make up for our losses.

Q. Is that what he said about the figures? A. No, he didn't say that about the figures.

Q. Did he make any comment regarding those
20 figures you showed him? A. He said that I was doing more business according to the business that I showed him than what he did.

Q. Was that all he said about it? A. That is all he said at that time.

Q. What did your figures show?

Mr. Bobker: I object. There has been nothing established to justify the Court in listening to the testimony as to figures.

30 The Court: I will admit the question.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. What did your figures show? A. Our figures showed between three and four thousand gallons of gas per month, the highest month storage was $1400 and some odd dollars, and the oil business
40 showed about $25 to $35 profit.

Q. Now, in regard to—you said something about the rent. What did your figures show as to that? A. My figures showed that I was paying $800 a month rent.

Q. What did he say about that? A. He said he could not understand how it was that I was not making a go of it, but I was doing more business than he was, and he was paying more rent than I was paying, but I found out afterwards that the $1000 he charged up for rent included the four stores in front of the garage for which he was collecting $500 rent which brought his rent down to $500.

Q. Did you ascertain how many cars the garage would hold? A. Yes, I did.

Q. How many cars would it hold in order to operate the garage? A. 75 to 76, if you want to be able to operate it.

Q. Now, do you recall when that recent note, this note that is being sued on now, when that was signed? A. I believe it was August 3, 1926.

Q. Where was that? A. In Mr. Creran's office.

Q. Where was the place, where it was signed? A. 783 Broad street.

Q. Who was present at the time? A. Dr. Radin, Mr. Creran and myself.

Q. Can you tell us at that time whether there was any conversation as to this particular note between Dr. Radin and Mr. Creran? A. Yes.

Q. At the time Mr. Creran placed his endorsement on the note——

Mr. Bobker: I object to the question on the ground it is immaterial and incompetent. In the first place in the answer they charge certain misrepresentations and facts at the time a certain note for $200 was signed by Miller

and endorsed by Creran, and the pleadings are absolutely silent as to any additional misrepresentations at the time when the last new note was signed.

The Court: I think the pleadings are silent as to that.

Mr. Bobker: For those reasons I object to 10 that testimony.

(Argument.)

Mr. Bobker: I object to any testimony to a conversation that was had at any time that Mr. Creran placed his endorsement on the note on the grounds that I have urged.

(Argument.)

20 The Court: I think that counsel wants to introduce the conversation for the purpose of showing the original fraud existed, not that there was any misrepresentation at the time of the conversation which took place prior to the making of the last note. I agree with you entirely, that unless it is elicited for that purpose it is improper.

Q. What did Dr. Radin say at the time of the 30 execution or endorsement of the note by Mr. Creran?

Mr. Bobker: I object.

The Court: Sustain the objection.

(Argument.)

Q. You say that the signing was done up in the office of Morton & Company at No. 783 Broad 40 street? A. Yes, sir.

Q. At that time what was the conversation leading up to the endorsement of the note by Mr. Creran?

Mr. Bobker: I renew my objection for the same reason, and ask an exception.

Exception noted as ground of appeal.

The Court: I will permit the question.

A. Dr. Radin came up and said he had to have this signature on the note because he had to make good to the bank and that he would, if Mr. Creran would sign this last note, get a reduction of $200 on the rent from which we could make up the losses. Mr. Creran signed the note and said to Dr. Radin——

10

The Court: No. Strike that out. None of this has anything to do with this alleged former fraud. That is improper. What did Mr. Creran say to Dr. Radin as to whether he would sign that note?

20

A. He said he would sign the note providing there would be a reduction in the rent.

Q. Was anything said regarding the fraud at that time? A. Yes.

Q. What was said? A. After the note was signed Dr. Radin said——

Q. Before the note was signed was any objection made by Mr. Creran regarding the signing of the note and what was his objection to it?

30

Mr. Bobker: That is objected to as incompetent.

The Court: I will admit it.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

40

Q. What did Mr. Creran say as the reason for not signing that note? A. He said he could see no reason——

The Court: We are not interested in what Mr. Creran said. I will not admit this testimony. Apparently either it never happened or the witness does not understand you, or you do
10 not understand what I thought would be competent. You ask each question separately and I will rule on each question.

Q. Do you recall when that renewal was signed and where? A. August 3, 1926, in the Morton & Company's office, on Broad street.

Q. Dr. Radin was present there? A. Yes, sir.

Q. Was anything said there about the fraud which you and Creran claimed was committed on
20 both of you?

Mr. Bobker: I object to that on the ground it is not pleaded.

The Court: I will admit it.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

30 A. I said in the past year up to that date that the figures of the business showed that it had not been anywhere near what he said it would be, and I was going into a deficit further and further, and I did not see any way out, as I was going deeper and deeper, and Dr. Radin said that he would get this reduction in rent for me providing that he could get it from his people in New York City——

The Court: That hasn't anything to do with
40 the original fraud. Strike that out.

Cross-examination by Mr. Bobker:

Q. Can you itemize and tell the Court and jury how you arrived at this loss of $2500 at the end of the first year in your business of that garage. A. The books will show that.

Q. Can you tell by looking at the books? A. I cannot myself, but the bookkeeper can. 10

Q. Did you hear the bookkeeper testify that the amount taken in for storage that first year was a little less than $14,000? A. Yes.

Q. You paid rent for that year of $9600? A. Yes.

Q. How much a week did you draw during that year? A. $50 a week.

Q. That is about $2500? A. Yes, sir.

Q. How much were your other expenses? A. The manager was getting $40 a week, the day man was getting $25 a week, the night man was getting $28 a week. $50 a month for electric light and $75 a month for heat. $10 a month for water; $15 a month for sponges, chamois and soap. Insurance. 20

Q. You were the manager of that business, weren't you? A. Not for the first six months.

Q. Why didn't you yourself manage the business? A. I couldn't manage it, because I wasn't acquainted with the people who came in the garage, and I didn't know who had charge accounts and who didn't have charge accounts. 30

Q. Did you have to keep him there six months for that purpose? A. Yes.

Q. You could ascertain that in a month or so, couldn't you? A. The garage had to be left occasionally for me to collect and solicit business, and I thought that by keeping the manager there for that time I could increase the business and make it worth my while. 40

Q. You never conducted a garage business before you conducted this one, did you? A. I was assistant service manager for the Bonnell Motor Car Company.

Q. You never actually conducted a garage yourself? A. No.

Q. This is the first experience along those lines
10 that you had? A. Yes, sir.

Q. When you found out that you were running behind did you attempt to cut down expenses? A. Yes, sir.

Q. When did you do that? A. November, 1925.

Q. What expenses did you cut down? A. I cut the manager out, $40 a week. I cut down—I saw that my electric light bill was much too high and I cut down on that. I had the telephone taken out
20 and a pay station put in.

Q. Do you know what your gas and oil profits were per month? A. No, I do not know offhand.

Q. Do you know what your washing profits were? A. No, sir.

Q. Do you know what your profits were for transient parking, what that amounted to? A. That was included in the $1400.

Q. At the time you took this garage over were there 88 cars in that garage? A. No, sir.
30
Q. How many cars were there? A. I don't know how many cars were there, but the garage was about half full.

Q. You were in the garage and saw the garage was half full at the time you purchased it, isn't that so? A. Yes.

Q. Yet, you bought this garage with that fact in mind? A. Well, it was a funny proposition. There were two kinds of business there, a day busi-
40 ness and a night business, and because of that it

was not so easy to decide right at that time how many cars were in that garage.

Q. Didn't Dr. Radin tell you that the reason why he was selling this business for $3000 for only $500 cash payment was because he had no time to take care of that business? A. No, sir.

Q. Didn't he tell you he was too busy with his profession? A. No, he did not. 10

Q. Did he talk to you along those lines at all? A. Yes, sir.

Q. What did he say? A. He said that when he came down to the garage he had to go into the office and do checking up and the odors of gas got on his clothes, and it was destroying his dentistry business and he would rather be in the dentistry business than the garage business.

Q. On June 1, 1925, you discovered that some of these representations that were made to you by Dr. Radin were false? A. Yes, sir. 20

Q. Did Creran know that fact? A. I spoke to Mr. Creran about it.

Q. So he knew the representations made were false on June 1st, 1925? A. Yes, sir.

Q. Then, when the first note became due on August 3, 1925, both you and Creran know that the representations that were made had been false? A. We knew that the amount of storage was not in 30 there that Dr. Radin said would be in there.

Q. Did you know anything about the misrepresentations as to the quality of gas that he said he sold? A. Yes.

Q. You saw that misrepresentation? A. We did not know that there was misrepresentation at that time because where you only go by the number of gallons we were selling, but we found out a year later, and I thought of the fact of asking the gas 40

company how much he bought from them, and I found out that the original amount was a misrepresentation.

Q. What else did you find out at the time the note was first renewed as a misrepresentation? A. I found that the storage was not in there that he said would be in there.

Q. How about the oil? A. Well, the oil business,
10 there was hardly any oil business to speak of.

Q. While you conducted the business, according to the bookkeeper's notations your average storage ran up to about $1250? A. I don't know whether it ran that high.

Q. In other words, it totalled approximately $14,000? A. Yes.

Q. You say that Dr. Radin told you that his average was $1500 per month at the time he sold you
20 the business. A. Yes.

Q. You knew when the first note was renewed and reduced and you say that Creran knew that the storage you took in the garage only totalled about $900 a month at that time? A. That's right.

Q. Why did you pay a ten per cent. reduction, and why was the note renewed if you knew the facts that he submitted to you were false? A. Dr. Radin, when I spoke to him about it, said that the business was purchased on a yearly average, that
30 just because I had one slow month did not mean that the whole year was going to be slow. He felt sure that at the end of a year I would show a profit; that is the reason the note was paid.

Q. He did not guarantee that you would make money in that business, did he? A. Nobody guarantees that.

Q. At the end of six months you and Creran knew that the facts alleged to be submitted to you
40 by Radin were all false? A. Yes, sir.

Q. Why, after you and Creran knew that, did you again pay ten per cent. on the note and renew this note on February 3, 1928? (Withdraw that.) February 3, 1925. A. The reason for that was the first six months was the slow part of the year, and the real business was then to come in, from then on, in the wintertime, and we paid it so that we could see what we would do during the winter 10 months, or I paid it.

Q. Did you at any time have the garage, the size of that garage surveyed for the purpose of finding out how many square feet were there? A. No, sir.

Q. Do you know how many square feet a garage the same as that would use for a truck? A. No, sir, I do not.

Q. How many cars were in that garage at the time you say it was half full? A. At the time I 20 took it over there were about forty accounts in the garage, forty-five.

Q. How many cars were there? A. Forty, approximately.

Q. No trucks? A. Including the trucks.

Q. How many were there at night? A. That is the night storage.

Q. How many during the day? A. I don't remember the parking account. Maybe eight or nine. 30

Q. Didn't Radin tell you that during the course of the day and taking into consideration the storage there at night that you would have to contend with possibly 125 cars? A. That I would have to what?

Q. Contend with only 125 cars? A. No, sir, he didn't say that.

Q. When he told you that this garage would hold 125 cars did you go down and look around for your- 40

self to find out whether he was telling the truth or not? A. No, sir, I did not.

Q. At the end of nine months you knew that all these representations were false? A. Yes, sir.

Q. You knew that the representations were false at the end of twelve months? A. I didn't know that they were all false at the end of nine months, I
10 knew they were false at the end of twelve, at the end of the year.

Q. At the end of the year you knew that all of the representations were false? A. Yes, sir.

Q. Then, you paid ten per cent. on the note and renewed the note? A. Yes.

Q. Mr. Creran knew then also that all the representations were false? A. Yes, sir.

Q. You renewed the note and paid ten per cent. at the end of the fifteen months? A. Yes, sir.
20

Q. Isn't it a fact that the reason you and Creran refused to pay this note was because you went into a venture which turned out to be a losing proposition either due to your carelessness, mismanagement or neglect? A. No, sir, it is not so.

Q. Radin did not tell you that you would make money there at the end of the first year, did he? A. He showed me that I would make money there.

Q. You had to go along in that business for one
30 year, and then for fifteen months for the purpose of finding out whether or not Radin's representations were true or false? A. I did have to: I was in.

Q. You could tell at the end of the first month that that garage could not hold 125 cars, couldn't you? A. That was only a minor item, 125 cars. If the garage was filled to capacity with 76 cars I could have made money.

40 Q. How much was the storage average a month

there? A. $10 a touring car and $12 for a truck was the average.

Q. Yet, despite the fact that your garage was only half full your average yearly income for garage storage was approximately $1400? A. Yes.

Q. Your garage was only half full. A. When I took it over, but when I was through at the end of the first year it was more than half full.

Q. You were not in that business all the time, were you? A. Yes, sir. 10

Q. You were on the outside to solicit business, weren't you? A. Not all the time. I was out collecting and soliciting for some.

