

NEW JERSEY
Court of Errors and Appeals.

BETWEEN

THOMAS P. MCKENNA,
Respondent,

and

RICHARD F. CORCORAN AND JOSEPH
A. DUFFY,
Appellants.

On Appeal.

Brief of Charles L. Corbin for Respondent.

The facts appear in the opinion of the Vice Chancellor. His findings of fact are sustained by the terms of the notes given by the defendant Duffy to the complainant (case, pp. 63 and 64), and by the written offer signed by Duffy to hire the complainant's house at \$600 (p. 62), followed by possession taken. These writings support the story of the transaction given by complainant and are inconsistent with the story of Duffy. The presumption raised by the note signed by Duffy that he owes \$600 to McKenna is not met; on the contrary, that presumption is strengthened by the evidence.

We have, therefore, established that when Corcoran bought the note from the bank, together with the judgment thereon against Duffy, he held two securities for his debt—one a judgment against Duffy, the principal debtor, the other, a right of action against McKenna who was surety

for Duffy. Corcoran enforced his right of action by suit against McKenna, the surety. When McKenna paid the judgment against himself, he demanded an assignment of the judgment held by Corcoran for the same debt against the principal debtor, which was refused, whereupon this suit was brought to compel the assignment under the right of subrogation which is ordered made by assignment of the Bank's judgment to complainant.

The right to this relief is so clear on the established facts, that it seems strange to find it disputed.

In *Bispham's Equity*, p. 446, the law is stated as "the generally received doctrine that a surety who "pays a debt which has been reduced to judgment, "is entitled to have the judgment kept alive for his "benefit, and to enjoy as against the principal "debtor exactly the same advantages which could "have been claimed by the judgment creditor."

In *Baylies on Sureties*, pp. 366, 367, it is stated that on payment of judgment by surety, equity will keep it alive and the surety is entitled to the assignment of the judgment against the principal.

A controlling precedent is *Irick v. Black*, 2 C. E. G., 189. There a third party bought up a judgment against two persons, one of whom was principal and the other surety, and proceeded to enforce payment against the surety. The Court required him first to exhaust his remedy against the principal. It was also held that before final decree the principal debtor must be made a party, so that the Court might determine whether he was the principal. "Whether the defendants in execution do in fact occupy the relation of principal and surety is the main subject of controversy, and that question cannot be settled, either as between the defend-

ants themselves, or in relation to the rights of the complainant unless they are both parties to the bill." It can make no difference whether there are two judgments for the same debt—one against the principal, and the other against the surety. The surety paying the debt takes all the remedies of the creditor against the principal debtor.

The fact that the complainant, when he paid the judgment against himself, did not tender payment of the costs recovered against Duffy is not material, for two reasons:

First—Corcoran did not place his refusal to assign on that ground, but both then and by his answer denied that he was the principal debtor (case, p. 11a). In such case tender is waived. *Hill v. Carter*, 101 Mich., 158; 59 N. W., 413.

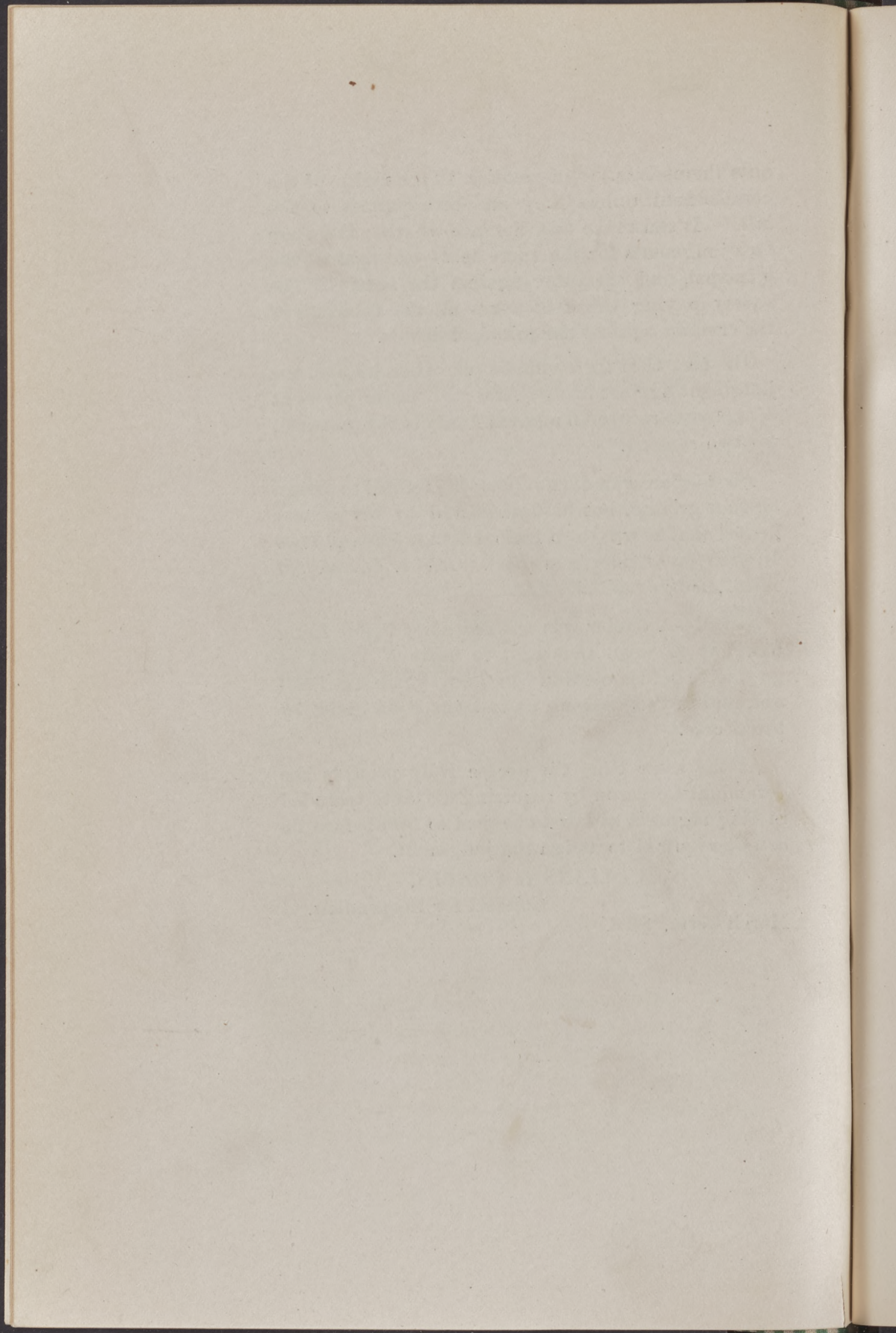
Second—A tender was not necessary before filing bill, but at most, the right to make it would be ground to refuse costs in Chancery against defendant, and in this case no costs have been given by the decree.

At the same time the decree fully protects the defendant Corcoran by requiring his costs included in his judgment at law to be paid to him before he can be required to assign the judgment.

COLLINS & CORBIN,

Counsel for Respondent.

March Term, 1906.



New Jersey Court of Errors and Appeals

Between
THOMAS P. McKENNA,
Respondent and Com-
plainant,

and

RICHARD F. CORCORAN and
JOSEPH A. DUFFY,
Appellants and Defendants.

On Appeal
from Chancery.

BRIEF OF DEFENDANTS.

The undisputed facts of the case are—

1. That on August 18, 1902, the defendant Duffy signed a note to the order of complainant for \$600., which was endorsed by complainant and transferred by him to the Citizens' National Bank. (Compl'ts bill pg 4a.)

2. That the Citizens' National Bank brought suit in the Supreme Court against Duffy alone and obtained judgment against him, dated June 16, 1903, for \$630.94, and costs \$33.90.

3. On October 19, 1903, this judgment was assigned by the Citizens' National Bank to defendant, R. F. Corcoran, who paid for same \$678.38. (Ex. D 4 and Ex. D 5.) The note being also delivered.

4. On June 7, 1904, judgment was taken against complainant on said note by Corcoran for \$701.78. (Compl'ts bill.)

5. Execution issued to Sheriff Monmouth on September 3, 1904. Amount due collected by Sheriff on said execution.

Prior to collection by the Sheriff on September 1, 1904, complainant in office of Collins & Corbin said he would pay execution to Sheriff if Corcoran would deliver the note and execute assignment of Duffy judgment to him, which defendant refused but would surrender note, which he did.

It is admitted, that the payment of the amount due on the judgment held by Corcoran vs. McKenna did not pay the whole amount due on the judgment held by Corcoran vs. Duffy by assignment, there being costs \$33 90 and interest still in arrear.

Duffy disputes personal liability and evidence is addressed to the point of proving that defendant Duffy was only *accommodation* maker, or surety for McKenna, the endorser.

FIRST.

The case presents no grounds for equitable relief.

This case presented is not such as the Vice-Chancellor postulates it, and on such postulation bases his judgment.

It is not a case, as Vice-Chancellor assumes, that defendant Corcoran holding two valid judgments on a note, one against maker and one against endorser, and that *after* endorser had paid the judgment *in full* he demanded an assignment from defendant Corcoran of his judgment against maker.

The case is that Corcoran did hold a judgment by assignment against maker.

That he did recover a judgment against McKenna on the same note as endorser.

That execution was issued on this judgment and in hands of Sheriff.

That while such execution was being executed on September 1st, and while *unsatisfied* in Sheriff's hands complainant offered to Corcoran to pay to *the Sheriff* the *amount due* on said judgment and demanded the note and an assignment of judgment Corcoran held against the maker, which Corcoran refused.

It was afterwards on September 3rd that complainant paid to Sheriff the amount of the execution.

No demand for assignment was afterwards made. (Bill pg 5 a)

1. There never was a tender or offer of tender made to defendant Corcoran.

It was a simple declaration made by complainant to Corcoran's attorney to pay to *Sheriff* a judgment *if or on condition* that Corcoran would assign another independent judgment held against a maker on same note.

No demand was afterwards made.

This was no tender, but proposal for agreement, which was not accepted.

a. A valid tender cannot be made to plaintiff in execution, being executed by a Sheriff and in his hands.

A tender to a *Sheriff* of amount execution is good.

Tiffany vs. St. John, 65 N. Y. 314.

But a tender or offer of tender made to a plaintiff or his attorney when the Sheriff is

executing his fi fa and has his own claim thereon for fees, is not good.

It is conditional that plaintiff or his attorney shall ascertain Sheriff's fees, stay execution and perform Sheriff's duties

An execution issued in enforcing a judgment throws a legal duty on officer which plaintiff is not obliged to interfere with.

b. The tender here was not an offer to pay plaintiff but to pay to Sheriff.

A tender may be made to agent or principal.

But it is not a tender to offer to agent to pay principal or make an offer to principal to pay agent.

SECOND.

If such were a tender it was invalid because of condition attached, as stated in bill (p. 5 a).

"Prior to making payment," &c., "your orator in presence of *attorney of record* of the said Richard F. Corcoran offered to pay the Sheriff the amount due on said judgment and demanded from said Attorney of record the delivery of the note and the assignment of the judgment which had been assigned to said Richard F Corcoran", &c., "and said attorney offered to surrender note to the Sheriff but refused", &c., "to assign judgment", &c.

Two things were demanded, one the assignment of first judgment, *then* refused.

The offer was to pay the judgment in execution which Corcoran had against McKenna.

Not a tender of Corcoran judgment against Duffy.

Yet the condition attached was the execution of an assignment by Corcoran of his judgment against Duffy.

In *Roosevelt vs. Bulls Head Bank*, 45 Barb. 579, where tender was accompanied by a satisfaction piece which plaintiff was requested to sign, this violated the tender.

In *Cass vs. Higenbotam*, 27 Hun. 406, in an action on a promissory note, defendant tendered the amount of note and demanded the return of certain diamonds which had been with plaintiff as collateral security for payment of note. It was held that this was not an unconditional tender.

In *Malone vs. Wright*, 34. S. W. 455, S. C. 90 Texas, 50, a tender to attorneys of a pledge of amount necessary to redeem a pledge on condition of the immediate surrender of pledged goods is not good, where person making the tender knows that the attorneys have not the pledge in possession and the attorneys are in doubt whether the party tendering has the right to redeem.

Sandford vs. Buckley, 30 Conn. 344.

Richardson vs. Boston Chem. Laboratory, 9 Metc. 42.

Robinson vs. Cook, 6 Taunton, 336.

Noyes vs. Wycoff, 114 N. Y. 204.

This was a condition attached that defendant could not perform.

1st. Because the judgment defendant had against Duffy remained still in force for \$33.90 and interest, which was not discharged by payment of judgment against McKenna.

2nd. That only an actual payment, not a tender to pay, effected a right in complaint to

subrogation, if such were subject of subrogation.

3rd. The judgment against Duffy in hands of Corcoran was satisfied pro tanto by payment of judgment against complainant and was unassignable.

4th. Because the defendant Corcoran as holder of both judgments on one instrument, when it was disputed by several defendants as to who was principal and who security, could not act in the matter before such question was legally determined.

THIRD.

The Vice Chancellor erred in decreeing a subrogation or compelling the defendant Corcoran to assign the judgment he holds against Duffy before that judgment was fully paid or discharged to him.

There was due to him on that judgment \$33.90 and interest.

This was never paid or payment offered.

The decree itself recognizes this, and strangely orders payment of this balance, or in other words orders complainant to do a thing which it was imperative should have been done before a suit in equity would lie.

This Court in *Receiver of Midland R. R. Co. vs. Wortendyke*, 12 C. E. Green, 568, 661, held that—

“The right of subrogation cannot be enforced until the whole debt is paid and until the creditor be wholly satisfied there ought not to be and can be no interference with his rights or his securities, even by bare possibility, to prejudice or embarrass him in any way

in the collection of the residue of his claim."

"These proceedings are prematurely brought," &c.

The surety may not meddle with creditors' rights and securities as long as any portion of the debt remains unsatisfied.

Bank of Pa. vs. Pontiers, 10 Wall (Pa)
148.

Richardson vs. Washington Bank, 3
Metc. 536.

Stamford Bank vs. Bourdict, 15 Conn.
437.

Wilcox vs. Fairhaven Bank, 7 Allen,
270.

If complainant has no right to subrogation,
he certainly has none to compel assignment.

FOURTH.

A plaintiff holding two distinct judgments on the same note cannot be compelled to assign one of said judgments to the defendant in the second judgment after such defendant has satisfied the execution issued on such judgment against him.

The case of *White vs Brown*, 29 N. J. Law, 514, relied upon by Vice-Chancellor in his opinion is distinguished from the present case.

1st. In that the voluntary assignment of the joint judgment by plaintiff to one defendant paying it, was under the authority of *Crane vs. Alling* in the nature of a covenant motto sue a joint debtor.

2nd. There was no intention to cancel said judgment.

3rd. The plaintiff was assigning a judgment in existence, the question in the case being whether or not such assignment *of itself* amounted to a discharge of the judgment.

In this case the defendant Corcoran had two judgments on the same note.

I.

The satisfaction of the execution issued on one of these judgments satisfied both judgments.

This was the common law method of procedure, and the doctrine is laid down in Chitty on Bills, marginal page 570—that “Whenever a holder of a bill, &c. has a remedy against several parties to it, he may commence and proceed in several actions against each of those parties at the same time, and an action commenced against one will not preclude any other remedy against the others; but as the different persons liable on the bill are debtor to the holder in respect to the same debt, satisfaction by any one will discharge the others from liability as to the principal sum due on the bill.”

Referring to *Windham vs. Withers*, 1st Strange, 515, and in *re (ex parte) Wildman* 2nd Vesey, Sr. 115, where Lord Hardwick said “In cases of bills of exchange or promissory notes where there is a drawer endorser, perhaps there may be more than one judgment against all, but there can be but one satisfaction.”

Burgess vs. Merrell, 4 Taunton, 468.

Hammett vs. Wymann, 9 Mass. 135.

II.

The satisfaction of the McKenna judgment by execution, so returned, absolutely took away from plaintiff the right to enforce the same defendant under the Duffy judgment.

The plaintiff could not issue execution upon it.

The plaintiff could not sue upon it.

If he could not, his assignee could not, no matter who such assignee was.