Q. You say that you asked Dr. Radin for the books and he told you that you could not examine the books because he might lose his manager. Did you at any time in the following six months or year ask for an examination of those books? A. Yes.

Q. And he refused to let you? A. Yes, sir. 20

Q. When and where did you make that request? A. The first day I took possession, May 1st, Dr. Radin took the books out of the garage so he could make up his bills, and during the course of the first month I asked him for those books and he said he was going to close them, they were old accounts, and he would give them to me when they were all done.

Q. Where are the two statements you spoke of of June and December 1924? A. He showed them to us; he did not give them to us. 30

Q. Did you look at those statements? A. Yes, sir.

Q. You did not have any examination made of any of the entries before you bought this business, did you? A. No, sir, none outside of those two because of Dr. Radin's reputable dentist business, and my brother-in-law's acquaintance with him. 40

Redirect-examination by Mr. Fuerstman:

Q. Did you receive a letter from Mr. Bobker? Did you see this letter (indicating)? A. Yes, sir.

Mr. Fuerstman: I offer this letter in evidence.

10 Mr. Bobker: It is objected to. In the first place it is a carbon copy of a letter and in the second place, it is not my signature.

Mr. Fuerstman: Withdraw the offer for the present, and I will call Mr. Bobker.

David Bobker sworn in behalf of the defendant.

Direct-examination by Mr. Fuerstman:

20 Q. You sent this letter, did you not (indicating), to Mr. Creran? A. This is a carbon copy of a letter that went out of my office, yes.

Q. He said he received it.

Mr. Fuerstman: I offer the letter in evidence.

Mr. Bobker: I object to it.

Q. After recovering a judgment against Mr. Miller you issued execution on the judgment, did you not? A. Yes.

30 Q. You held an execution sale? A. The sheriff held it.

Q. You attended the sale? A. I don't recall whether I was there or some one in my office.

Q. At any rate you bought in, or some one for you bought all the stock of the Lafayette Broad Realty Corporation which had been sold to Mr. Miller under that. A. No, the Lafayette Broad Realty Company.

40 Q. Is that so or not? A. No, not that stock.

Q. I call your attention to a letter and I ask you whether that writing on this letter will refresh your recollection as to whether you did not sell all of the stock of the Lafayette & Broad Realty Company which is owned by Mr. Miller. A. No, we sold the stock of the New Lafayette Garage, Incorporated; the Lafayette Broad & Realty Company owned the building.

Q. Didn't you at that sale, or some one for you, buy in all the stock that had been previously sold to Mr. Miller at the consideration for the original note that was issued in this case? A. That stock—you mean the sheriff, the sheriff sold it, yes. 10

Q. Didn't the Continental Realty Company and Securities Corporation buy that in? A. I believe so.

Q. That is a company represented by you? A. Yes. 20

Q. What was paid for all the stock that Miller bought from Dr. Radin and Mr. Wallach, and the other gentleman Mr. Lichenstader. A. At the sheriff's sale?

Q. Yes. A. I think we paid the nominal sum of five or ten dollars, something like that.

Q. Don't you know? A. It was around that, I don't know for sure.

Q. Was it $25? A. It may have been $25. 30

Q. You don't know yourself? A. It was a nominal amount, we just paid for what interest he had in that stock.

Q. Can't you tell us the approximate amount? A. $20 or $25. The sheriff's records will give you that.

Mr. Fuerstman: Will you stipulate what the amount of that judgment against Mr. Miller was.

Mr. Bobker: The judgment in the other suit?

Mr. Fuerstman: Yes.

The Court: The damages were $1493.59, and the costs were $21.41. The personal property was sold February 7, 1928, for $25.

Mr. Fuerstman: I offer to stipulate the amount due.

10 The Court: Without the costs?

Mr. Fuerstman: Yes.

The Court: $1493.59.

Mr. Fuerstman: That is the amount recovered at the execution sale.

Carl Miller recalled in behalf of the plaintiff.

20 Direct-examination by Mr. Bobker:

Q. I show you this contract dated April 30th, and marked P-4 for identification, and I ask you if that is your signature? A. Yes, sir.

Mr. Bobker: In view of this fact this contract is offered in evidence. It is marked P-4 for identification.

Mr. Fuerstman: I object to the offer.

The Court: Suppose you put it in on your
30 case or attempt to put it in our your case.

Mr. Bobker: Very well, your Honor.

Adam A. Morton sworn in behalf of the defendant.

Direct-examination by Mr. Fuerstman:

Q. You are connected with Morton & Company? A. Yes, sir.

40 Q. In business at 783 Broad Street? A. Yes, sir.

Q. Where was the business of Morton & Company in November, 1926? A. 783 Broad street or 828 Broad street, one of the two; 1927.

Q. 1926. A. It was at 783 Broad street.

Q. When did you get into that place? A. I think on May 1, 1926.

Q. At any rate, you were there in August, 1926? A. Yes. 10

Q. Now, then, where were you previous to that? A. 828 Broad street.

Q. When you moved from 828 Broad street to 783 Broad street, Morton & Company, where did you bank? A. At the Broad and Market National Bank.

Q. Did you see any one about a change of address there? A. Yes, sir.

Q. Who did you see there? A. Mr. Gardner and Mr. Williams. 20

Q. Did you tell them? A. Yes, I told him that I had moved and to change the address to 783 Broad street.

Q. Did you ever have any trouble with the Broad & Market Bank before? A. Yes.

Mr. Bobker: I object.

The Court: Sustain the objection.

30

Q. Previous to being at 828 Broad street where is your office? A. 45 Clinton street.

Q. Then, when you moved from there did you notify the bank? A. Yes, sir.

Q. When you notified them where did they continue to send the mail? A. 45 Clinton street.

Q. Did this mail or some of this mail go astray?

Mr. Bobker: I object.

The Court: Sustain the objection.

40

Q. Did you receive mail from the Broad and Market Bank at 783 Broad street? A. Not that I know of.

Q. You mean you personally recollect? A. No.

Cross-examination by Mr. Bobker:

10 Q. This mail that was addressed to 45 Clinton street was delivered at 828 Broad street, wasn't it? A. No, there was a peculiar case at 45 Clinton street. When we moved out of there another firm by the name of Morton & Company moved in there, they were in the insurance business. I was up at the bank to get them to change the address, but they never changed it.

Q. Did any mail addressed to 828 Broad street 20 come over to 783 Broad street? A. I don't believe the bank has changed it yet.

Q. Was any mail addressed to your company at 828 Broad street sent to 783 Broad street? A. No, we changed the bank when we moved over there.

Q. I am talking of any mail. A. I couldn't say whether there was or not; I guess there was.

Q. 828 is two blocks above 783, isn't it?

Mr. Fuerstman: Are you referring to Morton 30 & Company?

Mr. Bobker: Yes.

Mr. Fuerstman: I object. The protest is addressed to Creran at 828 Broad street, and not Morton & Company. The testimony of this man is to show that when Morton & Company moved he told them he moved from 828 Broad street.

Q. Did you notify the postoffice of that change 40 of address? A. Oh, yes.

Redirect-examination by Mr. Fuerstman:

Q. I show you a card marked P-5 for identification. This was signed in 1918? A. Yes, sir.

Q. Were you at 828 Broad street in 1918? A. 45 Clinton street.

Q. That is not on this card at all. A. It is right there. 10

Q. 828 Broad street appears in pencil there? A. Yes, sir, that is the card I tried to get changed.

Mr. Bobker: I offer the card in evidence.

Mr. Fuerstman: I object to the offer of P-4 for identification for the reason that the man who entered all these notations on here ought to be here.

Q. Did you put 828 Broad street on that card? 20 A. No, sir.

Q. Is this in your handwriting? A. No.

Q. You do not know when it was put on? A. No.

The Court: I will admit the card in evidence.

(Ex. P-4 for identification is marked P-5.)

Paul Ruesen sworn in behalf of the defendant.

30

Direct-examination by Mr. Fuerstman:

Q. You took over the garage from Mr. Miller, did you not? A. Yes, sir.

Q. Do you recall when you took it over? A. March 9, 1927.

Q. At the time you took it over what was the rent? A. $800 a month.

Q. Since that time has the rent been reduced?

Mr. Bobker: I object. 40

The Court: Sustain the objection.

CROSS-EXAMINATION BY MR. BOBKER:

Q. You bought this garage in 1928, is that what you mean? A. 1927, two years tomorrow.

[DEFENDANT RESTS.]

10 ———

Mr. Bobker: At this time I request that your Honor grant the plaintiff a nonsuit on the counterclaim which is based——

The Court: There isn't any counterclaim unless I have the wrong answer here.

———

20 LOUIS R. RADIN, plaintiff, recalled in his own behalf in rebuttal.

DIRECT-EXAMINATION BY MR. BOBKER.

Q. When did you first talk with Creran and Miller concerning the sale of this business? A. Some time in April, 1925.

Q. Where did you talk with them? A. Why, Mr. Creran approached me in the garage one day and talked to me as to why I as a Doctor wanted to be 30 in this business, and I told him that I did not want to be in the business if I could find a suitable tenant.

Q. You did not give all of your time to that business, did you? A. Absolutely not.

Q. You are a practicing dentist. A. For the last seventeen years.

Q. Who was your manager? A. At that time a fellow named Greebaum.

40 Q. William L.? A. Yes, and ended up with Mr.

Smith at the time I spoke to Mr. Creran about the garage.

Q. This man Ruesen who testified, he was the manager employed by you? A. He never was manager, he was a mechanic.

Q. How long was he in you employ? A. About four months, up until March about 1924, when he was discharged because he was not suited. 10

Q. This garage business was owned and operated as the Lafayette Garage, Incorporated, is that right? A. That's right.

Q. You and Mr. Wallach and Mr. Lichenstader owned all the stock? A. That's right.

Q. Tell the Court and jury briefly what you said to Creran and what he said to you before the contract of April 30, 1925, was signed. A. Creran approached me about the buying of this garage for 20 a brother-in-law of his who was working for him or some lumber concern at the time, and he asked me would I be interested in selling the garage and I said, "Yes", and he asked me how would I do it, and I said, "I will be frank with you, I was simply running the garage to be able to carry the overhead expenses for an extensive business." He said, "About how extensive?" I said, "I can show you some figures." I said, "And I will be glad to do so." He came up to my office with Mr. Miller and 30 I had an accountant keep my books, and I said, "Here are my accountant's report from the time we started in the business," and those reports he took and still has, although I have a copy which I received from my accountant. We had ten or twelve conferences with the business and he went into it frontwards and backwards, and over my books, and everything. Mr. Creran kept his car in my garage for a period of two years that I operated 40

there, and he saw me starting in an empty brand new building and in two years I had complete full garage in that period of time. I told him that I drew a salary of $2500 in two years, paid a manager $50 to $75, and paid the stenographer $25, a week, and I said what a simple matter it would be if some one who would give his entire time and 10 attention to this business to make a successful business of it. It is perfectly possible in that little time that I gave to it that I should pull out even. It was impossible to make money with $1000 a month rent, and he said, "Do you think there is a chance for my brother-in-law?" I said, "Figure it out for yourself. To start with, you are only going to pay $800 a month rent, that is $200 a month saving. I was drawing $100. You need not 20 need a manager for $50 or $75 a week. Do that yourself. You do not need a stenographer, your wife is going to take care of the business. Take all those deductions from the sum total of the business and you can make a nice living. I do not say how much of a living, but it depends on yourself to build from that point upwards."

Q. You referred to the accountant's report. I show you a paper and I ask you whether you gave Creran and Miller a copy of this report? A. He 30 had a duplicate copy of that report as it was given by me by my accountant. That was given to me every month, and attached every year to the book. He received the very same duplicate we have here.

Q. (By Mr. Fuerstman.) Who? A. Which one? I don't know. They were both there, I don't know which one took it, they were both there; one of the two of them took it.

Q. (By Mr. Bobker.) There were both there? 40 A. Yes, they were always together.

Q. The books of the garage showed the salaries you drew? A. Everything in those reports were taken directly out of our books.

Q. The books of the garage show that the New Lafayette Garage, Incorporated, was paying to the Lafayette & Broad Realty Company these rents you testified about? A. We paid $1000 a month rent, with the exception of two months where we paid $850 or $700. It was run for the benefit of the realty company so we could pay our taxes.

Mr. Bobker: I offer the book in evidence.

Mr. Fuerstman: I object if he says he gave us another copy of this. He hasn't served us with a notice to produce that copy.

The Court: Sustain the objection.

Q. Did you make any representations either to Mr. Creran or Mr. Miller relative to the monthly average income for the storage of cars? A. I could not make anything more than the statement shows, it was black and white.

Q. Referring to the month of June, 1924, can you tell us what the total income for that month was in your garage? A. I couldn't tell you offhand. I could tell you from the report.

Q. The books are in court. A. Oh, yes.

Q. Approximately, as far as you remember. A. In the month of June I approximately figured around $1900 and $2000.

Q. How about the month of December? A. I think it ran above $2600 during the fluctuation of weather conditions.

Q. Did you make any representations concerning the sale of gasoline? A. Our statement showed how much gasoline was bought and sold; there was nothing for me to say.

Q. Did you make any direct statement concerning the profits from oil? A. The report shows that.

The Court: That was not the question.

A. No, I made the statement from the report.

Q. (By Mr. Bobker.) Did you make any statement in connection with the total profits for the
10 year preceding the sale? A. I don't think there was any profit to talk about.

Q. What did you tell them about that?

Mr. Fuerstman: I object to that answer and move that it be stricken out.

The Court: I will let it stand.

Q. What did you tell them about the profits? A. We came to the question of the price of the garage. He asked me, "What do you want for it?" I said,
20 "I will tell you what I want for it, I have run this business for several years, and for a period of two years my operating losses were approximately $3300. After throwing off all this rent, and so forth, I want about $3000 for the business so that I can come out even; I figured the good will and the amount of time I spent was worth $3000.

Q. After they agreed upon the price, then, what was done? A. We went up to your office to draw
30 up the agreement.

Q. There was an agreement prepared. A lease? A. A lease, yes.

Q. Those papers were taken by Mr. Creran to his attorney, Mr. Kiel? A. I went right with him. I was present at the time.

Q. I show you a contract with Mr. Miller's signature thereon. Was that the contract he signed? A. Yes, sir.

40 Q. Did you and Mr. Wallach and Mr. Lichen-

stader sign the copy turned over to you? A. Yes, sir.

The Court: This is the contract that provides for the payment of the note of which is a renewal, this note?

Mr. Bobker: Yes.

The Court: I will admit it.

10

(P-4 for identification is marked in evidence Ex. P-4.)

(Mr. Bobker reads the contract to the jury in brief.)

Q. After this contract was signed did you have any talk with Creran or Miller concerning the business that you did in the garage or concerning any of the representations you are alleged to have made? A. I never made any such representation. 20

Q. Did you have any talk with them? A. Yes, we spoke of how things were going on in the garage.

Q. When these notes became due were they renewed promptly? A. Absolutely, they were in my desk the day before, or either Creran might meet me at the bank.

Q. That went right on up to the time of the giving of the last note? A. That was right up to the time the last note was given, yes. 30

Q. Were any complaints made during the interim? A. Mr. Creran spoke to me about Mr. Miller not attending to his business, and if I could instruct him in any way he would certainly appreciate it.

Q. Did you at any time promise to go down and help Miller run the garage? A. Never.

Q. Did you at any time refuse permission to 40

have the garage books examined? A. They never asked for it.

Q. Did they complain to you at the expiration of six months that the garage would not hold 125 cars? A. I don't recall it.

Q. Did you ever tell them that your garage could hold 125 cars? A. Never did, because I do not be-
10 lieve it could hold 125 cars.

Q. How many cars were in there at the time it was sold? A. Our books distinctly showed 66 cars night storage and 22 cars day storage when we turned over this business.

Q. What is the size of this garage? A. 180 foot depth, 90 feet wide, 10 feet of which is a driveway making a garage of 180 foot by 80 foot, that is correct. Now, there are stores in the front which
20 take up 30 feet of the front leaving the net garage space 150 foot deep and 80 foot wide, approximately 12,000 square feet. Every garage man knows that it takes 100 square foot per car and 100 square foot into 12,000 square feet would be 120 cars, but, of course, they left the center aisle open.

Q. Did you tell Creran that during the two years you were trying to run this business you lost $16,000? A. That is absurd.

Q. During those two years you received yourself,
30 received from the corporation $2500? A. Yes, sir.

Q. During those two years approximately how much was lost in that business taking into consideration the $1000 a month rent and for your salary. A. Approximately $3300.

Q. For both years? A. For the two years. Our books show that.

Q. Did Creran and Miller know at the time of the purchase? A. Why, certainly, that is how we
40 agreed on the purchase price.

Q. Mr. Ruesen, in his examination said a receiver was in charge of this garage. Is that true? A. There never was.

Q. There was some litigation between Greenbaum, one of the stockholders and the owner of the building? A. That is right.

Q. That was away back in October, 1923? A. That is correct.

Q. A receiver for the building was appointed, but the receiver was dismissed? A. That is correct. 10

Q. Was there ever any receiver appointed for the garage? A. Our garage was always in fine business shape.

Q. The same company now owns that building? A. Yes, sir.

Q. You and your father-in-law own the stock of the corporation that owns the building? A. Positively.

Q. Can you tell us what the average storage income was for the year 1924 and 1925? A. Approximately around fourteen or fifteen thousand dollars. 20

Q. What was the approximate monthly average, $1200? A. Approximately, yes.

Q. (By Mr. Fuerstman.) For what? A. Storage. That includes day parking storage and night storage.

Q. (By Mr. Bobker.) Did you ever promise to reduce the rent? A. Never. 30

Q. They had a lease, didn't they? A. Absolutely.

Q. And they paid the rental under that lease? A. They did when they could.

Q. What do the books show in connection with the monthly payments by owners of automobiles and trucks while you were in the garage business? A. You mean as to the price charged for the trucks?

Mr. Fuerstman: I object. The books are here. 40

Q. Do you know what they paid? A. I nearly do, but our books will tell you better.

Q. There was some testimony about the Wagner account. What are the facts in connection with that? A. The Wagner Meat Company, and I personally got them the day I opened the garage, in fact I filled up the garage with people I knew in

10 the city, and I got seven of their cars. We got $14 a month from seven cars because they were there and they got large quantities of gas from us, and we gave it to them for $14. There is no such price as $20 a month for storage; it was a question of so much a car and the amount of cars they had there. We were trying to build up a business and we were glad to get them at $14 to start off, but they never paid $10 a month and they never left the garage because of the $10 a month, they left because Mr.

20 Wagner built his own garage and they know it, and he still has his own garage down on Lafayette street.

Q. Did Miller come to your place of business at the end of the first year and show you his books of the business? A. Never.

Q. Did you attend at Morton Company's office the time the last note was renewed? A. Absolutely not. I was never in Morton Company's new office

30 since he has it.

Q. How did you get the last note? A. The note that was protested?

Q. Dated August 23, 1926. A. Miller brought it into the bank; he usually met me there or at my office; he paid ten per cent. and the interest.

Q. He paid on the renewal note and took back the old note? A. Yes, sir.

40

CROSS-EXAMINATION BY MR. FUERSTMAN:

Q. About these notes. Do you want the jury to understand that Mr. Creran came into the bank and signed as the endorser in the bank every time when the note was renewed? A. I didn't say that, I said Mr. Miller.

Q. So, you never met Mr. Creran at the bank? A. I met Mr. Creran at the bank, too.

Q. In connection with these notes? A. Yes. 10

Q. On what occasion? A. The signing of the note.

Q. Which note was that? A. That I couldn't tell you.

Q. What time of day was it? A. It was before three o'clock because I know that I told Mr. Gardner to hold the thing open until ten after three so Mr. Creran could get there to sign the note.

Q. Do you recall on one occasion when you met him at the bank? A. Yes. 20

Q. That was not the last time, though, was it? A. I couldn't tell you which time it was.

Q. You made the statement that they paid you the rent when they could. Do you mean they owe you any rent? A. We were in court ten times to collect our rent.

Q. They paid their rent regularly, did they not? A. No.

Q. Did you lose any rent on Miller while he was there? A. No, we didn't give him a chance. 30

Q. You did not waive any rent, did you? A. Why should we?

Q. So, that statement is not true, is that correct? A. Absolutely correct. We had to go into court a dozen times to collect our rent.

Q. You knew he had great difficulty with the business, didn't you? A. I didn't know what he had in his business. 40

Q. Every time you wanted the rent he didn't have it? A. That is pretty near the usual thing in the garage business.

Q. At any rate, he complained every time you wanted the rent that he did not have it. Did he say why he did not have it? A. He did not complain at all.

10 Q. You always sued him every month to get it? A. Absolutely if the rent was not paid by the 15th of the month we went out to get our rent.

Q. You started suit the second month, didn't you? A. That is possible.

Q. You say that although the man did not have his rent on time that he never complained to you about the business? A. No, his complaints were that his collections were very hard to get in.

20 Q. He never said anything about the way the business was done? A. He never complained about his business.

Q. He never said anything about the representations you made? A. Not to me.

Q. When you sold the business to him had Wagner already notified you that he was going to take the seven cars out of the garage? A. Not to my knowledge.

Q. Did he move those cars out just after you sold
30 him the business? A. I don't know.

Q. Did you know that he was building a garage? A. I didn't know that either at that time.

Q. He was a very great friend of yours, wasn't he? A. That is perfectly possible, but he did not tell me his business.

Q. So, although he had several cars in your garage and he was a friend of yours you did not know that he was at that time building a garage and you
40 did not know that he notified you that he was going

to move out? A. He did not notify me he was going to move out, no.

Q. Now, then, you say that you did not approach Creran in regard to this sale at all, that he came to you? A. Absolutely.

Q. To buy this garage? A. Absolutely.

Q. What did he say to you? A. He talked over the question of the garage, and how I felt about selling it. 10

Q. Where was that? A. At the garage.

Q. Were you devoting all your time to the garage at that time? A. No, I was there pretty nearly all the morning. I came down with my car and left my car there, and Mr. Creran brought his car there, and I came back two or three times a day.

Q. You had a manager there? A. Yes.

Q. How long had you been doing that, going down in the morning and then coming back? A. Pretty near two years. My office was only across the street from there. 20

Q. When did you begin doing that? A. When we first got the building in 1923.

Q. You first got the building in 1923? A. Yes.

Q. Did you build the building? A. We took it over before it was completed.

Q. I say did you build the building? A. I finished the completion of it. I know all about the building of it. 30

Q. You did not contract to build it, did you? A. I bought the building while it was under construction.

Q. You bought the building after it was foreclosed? A. You are all wrong, that building was never foreclosed.

Q. Who did you buy it from, Cronheim? A. From the construction company which is Mr. Cronheim. 40

Q. He built the garage? A. Yes, sir.

Q. When you made the statement that you built the garage that was not strictly correct, was it? A. I didn't say I built the garage, I said I know all about the building of the garage.

Q. You bought it in 1923? A. Yes.

Q. Were you managing the garage yourself? A.
10 I told you I had a manager.

Q. Who was the manager in 1923? A. At that time a man by the name of Greenbaum.

Q. He was a partner? A. One of the stockholders.

Q. He and you and who else were interested in the garage? A. Mr. Lichenstader and Mr. Wallach.

Q. That was in the garage? A. Yes, sir.

20 Q. Were the same parties also interested in the building? A. Yes, sir.

Q. So the building of the garage was practically operated by the same people? A. By the same people, yes.

Q. Then, there was a receiver appointed for the building? A. Yes.

Q. Did that have anything to do with the garage business? A. Nothing at all.

30 Q. Greenbaum was operating the garage? A. He was at that time dismissed, that is why he started receivership proceedings against the realty company.

Q. Smith is what? A. Manager of the garage.

Q. So, in the conduct of the business, the manner of his conduct by Greenbaum had something to do with the filing of the bill? A. What business has that to do with the other?

Q. Why did you dismiss Greenbaum from the
40 garage business? A. Do you want to know that?

Q. Yes, because he stole some money? A. Yes, you said it.

Q. Yes, all right, there was some difficulty in the garage business? A. No difficulty.

Q. The receivership was directly the result of this difficulty with the garage business? A. No, it was not the result at all, and it was not the receivership at all. 10

Q. Now, then, when Mr. Creran came to you and asked you to sell this business did you tell him that the business was making money or losing money? A. I showed him the statements.

Q. The minute he opened up on the question you pulled out the statement to show it to him? A. Why, certainly. I told him to come over to my office, and I said, "Here are my statements of what I am doing." 20

Q. Didn't you make a single statement to him about the business before you showed him that? A. I told him that we were running the business to get as much rent as we could to carry the building, we were not running it for a profit; those were my exact words.

Q. So, at the time you told him distinctly that you were not making any profit in this business, but, "What we want is some one to come in and pay the rent, that is all we are interested in"? A. Looking for a good tenant, certainly. 30

Q. You want us to understand that when you were losing money in the garage business that Mr. Creran became interested and wanted to buy it? A. Mr. Creran is a very clever business man, and when he saw my statement of the salary I was drawing, the salaries that we were paying which he would not have to pay and saw that many months and saw that the garage from the A & Z—— 40

Q. Did Mr. Creran know anything about this garage before you told him about it? A. He kept his car there for two years.

Q. He put it in and took it out. A. He was in and out.

Q. His car. A. He is still in there today.

Q. He did not spend any time looking into your books, did he? A. He spoke to me pretty nearly
10 every morning.

Q. He always was there every morning at the time you were there? A. Pretty nearly. We both came down there at the same time, our homes are close together.

Q. How long had these conferences been going on, talking about the garage before you finally showed him the statement? A. About the buying of it?