1st Story Equity Jurisprudence, sec. 499b. says "the doctrine is now fully established that the surety has no right to have enforced in equity, and that he cannot insist upon an assignment to him of the debt. The ground is that by payment of the debt the title derived under the instrument has become extinguished and that therefore an assignment thereof would be utterly useless and that it would make no difference if several judgments had been obtained by the creditor against the principal and surety, that the latter had paid the debt on the judgment against him and *sought an assignment* to be made of the judgment against the principal after the judgment had been extinguished by such payment, and the surety would not be permitted to avail himself of it against the principal."

There is a distinction in the case of the payment by McKenna before judgment and the enforcement of payment by Corcoran upon a judgment recovered.

Lord Eldon in Copis vs. Middletown, 1st

Turner and Russell, 224, was a case upon a bond, where the surety paid off the bond, and the action was to place the surety in the position of the creditor, and the Court held that the debt was extinguished, but that the rule of subrogation would extend to *securities which continued to exist*, and not go back for payment to the person of the principal debtor, and that as against the principal debtor it was *an action of law*.

In Hodson vs. Shaw, 3 Mylne and Keen, 183, Lord Brougham said "The rule here is undoubted, and it is one founded on the plainest principles of natural reason and justice, that the surety paying off a debt shall stand in the place of the creditor, and have all the rights which he has, for the purpose of obtaining his reimbursement." And quoting Craythorne vs. Swinburn, said "A surety, to use the language of Sir Samuel Romilly, will be entitled to every remedy which the creditor has against the principal debtor to enforce every security and all means of payment; to stand on place of the creditor . . . But can the creditor be said to have any specialty after the bond is gone by payment? The surety may *enforce any security* against the debtor which the creditor has, but by the supposition there is *no security to enforce*, for the *payment has extinguished* it. He has a right to have all the security transferred by him, but there are in the case supposed none to transfer—they are absolutely gone."

Adams vs. Drake, 11 Cush. 504, was a judgment on a joint note. Surety paid it and asked for an assignment. The Court held

that *payment of execution* by one of several defendants extinguishes the judgment, and it cannot subsequently be assigned and levy made thereunder.

Our Practice Act, 1903, page 543, remedies this Common Law rule regarding *joint* judgments, but does not apply to the old Common Law practice where *several* judgments are obtained.

The judgment against Duffy, if assigned by plaintiff, is not available in complainant's hands.

Courts of Law would not permit execution to issue because same is satisfied.

A suit on judgment would be defeated by a plea of payment.

The assignment, therefore, asked for and enforced by virtue of decree in this case is utterly of no avail or of any benefit to complainant.

The right of complainant, if he is surety, is a *legal right* against Duffy on his implied promise to indemnify him against loss.

Apgar vs. Hallam (E. & Ap.) 4 Zab.
812.

FIFTH.

Equity cannot usurp the right strictly belonging to Common Law Courts of determining questions arising on contracts, express and implied, and giving judgment thereon.

Equity cannot render new life to a law judgment absolutely dead.

Equity can preserve any liens acquired under such judgment, if necessary to protect surety, but that is not in this case.

Equity cannot presume to try the jury fact as to who is principal or surety in a cause where nugatory relief only is sought.

In this cause the decree that complainant be subrogated to the judgment held by Corcoran, and that such defendant assign that dead judgment, avails complainant nothing except the adjudication of a Court of Equity that Duffy is principal, to be used for what force it may have in an action at law, which complainant must bring against Duffy on the implied promise to repay.

Equitable jurisdiction in this case arises only under the doctrine of subrogation.

In *Irick vs. Black*, 2, C. E. Green, 189-195, it is clearly set forth "When a surety has paid the debt he may not only call upon principal to reimburse him, but for the purpose of obtaining indemnity he is at once subrogated to all the rights, remedies and securities of the creditor."

His remedy is not confined to law but he may file bill, &c.

Complainant files his bill to be subrogated to a *bare judgment*.

Not alleging or proving that by virtue of that judgment the holder Corcoran holds *any property* or has obtained *any lien* against Duffy.

The decree appealed from does not adjudge anything more than a subrogation to this bare judgment.

The bare judgment is not a right remedy or security in the hands of Corcoran. It is value-

less, unenforceable and not an evidence of debt in Corcoran's hands.

An assignee acquires no greater rights than assignor had.

A person subrogated stands in place and acquires only the rights of the person to whom he is subrogated.

In *Taylor vs. Dueyea*, 59 Equity 621-629, it is held that there could be no subrogation where the creditor's lien has gone.

Morgan vs. Wordell, 178 Mass. 350, it was held that a surety who discharges his liability by the payment of the principal debt does not thereby release the principal from liability to pay it, but he subrogates himself to the rights of the former owner of the claim and *stands in his shoes*.

In *Swarts vs. Siegel*, 117 Fed. 13-15, it was said that subrogation is the *substitution* of one person or thing for another. Here it is the substitution of one holder of a claim for another.

But one who holds the rights or claims of another by subrogation takes them *subject* to the *limitations* and *disqualifications* attached to them in the hands of his predecessor."

Shur vs. Swartz, 149 Pa. 53, 21 Atlantic R. 249.

In *re Abram Hewitt*, 10 C. E. G. 210, the Chancellor held that Equity would not enforce subrogation when unnecessary.

SIXTH.

The Vice Chancellor, we submit, errs in assuming that Practice Act (General Statutes, p. 2538, sec. 36. Pamp. L. 1903, p.

543) which gives power to Courts of Law to determine the issue of the primary and secondary liabilities of defendants on joint judgments taken against all parties on a promissory note, confers on Courts of Equity like powers where several individual judgments are taken against said parties.

Durand vs. Truesdall, 44 N. J. Law 596, cited by the Vice Chancellor is an issue at law framed on such joint judgment determining in a law court who is principal and who is surety *under said statute*.

D. L. & W. R. R. Co. vs. Oxford Iron Co., 38 N. J. Equity 153, was a petition in Chancery by a Receiver for direction, asking whether dividends due from a Receiver of a company should be paid to an assignee of an indorser of said Company. The Court said Equity had power to cause such application after endorser had paid, and quoted the act above mentioned by way of illustrating the fact that the legislature had extended such protection in case of joint judgments.

But this act does not extend to cases like the present where separate judgments are taken.

In such cases the judgment does not become a joint judgment.

The creditor becomes the holder of the two judgments for the same cause of action.

If execution is returned satisfied on one, the other is under control of a court of law, which will order it cancelled.

Equity cannot interfere to prevent it, unless that judgment holds in its clasp some property by way of lien, by way of levy, in which case

equity will hold the property to indemnify one who may be surety.

It is the property not the judgment that equity can reach.

The judgment itself is by law dead: it is no longer evidence of indebtedness, or serviceable to execute.

A Common Law action arises on the part of one claiming as surety against the alleged principal, on implied contract to reimburse.

And this question must under our constitution be submitted to a jury.

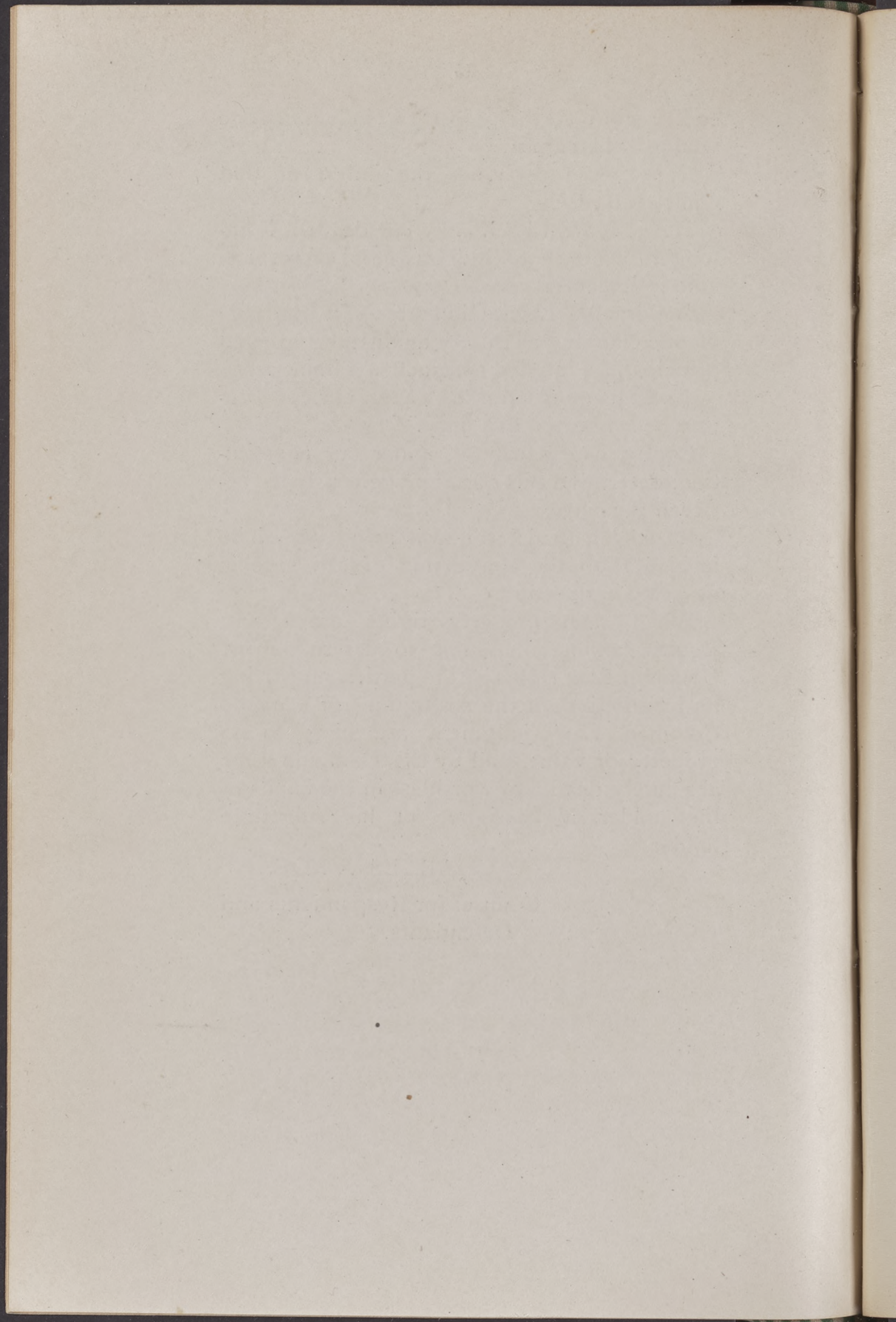
Equity courts cannot, under our constitution, determine this question generally as between the parties.

Its power to determine it at all would be incidental to the application of any specific property in question.

When such property rights are absent, Equity cannot so assume to determine the Common Law rights of the parties, supporting its jurisdiction on the scaffolding of a naked Common Law judgment attaching to no property or value, and by the Common Law absolutely dead and worthless in the hands of the holder, his assignee or his substitute holder.

CHARLES J. ROE,

Counsel for Respondents and
Defendants.



50-1a

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between	}	
THOMAS P. McKENNA,		10
Respondent,		
and		On Appeal from
RICHARD F. CORCORAN and JOSEPH A. DUFFY,		Chancery.
Appellants.		

PETITION OF APPEAL.

20

*To the Honorable the Court of Errors and Appeals in the
last resort in all causes:*

The petition of Richard F. Corcoran and Joseph A. Duffy, the appellants in the above-stated cause, respectfully show that your petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor, William J. Magie, Chancellor of New Jersey, bearing date the tenth day of July, nineteen hundred and five, wherein the said Thomas P. McKenna was complainant, and the said Richard F. Corcoran and Joseph A. Duffy were defendants, in this respect, to wit: that the said decree adjudges that the said Joseph A. Duffy is primarily liable for the debt on said note, and that the complainant is in the position of a surety thereon and is entitled to be subrogated to the judgment held by the said Richard F. Corcoran against Joseph A. Duffy on payment of the costs included in said judgment, and that the said defendant, Richard F. 40

~~20~~ 20

Corcoran, shall sign and deliver an assignment of the judgment recovered by him against Joseph A. Duffy, to the complainant within ten days from the date of said decree, on receipt from the complainant of thirty-three dollars and ninety cents costs, included in the said judgment, with interest thereon from the sixteenth day of June, nineteen hundred and three.

10 And your petitioners humbly appeal from that part of the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous, for that your petitioner, Joseph A. Duffy, is not primarily liable for the debt on said note, and that the complainant is not in the position of a surety thereon and is not entitled to be subrogated to the judgment held by the said Richard F. Corcoran against your petitioner, Joseph A. Duffy, on payment of the costs included in said judgment, and that your petitioner, Richard F. Corcoran, should not sign and deliver an assignment of the judgment recovered by him against Joseph A. Duffy, to the complainant, on receipt from the
20 complainant of thirty-three dollars and ninety cents costs included in the said judgment, with interest thereon from the sixteenth day of June, nineteen hundred and three.

Your petitioners therefore pray that the said decree of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden. And that your petitioners may have such relief in the premises as to this Honorable Court shall seem meet.

CHARLES J. ROE,

30 Solicitor and of Counsel with defendants
and appellants.

NEW JERSEY COURT OF ERRORS & APPEALS.

Between	} <i>On Appeal from</i>	10
THOMAS P. MCKENNA,		
<i>Complainant-Respondent,</i>		
and		
RICHARD F. CORCORAN and JOSEPH A. DUFFY,		
<i>Defendants-Appellants.</i>	<i>the Court of</i>	
	<i>Chancery.</i>	

ANSWER TO PETITION OF APPEAL.

20

The Answer of the above-named Respondent to the Petition of Appeal of the above-named Appellants.

This Respondent, not acknowledging all or any of the matters which in the said Petition of Appeal are contained to be true, for answer thereto, nevertheless, *says* and *admits* that a Decree was, on the Tenth day of July, Nineteen Hundred and Five, and made and entered in the Court of Chancery in the cause for that purpose mentioned in the said Petition, as therein stated; but as to the substance and form thereof, this Respondent *prays* to refer thereto when the same shall be produced; and this Respondent is advised, and believes, that the said Decree is agreeable to equity, and he *prays* that the same may be affirmed, with costs to be adjudged to this Respondent.

30

COLLINS & CORBIN,
Solicitors for and of Counsel
with Respondent.

40

4a

IN CHANCERY OF NEW JERSEY.

10 *To His Honor, William J. Magie,*
Chancellor of the State of New Jersey.

Complaining, shows unto your Honor, your orator,
THOMAS P. MCKENNA, of the Town of Long Branch,
County of Monmouth and State of New Jersey:

20 1. On the eighteenth day of August, Nineteen hundred
and two, at Long Branch, in the County of Monmouth,
JOSEPH A. DUFFY became indebted to your orator in the
sum of Six hundred (\$600) dollars and gave to your
orator his note, whereby he promises to pay to your orator,
or his order, three months after date thereof, the sum of
Six hundred dollars at the Citizens' National Bank of
Long Branch, New Jersey, for value received; which note,
dated August eighteenth, Nineteen hundred and two, was
delivered to your orator. Your orator endorsed said note
and sold and delivered the same for value to the Citizens'
National Bank of Long Branch.

30 On the eighteenth day of November, Nineteen hundred
and two, the said note was protested for non-payment and
the said bank brought suit in the New Jersey Supreme
Court against Joseph A. Duffy, and such proceedings were
had in said Court that a judgment was recovered by said
bank against Joseph A. Duffy for Six hundred and one dol-
lars and fifty-four cents (\$601.54), the amount due on said
note, with protest fees, besides interest from August eigh-
teenth, Nineteen hundred and two, with costs of suit; which
judgment was entered on the sixteenth day of June, Nine-
teen hundred and three, and still remains wholly unsatis-
40 fied.