20 Q. Yes. A. Only in the month of April when he first approached me about it.

Q. You saw him every day, or almost every day for two years before that? A. Yes, sir.

Q. Then, in the month of April he suddenly approached you about it? A. That was exactly the case.

Q. Then you, after telling him the garage was losing money and that you were just looking for some one to pay the rent, after that did you sell
30 him the business? A. I didn't get you.

Q. After you told him that the garage was losing money—— A. I didn't tell him anything until he came to my office. All we spoke about each morning was he said, "How do you do? How are you getting along?" We never discussed our financial affairs with Mr. Creran until the time he approached me about the purchase of it.

Q. At that time you said the garage was losing
40 money and that all you wanted was a tenant to

pay the rent? A. My dear man, I am going to repeat what I said before.

Q. Did you say that or not? A. I didn't tell Mr. Creran any such statement at all.

Q. Can you tell us how much money was lost in the garage for one year as of April, 1924, to April, 1925. A. I will tell you something: our books will show you better than I can tell you, about the operation for the two years; the first year we had no business. 10

Q. Can you tell us how much you lost the second year. A. The two years combined was approximately $3300. I couldn't tell you any more, my accountant can give you better figures.

Q. Did you have that statement completed at that time showing the $3300 loss? A. It is sent to us every month.

Q. How many statements did you show Mr. Creran? A. He got the whole book for the whole year, the same as I have there. 20

Q. What year's report did that contain? A. The year previous to the month of April.

Q. How many reports did you get monthly from your accountant? A. One report.

Q. Is this the report you got (indicating)? A. That is the report from the accountant.

Q. When did you get this? A. Yesterday from his office files. 30

Q. Did you ever see that before? A. Never before until yesterday.

Q. Did you have it at the last trial? A. This report here?

Q. Yes. A. Certainly.

Q. Did you see it at that trial? A. I did not see it.

Q. Now, how do you know that this is the exact report you showed Mr. Creran if you have not seen 40

it now for something like four years. A. A certified accountant doesn't do any lying.

Q. That is why. A. There is a little dignity among some professions.

Q. That is why you think this is an exact copy? A. It cannot be anything else because he got that from our books.

10 Q. You did not retain any copy then of them at all? A. The copy I had Mr. Creran took, and never returned it.

Q. Did that copy for that year show how much was lost for that year? A. Why, certainly.

Q. What was that occasion when you gave him this book? A. When?

Q. Yes. A. On one of these occasions he came to one of these conferences we had.

Q. Was it after the contract was signed? A.

20 No, before the contract was signed.

Q. Did you give him the book then? A. He took it, he took the two sheets and he took the whole thing.

Q. Did he at that time take it with him? A. Yes, I never saw it again.

Q. You never asked him for it again at the time the contract was signed? A. He bought the thing the following week and I had no more interest in it.

30 Q. You testified on your direct examination regarding the note that you did not know there was a judgment entered in the case from the amount? A. I told you I did, but I did not know the amount.

Q. Do you know where Morton & Company had their office? A. When?

Q. In August, 1925. A. Why, I guess they moved to their new building May 1st.

Q. Your office is directly opposite 828 Broad

40 street? A. Directly opposite Morton Company.

Q. Your dental office is directly opposite 828 Broad street? A. Right.

Q. You knew from the day Morton & Company moved out that they had moved out from 828 Broad street? A. I knew it right along.

Q. You knew that building was closed up, didn't you? A. It was not quite closed.

Q. It was going to be torn down? A. Yes.

Q. You knew they moved to 723 Broad street. A. A block and a half down from Broad street. 10

Q. You saw their sign there, didn't you? A. Every one in Newark knows where Morton & Company is.

Q. Did you tell your bank that Morton & Company had moved?

Mr. Bobker: I object to that as immaterial.

The Court: Sustain the objection.

Defendant's counsel prays an exception to this ruling of the Court. 20

Exception noted as ground of appeal.

George W. Gross sworn in behalf of the plaintiff, in rebuttal.

Direct-examination by Mr. Bobker:

Q. You are the notary public who was connected with the Broad and Market National Bank, when the note was protested? A. Yes, sir. 30

Q. I show you Exhibit P-5 and I ask you if that was the card you used when you sent your notices? A. That is the card.

Q. Did you put that notice in a sealed, stamped envelope? A. Yes, sir.

Q. Where did you mail it? A. At the postoffice.

Q. In the postoffice building? A. In the postoffice building, Newark, New Jersey.

Q. Didn't they come back to you? A. No, sir. 40

CROSS-EXAMINATION BY MR. FUERSTMAN:

Q. You do not receive all the mail, do you, at the bank? A. My notary mail is returned to me.

Q. You do not receive all the mail that is received at the bank, do you? A. Anything——

Q. Do you? A. Anything I send out pertaining 10 to my notary work is sent to me.

Q. That is, if they return it to you you get it, that is the idea? A. Yes.

Q. The letter-carrier doesn't give all the mail to you? A. The letter-carrier doesn't bring our mail.

Q. Who brings the mail? A. Our runner; we have a box in the postoffice.

Q. Do you personally mail the notices? A. I personally mail the notices going out.

20 Q. Do you always? A. Always, every night.

Q. Where do you mail them? A. At the postoffice.

Q. There is a card in evidence bearing the address of 828 Broad street, is that in your handwriting? A. That is Mr. Kugleman's handwriting; the cashier now.

Q. How long has he been with the bank? A. Since 1912.

Q. Did you see him put that on? A. I will say 30 yes.

Q. When did you see him do that? A. Some time around 1921 or 1922, I think, I won't swear to it, but I can get those records.

Q. You think it was in 1921? A. I won't answer that question. I will withdraw the answer.

Q. Will you swear that you saw Mr. Kugleman put 828 Broad street, on that card? A. Yes, I will swear to that.

40 Q. If it was as far back as 1921 would you still

remember it? A. Yes, because, at that time I had charge of all the records.

Q. Is that why you say he did it because if you did not do it he must have done it, is that the idea? A. No, because we were both in the same cage on the same records.

Q. Your recollection is good if you remember every card, remember the day or the date or approx- 10 imately the time when an address is noted on any of your cards. A. I couldn't tell you the day.

Q. What can you tell us, the approximate time? A. I won't even try.

Q. Or that you saw any one in particular put it on? A. Yes, I will say that, because he and I were together at the time.

Q. How many of those cards have you in the bank? A. We handle about 5000 accounts.

20

Q. Between you, or each of you? A. Not alone.

Q. How many does he handle? A. We both handle them together.

Q. Out of the 5000 you handle would you remember that you saw any particular address put down by either one or the other? A. At that time I do remember, because if I didn't do it he did it, it was brought to my attention, and I saw him do it.

Q. What is there about that particular card that refreshes your recollection? A. There is nothing 30 about that particular card.

Q. You simply see this card and you recall that you saw him put down 828 Broad street? A. Let me straighten you out on that point. Every time an address is changed or a resolution comes into the bank he or I at that time had to know it because we were the tellers. He put that address down and he and I went over it together at the end of the day when our work was done and it was 40

double checked, all resolutions and changes of addresses; we had to be there to put the addresses on the card.

Q. You have no distinct recollection of it, though, have you? A. No.

Q. Therefore, you cannot say when you saw this put on? A. No, sir, I couldn't state.

10 Q. You do not know whether it was put on yesterday, do you? A. Yes, I do.

Q. That it was or was not? A. That it would not be put on yesterday.

Q. Why wasn't it put on in ink. You have your records in ink, haven't you? A. Not necessarily.

Q. If it was in ink—— A. In the bank as to addresses there is no legality of putting it on in ink, addresses.

Q. You do not carry them along in this manner,
20 do you? A. Yes, in any bank.

Q. Is that the way you change your records, in pencil? A. Any changes are made in pencil.

Q. And your records are changed in pen or pencil? A. It doesn't make any difference.

Q. You knew Morton & Company, didn't you? A. I did.

Q. You knew they were in your bank, didn't you? A. Yes.

30 Q. And you knew they had moved, didn't you? A. No.

Q. Your bank was on Broad street, corner of Broad and Market, and their sign was right across the way, about diagonally across, wasn't it? A. No, they were on the same side of the street we were.

Q. I mean their new address at 783 Broad
40 street? A. No.

Q. That is on the second floor over the Prudential annex building. A. I don't even know where it is now.

Q. Have you made any effort to find out? A. I never had occasion to only as I come into court here now.

Q. So far as you are concerned, for all you know, Morton & Company are still at 828 Broad street? A. As far as I know. 10

Q. You never made, or did not at that time make any effort to find out whether they were there or not outside of looking at this card?

Mr. Bobker: I object. There is no duty on him to do that.

Q. That is all you did, look at this card? A. Yes. 20

Q. Do you know Mr. Morton? A. Yes.

Q. Did you see him in the bank? A. Many times.

Q. Didn't he ask you to change the address from 828 Broad street? A. No, sir.

SOLOMON J. WALLACH sworn in behalf of the plaintiff, in rebuttal.

DIRECT-EXAMINATION BY MR. BOBKER: 30

Q. You are Dr. Radin's father-in-law? A. I am

Q. You are an officer of the New Lafayette garage, Inc., the owner of the garage on Lafayette street before the sale to Miller? A. I was.

Q. You still are an officer, director and stockholder of the Lafayette & Broad Realty Company? A. I am.

Q. That corporation owns the building wherein this garage is situated, is that correct? A. It does.

Q. Mr. Ruesen testified that a receiver was appointed for the garage, is that true? A. No, sir.

Q. A receiver was appointed for the realty corporation? A. There was.

Q. Who was the complainant in that suit? A. Greenbaum, I believe William Greenbaum.

Q. He was the manager referred to by Dr. Radin with whom you had your troubles and disputes?
10 A. Yes.

Q. He was also a stockholder? A. Yes, sir.

Q. What became of the appointment of that receiver? A. It was vacated by an order of the Court of Errors and Appeals.

Mr. Fuerstman: I object. I think the court record would be the best evidence, and I do not think it is material to this issue. It was a collateral statement brought out regarding who
20 managed it at the time. If they say there was not a receiver for the garage we accept that statement.

(Argument.)

The Court: The issue is whether certain words spoken were false or not. What in the world has the receiver of another company to do with this case? The issue is did Dr. Radin make certain statements that were false, and
30 did he know them to be false at the time, and did the defendant in this case act upon those statements and was he injuriously deceived. That is all there is to it. Were the statements made and were they false?

Q. Are you familiar with the garage space in that garage? A. I am.

Q. How many square feet are there? A. The lot is 90 by 180 feet. The building is a building the
40

full depth of the lot with an easement of 10 feet on one side for an alleyway making the net building space of 80 by 180 feet. There are stores on the front, and the entrance to the garage itself which runs back 30 feet, leaving a net space of the garage proper without any posts or pillars in it of 80 by 150 feet.

Q. During the two years prior to the sale to Miller do you know how much your net loss in running that business amounted to? A. I had my recollection refreshed this morning, and I think it was $2500. But I remember it was testified that it was $3300, but that takes in the entire three years when we took the building over and had no income and we started to pay salaries while we were building that garage business.

Q. During those two years did the realty company receive rent from the garage corporation? A. Yes, we got $1000 a month rent, or did several months at one time. I could not even tell you what period that was, since the corporation that virtually owned the garage made a slight concession in order to meet the income of the garage.

Cross-examination by Mr. Fuerstman:

Q. If you had charged up $1000 a month continuously the loss would have been greater, would it not? A. I think probably three or four hundred dollars more: it was several months only.

Q. You charged, according to the accountant's report, $750 for the month of July, 1924: $800 for the month of August, 1924: $800 for the month of September, 1924; $800 for the month of October, 1924; $800 for the month of November, 1924; $800 for the month of December, 1924: and then in January, 1925, you charged $1000. In all those months

I have related to you which I have just referred to, the rent is as I have stated? A. If they are in that statement they are absolutely correct.

Q. This statement does not contain a statement for the two years, does it? A. I haven't looked at it.

Q. You said you saw the statement. A. I didn't
10 say I saw that statement.

Q. This $1000, did that include the collection from the stores? A. No, sir.

Q. It was extra, the stores were extra? A. Yes, absolutely.

Mr. Bobker: I offer in evidence the accountant's report.

Mr. Fuerstman: That is objected to.

The Court: Sustain the objection.

20 Mr. Bobker: This account was referred to by counsel on the other side, and I think I have a right to offer it in evidence, he having used it.

The Court: That does not make any difference.

Morris W. Weinberg sworn in behalf of the plaintiff in rebuttal.

30
Direct-examination by Mr. Bobker:

Q. Are you an accountant? A. I am.

Q. Connected with Carl R. Hausner? A. Yes.

Q. Have you there the books of the Lafayette Garage, Incorporated? A. I have.

Q. Did you make an examination of those books and records for the month of January, 1924, to March, 1925? A. I did.

40 Q. Did you yourself make that examination? A. Certainly.

Q. I show you that report and ask you whether that represents the result of your examination? A. Those are the office copies of the result of the examination.