5a

2. RICHARD F. CORCORAN, of Jersey City, purchased the judgment from the said bank, and said note was delivered to him and the said judgment was assigned to him, and the said Richard F. Corcoran began suit in the New Jersey Supreme Court against your orator as endorser on said note, and such proceedings were had that judgment was entered on June seventh, Nineteen hundred and four, in favor of the said Richard F. Corcoran against your orator for the amount due on said note, with costs amounting to Seven hundred and one dollars and seventy-eight cents (\$701.78). 10

3. Execution was issued on said judgment by Richard F. Corcoran against your orator to the Sheriff of the County of Monmouth, and on the third day of September, Nineteen hundred and four, your orator paid to the Sheriff the amount due on said execution, amounting, with interest and Sheriff's fees, to Seven hundred and thirty-two dollars and twenty-six cents (\$732.26). 20

4. Prior to the making of said payment and on or about the first day of September, Nineteen hundred and four, your orator, in the presence of the attorney of record for the said Richard F. Corcoran, offered to pay to the Sheriff the amount due on said judgment and demanded from the said attorney of record the delivery of the note and the assignment of the judgment which had been assigned to said Richard F. Corcoran by the Citizens' National Bank of Long Branch, and said attorney offered to surrender said note to the Sheriff, but refused, on behalf of the said Richard F. Corcoran, to assign the judgment, stating that he represented not only said Richard F. Corcoran, but also Joseph A. Duffy, against whom the said judgment so assigned was recovered. 30

5. Your orator shows that the said Joseph A. Duffy, against whom the said judgment so assigned was recovered, was the maker of said note and was primarily liable thereon, and that the liability on said note of your orator was that of endorser, and that your orator is the surety for the 40

62

debt held by Richard F. Corcoran against the said Joseph A. Duffy, and as such surety has satisfied the debt and is entitled to subrogation to all the securities held by the said Richard F. Corcoran for the debt, including the said judgment held by him against the said Joseph A. Duffy.

10 Your orator therefore prays that the said Richard F. Corcoran and Joseph A. Duffy may, without oath, answer the premises, and that the said Richard F. Corcoran may be adjudged by the decree of this Court to be the holder of said judgment, in trust for your orator, and to assign the same to him, and that the said Joseph A. Duffy may be decreed to pay to your orator the amount due to your orator on said note and judgment, and that your orator may have such other and further relief as may be equitable.

20 May it please Your Honor, the premises considered, to grant unto your orator not only the Writ of Injunction restraining the said Richard F. Corcoran from assigning or satisfying the said judgment against Joseph A. Duffy, but also the Writ of Subpoena, to be addressed to the said Richard F. Corcoran and Joseph A. Duffy, commanding them to answer the premises and abide the order of the Court.

COLLINS & CORBIN,

Solicitors and Counsel for Complainant.

30 STATE OF NEW JERSEY, ss:

THOMAS P. McKENNA, being duly sworn according to law, on his oath says:

I am the complainant named in the foregoing Bill. The matters therein set forth are true.

40 Joseph A. Duffy gave me his note for Six hundred dollars for rent of property at Long Branch, and I endorsed and discounted the same. Mr. Duffy did not pay it, and it

7a
was protested, and the bank brought suit against him and recovered judgment, which has not been satisfied.

Richard F. Corcoran took an assignment of the judgment from the bank, and the bank gave him at that time the note, and he brought suit against me as endorser and recovered judgment in the New Jersey Supreme Court and execution was issued on the judgment. I paid to the Sheriff of the County of Monmouth on September third, Nineteen hundred and four, the amount due on the execution, amounting to Seven hundred and thirty-two dollars and twenty-six cents. About September first, Nineteen hundred and four, I met the Sheriff, together with Mr. Roe, the attorney of record for Mr. Corcoran, and offered then to pay to the Sheriff or to the attorney of record the amount due on receipt of the note and of an assignment of the judgment which Mr. Corcoran held by assignment from the bank. Mr. Roe said he would give me the note but would not furnish an assignment of the judgment.

Subscribed and sworn to at New York,
this 7th day of September, A. D.,
1904, before me,

20

THOMAS P. McKENNA.

ANDERSON PRICE,

M. C. C. of N. J.

30

40

85

IN CHANCERY OF NEW JERSEY.

10

BETWEEN

THOMAS P. McKENNA,
Complainant,

AND

RICHARD F. CORCORAN and
OTHERS,
Defendants.

On Bill, &c.

20

ANSWER.

The Answer of Joseph A. Duffy, one of the defendants, to the bill of complaint of Thomas P. McKenna, complainant:

30

This defendant answering says, that he denies the allegation made in the bill of complaint that on the eighteenth day of August, Nineteen hundred and two, at Long Branch, in the County of Monmouth, he became indebted or was indebted to the complainant in the sum of Six hundred dollars and gave to the complainant the note therein stated in payment thereof; but he admits that such note as therein stated was given and that suit was brought thereon against this defendant, as stated in paragraph 2 of said bill, but defendant says that the judgment was not as stated in the said bill of complaint, but was for the sum of Six hundred and thirty dollars and ninety-four cents damages and

40

Thirty-three dollars and seventy cents costs of suit.

~~87~~ 9a

That he believes that it is true that the said Richard F. Corcoran brought suit by attachment and obtained a judgment and issued execution as stated in paragraphs 2 and 3 of said bill of complaint.

That he desires the allegation in paragraph 5 of said bill of complaint that this defendant was the maker of said note and primarily liable thereon, or that the liability on said note of the complainant was that of endorser, or that the endorser was surety for the debt held by the said Richard F. Corcoran against this defendant. 10

4. That on the eighteenth day of August, Nineteen hundred and two, this defendant was in the law office of the complainant at 25 Broad Street, New York City, and that the said complainant then and there requested this defendant to aid him in raising the sum of Six hundred dollars, and desired him to sign a note as the accommodation maker thereof, in order that the said complainant might the more readily discount and receive the money on said note. 20

5. That this defendant at first refused to sign the said note, but subsequently did so at the urgent solicitation of the said complainant as a favor to him; that after the said note was made, as aforesaid, the said complainant requested this defendant to take the said note to the Citizens' National Bank at Long Branch and have the same there discounted for his use and credit, and that thereupon the said defendant did, afterwards, to wit, on the nineteenth day of August, Nineteen hundred and two, take the said note to the said bank, together with the bank-book of the said complainant which had been entrusted to this defendant, and then and there stated to the cashier of said bank that this defendant had brought the said note there to be discounted for the credit of the complainant, and that while the said note was signed by this defendant as maker that he was an accommodation maker upon said note and surety for the said complainant, and that the said note was then taken by the said bank and discounted and credited for the 30 40

sum entered upon the complainant's pass-book, which this defendant afterwards delivered to the said complainant.

6. That after the said note was due and protested this defendant requested the said bank, which had notified him that the said note was not paid, to bring suit against the said complainant and this defendant, and again stating that he was a surety on said note and that the relative position of the complainant and this defendant in said note could
10 be easily determined.

7. That the defendant received no reply to this request and on or about the ninth day of January, Nineteen hundred and two, the said Citizens' National Bank of Long Branch brought suit against this defendant upon said note, and that after this defendant was served with said summons and declaration he again requested the bank, through Benjamin P. Morris, the attorney of record and a director of said bank, to join the said complainant in the said action,
20 which was refused, and that afterwards such proceedings were had in the said suit that on the sixteenth day of June, Nineteen hundred and three, a judgment was entered against this defendant for the sum of six hundred and thirty dollars and ninety-four cents damages and thirty-three dollars and seventy cents costs of suit.

8. That afterwards the said Benjamin P. Morris, the attorney of said bank, stated that the said complainant had agreed to pay him or the said bank fifty dollars to bring
30 the said suit against this defendant as aforesaid.

That afterwards, as this defendant is informed and believes it to be true, the said Richard F. Corcoran took an assignment of said judgment and began proceedings against the said Thomas P. McKenna upon the said note, which resulted in the judgment stated in the complainant's bill of complaint.

And this defendant in further answering says, that while
40 he is the maker of the said note, he is but accommodation

maker and not primarily liable thereon, and that he received no benefit on the said note, and that the proceeds of the same after it was discounted by the Citizens' National Bank were paid to the said complainant; and that while the said complainant appears as endorser on said note he is primarily liable thereon, and that this defendant is surety for the said complainant in respect to said debt, and that the payment by him of his said judgment is a satisfaction of the said debt and is an exoneration of this defendant, except so far as this defendant is liable for the costs upon the said judgment taken by the said Citizens' National Bank against him and held by the said Richard F. Corcoran, and which he is alone liable to pay. 10

Wherefore this defendant humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

CHARLES J. ROE,
Solicitor for Defendant. 20

30

40

70/2a

IN CHANCERY OF NEW JERSEY.

10	Between THOMAS P. McKENNA, and RICHARD F. CORCORAN and OTHERS,	Complainant Defendants,	} On Bill, &c.
----	---	--	----------------

ANSWER.

20

The Answer of Richard F. Corcoran, one of the defendants, to the bill of complaint of Thomas P. McKenna, complainant.

30 1. This defendant answering says, that on the sixteenth day of June, Nineteen hundred and three, the Citizens' National Bank of Long Branch recovered a judgment in the New Jersey Supreme Court against Joseph A. Duffy for the sum of Six hundred and thirty dollars and ninety-four cents damages and Thirty-three dollars and ninety cents costs of suit, upon a note made by the said Joseph A. Duffy in the sum of Six hundred dollars, to the order of the complainant, Thomas P. McKenna, and dated August 18th, 1902, payable three months after date, as stated in the complainant's bill of complaint.

40 2. That on the first day of October, Nineteen hundred and three, the Citizens' National Bank of Long Branch, in consideration of the sum of Six hundred and seventy-eight

dollars and thirty-eight cents to it paid by this defendant, transferred to this defendant in writing the said judgment, and also delivered to this defendant the note upon which the same was founded.

3. That this defendant having collected or secured nothing on the said judgment from the said Joseph A. Duffy, afterwards, to wit, on the ninth day of December, Nineteen hundred and three, caused an attachment to be issued out of the Supreme Court of the State of New Jersey, against the goods and chattels of the said Thomas P. McKenna, upon the said promissory note, and that such proceedings were had therein that the said Thomas P. McKenna, the complainant, entered an appearance and received a declaration; and that afterwards, to wit, on the seventh day of June, Nineteen hundred and four, a judgment was entered in the said suit in favor of this defendant against the said Thomas P. McKenna, the complainant, for the sum of Seven hundred and one dollars and seventy-eight cents damages and costs, and that this defendant caused an execution to be issued thereon to the Sheriff of the County of Monmouth.

4. That on or about the first day of September, Nineteen hundred and four, the said complainant called this defendant's attorney of record to the law office of Collins & Corbin in Jersey City, at which place was a Deputy Sheriff of the County of Monmouth, and then and there the said complainant stated that he was ready to pay to the said Sheriff the said execution, or the amount of damages, costs and Sheriff's fees due thereon, if the defendant would make him an assignment of the judgment recovered by the Citizens' Bank against the said Joseph A. Duffy, and which had been assigned to this defendant; that this defendant then refused, through his attorney, to give such assignment in consideration of such offer of the payment of said execution, but stated his willingness to give to him the note upon which such judgments were founded.

5. That the amount due this defendant upon the said execution for damages, costs and execution fees was the sum

of Seven hundred and thirty-two dollars and twenty-six cents, and that the said defendant on the said third day of September paid to the said Sheriff the sum of Seven hundred and twenty-five dollars thereon, and that afterwards, on the Seventh day of September paid the balance of seven dollars and twenty-six cents, which satisfied the said judgment.

- 10 6. That the payment of the amount due on the said execution did not pay the judgment that was recovered by the said Citizens' National Bank against the said Joseph A. Duffy and assigned to this defendant, but that the said payment operated only, so far as this defendant was concerned, to satisfy as against this defendant only a part of said judgment, to wit, said sum of six hundred and thirty dollars and ninety-four cents recovered as damages, and that this defendant still had an interest to the amount of thirty-three dollars and ninety cents as and for the costs recovered together with the interest; and he submits that he was not
- 20 obliged to assign said judgment, if the complainant was entitled to the same, until the whole amount due thereon was paid or tendered to him, which the said complainant has never done or offered to do.

Wherefore this defendant humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

CHARLES J. ROE,
Solicitor for Defendant.

IN CHANCERY OF NEW JERSEY.

BETWEEN

THOMAS P. McKENNA,
Complainant,

AND

RICHARD F. CORCORAN and
JOSEPH A. DUFFY,
Defendants.

On Bill, &c.

10

*Hearing and
Proofs.*

APPEARANCES:

20

COLLINS & CORBIN, *for Complainant.*

C. J. ROE, ESQ., *for Defendants.*

Before HON. LINDLEY M. GARRISON, Vice-Chancellor.

CHANCERY CHAMBERS, Jersey City, N. J., June 13, 1905. 30

THE CASE FOR THE COMPLAINANT.

MR. CORBIN. Your Honor will see that the issues are considerably narrowed by the pleadings; and I think there is nothing more for me to do on the opening than to put in the note and call Mr. McKenna to testify briefly in regard to his request for an assignment and offer to pay, and the refusal on ground stated in the answer.

40

THE VICE-CHANCELLOR. What about the allegation in Mr. Corcoran's answer that, in any view of the case, there are some thirty dollars due him and which must be paid before he could be called upon to assign the Citizens' National Bank vs. Duffy judgment?

MR. CORBIN. Well, I think that may be so. The bill, however, as shown by the answer itself, is based upon a denial of any liability at all.

10

THE VICE-CHANCELLOR. By Duffy.

MR. CORBIN. Yes.

THE VICE-CHANCELLOR. But there is no dispute that if Mr. Corcoran is to be called upon to assign that judgment it would only be upon payment of any amount remaining due to him on it?

20

MR. CORBIN. Yes, sir.

THOMAS P. MCKENNA, *sworn*.

BY MR. CORBIN:

Q. Mr. McKenna, you are the complainant in this cause?

A. Yes, sir.

30 Q. Did you meet Mr. Roe, as attorney for Mr. Corcoran, in the office of Collins & Corbin about the time the judgment was paid?

A. Yes, sir.

Q. What conversation did you have with him about an assignment of the Corcoran judgment?

40 A. Well, you had arranged for the Deputy Sheriff of Monmouth County to be present at the time, and telephoned Mr. Roe that he was to be at your office, and asked him to come over for the purpose of taking up this matter; and then the Sheriff had present with him a full statement of the judgment, which was submitted there to

all of us, and then I offered to Roe the amount of that statement.

BY THE VICE-CHANCELLOR:

Q. Which judgment are you now speaking of?

A. I am speaking now of the judgment against me.

Q. The Corcoran judgment?

A. Yes, sir.

10

BY MR. CORBIN:

Q. And what request did you make in regard to the judgment?

A. I asked Mr. Roe to assign the judgment to me.

BY THE VICE-CHANCELLOR:

Q. Which judgment did you ask Mr. Roe to have assigned to you? 20

A. Why, the judgment that Mr. Corcoran had against me.

MR. CORBIN. No, no.

THE WITNESS. Well, there is a statement of it.

Q. You are a little mixed on this. What was the first judgment that Mr. Corcoran had recovered—what was the first judgment that had been recovered? Are you talking about the judgment recovered by the bank? 30

A. That is the one I am talking about.

Q. That is the one you asked him to assign?

A. Yes, sir.

Q. That is the judgment of the Citizens' Bank of Long Branch vs. Joseph A. Duffy.

A. That is the one. That is the one we considered as collateral.

40

BY MR. CORBIN :

Q. What did he say in regard to what he would do?

A. He said that he could not do that, as he also represented Mr. Duffy, and that Mr. Duffy requested him not to assign that judgment, and that he would not do it, to protect Mr. Duffy's interests.

Q. Now, what did he say about the note, about turning over the note?

10 A. He said he saw no objection to turning over the note; and then the money was paid to the Sheriff, and the Sheriff received the note, as I understand, and there was an endorsement on the back of it, and with that endorsement he turned the note back to me.

Q. Now, I show you a note; is that the note on which the judgment of the Bank was recovered?

A. Yes, sir.

Q. Signed by Mr. Duffy?

A. Yes, sir.

20 Q. To your order?

A. Yes, sir.

Q. And endorsed by you?

A. Yes, sir.

THE VICE-CHANCELLOR. Is this also the note on which the Corcoran-McKenna judgment was recovered?

MR. CORBIN. Yes, sir. Mr. Corcoran also recovered
30 judgment against Mr. McKenna as endorser.

Q. Now, the endorsement on it was written after it was signed by you?

A. Yes, sir.

Q. That was written before it was delivered—before it was rendered up?

A. Before it was rendered up to the Sheriff.

Q. Afterwards the note was given—

A. (Interrupting.) The note was given to the Sheriff,
40 and the Sheriff gave it to me.

MR. CORBIN. We offer the note and notice of protest in evidence. (Admitted without objection, and marked Exhibit 1 of Complainant.)

THE VICE-CHANCELLOR. (To the stenographer.) Take a memorandum of this exhibit on the notes Mr. Black: The face of the note is "\$600.00. Long Branch, August 18, 1902. Three months after date I promise to pay to the order of Thomas P. McKenna Six hundred dollars at the Citizens' Bank of Long Branch, N. J. Joseph A. Duffy." 10
On the back is the written signature "Thomas P. McKenna," and then in a different handwriting (which Mr. Roe now admits is his, Roe's, handwriting) the following "In Judgment. June 16th, 1903. For \$664.64 against Joseph A. Duffy at suit of the Citizens' National Bank of Long Branch, in Supreme Court, assigned October 1, 1903, to Richard F. Corcoran. Judgment June 7th, 1904, for \$701.78 against Thomas P. McKenna at suit of Richard F. Corcoran in Supreme Court both on within note." 20

CROSS EXAMINATION.

BY MR. ROE:

Q. Mr. McKenna, you made an appointment to meet me at Mr. Corbin's office, did you not?

A. I think so; yes. 30

Q. Will you just look at that letter that I show you (handing witness a letter); is that your letter?

A. Yes, sir.

Q. That is the letter making the appointment, is it not?

A. I couldn't say that that is the date of the appointment. You can tell it by comparison with the endorsement there. This was making the appointment for you at Mr. Collins' office.

(The letter identified by the witness is now marked for identification "G. W. B., 1.") 40

Q. You had several talks over the 'phone, with reference to this judgment of Corcoran's against you, with me, had you not?

A. I don't remember any.

Q. You had communicated prior to this, about paying that judgment, with me, had you not?

A. I do not recall. I think that any communications from me were probably made from Collins & Corbin's office.

10 Q. Is this your letter (showing witness a paper dated June 30, 1904)?

A. Yes, sir.

(The letter identified by the witness now marked for identification "G. W. B., 2.")

Q. What time was it that you met me at Mr. Corbin's office?

20 THE VICE-CHANCELLOR. Do you mean the time of day?

MR. ROE. No, what time of the month, what date?

A. Well, I have no way of fixing the date of the appointment. I know we were there. By reference to that endorsement, if I had it here before me, no doubt that states exactly the date.

30 Q. And you made a suggestion to me to make an assignment of the Bank judgment that day, whenever it was, that we met at that office?

A. Yes, sir.

Q. That was the first time you had made any such suggestion to me, wasn't it?

A. I think so.

Q. And didn't I tell you that I could not assign that judgment, that the payment of your judgment killed it so far as we were concerned?

A. No, sir.

Q. Didn't I tell you that?

40 A. You made no such statement.

Q. Then did you not take me into Mr. Corbin's office, Mr. Charles Corbin's office?

A. No, sir; we were all sitting in Mr. Charles Corbin's office waiting for you, and Mr. Corbin had telephoned over his telephone for you, and I sat there waiting for you, with the Sheriff.

Q. Was not the first interview in the office of Mr. Hobart, or someone connected with that office, and after that we went into Mr. Charles Corbin's room?

A. The interview was not with me, if it was in the other 10 room.

Q. And did not I, at that time, say to Mr. Corbin that I could not assign the judgment because I considered that so far as Corcoran was concerned the judgment was dead?

A. No, sir.

Q. If you paid it?

A. No, sir.

Q. And then did not Mr. Corbin say that "he was entitled to subrogation," and look at a book at the time?

A. I would not like to say that Mr. Corbin said "he was 20 entitled to subrogation"; I do not recall that; but Mr. Corbin said that Mr. McKenna—this was his language—"Mr. McKenna was entitled to an assignment of this judgment," and I won't say that he looked at an authority or not, but I know he had been looking at the authorities while waiting for you to come, and had the books in front of him.

Q. And then Mr. Corbin asked me if I represented Duffy, and I said that I did, in a way, represent Duffy?

A. Yes, sir; you said you represented Mr. Duffy.

Q. And I said Mr. Duffy claimed that he was surety on 30 the note, an accommodation maker?

A. No, sir; I do not recall that.

Q. And that, therefore, I could not make the assignment?

A. No, sir; I have no recollection of you making any such statement.

BY MR. CORBIN:

Q. In whose handwriting is the body of the note "Ex- 40

hibit 1 of Complainant"?

A. In Mr. Duffy's handwriting, all except the date.

BY MR. ROE:

Q. Is the amount of that note, written in figures, in his handwriting also?

A. No, the figure part of it is in my handwriting.

Q. And the date?

10 A. And the date.

BY MR. CORBIN:

Q. The figure part?

A. Yes, sir.

Q. But not the written part?

A. Not the written part.

20

COMPLAINANT RESTS.

THE CASE FOR THE DEFENDANTS.

30

MR. ROE: I have the assignment of this judgment here. Mr. Corcoran, unfortunately, I could not reach at his home, but will probably do so later, if it is necessary to have him here. But I might say that I have the assignment that has been spoken about, to Mr. Corcoran by the Citizens' National Bank, of Long Branch, of that judgment; and I have also the check of Mr. Corcoran here that he paid for that assignment; and the amount, I presume, of the judgment is as in our answer correctly stated (I mean the first

40 judgment), but in their bill it is incorrectly stated.

THE VICE-CHANCELLOR: Well, the principal is only stated in their bill; you have probably added interest and costs; they only state it as \$601.54, which would be the principal.

MR. ROE: Yes. And I don't know whether formal proof is wanted of these things or not.

THE VICE-CHANCELLOR: Perhaps Mr. Corbin will agree to them. If he does, you can put them in without proof. 10

(The assignment and check referred to by Mr. Roe were thereupon offered in evidence by him, admitted without objection as to lack of proof of signatures, &c., and are marked, the assignment, Exhibit 1 of Defendant, and the check of Corcoran, dated October 19, 1903, Exhibit 2 of Defendant.)

(The two letters heretofore marked for identification "G. W. B., 1" and "G. W. B., 2," are now offered in evidence by Mr. Roe, admitted without objection, and are marked respectively Exhibit 3, of Defendant and Exhibit 4 of defendant). 20

JOSEPH A. DUFFY, *sworn*.

BY MR. ROE:

Q. Are you acquainted with Mr. McKenna? 30

A. I am.

Q. How long have you known him?

A. I should say about ten years.

Q. I show you a paper marked Exhibit 1 of complainant, a note made by you to the order of McKenna, and ask you, did you sign that note?

A. I did.

Q. When?

A. About the date of it. 40

Q. Where?

A. 25 Broad Street, Mr. McKenna's office, New York City.

Q. What is Mr. McKenna's business?

A. He is a counselor-at-law.

Q. And has an office in New York City?

A. Had an office at that time at 25 Broad Street, New York City.

Q. Will you state the circumstances and conversation leading up to the signing of that note?

A. On August 18th, 1902, with Hugh E. O'Reilly, I called at Mr. McKenna's office in reference to transactions I had through him with Arthur L. Myer and Offenbach & Moore. Mr. McKenna was instrumental in having me make those investments, and I looked to him to obtain for me a return of the money I had invested. He had promised to do so. On August 18th I called at the office, as I said, and asked him to obtain for me at that time a return of my money on account of the Offenbach & Moore account.

Mr. O'Reilly was also interested in those investments, and he called for the same object. While there Mr. McKenna stated that he had received a notice of protest of a note for six hundred dollars, and asked me to sign a note for him to put in the bank. I absolutely declined to do so, and told McKenna that he owed me a great amount of money. He said nothing further. I said "Furthermore, I want you to get this money from Offenbach & Moore for me." He left me and went out of the room; he was gone several minutes, and when he returned he said, "I have arranged for the repayment of your Offenbach & Moore account from Arthur L. Myer; he is going to give you South Elberon Land Company bonds in payment for it." I said, "When?" He said, "You come to-morrow afternoon, after three o'clock." He then turned to me and said, "Now," he says, "I have done this favor for you—I straightened this Offenbach & Moore account out for you—you do this favor for me. I am going to be married in a couple of days, and this note is due at the bank, and I want you to make this note out as a favor for me." I again demurred. He said,

"I having done this favor for you, you ought to do this

favor for me." I relied upon his promise that he had arranged this Offenbach & Moore account, and I said I would sign the note for him. He then took a note out of his desk and started to fill it in. He put the amount and date in. He then told me he was in a great hurry, and asked me to finish the rest of it, which I did. After I signed it he endorsed it and handed it to me and asked me to bring it to the Citizens' National Bank and put it into his account, which I did the following day.

Q. Where were you in business at that time?

10

A. I was in business at 15 Exchange Place, Jersey City.

Q. Prior to that time, where had you been in business?

A. I was also engaged in business over the Citizens' National Bank in Long Branch, in partnership with Mr. McKenna.

Q. You say that there was another note of which he spoke, prior to that, as being protested—what note did you refer to?

A. A note made May 18th.

Q. By whom?

20

A. By me, to the order of McKenna; that note was a renewal of a note given on February 17th, 1902, upon which I also was an accommodation maker.

Q. Was that the first note you were on for McKenna?

A. The first note, and the only note that I ever was on.

Q. Will you state the circumstances under which that note was given?

THE VICE-CHANCELLOR: You mean the February note?

30

MR. ROE: The February note.

A. In December, 1901, I was about to be married, and, looking about for a home, I struck upon Long Branch. I had known McKenna very well, and visited him at his house down there. I spoke to him about getting a house. We looked around the neighborhood and at last located a house on Franklin Avenue—

Q. (BY THE VICE-CHANCELLOR): Long Branch?

40

- A. In Long Branch. I was about to take that house when he suggested that he had two houses of his own on Morris Avenue, not yet complete, which he would let me have, or one of which he would let me have, when it was completed, and asked me when I would expect to occupy it. I told him I would not be married until the middle of January and could not take possession before February. He said that the house would be finished by that time, and that I could move in. I agreed at that time to take the house
- 10 from him and pay fifty dollars a month rent. He said they were principally summer houses and that he rented them by the summer, and that no rent would commence until the 1st of May. An agreement also was made at that time to equip the house with steam. I was to pay one hundred dollars and he was to pay the balance. When I returned from my wedding trip, I went to Long Branch, and the house was not yet complete, but I moved in about the 2d day of February. Subsequently to that Mr. O'Reilly spoke to me—Mr. McKenna was away, and Mr. O'Reilly spoke
- 20 to me of a proposition Mr. McKenna had made to him—

MR. CORBIN: I object to the conversation.

Q. As the result of this conversation you went to see Mr. McKenna?

A. As the result of the conversation with Mr. O'Reilly I saw Mr. McKenna.

Q. When was that?

- 30 A. That was on the 18th day of February, 1902. Mr. McKenna had been away in Canada, and had not returned until the day before. On Sunday, the 18th day of February, at his office he asked me if O'Reilly had spoken to me about a proposition to become a partner of his. I told him he had, and that I was not quite sure about entering into the scheme with him; and at that time he pictured to me the beneficial results and how much money we would make, and how easy it was made down there, and at last I consented; and at that time, in talking over the terms, he said,
- 40 "Now, I will take—

MR. CORBIN: I object to the terms of the partnership. There is no such defense pleaded here. I submit it is an outside matter.

THE VICE-CHANCELLOR: I will admit it. I cannot tell yet. He is entitled to give the whole conversation, and if that develops a different defense than that made here, then we will consider the question of whether it may be considered in this case. He may tell the whole conversation, and the court will determine afterwards its relevancy. 10

A. (Resuming.) He said, "Now, you are to pay rent, fifty dollars a month; but," he said, "under our agreement you will not have to pay anything." He said, "I will have charge of the funds, and as the money is earned I will deduct the rent therefrom." He said, "Now, I am a little short of money, and I would like to get some money downstairs; if you will sign a note for six hundred dollars, which would be in a form that would be the amount of a year's rent, I can bring this note downstairs to the bank and they will think it an asset of mine. That is the reason why I would like you to be the maker instead of the endorser." At the same time he had prepared a mortgage, after I had demurred to making or endorsing any note. He said, "You will be perfectly protected in making this note for the reason that I am going to give a mortgage to the bank, and they are to let me draw beyond my account over three thousand dollars, and this mortgage will cover any note either made or endorsed by me." The mortgage was subsequently drawn, and three days afterward I executed the same. A certified copy of that mortgage is here. 20 30

BY THE VICE-CHANCELLOR:

Q. You executed the mortgage?

A. That is, I took his acknowledgment to it. And after that I never received one dollar from Mr. McKenna of the partnership proceeds.

BY MR. ROE:

Q. After you had executed that note, what was done with it?

A. Why, at Mr. McKenna's direction, I brought it downstairs to the Citizens' National Bank, with his bank-book, and it was entered to his account; the discount was charged against him.

Q. You say that a mortgage was executed before you; will you look at that paper and say whether that is a copy of that mortgage (showing witness a paper)?

10 A. This is a certified copy of the mortgage executed before me, which I have just referred to.

Q. Now, how long was that note made payable?

A. Three months' note.

Q. At the end of the three months did you hear from that note again?

A. The day before the three months were up I was again in Mr. McKenna's office in New York. By the way, Mr. McKenna was very seldom present at Long Branch. He had an office with Arthur L. Myer in New York City, at 25
20 Broad Street. I was over in the office in reference to an investment I had made through McKenna with Myer. It was immediately after the collapse of the Webb-Myer securities. At that time I spoke to Mr. McKenna about his paying the note when it came due. He said, "I am up to my neck in trouble here now"; he said, "as a favor to me—that will be all right—you can execute another note and the bank will take it for you." I signed another note, and, at his request, with his bank-book I went to the bank, and they again entered to his credit the amount of that note,
30 after deducting the discount.

Q. And the note sued upon was—

A. (Interrupting.) The note I first referred to in my testimony. When that note that I have just spoken about, made in May, came due, it was protested. I refused to pay it; and, as a favor to McKenna because he was going to be married, and because of his alleged favor in obtaining from Myer bonds of the South Elberon Land Company—which he never did, by the way—

Q. (Interrupting.) You say that at that first conversation,
40 tion, when the house was spoken about, the rent of the

house, and he said that you would have nothing to pay for that, did he say where the pay would come from?

A. The pay would come from the partnership proceeds.

Q. And how long did you continue with him?

A. Up to July, inclusive.

Q. And during that period were you a partner, under that arrangement, with him?

A. I was.

Q. And did active business?

A. I did.

Q. How did you divide the profits?

A. The profits were to be divided in two.

Q. And when—at what period?

10

MR. CORBIN: I object to the discussion of the partnership profits.

THE VICE-CHANCELLOR: This witness's testimony was that after he had agreed to rent a house from McKenna and to pay six hundred dollars for the season's rent, Mr. McKenna told him that by reason of their partnership arrangement he need not see to the payment of that money, that he, McKenna, would take it out of the partnership proceeds. Now then, the further examination seems to be as to whether that was done, I presume. I do not see how I can shut it out.

MR. CORBIN: You cannot go into the partnership accounting, under these pleadings.

30

THE VICE-CHANCELLOR: There is no question about that. I will permit the testimony.

A. The profits were never divided. Mr. McKenna retained every dollar.

Q. Do you mean that he got all of the money?

A. He got all the money.

Q. And there was never any division of the profits?

A. There was never any division of the profits.

Q. Do you know what the returns of the business were?

40

MR. CORBIN: I object to that; that is going into a partnership accounting.

(Question admitted.)

A. I do not know exactly how much the business netted, because I never had an opportunity of finding out how much Mr. McKenna collected. He would never tell me. I know, however, that the amount which should be coming
10 to me was greatly in excess of the sum of six hundred dollars.

Q. How do you know that?

MR. CORBIN: I object to that statement, and to all of the testimony as outside of the proper issues here.

THE VICE-CHANCELLOR: I will admit it.

A. I know that from some of the items which were col-
20 lected and went to Mr. McKenna's hands from my own.

Q. Can you mention those items?

A. Some of them are: In the Beck Mortgage Case, over \$350; Wheaton Administration Case, about the same amount; Braker Matters, about the same amount.