Q. Are those figures correct, so far as your examination was concerned? A. Taken directly from the books.

Mr. Bobker: I offer this report in evidence. 10

Mr. Fuerstman: I object. I want to examine the accountant first.

Q. (By Mr. Fuerstman.) Did you make the entries in the books? A. The entries were made by the bookkeeper.

Q. You do not know whether they were correct or not? A. I verified the entries monthly.

Q. From what did you verify those entries? A. From her record and the record she kept. 20

Q. You did not make the entries yourself? A. No, sir.

Mr. Bobker: The accountant is just to verify the errors.

Mr. Fuerstman: I object to the admission of the books on another ground: I think we are interested in one thing only. The accountant can refer to the books or any other memoranda 30 he has with regard to the particular account we have charged of the amount of gas and storage but not relating to something which has nothing to do with this case.

The Court: How are the statements you have there material?

Mr. Bobker: They contain the résumé of the business of June.

(Argument.) 40

The Court: Sustain the objection.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. (By Mr. Bobker.) Turn to the books which contain the entries pertaining to the income for June, 1924, relative to the storage of automobiles for day and night, and tell us what those items total. A. June 1st storage $199.45.

Q. How much was the night storage? A. $761.22.

Q. Turning to December what was the day storage in December? A. $314.75.

Q. How much was the night storage? A. $1295 and change, I don't know exactly, unless I take a pencil and figure it out.

Q. $1295 and change? A. Yes, sir.

Q. That is in excess of $1600? A. Yes, sir.

Cross-examination by Mr. Fuerstman:

Q. You do not know whether these are the statements or copies of statements that Dr. Radin showed Mr. Creran, do you? A. Those?

Q. Do you know what statement Dr. Radin showed Mr. Creran? A. The originals.

Q. Do you know that? A. Why, not.

[Plaintiff rests.]

JOHN J. CRERAN defendant, recalled in his own behalf in rebuttal.

DIRECT-EXAMINATION BY MR. FUERSTMAN:

Q. Were the papers Dr. Radin showed you anything like the sheets there (indicating). Those papers that were referred to as shown to the accountant? A. No, sir. 10

Q. What size are those papers? A. Two foot six wide and two foot on the length.

Q. Were they ink or pencil or were they typewritten? A. They were in ink.

Q. Did Dr. Radin ever give you a book like the one shown here? A. No, sir.

Cross-examination waived. 20

ADAM A. MORTON, recalled in behalf of the defendant, in rebuttal.

DIRECT-EXAMINATION BY MR. FUERSTMAN:

Q. Did you personally talk to Mr. Gross about changing your address at the time you moved from 828 Broad street to 783 Broad street? A. No, from 30 45 Clinton to 828 Broad street.

Q. I mean afterwards. A. No, I didn't tell him that.

Q. You did not see him after that? A. No.

[DEFENDANT RESTS.]

40

Mr. Bobker: I respectfully move for the direction of a verdict in favor of the plaintiff, and I will take up first the question of the non-receipt of the notice of protest. The answer to the third defense simply sets up the following: "Defendant did not receive notice of protest for nonpayment of said note." The certificate of the notary public was attached to the complaint at the time of the institution of suit, and the facts, therefore, alleged as set forth in that certificate are conclusive. In that certificate the notary public recites the fact that he mailed the notice of protest to this man at a certain address and the notice never came back to him.

(Argument.)

Mr. Bobker: Taking up the other ground; I say that as a matter of law there is nothing for the jury to consider on the question of fraud. In the first place, here is a contract where all prior transactions were merged. There has been no damage shown. Creran was an accommodation endorser: he endorsed the note for the accommodation of his brother-in-law.

Furthermore, I come back to the point I raised before where your Honor told the jury that as an endorser he could not set up this defense, this defense between the maker and Dr. Radin. The cases hold that it must be established by a preponderance of the evidence that the fraudulent representations charged were made with fraudulent intent.

(Argument.)

The Court: You spoke of a personal defense not being able to be interposed. The holder of this note and the endorser are successive parties in interest here. Why can't a personal defense be interposed between them? The note is made payable to Dr. Radin and then endorsed by Mr. Creran. The status of these two people is that one is a successor to the other. 10

(Argument.)

The Court: That is elementary. There are three real defenses and six personal defenses, I think. Now, you cannot, as I said yesterday, interpose a personal defense between the second endorser and a payee, but a real defense can assume that the note was taken for value before maturity. 20

(Argument.)

Mr. Bobker: On those two grounds I respectfully request that there be a judgment for the plaintiff against the defendant Creran, and I think we are bound by the judgment in the case of Creran *versus* Miller. I do not think the endorser is liable for anything more than the maker is liable for.

I, therefore, ask your Honor to return a verdict against Creran and in favor of Radin for the same amount as was rendered in the other case. 30

(Argument.)

(The jury retires.)

(Argument.)

At one o'clock, P. M., the court takes a recess of one hour. 40

AFTER RECESS

Mr. Fuerstman: I desire to move for the direction of a verdict in favor of the defendant on the following grounds:

The evidence shows that the defendant did not reside or have his personal place of business at 828 Broad street either at the time of endorsing the note or on the due date of same,
10 that he did not add any address after his signature to which the notice of protest was to be sent, and that the notary by inspecting a card bearing the name of Morton & Company, of which the defendant was an officer or director and finding the address on that card which was made in 1918, 828 Broad street, mailed a notice to the defendant Creran at that address, without making any further inquiry. This, we think is improper notice as a matter of law and
20 we respectfully ask for the direction of a verdict in favor of the defendant on that ground.

(Argument.)

The Court: I will deny both motions, and leave it to the jury on the questions of fact. I think it is a jury question, of course; it is not a question of law. As to the question of the notice of dishonor, if Mr. Creran had denied he had received the notice and if there was proof that it had been duly addressed and was
30 sent, as was said by Justice Parker in the case of People's Bank & Trust Company *against* Allen, there would still be constructive notice. It does appear in this case that the three defenses in my opinion, do not comply with the 21st section of the Evidence Act, Pamphlet Laws of 1900, page 368, so I will leave it to the jury.

Plaintiff's counsel asks for exception. Defendant's counsel asks for exception.

40 Exceptions noted as grounds for appeal.

Court's Charge.

The Court charges the jury as follows:

MOUNTAIN, *J.*

GENTLEMEN OF THE JURY. The case which you have tried is an action based upon a note. The payee of the note, Louis R. Radin, has brought this action against the endorser of the note, John J. Creran, and alleges that Creran should pay him the amount of the note with interest. 10

The defenses that Mr. Creran makes to this is that he was persuaded to sign the initial note by statements which he alleges were misrepresentations of Dr. Radin and as another defense he urges that he was not notified of the dishonor of this note in accordance with the law.

So far as the Court is concerned, I will only discuss the testimony that is material to these two defenses, and, if, in that discussion, I make any statement as to the testimony which is not in accord with your memory as to what the witnesses have said, you must take your recollection and not mine. 20

Mr. Creran said, among other things, that the original transaction contemplated the purchase of a garage, and he told us that the lease and the contract and the first note, of which this one is a renewal (indicating), were all signed at the same time, so that the transaction was, if I may use the expression, grouped. As I understood him, it was at that time and prior to that time that he complained these representations were made which he alleges were untrue. 30

Gentlemen, when you retire to the jury-room it seems to the Court that you should differentiate between the representations which were made before 40

the transaction and the condition that existed at the time of the transaction. This is what I mean, to take an entirely different example: Suppose I say to you before I sell you an automobile, "I have driven this car sixty miles an hour." Suppose after you acquire the car, you find you cannot make it go more than thirty. That does not necessarily in-
10 dicate that my statements were not true, for I have stated that I have driven the car sixty miles an hour, and the fact that perhaps for mechanical reasons, or otherwise, you cannot make the car go as fast as that, if you are foolish enough to try it, does not necessarily indicate that I did not tell the truth. If you should accuse me of misrepresentation, my effort would not be to show that you could have driven the car sixty miles an hour, but to
20 persuade you, if I could, that I had done it.

In this case Mr. Creran says that these were the statements that were made to him that were not true. He said that Dr. Radin told him that the income from gross storage of automobiles to June, 1924, was $1300. In December of that year it was $1500. He says that Dr. Radin told him, that he, Dr. Radin, was paying $1000 rent. He said that Dr. Radin told him that he sold 6000 gallons worth of gasoline a month and received a
30 refund of one cent a gallon, because, they sold 1000 gallons more than the required 5000 gallons fixed by the distributor. He stated further that Dr. Radin said that the garage would hold 125 cars: he stated further that just before he signed the note he said to Dr. Radin, "If what you have said is true I will endorse the note." There was testimony on the part of Mr. Creran, you may find, indicating that the garage did not hold 125 cars in storage.
40 There is testimony that you may find indicates that

Dr. Radin sold less than 5000 gallons of gasoline a month. There was testimony, if you consider the defense of Mr. Creran alone, and believe it, that Dr. Radin told him that he was making $200 a month clear, and that a year later he discovered that the gas that was bought from the company was less than 6000 gallons.

Dr. Radin, in rebuttal, took the witness-stand 10 and testified that he had shown Mr. Creran the monthly report for these two months in question and that was the statement of the business and the true statement of the business, and that he had made his statement from the day's report. He said he told Mr. Creran that his operating loss was $3300, and as I understood it, he pointed out to Mr. Creran, and the maker of the note, Miller, that there would be a saving in operating expenses if 20 Mr. Miller himself would superintend the garage, which the Doctor was not entirely able to do, and if Mr. Miller's wife would act as a stenographer in the business.

Without detailing the pros and cons to the alleged fraudulent statements, what about the notice of dishonor of the note in this case? Did Mr. Creran receive notice or did he not, in accordance with the law, and did the notary use due diligence? First of all, we find out that the notary public 30 mailed a notice to Creran at 828 Broad street, Newark, New Jersey, which was formerly the office of Morton & Company, of which Creran was an officer or employee, but that they had not been there for some months so that from the notarial certificate, if it is true that they had not been there some months, it would appear that it was not correctly addressed. There is testimony by Mr. Creran that he never received notice of the dishonor 40

of this note. He, in his answer has set forth that no notice of protest was ever received by him for the nonpayment of the note.

Gentlemen, the first question it seems to the Court that you should consider when you retire to the jury-room is whether there was a misrepresentation or not. It is not a question of whether Mr.
10 Miller and Mr. Creran were disappointed in the transaction, whether they thought they had a poor bargain, it is a question, so far as the misrepresentation is concerned, as to whether these representations made by Dr. Radin, if they were made, were false representations and were made in order to influence Creran's conduct and that relying upon them he endorsed the original note and subsequent notes, and if these representations were untrue, but
20 Creran believed them and was deceived because they were untrue.

The burden of proof is upon the defendant Creran to prove these misrepresentations were made. As to the notice of dishonor, the law is that where a note is dishonored for nonpayment by the maker or the party liable, that an endorser must have notice in accordance with the statute, and if that notice is not given he is discharged from liability. But how does the statute indicate that the notice
30 shall be given, both as to the method of protest, method of mailing and diligence which the notary should use under certain circumstances? On that point I am going to read the law because it is more succinct than I can express it. The Negotiable Instrument Act provides that where a person giving and the person to receive notice of protest reside in the same place, as they did here, that the notice if sent by mail must be deposited in the
40 postoffice in time to reach him in the usual course

on the day following. It further provides that where notice of protest is duly addressed, that is, addressed properly, and deposited in the postoffice, the sender is deemed to have given due notice, notwithstanding any miscarriage of the mails. Then, it provides that where a party has not added his address to his signature on a note then the notice must be sent either to the postoffice, to his office, 10 residence, or postoffice where he is accustomed to receive his letters. Lastly, there is a section of this act which provides that notice of dishonor shall be dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought, to be charged. Ordinarily, when a note is protested, what happens? As said by counsel, at three o'clock in the afternoon, as soon as the bank is closed, when it is discovered 20 what notes have not been paid they are immediately protested by a notary over his signature officially and he sends a notice to the endorsers and he does that himself generally by putting the notice in the postoffice or in a postoffice box. Those notices are supposed to be addressed. For instance, if a man lives in the city, and the note is protested in the city, after it is sent to his residence, then, notice is supposed to be sent to the street number in the city and if sent to his place of business the 30 same thing is true. If it is sent to some town the statute provides it must be the nearest postoffice address. The law goes a little further than that and says that if the notary public does protest the note and does duly address it and the notary does put it in the postoffice the addressee is supposed to receive it, and even though he comes in court and says, "I did not get it," he is deemed to have had constructive notice. 40

Now, in this case I am giving you the law, you must decide the facts. Certain questions will be put to you which you will answer, if you please, and they have to do with the protest and with the diligence of the notary, and also with the misrepresentation.