MR. CORBIN: All of this is taken subject to my objection.

THE VICE-CHANCELLOR: Oh, yes. Your objection goes
30 to the point that these unsettled partnership matters cannot be brought up between them. Since you, however, say that the issue here is whether Mr. Duffy is a principal or is surety on this note, I do not see how I can better find that out than by finding out what the financial relations were between these men, and what they were at that time.

A. (Resuming.) I also received a letter from Mr. McKenna, dated September 8th, 1902, which has reference to our account. (Producing a letter.) This is the letter.

40 Q. Do you know Mr. McKenna's handwriting?

A. I do.

Q. Is that written by Mr. McKenna?

A. It is.

Q. Dated September 8, 1902?

A. Yes, sir.

(Letter of September 8, 1902, identified by the witness is offered in evidence.)

MR. CORBIN: I object to it, on the ground that the letter has no relation to the matter in issue. 10

THE VICE-CHANCELLOR: I will admit it.

(The letter is marked Exhibit D, 5.)

THE WITNESS: There were many other matters which Mr. McKenna never accounted to me for.

20

Q. Did he owe you any other money?

A. Yes. When I informed him that I was going to leave—

MR. CORBIN: I object to the evidence. The witness has answered the question "Yes." Let us have the next question.

Q. What other?

30

MR. CORBIN: I object to that.

THE COURT: At what time, Mr. Roe?

MR. ROE: At the time that this last note was given, the 18th of August, 1902.

MR. CORBIN: I object. There is no set-off here; there is no ground on which that would be a proper matter of inquiry.

40

THE VICE-CHANCELLOR: Why not? If the question is whether or not this man was a principal or surety on this note, if he did not owe Mr. McKenna any money he could not be the principal, as between him and McKenna. I will admit it.

10 A. Yes. About the early part of August, when I told him I was about to move from Long Branch, he told me that he would pay me whatever the furniture cost which I would leave in his house. When I moved on September 1st, I left there furniture which cost me over ninety dollars.

THE VICE-CHANCELLOR: That will have to be stricken out, because he did not owe you that money on the 18th of August. I will strike that out.

Q. When did you leave?

20 THE VICE-CHANCELLOR: He said he left on the 1st of September. (To the witness): You are now asked as to what money you now say Mr. McKenna owed you at the time this note was dated, August 18, 1902.

MR. ROE: I mean beyond what he owed you on the partnership account.

THE COURT: He has given all of that as well as his recollection will serve him.

30 THE WITNESS: Yes, I had claims against him amounting to thousands of dollars, for having induced me to go into these schemes in New York, which he had promised to have the money returned to me from.

MR. CORBIN: I move to strike that out. That certainly cannot cut any figure here in this case.

THE VICE CHANCELLOR: It shows the relationship between the parties at the time. I will let it stand.

40 Q. What were they—these schemes you refer to?

A. Why, they were the accounts which I have already referred to with Offenbach & Moore on the purchase of Hackensack Meadow stock and North American Lumber and Pulp Company.

Q. What was McKenna's relation to those?

A. Why, he was counsel.

Q. Well, how did he become liable to you on account of those?

A. Because it was through him and the representations made by him, and the giving of the money to him, that I 10
went into those.

Q. How much money did you give to him?

A. On one occasion—the only occasion on which the money was handed direct to him, was a check for one thousand dollars.

Q. And that existed at the time of the note of the 18th of August?

A. Yes.

CROSS EXAMINATION.

BY MR. CORBIN:

Q. You had an office in Jersey City, Mr. Duffy, for this period of 1902?

A. Yes.

Q. And your residence was in Long Branch?

A. Yes.

Q. You traveled on the train to reach your office?

A. Yes.

Q. Mr. McKenna was at that time living in New York, was he not?

A. At that time Mr. McKenna was stopping in New York. His home, I understand it, was at Long Branch.

Q. He did not go out on the train on which you did every night?

A. Not every night; sometimes; it would all depend on 40

the season of the year. After June he was down every night.

Q. He was boarding somewhere in New York?

A. He was stopping at 45 W. 16th Street, occasionally, with friends.

Q. A boarding house?

A. No.

Q. Now, he was married on the 20th of August?

A. 20th of August.

10 Q. Then he went off on a trip?

A. On a trip.

Q. And was gone for how long?

A. I should imagine six weeks. This letter was written to me from California while he was away; that was dated September 8th.

Q. Now, you had your business here in Jersey City, and your office here?

A. I had one of my offices here, yes.

Q. And he had his business and office in New York?

20 A. Had an office in New York.

Q. And then you had a partnership relation with reference to what business you could get down at Long Branch? He had been doing business there?

A. Yes.

Q. And, of course, when he was in New York he could not attend to that, and you undertook to look after some business at Long Branch?

A. Oh, yes.

30 Q. And you were here every day, traveling in the morning and night by train?

A. I was.

Q. And traveled from Long Branch?

A. Yes.

Q. Were you a partner in New York in whatever business he had there?

A. No, I was not.

Q. Were you partners in whatever business you had in Jersey City?

A. No, sir; he was not.

40 Q. It was only in the Long Branch business?

A. Only in the Long Branch business.

Q. You, yourself, were married in the early part of that same year?

A. January 16, 1902.

Q. And you hired this house in order to set up house-keeping there, I suppose?

A. That is the idea.

Q. And you were actually there with your family until September?

A. Until the 1st day of September.

10

BY THE VICE-CHANCELLOR:

Q. Of that same year?

A. Same year.

BY MR. CORBIN:

Q. So you were at the house, then, for the season?

A. I hired it for fifty dollars a month.

20

Q. I say, you hired it for the season?

A. It all depends on what you call "the season." I had it from February 1st to September 1st.

Q. Long Branch is a summer resort?

A. Yes, and a winter resort, also.

Q. Most houses there are rented for the summer season?

A. This was rented for the year around, and steam heat was put in, and it was considered a winter house.

Q. You put the steam heat in yourself?

A. Partly at my own expense.

30

Q. When did you enter the house?

A. February 2d, as I best recollect.

Q. Had anything been done on it during your absence?

A. The steam heat had been installed.

Q. By whom? Who had looked after that for you?

A. Mr. McKenna.

Q. Were some of your own relatives there?

A. None whatever.

Q. What did you say?

A. No relatives of mine.

40

Q. And then was that any part of what you were to do—putting in the steam heat? Was putting in the steam heat part of your obligation?

A. No; he was to put the steam heat in, and I was to pay one hundred dollars on account of it.

Q. Was your lease in writing?

A. It was not.

Q. Was there ever any other proposition than that discussed, to pay fifty dollars a month?

10 A. Not until it was afterwards changed on the date of the making of the first note, which was in February.

Q. But the only discussion, prior to that, was the question of fifty dollars a month?

A. Fifty dollars a month, from May 1st, succeeding.

Q. Did you have some discussion with Mr. McKenna about buying the house?

A. Mr. McKenna had spoken to me, that he would like me to buy the house.

Q. And you had some discussion of that proposition?

20 A. Oh, I shouldn't wonder that I had. I had, probably, in the beginning.

Q. And you finally concluded, instead, to hire it?

A. Oh, no; the proposition to buy came up after the proposition was entered into to rent.

Q. But you did not decide whether you would rent or not until after you had determined not to buy this house?

A. I decided to rent at Long Branch. The proposition to buy was an after-consideration, after I had rented it.

Q. And did you have occasion to send any telegram to

30 Mr. McKenna about that business?

A. Not that I recollect.

Q. I show you telegram of January 3, 1902 (handing witness a telegram): Do you remember sending a telegram?

A. I probably sent this telegram.

Q. You say (and you have the telegram before you) that you think you probably sent that telegram?

A. Yes.

40 Q. In view of that, do you desire to correct your statement in that respect?

A. Not in the slightest.

Q. I ask you now whether you know the signature to the letter dated January 3, 1902? Will you look at the signature and state whether that is your signature? (Handing the witness the letter referred to, which the witness proceeds to read.) Cannot you tell, without reading the letter, whether that is your own signature?

A. I probably could, but I would just as leave read it. (After having read the letter.) Yes, that is my signature, and that is my letter.

10

HUGH EDWARD O'REILLY, *sworn*.

By MR. ROE:

Q. Mr. O'Reilly, are you acquainted with Thomas P. McKenna?

A. I am.

Q. And Joseph A. Duffy?

A. Yes.

Q. How long have you known Mr. McKenna?

A. Oh, I should say twelve years.

Q. Do you remember the circumstances of Mr. Duffy's signing this note, Exhibit C, 1?

A. Yes, I do.

Q. Where, and at what place was it?

A. At Mr. McKenna's office with Arthur L. Myer, 25 Broad Street, New York City.

Q. Will you state what took place at the time that note was signed, between Mr. McKenna and Mr. Duffy?

A. Yes. I was at Mr. McKenna's office, and Mr. Duffy was to be over there. We were arranging to procure, through McKenna, from Arthur L. Myer, bonds of the South Elberon Land Company instead of the cash that we put up with Offenbach & Moore, as McKenna had arranged to do that for us. While I was there Duffy came in, and Mr. McKenna said to him, "There is a note here I want you to sign, Joe," and Mr. Duffy said, "Well, I won't sign

20

30

40

the note; I don't owe you any money." And McKenna said, "Well, now, I am doing a great favor for you with Arthur Myer; I am getting Myer to give you South Elberon bonds, and I am fixing up your affairs, and I am going away in a couple of days, out West, and I want you to do this favor for me." And the amount and date is in Mr. McKenna's writing, but the rest of it is in Mr. Duffy's writing. And he, Duffy, signed the note. Then Mr. McKenna asked Duffy if he would not take the note, with his
 10 pass-book, down to Long Branch and put it into the bank, because he was not going down to Long Branch before he went away.

Q. Was the note drawn there at that time?

A. Oh, yes, it was drawn at that time. McKenna started to put in the date. He wrote August 18, put in the 2 and the amount "Six hundred dollars," then he went in the other room, and said, "Joe, you will fill the rest of this out, and sign it, and then take it down to Long Branch and get it discounted."

20 Q. What relation are you to Mr. McKenna?

A. He is married to my sister.

CROSS EXAMINATION.

BY MR. CORBIN:

30 Q. You are not very friendly with Mr. McKenna, I suppose?

A. No, I am not.

Q. Were you at that time?

A. Oh, yes; we all were very good friends at that time.

Q. Did you have any special interest in this transaction, personally?

A. No, not at all.

Q. Your observation of it was simply casual?

A. I happened to be there by chance when Mr. Duffy
 40 came in.

Q. You had no occasion to pay any great attention to this particular matter?

A. Oh, yes, sir; on the contrary, I had went there with Mr. Duffy to get these bonds from Mr. Myer.

Q. I say, this matter of the note was not your business there?

A. Oh, no.

Q. And whatever observation you had of this was casual?

A. Yes.

Q. Had Mr. McKenna asked you to call the attention 10
of Mr. Duffy to the note—the protest of this note?

A. Not at that time, no. He did later on. Three months from that date McKenna handed me the notice of protest that he had received when this note became due and was not paid, and he asked me to bring that over to Mr. Duffy in Jersey City and ask Mr. Duffy to renew the note, and I brought the notice of protest over to Mr. Duffy.

Q. Never mind; I did not ask you that. Did you live down at Long Branch in the summer of 1902?

A. Yes.

Q. You went back and forth on the train? 20

A. No, I beg your pardon. I was in Europe during the summer of 1902.

Q. You did not go back and forth to Long Branch at that time?

A. No, because I left New York on April 19th and I got back on the 28th of June, and from that time on I was going to Long Branch, back and forth.

Q. After the 28th of June?

A. Yes.

Q. Then in July and August you were going down to Long Branch? 30

A. Oh, yes; every day, practically.

Q. And you went down on the same train with Mr. Duffy?

A. Very often, yes.

Q. And frequently you met him on the trains?

A. Yes, and frequently met him coming up in the morning, too.

Q. And you met him at Long Branch? 40

A. Yes.

Q. So that you could conveniently bear a message from Mr. McKenna to him?

A. Oh, it was possible, yes.

MR. ROE: I would like to offer in evidence certified copy of a mortgage from Thomas P. McKenna to the Citizens' National Bank, dated February 20, 1902.

MR. CORBIN: I object. It seems to me to be imma-
10 terial.

THE VICE-CHANCELLOR: I will admit it.

(Mortgage in question is marked Exhibit D, 6.)

MR. ROE: I offer in evidence certified copy of mortgage, bearing date the 10th day of April, 1902—

THE VICE CHANCELLOR: We have not had any evidence
20 about that yet. The first one Mr. Duffy testified as having been disclosed to him at the time he went on this first note. The other one I do not remember any testimony about.

Joseph A. Duffy recalled.

BY MR. ROE:

Q. I show you certified copy of mortgage made by
30 Thomas P. McKenna to the Citizens' National Bank, dated the 10th day of April, 1902. Do you know anything about that mortgage, or the execution of that mortgage?

A. I do.

Q. Before whom was it executed?

A. That was executed before me.

Q. Who drew the mortgage?

A. I drew the mortgage.

MR. CORBIN: I object. It does not seem to have any con-
40 nection with the case.

THE VICE CHANCELLOR: I cannot tell yet. All he says is that he drew it. It may be connected, and it may not.

Q. Do you know for what that mortgage was given?

A. I do.

Q. What?

MR. CORBIN: I object to that. It does not appear to be relevant.

THE VICE CHANCELLOR: I will have to take the testimony first, to find out whether it is relevant or not. 10

A. After this mortgage, known as "Exhibit D, 6" was given, Mr. McKenna got in trouble by giving a mortgage upon the property covered by the first mortgage. He came to me and asked me to help him out at the bank downstairs, which I did. Both he and I went to the bank and obtained their consent to take a mortgage upon another piece of property, and release the first mortgage, to cover the same objects as was contained in the first mortgage, which, as he explained to me, would also protect the note already existing made by me. 20

THE VICE CHANCELLOR: You went into all of that.

THE WITNESS: I know, but the second mortgage protects me in the same way; and the first mortgage was cancelled.

MR. ROE: The mortgage is now offered in evidence.

MR. CORBIN: It seems to me it does not enter into this transaction at all. I object to it. 30

THE VICE CHANCELLOR: I will admit it.

(The certified copy of the Mortgage was thereupon marked Exhibit D, 7.)

DEFENDANTS REST.

40

COMPLAINANT'S REBUTTAL EVIDENCE.

THOMAS P. McKENNA, *recalled*.

BY MR. CORBIN :

Q. In December, 1901, did you see Mr. Duffy about hiring a house?

10 A. Yes, sir.

Q. You had known him for some years?

A. Yes, sir.

Q. What dealings did you have with him?

A. Why, Mr. Duffy, as we had known for some time, was about to be married, and about that time, in December, he said he thought he would take a house down at Long Branch, as it would be cheaper to live there than it would be in Jersey City, and wanted to know if I would not assist him in getting a house at a reasonable figure; and I went
20 around with him on one occasion, I think, and may have went around with him on two or three occasions, and looked at two or three different houses.

Q. When he came down he came to your place?

A. Yes, sir, and stopped there with us.

Q. At your house?

A. At our house, yes, sir.

Q. And stayed there over night?

A. Oh, on a number of occasions; yes, sir.

Q. And you went with him to look at different houses?

30 A. Yes, sir.

Q. And what did you discuss, purchasing or renting?

A. Why, he discussed purchasing a house first, and that was under discussion up until in the month of January, I think it was; then he suddenly decided to take a lease.

Q. Had you shown him any houses belonging to your father or yourself?

A. Yes, sir; after he had looked at several others he spoke of houses which we had just completed on Morris Avenue, and wanted to know if he couldn't have one of
40 those, and I told him that I was reluctant to speak of those

until he had looked at the other houses, and he said he preferred to have one of those houses because it was near the depot.

Q. What was the rental value of those houses?

A. Well, the rental value I should place at about eight or nine hundred dollars for a year. We have gotten for the house adjoining the one which Mr. Duffy took seven hundred and fifty dollars for the summer.