If you find the plaintiff is entitled to your verdict, there is testimony indicating that the face of the note was $1476.23, and that the interest due until today is $229.31, making a total of $1705.54. If you find for the defendant, of course, your judgment will be for the defendant.

I have two requests which I have been asked to charge for the defendant:

1. The burden of proving notice is on the plaintiff.

2. The burden is on the plaintiff to prove that the notary used due diligence.

(The jury retires.)

Mr. Fuerstman: I respectfully pray an exception to that part of your Honor's charge wherein your Honor said, "If the notary does protest the note and duly addresses the same, but does put it in the postoffice the addressee is supposed to have received it, or is considered as having received it." The only objection to that is under the evidence whether there was due addressing of the notice.

Exception noted on ground of appeal.

The questions propounded to the jury are as follows:

1. Did the plaintiff misrepresent the income and business done by the Lafayette Garage?

2. Did the holder of the note use reasonable diligence to ascertain the address of the defendant?

3. Did the notary use reasonable diligence to ascertain the address of the defendant.

4. Did the defendant receive notice personally? 10

Defendant's Requests.

Defendant's counsel respectfully requests the Court to charge the jury as follows:

1. The burden of proving notice is on the plaintiff. 20

2. The burden is on the plaintiff to prove that the notary used due diligence.

(The jury returns into the courtroom.)

Mr. Fuerstman sums up for the defendant.
Mr. Bobker sums up for the plaintiff.

30

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Jury's Return.

ESSEX COUNTY CIRCUIT COURT.

LOUIS R. RADIN, Plaintiff, vs. JOHN J. CRERAN, Defendant.	}

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The evidence being closed, the jury retired to consider their verdict, an officer being sworn to attend them, and having returned into court, say they have agreed upon their verdict, and by their foreman, say they find in favor of the defendant so they all say, and the jury failed to answer the question submitted to them in connection with the case.

20

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Rule for Judgment.

(Filed Feb. 28, 1929.)

ESSEX COUNTY CIRCUIT COURT.

LOUIS R. RADIN,
Plaintiff,

vs.

JOHN J. CRERAN,
Defendant.

10

Action was tried before Judge Worrall F. Mountain with a jury in the Essex County Circuit Court on February 28, 1929.

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

20

They find in favor of the defendant, John J. Creran and against the plaintiff, Louis R. Radin, whereupon it is adjudged that the complaint of the plaintiff be dismissed and the defendant recover of the plaintiff, costs, which are taxed at $

Judgment entered and signed February 28, 1929.

30

Exhibit P-1.

Newark, N. J. August 3, 1926

Int. 22/63/

$1476.23 /1498.86

Three Months after date I promise to pay to
10 the order of Sol J. Wallach and Louis R. Radin
FOURTEEN HUNDRED SEVENTY SIX and 23/100.....
.... Dollars
at BROAD & MARKET NATIONAL BANK OF NEWARK

VALUE RECEIVED

With interest at 6%

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

(Signed) CARL H. MILLER
20 36-40 Lafayette St.
City.

Endorsed:

John J. Creran
Louis R. Radin
Sol. J. Wallach

30

40

Exhibit P-2.

United States of America,
State of New Jersey ss
County of Essex, City of Newark on the 3rd day of November in the year of our Lord one thousand nine hundred and twenty six at the request of the Broad & Market National Bank of Newark, I, George W. Gross, Notary Public, duly commissioned and sworn, did present the original note above annexed at the Counter of the Broad and Market Nat'l Bank Newark, N. J. Teller thereof in attendance and demanded payment of said note which was refused. Whereupon, I, the said Notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the Maker and Endorsers of the said note as against all others whom it doth or may concern, for exchange, re-exchange and all costs, damages and interests, already incurred and to be hereafter incurred for want of payment of the same. And thereupon I did serve notice upon the drawer and endorsers by putting the same on the last day aforesaid in the Post Office of the City of Newark, New Jersey, sealed up with the postage thereon prepaid and directed as follows, viz:

Carl H. Miller......36 Lafayette St. Newark N J
John J. Creran.....828 Broad St "
Louis R. Radin.....837 Broad St "
Sol J. Wallach..... " " " "

Thus done and protested at Newark, New Jersey. In testimony whereof, I have hereunto set my hand and seal the day and year above written.

George W. Gross
Notary Public.

Plaintiff's Exhibit 2.

PROTEST

	$1498.86
Fees	$ 2.
Postage	$ 36
	$1501.22

10

THE BROAD AND MARKET
NATIONAL BANK
OF NEWARK, N. J.

11/3/1926

20 GEORGE W. GROSS, Notary
800 Broad Street
Newark, N. J.

Recorded in Book 24 of
Protest Page 496

30

40

Exhibit P-3.

United States of America }
State of New Jersey } ss.
County of Essex, City of Newark }

On the 3rd day of November in the year of our Lord one thousand nine hundred and twenty six at the request of the Broad & Market National Bank of Newark, I, George W. Gross, Notary Public, duly commissioned and sworn, did present the original note above annexed at the Counter of the Teller thereof in attendance, Broad and Market Nat'l Bank, Newark, N. J., and demanded payment of said note which was refused. 10

Whereupon, I, the said Notary, at the request aforesaid, did PROTEST, and by these presents do publicly and solemnly PROTEST as well against the maker and endorsers of the said note as against all others whom it doth or may concern, for exchange, re-exchange and all costs, damages and interests, already incurred and to be hereafter incurred for want of payment of the same. And thereupon I did serve notice upon the drawer and endorsers by putting the same on the last day aforesaid in the Post Office of the City of Newark, New Jersey, sealed up with the postage thereon prepaid and directed as follows, viz: 20

Carl H. Miller.....36 Lafayette St., Newark, N. J. 30
John J. Creran....828 Broad St. "
Louis R. Radin....837 Broad St. "
Sol J. Wallach....837 Broad St. "

Thus done and protested at Newark, New Jersey. In testimony whereof, I have hereunto set my hand and seal the day and year above written.

George W. Gross, Notary Public. 40

Exhibit P-4.

AGREEMENT, made the 30th day of April, 1925, BETWEEN—LOUIS R. RADIN, of Newark, New Jersey, SOL J. WALLACH and MILTON LICHTENSTADER, of the City of New York, State of New York, hereinafter called the parties of the first part:

10 NEW LAFAYETTE GARAGE, INC., a corporation of the State of New Jersey, having its principal office in the City of Newark, New Jersey, hereinafter called party of the second part; AND CARL H. MILLER, of the City of Newark, New Jersey, hereinafter called party of the third part:

The parties of the first part are the owners of all of the capital stock of New Lafayette Garage, Inc., which said corporation is the owner of the 20 garage business now being conducted at #36-40 Lafayette Street, Newark, New Jersey.

The parties of the first and second parts hereby sell to the party of the third part as of May 1st, 1925, such garage business, together with the goodwill thereof, and including all of the capital stock of New Lafayette Garage, Inc., and the party of the third part hereby purchase such business, goodwill and stock from the parties of the first and 30 second parts upon the following terms and conditions, which are agreed to and accepted by all of the parties hereto:

1. The party of the third part will pay to the parties of the first and second parts, for such business, good-will and stock, the sum of Three Thousand Dollars ($3000). The sum of Five Hundred Dollars ($500) is to be paid upon the signing and execution of this agreement, and the balance of 40 twenty-five hundred dollars ($2500) is to be paid

by making, executing and delivering to parties of the first part, and—or party of second part, a note for $2500.00, with interest at the rate of six per cent per annum, which said note is to bear the endorsement of John J. Creran, and which said note in the first instance shall be a three months note, so as to make the same negotiable, and which said note is to be reduced every three months by paying ten per cent of the principal balance thereof, together with interest, and which said note is to be renewed every three months and to be signed, endorsed, executed and delivered by the same parties. 10

2. Parties of the first and second parts expressly agree with party of the third part that said note will be reduced, renewed and continued at the expiration of each and every three months thereafter, in accordance with the terms of this agreement. 20

3. For the purposes of securing the payment of this note, party of third part expressly agree to permit Mr. Gardner of the Broad & Market National Bank of Newark, New Jersey, to hold the capital stock belonging to the parties of the first part in escrow, until said note is paid, and upon the payment thereof will redeliver said stock to the party of the third part. 30

4. All adjustments in connection with the conduct of the garage business, including rentals and any and all other items, shall be made as of May 1st, 1925.

5. Parties of first and second parts are to have access in and to garage during the month of May, 40

or at such other times for the purpose of collecting any and all outstanding accounts due and owing to party of second part as of May 1st, 1925, and party of the third part agree that all checks belonging to parties of the first part, and—or party of the second part as of May 1st, 1925, shall be properly endorsed and turned over unto parties of first
10 and—or second parts.

6. Parties of first and second parts expressly assign, transfer and set over unto party of third part all personal property now contained in and upon the garage premises and belonging to the party of the second part, excepting typewriter, adding machine and table.

7. It is expressly agreed and understood that
20 upon failure to make any ten per cent payment that the entire unpaid principal amount of the note shall be considered as due and payable immediately, anything herein to the contrary notwithstanding.

8. Party of second part agrees to pay any and all claims and liabilities due and owing by it in connection with the conduct of the garage business,
30 as of May 1st, 1925, and agrees to save harmless from any and all liability in connection with said debts all of the party of the third part.

40

In witness wherof, the parties to this agreement have hereunto set their hands and seals the day and year first above written.

In the presence of }

.... [SEAL] 10

.... [SEAL]

.... [SEAL]

New Lafayette Garage, Inc.

20

.... Pres.

Attest:

.... Secty.

.... [SEAL]
Carl H Miller

30

In the presence of }

David Bobker

40

Exhibit P-5.

Corporation Authorized signature of Acceptance

Morton & Co.

John J. Creran

J. J. Creran

Adam A. Morton

10 A. A. Morton

Business—Lumber— Address—828 Broad St.

Introduced by—Kanner.

20

30

Y5205

40

New Jersey Court of Errors and Appeals.

LOUIS R. RADIN, Plaintiff-Appellant, vs. JOHN J. CRERAN, Defendant-Respondent.	**Brief for Plaintiff-Appellant.**

Preliminary Discussion of Facts.

A suit was instituted on a promissory note by the payee in said note mentioned against the maker and endorser of said note, to wit, Carl J. Miller and John J. Creran, respectively (Case, p. 5, lines 1-40) (Case, p. 6, lines 1-20).

Both Miller and Creran filed answers (Creran's Answer, Case, p. 9).

At the trial of the issues, on complaint, answer and reply (Reply, Case, p. 12) of both Miller and Creran, a judgment for the plaintiff was entered against Carl H. Miller, and in favor of the defendant, John J. Creran, against the plaintiff, Louis R. Radin.

On a rule to show cause, obtained by the plaintiff, Louis R. Radin, the judgment in favor of the defendant, John J. Creran, was opened and a new trial ordered.

At the trial of this case, to wit, by the payee against the endorser, John J. Creran, the jury returned a verdict in favor of the defendant, John J. Creran (Case, pp. 114 and 115) and against the plaintiff, Louis R. Radin.

It is with respect to this determination that the appeal has been taken.

Statement of Issues.

In brief, the facts which gave rise to the controversy between the parties are as follows:

A suit was instituted on a promissory note (Case, p. 14). It was on a renewal note (so-called) being the fifth note given by the maker, Miller, and endorsed by the defendant, Creran, the original note having been in the sum of Twenty-five Hundred (2500) Dollars, and having been reduced every three months, by payments of ten per cent. on account of principal, pursuant to an agreement to that effect (Exhibit P-4, Case, p. 120).

The original note of Twenty-five Hundred (2500) Dollars was made May 3, 1925 (Case, p. 36, lines 8-12) pursuant to the agreement (Exhibit P-4).

On August 3, 1925, the due date of said note, a ten per cent payment was made on account, and a new note executed; similarly on November 3, 1925; similarly on May 3, 1926; and similarly on August 3, 1926 (which latter note became due November 3, 1926), and for which payment was refused. This is the note which is the basis of this suit.

This note, like all the rest that had preceded it, was payable at the Broad & Market National Bank. When this note was not paid, the notary public notified the parties to said instrument of the protest of said note, notifying particularly, the endorser of said note, John J. Creran (Exhibit P-2, p. 117) by personally (Case, p. 17, lines 20-30; Case, p. 93, lines 28-38; Case, p. 94, lines 18-19) sending a notice of protest to the endorser, to the address appearing on a card, containing the address of John J. Creran, which address appeared on a card in the files of the bank (Exhibit P-5, p. 124) the address being 828 Broad Street, Newark, New Jersey.

The defendant, John J. Creran, was an officer

and director of Morton & Co. (Case, p. 30), and the said Morton & Co. had an account with the Broad & Market National Bank (Case, p. 32, lines 30-40).

The said Broad & Market National Bank had a card (Exhibit P-5, Case, p. 124) containing the names Morton & Co., John J. Creran and J. J. Creran, with the address 828 Broad Street, Newark, New Jersey (Case, p. 23, lines 20-22).

The letter containing the notice of protest was never returned to the notary that sent it out (Case, p. 93, line 40).

The defendant interposed an answer to the complaint, (Case, p. 9) dividing said answer into three parts:

1. That the endorsement was without consideration.

2. That the transaction was conceived in fraud, and that the note was similarly tainted; and

3. That the endorser did not receive the notice of protest.

The first point was not pressed by the defendant at the time of trial.

The matters, however, under 2 and 3 (*supra*) were presented by the defendant, and apparently favorably, for the issues were found by the jury in favor of the defendant and against the plaintiff (Case, p. 114 and 115).

We shall first take up the matter alleged under 2, to wit,

Fraudulent representations, combining, because of its interrelation, the matters alleged as error, under 2 of grounds of appeal (Case, p. 2) and ground C and E (Case, p. 3):

2. The Court erred in submitting to the jury the question of alleged misrepresentations in connection with the note sued upon.

C. From the pleadings in the case defendant was estopped from settling up any continued misrepresentations of facts at the time renewal notes were issued by defendant to the plaintiff.

E. The defendant, by reason of renewing original note and making payments thereon, waived any fraud that did exist, and was estopped from setting up any alleged fraud perpetrations subsequent to the issuance of the original note.

It is clear from the testimony of both the witnesses for the plaintiff and for the defendant, that a garage business was sold by the plaintiff, and bought by the defendant, for the sum of Three Thousand (3000) Dollars, of which amount Five Hundred (500) Dollars was paid at the time of the sale (Exhibit P-4, Case, p. 120) and the balance, in the form of a promissory note, in the sum of Twenty-five Hundred (2500) Dollars, which sum was to be reduced by ten per cent payments on account of principal every three months; that after making payments and reducing the original note five specific times, the defendant stopped payment and refused to pay, justifying his action on the alleged false representations of the plaintiff in the inception of the transaction, on April 30, 1925, and the continuing of false representations and luring on, on each specific instance when the notes were re-executed.

The alleged false representations were categorically denied by the plaintiff.

Law.

It is respectfully contended that the Court erred in submitting to the jury the question of alleged misrepresentations in connection with the note sued upon; that

From the pleadings in the case, defendant was estopped from setting up any continued misrepresentations of fact at the time renewal notes were issued by the defendant to the plaintiff; that

The defendant, by reason of renewing original note, and making payments thereon, waived any fraud that did exist, and was estopped from setting up any alleged fraud perpetrated subsequent to the issuance of the original note.

If the answer (Case, p. 9) is examined, it will be found (second defense, p. 9, lines 30-35) that "the defendant says that the note referred to in the plaintiff's complaint was given as a renewal note for another note in the sum of Twenty-five Hundred (2500) Dollars, originally given to plaintiff, pursuant to an agreement made and entered into, etc."

This statement, of course, is contrary to fact.

The note upon which the suit was based, was a fifth renewal note, in the sum of Fourteen Hundred Seventy-six Dollars and Twenty-three Cents (1476.23) not in the sum of Twenty-five Hundred (2500) Dollars. The alleged misrepresentations (if made) were made, if at all, on April 30, 1925, the date of the agreement.

The answer is barren of any alleged misrepresentations at the time of the fifth renewal note.

The court, however, admitted the testimony (Case, p. 60, line 10; also Case, p. 60, lines 1-30). Objection was made to this testimony, and admitted over objection.

Though later, it may not be amiss to state, the Court struck out the testimony attempted to be interposed, relative the continued representations or misrepresentations with respect to the note sued upon (Case, p. 62, lines 39-40).

This brings us to the second ground of appeal, page 2.

The Court erred in submitting to the jury the question of alleged misrepresentations in connection with the note sued upon.

It is respectfully submitted that the Court, despite the fact that upon proper objection, did not allow the testimony to be adduced (Case, p. 62, lines 39-40), and that there was therefore nothing for the jury to pass upon, yet the Court in his charge (Case, p. 110) said: "Gentlemen, the first question it seems to the Court that you should consider when you retire to the jury room, is whether there was misrepresentation or not."

It is contended that if the plaintiff were suing the defendant for the full sum of Twenty-five Hundred (2500) Dollars, and if there had been no renewals, as in this case, and this was a suit to recover the unpaid purchase price of the business, the defendant would be in a position to interpose a defense of the

nature interposed here, but it is to be noted, that such is not the case. Nor is this suit, on the other hand, a suit in equity, where the complainant elects to rescind the contract by placing the parties in *status quo,* and returning the property obtained.

The significant fact appears that after being in possession from May 3, 1925 to November 3, 1926, a full period of eighteen months, during which period of time the defendant reduced the original note by payments on account, and with full knowledge of all the facts, and for the first time, did renounce the obligation by refusing to make payment.

The facts present an apt illustration of a person accepting, on the one hand, the benefits of a contract (though the contract may be an unprofitable one) and holding on, under the well known adage of "Hope springs eternal in the human breast", playing hot and then cold, and when after the acceptance of the benefits he is asked to share the burden, he very quickly renounces it.

Can it not be said with reasonable assurance of certainty that the defendant was trying to "crawl out from under" an unprofitable bargain by the method pursued herein?

Was it not the defendant's duty, as soon as he realized that he had been defrauded, as he alleged, to rescind his bargain and not wait a period of eighteen months to disaffirm in the manner herein?

Does the defendant's statement that he was continuously lured on, every time he endorsed a renewal note, strike with forcefulness?

Is it not rather the fact that, as testified, the lack of business was due to the inattention or lack of business ability of those in charge, and that the defendant was forced to adopt the defense of continued misrepresentations *ex necessitate?*

It may be contended that all of this is argumentative; that the jury took all of these matters into consideration in their deliberations; that they de-

cided adversely to plaintiff's contention. This is not offered with that view in mind, but to lay a premise for the doctrine of estoppel, which should have been invoked here, and to justify our position that the Court was in error in permitting any testimony to go in with reference to these misrepresentations.

In *Fitch* vs. *Archibald,* 29 L. 160, it was there held in a case where the defendant had agreed to purchase a certain amount of barytes from a certain ship that was delivering the barytes, and where the defendant purchaser, with full knowledge of their condition, voluntarily received them from the ship and paid the duty on them, that the defendant could not afterwards set up that the goods were not of a marketable quality.

Is this not illustrative of the principle contended for by the appellant herein, that the defendant had full knowledge, as he alleged, of a fraudulent scheme, yet acquiesced therein, by his conduct?

In *Coke on Littleton,* 352 A—Lord Coke—

> It is called an estoppel or conclusion, because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth.

In 10 *Ruling Case Law,* 676,

> An estoppel may be said to arise when a person executes some deed, or is concerned in, or does some act either of record of *in pais,* which will preclude him from averring anything to the contrary.
>
> And again in *10 Ruling Case Law,* 694, under the caption Acquiescence and Acceptance of Benefits, it seems that the acquiescence need not involve anything in the nature of a positive affirmation as the rule is well recognized that when a party with full knowledge, or with sufficient notice or means of

> knowledge, remains inactive for a considerable time or abstains from impeaching the transaction, so that the other party is induced to suppose that it is recognized, this is acquiescence, and the transaction, although originally impeachable, becomes unimpeachable.

And in *Bigelow Fr.* 436,

> It is the rule that the defrauded party to a contract has but one election, to rescind; that he must exercise that election with reasonable promptitude after discovery of the fraud, and that when he once elects, he must abide by the decision.

And in the equity side of our judicial system, we find that

> "Delay in rescission of the contract is evidence of a waiver of the fraud, and an election to treat the contract as valid and still subsisting."
>
> *Williamson* vs. *New Jersey Railroad Company,* 29 Equity 311, 19.
>
> *Brown* vs. *Mutual & Beneficial Loan Insurance Co.,* 41 Equity 350.

Delay in rescission of the contract, payments in pursuance of it, and continued dealing with it, and with reference to the fraudulent transaction after discovery of the fraud may be shown as evidence of an election to treat a fraudulent contract as valid.

Dennis vs. *Jones,* 44 N. J. Equity 513.

The Court erred in submitting to the jury the question of receipt of notice of protest by the defendant.

The Court erred in submitting to the jury the question of notary's diligence to ascertain defendant's address.

These two points will be discussed, together, being mutually involved.

We respectfully refer to the pertinent sections of Negotiable Instruments Acts, 3 Compiled Statutes, page 3747, which are as follows:

NOTICE OF DISCHARGE

PARAGRAPH 103:

I. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following;

II. If given at his residence, it must be given before the usual hours of rest on the day following;

III. If sent by mail, it must be deposited in the post-office in time to reach him in the usual course on the day following. (P. L. 1902, p. 600.)

105: NOTICE BY MAIL; miscarriage—Where notice of dishonor is duly addressed and deposited in the post-office, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails. (P. L. 1902, p. 601.)

106: NOTICE BY MAIL: deposit—Notice is deemed to have been deposited in the post-office when deposited in any branch post-office or in any letter box under the control of the post-office department. (P. L. 1902, p. 601.)

108: PLACE OF GIVING NOTICE.—Where a party had added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent as follows:

I. Either to the post-office nearest to his place of residence, or to the post-office where he is accustomed to receive his letters; or

II. If he live in one place, and have his place of business in another, notice may be sent to either place; or

III. If he is sojourning in another place, notice may be sent to the place where he is so sojourning.

But where the notice is actually received by the party within the time specified in this act, it will be sufficient, though not sent in accordance with the requirements of this section (P. L. 1902, p. 601).

Particular attention is directed to paragraph 105.

It is respectfully contended that on the testimony adduced before it, it was incumbent upon the Court to disallow the jury from passing on the question. "The sender is deemed to have given due notice, notwithstanding any miscarriage in the mails." So reads the act (section 105); the receipt or non-receipt is immaterial, for as was said in an early case in New Jersey, *Washington Banking Co.* vs. *King,* N. J. L. pages 45-47, "A written notice of dishonor of a note to the party to be charged, addressed to him properly and put into the post-office in due season, amounts to what is termed due diligence, even if the letter should never be received;" and in

Byron vs. *Hefferman,* Court of Errors and Appeals case, 119 Atl. page 12, it was held,

That the non-receipt of notice of protest by the party to be charged does not affect his liability to holder when notices are forwarded in due course to his address.

Citing,

Second National Bank of Hoboken vs. *Smith,* 91 N. J. L. 531.
Battery Park vs. *Ramsay,* 100 Atl. 51.

In the present case the following elements appear:

A. Parties resided in the same place.

B. The letter containing the notice of protest was deposited in the post-office personally, by the notary public, on the day of nonpayment, so as to reach the endorser in the usual course, on the day following.

C. The letter was properly stamped.

D. There was no address added to the signature, so that the notice was sent to his place of business, pursuant to paragraph 8, Section 2, of Negotiable Instruments Act.

E. The non-return of the letter containing the notice of protest by the notary public that sent it.

F. The claim by the defendant of the non-receipt of protest.

In short, all statutory elements fulfilled to the letter as against the bare statement of the defendant of its non-receipt. Shall we term them a balance on the one hand of "acts" as against that of "word"—of actions speaking with louder potency than that of words?

It is our contention that the question of non-receipt of notice was not for the jury; it was purely a legal question; not a factual one. It was for the Court, and for the Court alone, to determine, and under the provisions of the Negotiable Instru-

ments Act (*supra*) the issue should have been decided by the Court and in favor of the plaintiff. It was error for the Court to submit the question of receipt or non-receipt of notice. Plaintiff's motion for a direction of verdict in his favor should have been granted on this ground.

Taking up now, the question of due diligence, it is respectfully contended that "due diligence" is only required in a set of facts exemplified in such cases as

> *Second National Bank of Hoboken* vs. *Smith,* 91 N. J. L., page 531, and
> *First National Bank of Belmar* vs. *Carpenter,* 100 Atl. 435.

The latter case being one in the Circuit Court, where Judge Jess wrote the opinion and wherein the Second National Bank of Belmar (*supra*) was mentioned.

In each of the above two cases cited, the endorser was dead, and the notary public had to make inquiry, pursuant to Section 98 of the Negotiable Instruments Act, which is as follows:

> Death of Party Entitled to Notice;—
>
> When any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence, he can be found; if there be no personal representative, notice may be sent to the last residence or last place of business of the deceased. (P. L. 1902, p. 600.)

It is in such a case that the question of reasonable or due diligence enters.

Sections 103, 105 and 108 significantly fail to point to such a word as "reasonable" which does, however, appear in Section 98.

It is therefore respectfully submitted that the Court erred in submitting the case to the jury on the further ground of permitting them to decide whether the notary had used due diligence.

The trial judge propounded four questions to the jury which the jury failed to answer.

The Court, in its charge to the jury, directed the jury to answer four questions (Case, p. 112).

The jury retired and failed to answer any of the questions (Case, p. 114).

For the plaintiff, it is respectfully submitted that each of the four questions were improper, yet the plaintiff feels that under the peculiar circumstances of the case, he was entitled to know whether the jury decided the issues on the theory of misrepresentations, or on the theory of the notary public's failure to exercise reasonable diligence.