Q. And the houses were the same?

A. Yes, both identically the same, except a difference in 10 the roof.

Q. What terms did you propose to him for the house?

A. Why, the terms proposed were a lease at \$600 per year.

Q. How do you let houses down there at Long Branch?

A. We let them by the year. They are only houses that, as a rule, are in demand for the summer periods, and if you rented them by the month you might be in the cold after one month had expired. We always rent them by the year, or by the season.

20

Q. Now, who was to provide the furniture?

A. Mr. Duffy.

Q. You did not rent it to him furnished?

A. He was to provide his own furniture.

Q. And how about steam heat?

A. He was to provide the steam heat.

Q. Now, did you have any telegram from him in regard to it?

A. Yes, sir.

Q. Is that the telegram (handing witness telegram)? 30

A. Yes, sir.

Q. What were the circumstances attending the receipt of that telegram?

A. Why, on the day of the receipt of this telegram Mr. Duffy had practically closed with me for the purchase of the property.

Q. For some other house?

A. No, sir; for the house that he occupied.

Q. He was talking of buying this very house?

A. Yes, sir; this very house; but he was not absolutely 40

settled in his mind, and that evening he sent me this telegram, and the next morning I received a letter from him.

Q. Just read the telegram?

THE VICE CHANCELLOR: Is it offered in evidence?

MR. CORBIN: It is offered in evidence.

THE VICE CHANCELLOR: Is there any objection?

10

MR. ROE: No objection.

(The telegram was thereupon admitted and marked Exhibit A of Complainant.)

A. (Reading Exhibit A of Complainant): "Jan. 3, 1902. Pennsylvania Depot, Jersey City, N. J. Thos. P. McKenna, Morris Ave., Long Branch. Don't bother about deed. Wrote to-night explaining. Get bid, however, Joseph A. Duffy."

20

Q. What does that refer to about "getting the bid"?

A. Getting bid for plumbing, or heating, rather.

Q. (Showing witness a letter.) Did you get that letter?

A. Yes, sir.

MR. CORBIN: This is a letter already identified by Mr. Duffy.

30 THE VICE CHANCELLOR: Is it offered?

MR. CORBIN: Yes, sir.

(The letter referred to is admitted without objection, and is marked Exhibit B of Complainant.)

Q. Just read it?

THE VICE CHANCELLOR (to the stenographer): Don't
40 take this on the record.

A. (Letter, Exhibit B of Complainant read by the witness.)

Q. Were there ever any other terms mentioned than those stated in this letter?

A. No, sir; never.

Q. Six hundred dollars per annum?

A. No, sir; never.

Q. Was there any agreement to let it by the month at fifty dollars?

A. No, sir.

Q. Now, then, were you present at the marriage of Mr. Duffy?

A. Yes, sir.

Q. And he went off on a trip?

A. Yes, sir.

Q. To Bermuda?

A. Yes, sir.

Q. And when did he return? When did he come to Long Branch?

A. In about two weeks.

Q. In the interval was anything done on the house?

A. Yes, sir; the steam heat had been put in the house.

Q. Under whose direction?

A. Well, Mr. Duffy had arranged the matter himself, before leaving, with Messrs. Northam & Throckmorton, plumbers and steamfitters at Long Branch. I do not think it was under anybody's direction. I never was in the house during the interval.

Q. Well, after his return did he come to you about the rent?

A. No, sir.

Q. And he moved in there in January?

A. No, February 2d—1st or 2d—he took possession. They put furniture in—his wife's family put furniture in while he was away; and some of the furniture I think was shipped down and members of our family saw that it was placed in the house.

Q. And after he came back did you then see him about the rent?

A. Yes, sir.

Q. Did you open the subject?

A. Yes, sir.

Q. And what did you say?

10 A. Why, I asked him if he was prepared to pay me something for the house, and I told him I knew that his expenses were heavy, and for him to suggest what plans he thought he could comply with; and he told me his wedding trip had been very expensive, and he had to buy a good deal of furniture, and had to instal the heat, or had
10 obligated himself for the cost of it, and he said he was not able at that time to pay me anything. Then I asked him to at least give me a note for the amount of the rent. He said he would gladly do that, and as the note came due he would pay on account of it and have it renewed for the balance until it was cleaned up.

Q. Did you tell him about your being able to get cash on it—about your being able to discount it on your own credit?

A. Yes, sir.

20 Q. Did you tell him anything about having a mortgage that enabled you to borrow on your own credit.

A. I don't think I went into that question with Mr. Duffy. I know that he knew of it from the fact that he took the acknowledgment of the mortgage; but I do not think I dwelt with him on the question of my credit.

Q. You did have an arrangement with the bank by which they gave you credit upon your depositing with them a mortgage?

30 A. Yes, sir. Well, I had credit in the bank, without depositing the mortgage, for a considerable sum; but at that time I contemplated borrowing a large sum from the bank. I do not think it had any particular connection with this transaction, but just at that time I expected to make a much larger loan, and had arranged to have credit of four or five thousand dollars in the bank; and I spoke to Mr. Blodgett about it, and Mr. Blodgett arranged with Mr. Sherman, and the mortgage was deposited accordingly.

Q. This mortgage was not in connection with this note transaction?

40 A. Oh, no; not in connection with this note transaction.

Q. Now, then, you said he proposed to give you a note, and you were willing to take that?

A. Yes, sir.

Q. Did he give you the note?

A. Yes, sir.

Q. And was that for a year's rent?

A. Yes, sir.

Q. And did he, at the same time, make any request to you in regard to the cost of the steam heat?

A. Yes, he told me that the steam heating was costing him more than he contemplated at the time he made the arrangement for six hundred dollars, and that the steam heat would be a permanent improvement to my house, that it would remain there after he left, and he thought I ought to pay something on account of it; and I did, therefore, agree promptly and immediately that day to pay one hundred dollars on account, and gave him a check for it. 10

Q. I show you check for one hundred dollars, dated February 17, 1902, by you to Mr. Duffy; is that the check?

A. Yes, sir. 20

Q. That is his endorsement?

A. Yes, sir.

Q. That was given for the purpose of reimbursing him for part of the improvement of the house—for steam heat?

A. Yes, sir.

MR. CORBIN: I offer the check in evidence.

(Check admitted, without objection, and marked Exhibit C of Complainant.) 30

Q. I now show you a note, dated February 17, 1902, for Six hundred dollars, signed "Joseph A. Duffy," to the order of Thomas P. McKenna, payable three months after date, at the Citizens' National Bank of Long Branch, endorsed by you; is that the note that you refer to?

A. Yes, sir; that is the note referred to, in Mr. Duffy's handwriting entirely.

Q. The endorsement is by you?

A. The endorsement is by me. 40

Q. Did you discount that note?

A. Mr. Duffy, I think, took this note down to the Citizens' Bank and placed it there.

Q. To be discounted for your credit?

A. Yes, in renewal of the other.

Q. I think he has testified that he took them all there himself?

A. Yes, sir.

10 (The note identified by the witness is offered in evidence, admitted without objection, and is marked Exhibit D of Complainant.)

Q. Does it bear your endorsement?

A. Yes, sir.

Q. Now, when the note came due, what, if any, conversation did you have with him about it then?

20 THE VICE CHANCELLOR: Do you mean when the February note came due?

MR. CORBIN: Yes, it came due in May.

Q. What conversation, if any, did you have about it then?

30 A. Why, Mr. Duffy told me that he couldn't pay anything on account of the note at that time, that he was expecting to get some money out of some law business here in the city that had been pending for some time, I think it was a Traction case, if I recollect the case—some matter of that kind—and that he was not able to make a payment on account as he expected to, and asked me to renew it and he would be able to do it later.

Q. Did you then get another note from him?

A. Yes, sir.

Q. I show you note dated May 17, payable three months after date (handing witness note)?

A. Yes, sir; that note is completely in the handwriting of Mr. Duffy.

40 Q. And you made that renewal at his request?

A. Yes, sir.

Q. And he looked after getting it discounted for you at Long Branch?

A. Yes, sir.

Q. Why did you have him look after these discounts?

A. I was living in New York.

Q. And he was down there?

A. Yes, sir; and it was his matter.

MR. CORBIN: I offer this note, being the first renewal note in evidence. (Note admitted without objection, and marked Exhibit E of Complainant.) 10

THE WITNESS: As to the first note, Mr. Corbin, I am not sure that I was clear in my answer as to that note which was given in February. I took that note into the bank myself, and arranged the discount between Mr. Sherman and myself, personally.

Q. The first note you think you discounted yourself? 20

A. Yes, sir.

Q. The subsequent ones Mr. Duffy looked after?

A. He looked after.

Q. Now, when this note dated May 17 came due, which was in August, it went to protest?

A. Yes, sir.

Q. You were getting ready to be married at that time?

A. Yes, sir; I was married on August 20th.

Q. Did you learn of this protest? 30

A. I learned of this protest; the notice was forwarded to me from Long Branch. I was in New York at the time.

Q. And then Mr. Duffy came to your office?

A. My recollection is that I saw Mr. O'Reilly, and told him that Duffy's note had gone to protest, and that I was so busy that I did not have time to hunt up Mr. Duffy and get him over to endorse it, and asked him if he would not, as a favor to me, get Mr. Duffy to attend to the note.

Q. Well, did Duffy come over?

A. Yes, sir. 40

Q. Do you remember whether O'Reilly was with him, or not?

A. I have no recollection of Mr. O'Reilly being present.

Q. What took place then?

A. Why, Mr. Duffy came over and endorsed the note and took the note down to Long Branch.

Q. I think you have already testified about that in your first examination?

A. Yes, sir.

10 Q. And that is the time when the note dated August 18th was made?

A. Yes, sir. I will say my bank book will show that the note was put in the bank on the 20th, the day I was married, and I was not down to Long Branch after the 18th.

Q. You were away August 18th. How long were you gone?

A. I was gone a little over six weeks.

Q. You went off for a little trip?

A. Yes, sir, went to California and Mexico.

20 Q. When you got back was Mr. Duffy in the house then?

A. No, sir; Mr. Duffy had vacated the house.

Q. Did he ever surrender possession to you?

A. No, sir.

Q. Did he ever pay anything on the rent?

A. No, sir.

Q. Or on the note?

A. No, sir.

30 Q. Now then, go back to March, 1902: Did you have any conversation with him then in regard to making some business arrangements with him for Long Branch business?

A. Yes, sir.

Q. What was it?

A. In March, 1902, I had not been able to attend to my Long Branch practice from the early winter in 1901, and was very seldom in Long Branch; I felt that I had a good practice there and it was being neglected, and people were coming to New York to see me in regard to it, and Mr. Duffy then was located at Long Branch, and gave me to
40 understand that he did not have very much practice here in

Jersey City, and that he had considerable time on his hands, and would appreciate it very much if he could take charge of the work there. This was after I had first suggested to Mr. O'Reilly that probably it would be a good thing to put Mr. Duffy in charge of the Long Branch business.

Q. Was that in connection with the giving of this note on February 17?

A. No, sir; no connection whatever.

Q. Was it after that time?

10

A. Yes, sir.

Q. Well, what was arranged about that afterward?

A. Why, it was arranged that Mr. Duffy would give the best part of his time to Long Branch business; that he would be there all the time that was necessary, and a majority of his time; and that, in return for it, whatever profits there accrued from the office he would divide them in half, after deducting the expenses.

Q. You had an office there at that time?

A. Yes, sir.

20

Q. And were paying rent for it?

A. Yes, sir.

A. And you continued to pay rent for it?

A. Yes, sir.

Q. The expenses of the office you paid?

A. Yes, sir—stenographer's fees.

Q. For a clerk or stenographer?

A. Yes, sir.

Q. You paid those expenses?

A. All of the expenses of the office I have had to pay. 30

Q. Was there an income derived from it?

A. There were two or three matters which came to my knowledge which were settled during the Fall after Mr. Duffy had left. But Mr. Duffy had full charge of the office, as he has testified himself. I was in Canada most of that time, and had no knowledge of the transactions of the office at all. Before I left I had orally asked Mr. Duffy to keep track of things, and try to keep up a statement of the business that had been done. No such statement was ever presented to me. And while I was in California I wrote 40

him that letter asking him to have a statement ready when I returned. After I came back all I found was debts against the office, and very little money collected. I think the two or three matters he spoke of there were collected by me, but it was far below the amount necessary to defray the expenses of the office.

Q. There was no profit in the business?

A. No, sir; if there is any I would like to see it.

Q. That is, none that came to your hands?

10 A. No, sir.

Q. Did you receive as much as you paid out in the business?

A. I paid out a great deal more than I received.

Q. Some reference has been made—and I hardly know whether it relates to the case or not—

A. (Interrupting) Mr. Corbin, just at this moment I would like to state that Mr. Duffy was taken sick in the Spring of the year and was away from Long Branch and away from this section a good deal of the time; he was
20 away from this place and up in the mountains. There is a letter he wrote to me while he was in the mountains; and he has been away at long intervals, sick with pleurisy or some illness.

Q. There is nothing in the letter relating to this case, is there?

A. No, no reference in it, except as showing the fact that he was away, and how much of his time was taken up in illness.

Q. There is nothing about business there, is there?

30 A. No, sir.

Q. I will not clutter up the record with it. There is something here about your having recommended investments to Mr. Duffy; were any investments made through you by him?

A. No, sir; never an investment made through me. There were investments made by Mr. Duffy and Mr. O'Reilly with Mr. Myer, a railroad company that Mr. Myer was with, and I did do considerable real estate law business for Mr. Myer and for the companies that he was connected
40 with at that time; but there never was a single dollar of

either of these gentlemen that ever was passed to my hands, or ever was invested through me; and it was always my wish and endeavor at all times to avoid having anything to do between them.

Q. You had no interest in their investments?

A. No, sir; and never had one dollar's worth. But after Mr. Myer's failure they came to me almost in tears, saying that I had more influence with Mr. Myer than probably anybody else, and asked if I wouldn't try to use my efforts to help them out; and I got Mr. Myer to finally agree to return them the money which they had paid to him, and they would not accept it unless he paid them all the profits which the books showed they were entitled to; and Mr. Myer would not agree to that, and the matter was locked-horns, and I couldn't do anything more; I got Mr. Myer to agree to pay every dollar they put in, and interest on their investment beside, and they claimed they had been pyramiding stock, which I had no knowledge of, and they claimed they were entitled to the profits, and claimed that they should have every dollar of it. I submitted the matter to Mr. Myer for them, and that is the best proposition I could get from him. I never had one dollar's interest in their investments or the outcome. And they had brought suit against Mr. Myer in New York for the amount.

CROSS EXAMINATION.

By MR. ROE:

30

Q. In this Myer matter you shared the profits, didn't you?

A. With Mr. Myer?

Q. Yes.

A. Never.

Q. Well, you say of Mr. O'Reilly that you simply advised him—didn't you take the money and share the profits with him?

A. With whom?

40

Q. With Mr. O'Reilly—on Storage Power?

A. I shared some profits with Mr. O'Reilly, yes, sir; but I never shared any with Mr. Myer.

Q. You took a check of Mr. Duffy's of a thousand dollars, didn't you?

A. No, sir; I never took any check of Mr. Duffy's of a thousand dollars.

Q. Not in that arrangement?

A. Oh, there may have been some outside arrangement; but not in any arrangement with Mr. Myer in which I induced them to invest their money in any securities of Mr. Myer's.

Q. Didn't you bring to him, in return for the check, fifty shares of the Hackensack Meadow, in which you were Secretary?

A. I may have done that. I have no recollection of having done it. The check will show.

Q. Who kept the books of the office—who kept the books of the firm when you and Mr. Duffy were there together—
20 the firm business at Long Branch?

A. Well, we had a stenographer there; Miss Cook; she attended to the books, I presume—between her and Mr. Duffy. I don't know who did keep them.

Q. Didn't you keep any books?

A. I was not there.

Q. Didn't you keep any books of that firm?

A. Well, I have kept whatever came under my knowledge.

Q. Well, you kept the books, didn't you, during the firm,
30 and have them now?

A. I have them now, but I never kept them then, no, sir.

Q. You have the books of the firm transactions when Mr. Duffy was there as partner?

A. I have all the books that we ever had in the office.

Q. You never have rendered any account to him of any kind?

A. No, sir; never have been asked to, but, on the contrary, I have asked him to render an account several times.

40 Q. Account of what?

A. Of the moneys he received during the time he had charge of the office.

Q. Did he receive any money?

A. I don't know; I suppose he did; he was there.

Q. Did you receive any?

A. Yes, sir; I received some.

Q. What accounts did you put them in?

A. Well, I cannot recall now, but every account that I had shows in the ledger.

Q. Well, is it in your personal account?

10

A. Do you mean the ledger?

THE VICE-CHANCELLOR: No, he means the receipts—whatever money you received from the Long Branch business—what did you do with that money?

A. Why, the bank account was always kept in my name, and that was the understanding between Duffy and myself.

Q. You kept the bank account?

A. The bank account stood in my name; and I presume Mr. Duffy deposited to the account. 20

Q. I did not ask you that. You kept all the receipts in your individual bank account, didn't you?

A. All the moneys that were received were deposited to my individual bank account, as far as I know.

Q. And did you keep a firm account of McKenna & Duffy?

A. No, sir.

Q. Where did you keep those accounts?

A. Didn't have any account to keep of that kind. 30

Q. Not of the money received for the firm?

A. No. Any money received was credited on the ledger the day it was received.

Q. Whose ledger?

A. The ledger that was in my office for years—the business of the office.

Q. Your own ledger?

A. Yes, sir.

Q. So you kept no distinct account at all of the firm of McKenna & Duffy? 40

A. No, I did not keep any. Mr. Duffy may have; I hope he has. But the understanding was, between Mr. Duffy and myself, that the name should not be—

Q. Never mind about that; I did not ask that. Did you collect from Wheaton for services rendered, legal services the firm rendered to him?

A. Yes, sir.

Q. Do you know how much?

A. No, I do not.

10 Q. Did you collect from Beck?

A. I collected from Beck for placing a mortgage, commission on placing a mortgage on his cottage at Long Branch.

Q. How much?

A. I don't know, and don't even know whether that was during Mr. Duffy's time.

Q. Was it over three hundred dollars?

A. No, sir; I don't think so. The amount of the loan was five or six thousand dollars, and we received a commission of two and a half per cent.

20 Q. Did you collect the Braker account?

A. I collected from Mr. Braker one hundred dollars, yes, sir, which was to cover the disbursements and services. A very small part of that was done during Mr. Duffy's time, though.

Q. Exactly, but the amount agreed upon was three hundred dollars, wasn't it—the charge?

A. Whose?

Q. Mr. Braker's?

30 A. No, sir; one hundred dollars.

Q. The business was done in the name of McKenna & Duffy, wasn't it, there?

A. No, sir; the business was done in the name of McKenna, except in a few instances.

Q. Well, what did the firm do?

A. Well, I will have to leave that largely to Mr. Duffy because he was in charge of the office.

Q. Well, you had advertised as a firm, hadn't you?

A. No, sir.

40 Q. Didn't you have your paper printed as a firm?

A. I don't know whether there was any paper printed or not as a firm; I do not recall that.

Q. But you were in partnership for a while?

A. We had this arrangement, just exactly as I have stated, that he was to go down there and take charge of the office, and devote his attention to it, and whatever profits accrued over the expenses we were to divide.

Q. Now, you say Duffy was to pay you six hundred dollars a year for the house?

A. Yes, sir.

10

Q. And wasn't it fifty dollars a month?

A. No, sir; the arrangement is exactly as in Mr. Duffy's handwriting, in his letter.

Q. The payment was to be in advance.

A. No, sir; there was no arrangement that it was to be paid in advance.

Q. And when you say this note was made the year had practically commenced?

A. He had taken possession of the house about two weeks.

20

Q. Who paid the discount on these notes?

A. I had them discounted. I discounted the first one.

Q. Mr. Duffy took down the next two?

A. He went down and had them charged to my account. He went in and took the bank-book in. The bank did not know him in the transaction.

Q. You say you rented the house next to Duffy for \$750?

A. Yes, sir.

Q. Was that furnished or unfurnished?

A. That was furnished; and that was for three months, 30 for the summer season. And I rented this one to Mr. Duffy for six hundred dollars for a year, he to furnish the furniture and heat.

Q. And there was nothing said about your paying for part of the heating?

A. Not one thing until afterwards.

Q. When was it spoken about?

A. It was spoken about on the day the check was given by me. He was to take it over and give it to the plumber on account of the bill, and he did not do it.

40

Q. Was that about the day the partnership was arranged?

A. No, sir; the partnership never was spoken of or arranged until along in March.

Q. And then you say you had asked him for the rent prior to that, had you?

A. No, sir; never spoke of the rent until the day the note was given.

10 Q. But you spoke about some conversation in which you asked him to pay the whole rent for the year for that house?

A. No, I say on the day the first note was given I spoke to Mr. Duffy about paying some of the rent. He said he was not able to do so. Then I suggested to him that he give me a note for the amount of the year's rent, and he would pay on account as each three months came around, and let the note be renewed for the balance.

20 Q. Then at the time this note was given, which was in February, he had, you say, commenced to occupy the house —on February 2d—was that the time your lease commenced?

A. No, the lease commenced from the time of the writing of that letter.

Q. What letter do you refer to?

A. Of January.

Q. January 3d, 1902?

A. That is my understanding of when the lease commenced.

Q. That was the date of the beginning of the year?

30 A. That was the date of the acceptance of the premises as a leasehold for one year at six hundred dollars per year.

Q. Was the property finished at that time—were the carpenters done?

A. No, my recollection is that the houses were finished in the Fall, but there were some little things to be done while Mr. Duffy was there before he was married, which we hurried up and had finished.

Q. Was the heat installed?

A. No, sir.

40 Q. When was the heat installed?

A. The heat was installed either before Mr. Duffy went away, or while he was away on his wedding trip. It was installed, anyhow, between the time that he took the premises under that letter and the time of his occupation. What little there was to be done—I think there was some slight little thing—was done, and they remained at our house for a couple of days before they completely moved into the house which they had leased from me.

Q. And then on the 18th you asked him for the rent?

A. I think it was the 17th.

10

Q. The 17th of February?

A. Yes, sir; the 17th of February.

Q. You asked him then for the year's rent?

A. Yes, sir; I asked him for the rent, and he then gave me this note.

THE VICE-CHANCELLOR: He has given us that conversation two or three times.

Q. And then your arrangement in regard to partnership was made in March—what time in March? 20

A. I cannot tell you the time, Mr. Roe. I know it was after Mr. Duffy had taken possession of the house. We talked it over several nights while he was down there.

Q. How do you fix it as March?

A. Why, the way it is in my mind is that I went away up to Canada again, examining those titles there, in February; I was very little at Long Branch during February; and when I came back I felt convinced of the advisability of having somebody there to look after the practice.

30

Q. Was that before or after the date of the first note, on February 17th, that you were in Canada?

A. Oh, I was there before and after; both.

Q. But you, on February 17th, saw Mr. Duffy about this note?

A. Yes, sir.

Q. For the rent, you say?

A. Yes, sir.

Q. And did you have any conversation at that time about his going into partnership with you?

40

A. No, sir.

Q. Then how do you fix that it was after that?

A. My recollection of it is, Mr. Roe, that I was up in Canada the first two weeks of March—the last week in February and the first two weeks of March—and that after my return from that trip then I spoke of it.

Q. And when this note was given nothing was said about it?

A. No, sir.

10 Q. Was anything said about the rent at the time you went into partnership?

A. No, sir; not a word.

Q. Nothing about the house he occupied?

A. No, sir.

Q. And nothing at the time this one hundred dollars was paid on account of the heating?

A. That was the very same day the note was given, and the conversation was just as I have detailed it.

Q. Now, when this check came in didn't you say to Mr.
20 Duffy, "You can take this check and put it in with your account, and when the bill comes in you can pay the plumber's bill"?

A. Put this check to his account?

Q. To his own account?

A. No, sir.

Q. Didn't you make the contract for putting the heat in?

A. Never. I simply spoke to a man to find out, as Mr. Duffy 'phoned me to find out, what artisans at Long Branch charged for heating; and I did that as he asked me to.

30 There is a balance of the account still due the plumber, and if there was any liability on my part he would have long ago had it, or forced the payment.

Q. Who paid the plumber in the end?

A. I don't know; I never knew of any payment to him.

THOMAS McKENNA, SR., *sworn.*

BY MR. CORBIN:

40 Q. Mr. McKenna, you reside at Long Branch?

A. Yes, sir.

Q. And Thomas P. McKenna, the complainant here, is your son?

A. Yes, sir.

Q. Did you know anything about the negotiations with Mr. Duffy about occupying a house at Long Branch, in December or January, 1901-02?

A. Well, all that I know about it was that Mr. Duffy wanted a house at Long Branch, and I went with Mr. Duffy, and I think my son was there, and we went around 10 to try to get him a house.

Q. To show him houses?

A. To show him houses. And there was one house he partly settled on, or thought it would suit him, a small house that had steam heat in; and the first thing I knew after that he was going to this other house; it was a bigger house and more elaborate, you know.

Q. And did you give him prices for it?

A. Well, I didn't give him any prices for it.

Q. You left that to your son? 20

A. Yes. I didn't give him any prices for it, no, sir.

Q. Did he go into the house, occupy the house?

A. Oh, yes, sir; yes, sir.

Q. And do you know anything about getting possession again, that is, getting the keys from him?

A. Well, when he went away he kept the keys and possession of the house; it was so understood; he kept the keys for he had the house for a year; and when he went away he took the keys away with him. I either wrote to Mr. O'Reilly or some person, I don't know who—I think I 30 wrote to him for Mr. Duffy's address when the year was up, or a little over the year—so I wrote to Mr. Duffy to please send down the keys, and he put them in an envelope and sent them promptly down as soon as I wrote him.

Q. That was, then, the following year, 1903?

A. Yes, after the year was up.

Q. That is the first that you got the keys of the house?

A. Yes, sir; that was the first.

CROSS EXAMINATION.

BY MR. ROE:

Q. Who was the owner of the house then, Mr. McKenna?

A. My daughter was the owner of it.

Q. And they had a key, hadn't they?

A. No, they never had the key; Mr. Duffy had the key.

Q. Didn't they go into the house?

A. Never got into the house.

10 Q. You didn't have any other key?

A. No, sir; I had no key that I know of. I never was in the house until after we got these keys.

Q. When did you daughter become the owner of it?

A. I couldn't tell positively that, myself.

Q. Was it before Tom got married?

A. Well, it was about that time, I think; I won't be positive whether it was before or after; I won't be positive about that.

20 Q. And then you were acting for the daughter, or for Tom?

A. Well, I was acting as a friend between Duffy and them all, as far as the little I done. It wasn't anything to me. I know that I never got into the house until after the keys came from Mr. Duffy.

BY MR. CORBIN:

Q. You looked after it for both of them?

30 A. Yes, sir. How I know it, was I was completely surprised when I got the keys and went in and seen the condition of the house. That is the reason I know I never was in it.

BY MR. ROE:

Q. Do you remember when the piano was taken away?

A. I do not.

Q. Don't you remember, in September, the piano being taken away, and you let the men in?

40 A. I do not. I never was in the house, and I never let the men in to take the piano away.

HENRY B. SHERMAN, *sworn*.

By MR. CORBIN:

Q. What is your employment?

A. I am cashier of the Citizens' National Bank of Long Branch.

Q. Do you recall the discounting of a note, and renewals, of Mr. Duffy, with Mr. McKenna's endorsement?

A. I do. 10

Q. Do you remember who came with the notes?

A. Well, I do not remember in each case. I remember the note was originally brought by McKenna.

Q. And the renewals—did Mr. Duffy come later with renewals?

A. Mr. Duffy came in with renewals once or more.

Q. Was there any conversation on any of these occasions about what the note was for?

A. When the note was discounted, I told Mr. McKenna I did not know Mr. Duffy. He told me he had rented his house, and this was for payment of rent. 20

MR. ROE: I object to that.

THE VICE-CHANCELLOR: Yes, it must be stricken out.

Q. Well, later Mr. Duffy brought a note there?

A. Yes, sir; I remember his coming in.

Q. Did you have any conversation with him about the note, in particular, that you recall? 30

A. I do not recall any conversation with him.

CROSS EXAMINATION.

By MR. ROE:

Q. Did not Mr. Duffy tell you that he was only accommodation maker on that note, and that it was McKenna's note? 40

A. No.

Q. On no occasion?

A. On no occasion.

Q. This note of February 17, marked Exhibit D, has marked across it, "Charge to account T. P. McKenna."

A. Yes.

Q. When was that charged to the account?

A. On May 19th.

Q. And what was done with the note?

10 A. This note was charged to his account, and the new note went to Mr. McKenna's credit.

Q. I call your attention to the next note, which is marked Exhibit C of Complainant: Across that note is written, "Charge account T. P. McKenna."

A. Yes.

Q. Who did that?

A. I did.

Q. Was the note charged to his account?

20 A. This note was charged to his account, and the new note placed to his credit.

Q. And the new note was placed to his credit when?

A. August 19th.

Q. When was it charged to his account?

A. Charged to his account on August 19th. It was due and protested; neither account was good for it, and when the new note was put in and placed to his credit, this one was charged to his account.

Q. It was due August 17th?

A. Yes, and protested.

30 Q. And charged to his account when?

A. On August 19th.

Q. And you handed these notes over to him?

A. These notes were returned with the vouchers; yes, sir.

COMPLAINANT RESTS.

DEFENDANTS' REBUTTAL EVIDENCE.

HUGH EDWARD O'REILLY, *recalled*.

BY MR. ROE:

Q. Did you have any conversation with Mr. McKenna 19
about Mr. Duffy going in partnership with him there at
Long Branch?

A. Yes, I did.

Q. When was that?

MR. CORBIN: I object to that. We have had this all
before; we discussed that once; it is not proper rebuttal.

THE VICE-CHANCELLOR: Did he examine Mr. O'Reilly 20
when he was on the stand before about this partnership
question?

MR. CORBIN: He did; he examined him, and he said he
had a conversation with Mr. McKenna about seeing Mr.
Duffy about the partnership.

THE VICE-CHANCELLOR: Well, I cannot rule upon it as
yet. You may proceed.

A. During December, 1901, and January, 1902, and 30
possibly the early part of February.

Q. What did he say about that to you?

A. Why, Mr. McKenna asked me if I thought Joe would
like to go into partnership with him in his business at Long
Branch, and I said I would talk to Joe and put the proposi-
tion to him in the most favorable light as I saw it, and I
thought it was all right, and would advise him to go ahead,
and I did so.

Q. And do you know when they entered into the agree-
ment?

MR. CORBIN: I object.

THE VICE-CHANCELLOR: How can he know that, unless it appears that this witness was there. I do not see how you can ask him that question.

Q. When did you speak to Mr. Duffy about this conversation?

10 MR. CORBIN: I object to that. I cannot see that his communication with Duffy has anything to do with it.

THE VICE-CHANCELLOR: I overrule the question as to when he spoke to Mr. Duffy about it.

Q. Did you report to Mr. McKenna the result of your interview with Mr. Duffy?

A. Yes, I did.

20 Q. When?

MR. CORBIN: It seems to me this all ought to have been opened on the direct case.

THE VICE-CHANCELLOR: No, this is proper rebuttal of your rebuttal about the time when Mr. McKenna said he entered into his partnership. I will admit it.

30 A. Yes, I reported on the day that I spoke to Mr. Duffy, that same afternoon.

Q. Well, when, I asked you?

A. About January 29th or 30th; it was the day, or a day or two after Mr. Duffy returned from his wedding trip, and he was married on the 16th of January, and he was away less than two weeks.

Q. Did you have any talk with Mr. McKenna as to how the property was rented to Mr. Duffy?

40 MR. CORBIN: I object to that. This is a new matter, a new defense made after the case was closed.

THE VICE-CHANCELLOR: I will admit it.

A. Yes, I did.

Q. When?

A. About the early part of February, I should think.

Q. What did he say to you about it?

A. He said that Joe was coming down, had taken one of his houses in Long Branch and was going to live down there.

Q. Did he say anything about the rent? 10

A. Yes, he told me the rent was fifty dollars a month, that that was what he was going to charge him.

No cross-examination.

JOSEPH A. DUFFY, *recalled*.

BY MR. ROE: 20

Q. Do you know Mr. Sherman that was on the stand?

A. I do.

Q. Did you have any talk with him in reference to this note?

A. Yes.

Q. Which note?

A. The last note; that is, the note that was due on August 17th, when I brought back the note in question. 30

MR. CORBIN: I object to his conversation.