The answer to these questions vitally affects the plaintiff, because if it is upon the latter theory that the plaintiff was unsuccessful, a suit would properly lie by the plaintiff against the bank for negligence.

With reference to this point, the plaintiff is unable to refer the Court to citation of authority substantiating his position to the point advanced here, and respectfully submits the point on the factual question.

Summary.

A. There was no evidence before the Court with reference to misrepresentations with reference to the note sued upon. Ergo, there was nothing before the jury to pass upon.

B. The question of receipt or non-receipt of notice of protest was a legal, and not a factual one.

C. The question of reasonable diligence was not involved.

D. The jury failed to answer the questions propounded by the Court.

We therefore respectfully submit that the Court should have directed a verdict in favor of the plaintiff, and ask that the judgment entered in the court below be reversed.

Respectfully submitted,

David Bobker,
Attorney for Plaintiff-Appellant.

Louis Klatzko,
Of Counsel with Plaintiff-Appellant.

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New Jersey Court of Errors and Appeals.

LOUIS R. RADIN, Plaintiff-Appellant, vs. JOHN J. CRERAN, Defendant-Respondent.	**Action at Law.** **On Appeal from Essex County Circuit Court.**

BRIEF FOR DEFENDANT-RESPONDENT.

Statement of Case.

This case was tried twice. The first case before Judge Smith and a jury, at the Essex Circuit, resulted in favor of the defendant. A new trial having been granted on account of an alleged mistake in the Judge's charge, the matter came on to be heard before Judge Mountain and a jury, again resulting in a verdict for the defendant. From the latter judgment the plaintiff appeals.

The action was for the recovery of a balance alleged to be due on a note dated August 3, 1926, on which the defendant was an accommodation endorser (Case, p. 116). The answer alleges that this note was a renewal of an original note given on April 30, 1925 as part of the purchase price of a garage business; that the sale was induced by the fraudulent representations of the plaintiff-appellant, among other misrepresentations being one that *"the net profit for the preceding year was in excess of $2500.00* (Answer, Case, p. 10, line 27), and the defendant-respondent's endorsement pro-

cured by means of the same fraud, and further that the note was not duly protested, neither actual nor constructive notice having been given to the defendant-respondent in accordance with the requirements of the Negotiable Instruments Law. The plaintiff-appellant's reply joins issue on the defendant-respondent's allegations. (Waiver of fraud, if any, was not pleaded.)

Appellant's Contention.

As we view it, the plaintiff-appellant's brief relies upon several general grounds, variously stated by him, but resolving themselves into the following four *erroneous* legal propositions:

1. That fraud is a question of law and that a person induced by another to enter into a contract by fraudulent misrepresentations has but one remedy, to wit, to rescind, and cannot raise fraud as a defense in an action for the consideration, or on an endorsement of a note given as part of the consideration of such fraudulent transaction.

2. That, one continuing with a contract which was induced by fraud, automatically waives the fraud and cannot raise the question of fraud when sued on the contract, or on an endorsement of a note given as part of the consideration of the fraudulent contract.

3. That receipt of notice of protest is conclusively presumed in any case where it is mailed to a specific address which a notary had in the bank's files for ten years, even though the notary makes no inquiry as to the correctness of the address, the endorser does not actually reside at the address, and the endorser does not actually receive the notice of protest.

4. That a jury's failure to answer questions submitted by the parties is fatal to the verdict, even though the court merely instructs the jury to answer them if they "please," and actually, without objection of either counsel, directs the jury to return a general verdict.

We take exception to each of the plaintiff-appellant's propositions and respectfully submit that, correctly stated, the law is as follows:

THE LAW.

I.

Fraud is a question for the jury and is available as a defense on the contract or as a basis for an action of damages.

Whether or not fraud exists is a question for the jury. Rothstein *v.* Rothstein, 143 Atl. 366.

But it is to be noted that nowhere does the plaintiff-appellant dispute the existence of fraud, but merely asserts that the respondent was without legal right to interpose fraud as a legal defense. We will therefore briefly address ourselves to a consideration of that question.

The late Justice Katzenbach in Mairon *v.* Calabrese, 100 N. J. Eq. 315, succinctly says that:

> It is well settled that one induced to enter into a contract by fraudulent misrepresentations has a choice of two remedies, the first remedy is that, if the party who alleges he has been defrauded desires to rescind the contract, he must restore to the other party what he has received, and recover what he has paid or parted with under the terms of the contract. * * * The other remedy is for the party

> alleging that he has been defrauded to affirm the contract and institute an action at law for the damages he has sustained.

And so in Williston on Contracts, page 2714, Sec. 1526:

> The right to sue for deceit, which is based on the assumption that the fraudulent transaction is to stand, does not therefore require prompt action by the injured party. The statute of limitations alone prevents excessive delay.
>
> See also Wilson *v.* Nichols, 43 Atl. 1052; 72 Conn. 173; Randolph *v.* Witherspoon Oil Co., 291 S. W. 587; McDaniel v. Crabtree, 254 Wash. 1091; McKinley *v.* Warren, 218 Mass. 310; 105 N. E. 990.

II.

Fraud in inducing a contract is not waived merely because the buyer after discovering the fraud, makes a part payment on the price; and, in any event, waiver to be relied upon must be specially pleaded.

It is to be noted that the plaintiff-appellant in his replication merely joins issue on the defendant-respondent's plea of fraud. Therefore the question of waiver has no place in this appeal. However, had waiver been pleaded, the plaintiff-appellant could not complain that he had not been amply protected by the court's rulings and instructions.

In 27 C. J. 22 (Fraud), Sec. 135, the rule enunciated is that while the person injured by fraud may waive the right to set it up as a defense or as a counterclaim, the question whether acts done by

him after entering into the contract constitutes a waiver depends largely on his intent in doing them. See cases cited under same section.

In the case at bar, the original note was part of the purchase price of a garage, and the agreement of sale provided for quarterly renewals of said note on 10% reductions. The plaintiff-appellant contends that as the fraud became known to the respondent before the second renewal, the respondent waived the fraud by executing a new note. The appellant attaches no importance to the circumstances surrounding the renewal. What appears is that when the respondent, before the second renewal, informed the appellant that he believed a fraud had been perpetrated on him, the appellant replied (Case, p. 29, line 22):

> "I sold it to you on the basis of an income I derived from it for one year. * * * You must give it a trial for one year."

We ask if renewal of the note under such *"luring on"* (availing ourselves of the appellant's apt characterization), constitutes, as a matter of law, waiver of the appellant's fraud.

In Charbonnel *v.* Seebury, 23 R. I. 543; 51 Atl. 208, the court significantly says of a person who was in the same position of the respondent:

> He was bound to work long enough to find out whether the statements were true. If he had stopped at once, he would have met with the objection that he could not know that the business did not produce what was promised.
>
> See Williston on Sales, Sec. 646; 27 C. J. Sec. 138 (Under fraud); Hankland *v.* Muirhead, 233 Mich. 390; 206 N. W. 549.

At the end of the year, when the appellant's fraud was more apparent than ever, the appellant

held the respondent off with another proposition, saying (Case, p. 30, line 18):

> "Well, I will tell you. You give me another note, and I will take this up in New York, and I will see what I can do about it. I think I can fix it up and get the rent reduced so that you can make out."

Was a renewal under such circumstances a waiver?

In the several reported note cases that we have found, where there were renewals of notes previously given in fraudulent transactions, the courts have uniformly held that the discovery of fraud before the renewal was executed did not waive the fraud. Among the cases are Stroud *v.* Henderson, reported in 284 S. W. 45; Walnut State Bank *v.* Muller, reported in 211 N. W. 215.

And the general rule on the law of waiver seems to be as stated in 27 C. J. Sec. 135 (Fraud).

> Acts done in apparent affirmance of the contract amount to a waiver of the fraud only where they were done with the full knowledge of the fraud and all material facts, and with a clearly manifested intention of waiving the right to set up the fraud as a cause of action or as a defense.
>
> See also Johnson *v.* Culver, 116 Ind. 278; 19 N. E. 129; Kennedy *v.* Bender, 104 Tex. 149; 135 S. W. 524.

Furthermore, waiver of fraud, as well as fraud itself, is a question of fact for the jury. Colbach *v.* H. & B. Steffins Lumber Co., 144 Atl. 1 (Me.), and other cases cited in the 1st, 2nd and 3rd Decennial Digest (American Digest System) under Key No. 119 of Estoppel.

III.

That the sender of notice under the Negotiable Instruments Law is deemed to have given due notice, notwithstanding any miscarriage in the mails, is expressly limited, by Sections 105 and 108, to those cases where notice of dishonor is "*duly addressed;*" and notice of dishonor is dispensed with only when after the exercise of a reasonably diligent effort to comply with Sections 105 and 108, notice cannot be given or does not reach the party to be charged.

In the case at bar, although no address was added to the endorsement, notice of protest was directed to the respondent at *828 Broad Street, Newark, N. J.* Respondent never received it. It is also a fact that for months prior thereto, the respondent resided in Dover Street, Newark, N. J., and the only office maintained by him was as a *member of the firm* of Morton & Co., at 783 Broad Street, Newark, N. J. This was well known to the appellant, who in his testimony opined that "Everyone in Newark knows where Morton & Co. is" (Case, p. 93, line 11).

The sections of the Negotiable Instruments Law applicable to this case are 105, 108 and 112.

> 105. Where notice of dishonor is duly addressed and deposited in the Post Office, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails.
>
> 108. Where a party has added an address to his signature, notice of dishonor must be sent to that address, but if he has not given such

> address, then the notice must be sent as follows:
>
> (1) Either to the post office nearest to his place of residence, or to the post office where he is accustomed to receive his letters, or
>
> (2) If he lives in one place and has his place of business in another, notice may be sent to either place, or
>
> (3) If he is sojourning in another place, notice may be sent to the place where he is sojourning.
>
> 112. Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged.

These three sections must be read together.

We submit that where notice is not actually received, any departure, no matter how slight, from the directions as set forth in Sec. 108 vitiates the presumption of constructive notice raised by Sec. 105.

Thus in Trenton Trust Co. *v.* Hudson Mechanical Rubber Co., 209 N. Y. S. 30, it was held that if the endorser gives no address, and the holder directs the notice to a specific street number, he does so at his peril.

And in Siegel *v.* Hirsch, 26 Pa. Super. 398, it was held that if the endorser does not add an address to his signature:

> It is incumbent on the holder of the note not to add anything to the direction which may lead the carrier to deliver the envelope containing the notice to a wrong address. The Negotiable Instruments Law, Secs. 105 and 108 do not relieve the holder from the responsibility for miscarriage in the mails brought about in that way.

Likewise, *in re* Marwitz's Estate, 133 Atl. 220, a recent Pennsylvania case, also under the Nego-

tiable Instruments Law, the court, after stating the rule that a notice sent to a proper post office nearest to the residence of the endorser, or where he actually receives his mail, is ordinarily sufficient to bind him, significantly adds:

> If, however, a wrong address has been given (Siegel *v.* Hirsch, 26 Pa. Super. Ct. 398; Fitler *v.* Morris, 6 Whart. 406) and the failure to receive notice is shown, the official act is without validity.

As there was no actual notice in our case, and as Sects. 105 and 108 have not been complied with in that a specific street address was used instead of a "post office" address, the appellant obviously cannot by resorting to Sec. 112 show that he had exercised reasonable diligence.

By directing the notice to a street number instead of to a "post office" address as set forth in Secs. 105 and 108, the holder deprives himself of the benefits of Section 112 of the Negotiable Instruments Law, which applies to cases where notice is not received. In other words, by using a specific address, the holder assumes at his own peril the risk of having the notice *actually reach the endorser.*

In any event, whether or not in the proper case "reasonable diligence" has been exercised is always a question of fact for the jury. National Bank *v.* Gray, 101 N. J. L. 179; Marwitz's Estate, 133 Atl. 222 (Pa.); Winans v. Davis, 18 N. J. L. 276.

IV.

Where there is no direction that the jury return a special verdict, the Court charging (State of Case, p. 112, line 9): "If you find the plaintiff is entitled to your verdict, there is testimony indicating that the face of the note was $1,476.23, and that the interest due until today is $229.31, making a total of $1,705.54. If you find for the defendant, of course, your judgment will be for the defendant," failure to answer certain questions which the jury was requested to answer, if it "pleased" is not error.

Here certain questions mutually agreed on by the respective counsel were submitted by the court to the jury, without directing it to bring in a special verdict, but merely to answer them if they "please." No exception was taken by either counsel to the court's charge in that regard. Nor was there any objection made by the appellant to the general verdict as brought by the jury. We know of no rule which now gives the appellant the right to raise on this appeal an objection either to the form of the charge or to the general verdict by the jury.

On all these grounds it is respectfully submitted that judgment should be affirmed.

Respectfully submitted,

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