THE VICE-CHANCELLOR: He has not asked him for the conversation yet.

Q. I asked you at what time?

THE VICE-CHANCELLOR: He fixed the time. He says when he took the note of August 18, 1902, to the bank he had a conversation with Mr. Sherman. 40

Q. Did you say anything to Mr. Sherman about being an accommodation maker on that note?

MR. CORBIN: I object to that. Your Honor will see that that was in his cross-examination, and he cannot contradict that.

THE VICE-CHANCELLOR: You brought it out, in fact, in the cross-examination of Mr. Sherman. I will exclude it.

10

Q. I show you a letter written by you on January 3d, that is marked in evidence Exhibit B: I have a copy in my hand. In that letter you make use of the words: "While it is true I could pay you from my profits, yet in doing so, &c., &c." What did that have reference to?

A. That had reference to the money I had invested through Mr. McKenna with Mr. Myer, in these transactions I have been speaking about with Mr. Myer and Offenbach & Moore.

20

CROSS EXAMINATION.

BY MR. CORBIN:

Q. Then those investments had been made in the year 1901, had they?

A. 1901, yes.

30

BOTH SIDES CLOSE.

40

IN CHANCERY OF NEW JERSEY.

 BETWEEN

 THOMAS P. McKENNA,
Complainant,

AND

 RICHARD F. CORCORAN and
 JOSEPH A. DUFFY,
Defendants.

10

Conclusions.

(Decided June 26, 1905.)

20

Heard on Bill, Answers and Proofs in open Court.

This is a bill filed by Thomas P. McKenna against Richard F. Corcoran and Joseph A. Duffy.

The purpose of the bill as to obtain, on behalf of the complainant, subrogation as against Duffy of the rights of Corcoran, who is the owner of a judgment against Duffy. There is also a prayer in the bill that Duffy be decreed to pay to the complainant the amount of the judgment now owned by Corcoran, which the complainant claims he is entitled to by right of subrogation.

30

 For the Complainant, *Collins & Corbin.*

 For the Defendants, *Charles J. Roe, Esq.*

GARRISON, V. C.:

40

The facts are that in January of 1902 Duffy and McKenna, who were each lawyers, and each residents of Long Branch, New Jersey, entered into an agreement by which McKenna leased a dwelling house at Long Branch to Duffy for Six hundred dollars a year, Duffy to install in the house a steam-heating apparatus.

- 10 The terms of letting are expressed in a letter dated January 3, 1902, from Duffy to McKenna, and there is no other evidence respecting the contract excepting the oral evidence, and in this McKenna's testimony is in accord with the statements contained in Duffy's letter, and Duffy's oral testimony conflicts with what he wrote in the letter.

I find the fact to be as above stated.

- 20 Duffy entered into possession of the property about February 2d, 1902, and the steam heat was installed, and about the 17th of February, 1902, McKenna requested Duffy to pay some part of the rent. Duffy stated his inability to do this, and as a result of this interview Duffy gave a note for Six hundred dollars to McKenna, at three months, dated the 17th of February, 1902.

The undoubted purpose of this transaction was to enable McKenna to realize six hundred dollars by getting the note discounted, and to enable Duffy to pay off the rent in small installments, by paying on account of the note as it fell due on its first due day and at the subsequent renewals thereof which they intended to make.

- 30 When the note fell due on the 18th of May, 1902, it was renewed, and it was again renewed when it fell due on the 18th of August, 1902. When it fell due on the 18th of October, 1902, it was not renewed, but was protested, and on the 16th of June, 1903, the Citizens' National Bank of Long Branch at which institution the note had been discounted, obtained a judgment against Duffy for the amount of the note with interest and costs.

Subsequently this judgment was purchased by and an assignment was made to Richard F. Corcoran.

On the 7th of June, 1904, judgment was entered by Corcoran against McKenna on the same note.

- 40 On the 3d of September, 1904, McKenna paid this last-named judgment to the Sheriff, and demanded of Corcoran,

through Corcoran's attorney, Mr. Roe, an assignment of the judgment of June 16th, 1903, of the Bank against Joseph A. Duffy, claiming that since he had paid the judgment against himself, founded upon a note of which Duffy was the maker, it was a security to which he was entitled to subrogation upon payment of the debt to Corcoran.

Corcoran consented to deliver the note, but refused to assign the judgment, his reason for the refusal to assign being that Mr. Duffy claimed that he was not primarily responsible on the note, and that therefore Corcoran should not assign the judgment to McKenna. 10

In my opinion, where one who is a surety pays the debt, he is entitled to all of the securities that the creditor has, and that it is not proper for the creditor to withhold any such securities upon any pretext as to the responsibility or liability of those under obligation to pay such securities; but he must, upon receiving payment, transfer them.

The defendants, however, insist, that since the judgment in each of the cases was for the same cause of action (namely, a promissory note signed by Duffy and endorsed by McKenna) that the payment by McKenna of the judgment against himself satisfied the judgment that had been recovered against Duffy. 20

This was the early English rule (SHELDON ON SUBROGATION, 2d Ed., Sec. 135, p. 203); but it has been changed in England by statute, and in most of the States of the United States. (SHELDON ON SUBROGATION, Sec. 136, p. 205 et seq.).

In New Jersey the statute regulates the proceedings on execution upon a joint judgment against principal and surety in such a way as to protect the surety, and gives to a surety who pays the judgment the benefit thereof against the principal. (Gen. Stat., p. 2538, Sec. 36; Pamph. Laws 1903, p. 543, Sec. 35; WHITE vs. BROWN, 29 N. J. Law, 514, Court of Errors, 1861, reversing Supreme Court, same volume, 307; DURAND vs. TRUSDELL, 44 N. J. Law, 596, Sup. Court, 1882; D. L. & W. R. R. Co. vs. OXFORD IRON Co., 38 N. J. Eq., 153, Van Fleet, V. C., 1884). 30

In the case of WHITE vs. BROWN, *supra*, the Court of Errors held that where one of several defendants pays to 40

the plaintiff a sum of money in satisfaction of a judgment, and procures an assignment of the judgment to himself, this payment does not operate as a satisfaction of the judgment as to any of the defendants except the one paying the money, unless it appears that the payment was intended as a satisfaction of the judgment as to all of them.

10 Applying this principle to the case in hand, I am clear that the payment by McKenna of the judgment against himself was not intended as and must not be held to be a satisfaction of the judgment against Duffy, that the judgment against Duffy was a security in the hands of the creditor for a debt originally due by Duffy as principal and McKenna as surety, and that upon payment to the creditor by the surety the latter is entitled to the assignment of the collateral, namely, the judgment against Duffy.

There is a small balance of costs incurred by Corcoran in obtaining the judgment against Duffy, and this balance, of course, must be paid to him by the complainant before he is called upon to assign to the complainant.

20 I will advise a decree in accordance with the views herein expressed, the terms of the decree to be settled upon notice.

30

40

59

FINAL DECREE.

This cause coming on to be heard in the presence of CHARLES L. CORBIN, counsel for complainant, and CHARLES J. ROE, counsel for defendants, Richard F. Corcoran and Joseph A. Duffy, and witnesses having been examined and exhibits offered, and counsel heard; and it appearing that the defendant Richard F. Corcoran is the holder, by assignment, of a judgment recovered by the Citizens' National Bank of Long Branch in the New Jersey Supreme Court on the sixteenth day of June, Nineteen hundred and three, against Joseph A. Duffy for Six hundred and thirty dollars and ninety-four cents damages, and for Thirty-three dollars and ninety cents, costs of suit, upon a note by the said Joseph A. Duffy, in the sum of Six hundred dollars to the order of the complainant, Thomas P. McKenna, dated August eighteenth, Nineteen hundred and two, and that the said Richard F. Corcoran was also the holder of another judgment recovered by him in the New Jersey Supreme Court on the seventh day of June, Nineteen hundred and four, against Thomas P. McKenna, complainant herein, for the sum of Seven hundred and one dollars and seventy-eight cents, damages and costs, which judgment was recovered against the said McKenna as endorser of the said note made by Joseph A. Duffy, and which judgment was satisfied by the said Thomas P. McKenna; and the Court being of the opinion and adjudging that the said Joseph A. Duffy is primarily liable for the debt on said note, and that the complainant is in the position of a surety thereon and is entitled to be subrogated to the judgment held by the said Richard F. Corcoran against Joseph A. Duffy on payment of the costs, included in said judgment, and that the complainant is entitled to the relief prayed for in said bill:

It is thereupon, on this _____ day of July, Nineteen hundred and five, on motion of COLLINS & CORBIN, solicitors for complainant, *ordered, adjudged and decreed* that the defendant, Richard F. Corcoran shall sign and deliver an assignment of the judgment, recovered by him against Joseph A. Duffy, to the complainant within ten days from the date hereof on receipt from the complainant of Thirty-three dollars and ninety cents costs, included in the said judgment, with interest thereon from the sixteenth day of June, Nineteen hundred and three; and either party may apply to the Court for further directions, if necessary, touching the carrying out of the said assignment.

10

Respectfully *advised*
~~ordered.~~

Lindley
~~LUDLEY~~ M. GARRISON, V. C.

20

30

40

COMPLAINANT'S EXHIBITS.

EXHIBIT "1."

10

\$600.00. LONG BRANCH, N. J., Aug. 18th, 1902.

Three months after date I promise to pay to the order of Thos. P. McKenna Six hundred dollars at The Citizens'

Long Branch, N. J.

For value received.

20

Due Nov. 18th.

JOSEPH A. DUFFY.

(Endorsed.)

THOS. P. MCKENNA.

9530.

30

In judgment. Judgment June 16, 1903, for \$664.64 against Joseph A. Duffy at suit of The Citizens' National Bank of Long Branch, in Supreme Court. Assigned Oct. 1, 1903, to Richard F. Corcoran.

Judgment June 7, 1904, for \$701.78 against Thomas P. McKenna at suit of Richard F. Corcoran. In Supreme Court. Both on within note.

Note regularly protested Nov. 18, 1902; fees, \$1.54.

40

62
EXHIBIT "A."

TELEGRAM.

Received at Long Branch, N. J.

Jan. 3, 1902.

Dated Penna. Depot, Jersey City, N. J. 3.

10 To Thos. P. McKenna,

Morris Ave., L. Beh.

Don't bother about deed wrote to-night explaining get
bid however.

J. A. DUFFY.

EXHIBIT B.

20

Telephone 3702.

Joseph A. Duffy,

Attorney-at-law, Commercial Trust Building.

JERSEY CITY, N. J., Jan. 3, 1902.

DEAR TOM:—

Since you left to-night I have been thinking the matter
over concerning a purchase. I have concluded it would be
rash for me to undertake such a thing. While it is true
30 I could pay you from my profits—yet in doing so I lost
sight of the fact that these profits are *my only* working
capital.

So I will have to drop that idea at present—and go away
back to the original plan; *i. e.*, the house at \$600 per an-
num, and install the heat, as suggested by you. That being
the case it is immaterial to me which house I have—I leave
it to you as to which house you would prefer to have the
steam in. My vagaries to-day must be due to loss of sleep.
40 There's no telling what the future has in store—but not

being gifted with "pre-knowledge" I dare not attempt too much. Sorry to have bothered you to-day—especially as you were so taken up with that *weighty* matter downstairs this P. M.

So you need prepare no deed at present—find out what Long Branch artisans charge for heat—and I will call you at 12 to-morrow as arranged.

With best wishes to all at home.

Sincerely, 10
JOE.

EXHIBIT C.

No. —

LONG BRANCH, N. J., Feb. 17th, 1902.

THE CITIZENS' BANK. 20

Pay to the order of Jos. A. Duffy (\$100.00) One hundred dollars.

THOS. P. McKENNA.

(The Citizens' Bank, April 8, 1902, Long Branch, N. J.)

(Endorsed.)

For deposit. Joseph Duffy. 30

(Pay any National or State Bank, Banking or Trust Co., or order. Prior endorsements guaranteed. First National Bank, Asbury Park, N. J. Martin H. Scott, Cashier.)

(Pay to the order of First National Bank, Asbury Park, N. J. Commercial Trust Company of New Jersey.)

OSCAR L. GUBLEMAN,
Treasurer. 40

70 64

EXHIBIT D.

\$600.00.

LONG BRANCH, N. J., Feb. 17, 1902.

Three months after date I promise to pay to the order of Thos. P. McKenna Six hundred dollars at the Citizens' National Bank of Long Branch, N. J.

For value received.

10 Due May 17.

JOSEPH A. DUFFY.

(Endorsed.)

THOS. P. McKENNA.

EXHIBIT "E."

20 \$600.00.

LONG BRANCH, N. J., May 17, 1902.

Three months after date I promise to pay to the order of Thomas P. McKenna Six hundred dollars at the Citizens' National Bank of Long Branch, N. J., for value received.

JOSEPH A. DUFFY.

Due Aug. 17.

Endorsed. "For renewal.

30

"THOS. P. McKENNA."

Protested Aug. 18, 1902. Fees, \$1.64.

DEFENDANTS' EXHIBITS.

EXHIBIT D. "1."

Thomas P. McKenna.

Counsellor-at-Law,
27 William St., New York.
Telephone 1647 Broad.

August 29th, 1904.

Charles J. Roe, Esq.,
15 Exchange Place,
Jersey City, N. J.

DEAR SIR:—

As I have written you, I am anxious to get the Corcoran judgement out of the way, and have arranged for the Sheriff of Monmouth County to meet you and myself at Judge Collins' office next Wednesday afternoon at 2 o'clock, for the purpose of adjusting this matter.

Yours respectfully,

THOS. P. MCKENNA.

EXHIBIT D. "2."

Thomas P. Kenna,
Counsellor-at-Law,
27 William Street, New York.
Telephone 1647 Broad.

June 30th, 1904.

Charles J. Roe, Esq.,
15 Exchange Place,
Jersey City, N. J.

DEAR SIR:—

I have your letter of the 27th inst. regarding the Corcoran judgement. I am, as you know from my frequent communications with you by telephone, very desirous of paying this judgement at once, and have only been delayed in doing so by waiting for the tax costs to be entered.

I have been endeavoring to make an appointment with Judge Collins at his office when we could settle this matter and have the papers delivered over, but he has been engaged in the Court of Errors and the Court of Chancery. I hope to be able to arrange an appointment for next Wednesday afternoon. Will you kindly advise me whether this appointment would be agreeable to you.

Yours respectfully,

THOS. P. McKENNA.

EXHIBIT D. "3."

No. 1598.

JERSEY CITY, N. J., April 8th, 1902.

Commercial Trust Company of New Jersey,
15 Exchange Place.

Pay to the order of Northam and Throckmorton two
hundred 00/100 dollars.

\$200 00/100.

JOSEPH. A. DUFFY.

(Indorsed.)

NORTHAM AND THROCKMORTON.

EXHIBIT D. "4."

An Assignment of Judgement, dated Oct. 1, 1903, made
by the Citizens National Bank of Long Branch, to Richard
F. Corcoran of judgement of said bank against Joseph A.
Duffy, consideration \$664.64. Judgement recovered June
16, 1903, in the Supreme Court, for damages \$630 94 and
costs \$33.74.

EXHIBIT D. "5."

Check of R. F. Corcoran, dated Oct. 19, 1903, on Third
National Bank of New York, payable to the order of
Charles J. Roe, and endorsed "Pay to the order of Ben-
jamin P. Morris, Attorney of Citizens National Bank,
Charles J. Roe," "Benj. P. Morris, Atty "

EXHIBIT D. "6."

Certified copy of mortgage made by Thomas P. McKenna to the Citizens National Bank, dated Feb'y 20, 1902, to secure \$5000. payable one year from date, with interest at six per cent., payable semi-annually, covering lands in the County of Monmouth, and recorded March 1, 1902, in Book 270, page 198, for Monmouth County.

EXHIBIT D. "7."

Mortgage given April 10, 1902, to the Citizens National Bank, to secure the sum of \$5000. in one year from date, with interest at six per cent., payable semi-annually, covering lands in Monmouth County, and acknowledged and recorded in Book 273 of Mortgages, page 45, for Monmouth County on May 20, 1902.