

New Jersey Court of Errors and Appeals.

FIRST NATIONAL BANK OF THE
TOWN OF UNION,

Respondent,

vs.

WILLIAM FESSLER,
Impleaded, Etc.

Appellant.

Appeal from
the Court of
Chancery.

Points for William Fessler, Appellant.

Statement of Facts.

This appeal is from the final decree of the Court of Chancery, made on the 5th day of June, 1913.

The bill of complaint (pages 8-9-10-11-12) sets out that on July 5, 1910, Thomas F. Purcell drew up and signed a promissory note, a copy of which is as follows:

“ \$3300. Weehawken Post Office, N.J., July 5, 1910.

“ Four months after date I promise
“ to pay to the order of myself Thirty-
“ three Dollars at First National Bank,
“ Town of Union, N. J., with interest.
“ Value received.

“ No. 809. Due Nov. 5.

“ Thomas F. Purcell.”

which note was endorsed by the following persons in the order next given: Thomas F. Purcell, M. William Hilbert, John S. Eastwood,

William Fessler, M. D. (case page 8 line 30). That William Hilbert presented it to the First National Bank of the Town of Union, N. J., and was paid thirty-three hundred dollars (case page 9 line 3). That after the payment to Hilbert of \$3300. the discovery was made that the note was for \$33. instead of \$3300, (case page 9 line 18). The bill of complaint then continues:

“ * * * and that said note was made, signed and endorsed by each of said persons well knowing the purpose thereof, and it was their intention then and there to make, sign and endorse a good and sufficient written instrument or note for the sum of thirty-three hundred dollars, but your orator avers, that through the *mutual mistake* of all of said parties to said transaction, and to the making and signing of said promissory note, said instrument contained a mistake or omission therein, that instead of reading thirty-three hundred dollars, same read thirty-three dollars, and same did not express the true intention and meaning of said parties to said written instrument or note. * * * ” (Case page 9 line 28).

The bill of complaint prays that the promissory note be corrected so as to read thirty-three hundred dollars instead of thirty-three dollars (case page 11, line 20).

Thomas F. Purcell, M. William Hilbert, John S. Eastwood and William Fessler were made defendants and process was asked for against them (case page 11, line 30).

Service of the subpoena was acknowledged by M. William Hilbert (case page 14, line 35). William Fessler was served and appeared and filed an answer. *The other defendants, Thomas F. Purcell and John S. Eastwood, were not served with process nor did they appear.*

A decree pro confesso was entered against M. William Hilbert.

The answer of William Fessler denied the making of a mutual mistake and denied that it was his intention to endorse a promissory note for \$3300. and set up that he endorsed a note for \$33. (case pages 16-17-18).

An order of reference was made to W. T. Rosenberg, Advisory Master, who heard the testimony and advised the final decree.

The final decree, which was made on the 5th day of June, 1913, directed that the note be reformed to be a note for thirty-three hundred dollars (case pages 194-195-196).

Fessler (the appellant) and Hilbert were the only parties served with process; the defendants Eastwood and Purcell were not served, nor did they appear and no decree has been made against them (case p. 13-14-15). They were not within the jurisdiction of the Court (case p. 177).

The Court of Chancery made a final decree granting the relief prayed for, to wit: reforming the promissory note to read in the body thereof "Thirty-three hundred dollars" (case p. 194).

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POINTS 1-2.

1. The Court of Chancery had no jurisdiction to make the decree in question because Thomas F. Purcell, a necessary and indispensable party to the suit, was not served with process therein nor did he enter an appearance or appear therein.

2. The Court of Chancery had no jurisdiction to make the decree in question because John S. Eastwood, a necessary and indispensable party to the suit, was not served with process therein nor did he enter an appearance or appear therein.

Thomas F. Purcell was the maker of the note which is sought to be reformed, and John S. Eastwood was an endorser thereof as to whom defendant, Fessler, was secondarily liable (case p. 9, line 1.) Subpœna was issued directing them to answer the bill of complaint (case p. 13, line 10.) They were never served with subpoena nor did they appear.

The appellant Fessler, who is the last endorser on the note, if he pays the judgment is entitled as follows:

Sect. 25 " * * * if the judgment be paid by a defendant secondarily liable, it shall not be considered satisfied as against any defendant liable over on the bill or note to the defendant making such payment, but he shall have, on application to the court or a judge, on notice to the other parties to the judgment and upon terms, the full benefit and control of such judgment for the purpose of compelling repayment from any defendant liable to him for such repayment, and on such application the

“Court or judge may order an issue to try
“the question in controversy.”

P. L. 1903, p. 543.

The endorser of a note, upon paying the amount of the judgement, is entitled to an assignment from the judgment creditor of the judgment against the maker.

McKenna v. Corcoran, 70 N. J. Eq. 627.

Purcell, being the maker of the note, is primarily liable; after him the order of liability as respects one another is as follows: Thomas F. Purcell, M. William Hilbert, John S. Eastwood and William Fessler.

See P. L. 1902, p. 596.

Purcell and Eastwood, not being parties to the suit for reformation, at the present time are liable for no more than the face of the note, to wit, \$33. with interest and costs. As to them the note is still a thirty-three dollar note.

See P. L. 1902, p. 587.

In the event of Fessler paying the face of the note as it stands as to him, to wit, \$3300. with interest, he would be entitled, under the statute above cited, to an assignment of the judgment to hold against *the maker and all* the endorsers. At present he would be entitled to an assignment of a note for \$33. and interest against *Purcell and Eastwood*.

We therefore contend that the Court of Chancery was without jurisdiction to make the decree appealed from because of the absence of two necessary and indispensable parties, and that said decree cannot be sustained since it is not made

against the maker and all the endorsers preceding the defendant Fessler.

The formal objection of lack of necessary parties was not made at the hearing, although the attention of the Court was directed to the fact that Purcell and Eastwood were not before the Court and Counsel for Complainant then showed in excuse that they were non-residents (case p. 177).

It may be argued that failure to make the objection is a waiver of the same. Our Courts have, however, always held differently. Thus the rule has been laid down that:

“The issuing of a subpoena against a non-resident and taking an order for his appearance and publishing the order will not give the court jurisdiction either over his person or over the subject matter of the bill, if, from the nature of the case, the court has no jurisdiction over either.

If the case be such that the court cannot give relief for want of jurisdiction over either the person or the subject matter, the jurisdiction may be objected to in any stage of the proceedings; indeed the court would take judicial notice of it.”

Gifford v. Thorn 7 N. J. Eq. 90.

And where defendants below have failed to make the objection of want of a necessary party blow, this question is not entertained on appeal for their benefit, but because the court cannot with the parties before it make a decree which will finally and properly dispose of the subject matter in controversy.

McLaughlin v. Van Kenran, et al.
21 N. J. Eq. 397.

Berryman, Graham 21 N. J. Eq. 370, p.
378.

The promissory note was made by Purcell and no decree can be made changing this note to a note for \$3300.00 without his presence in court.

In the *McLaughlin* case (21 Eq. 379) the decree was reversed and the record remitted that the necessary party might be brought in. In the case at bar it seems to be impossible to *bring in* the two necessary parties since they appear to be beyond the jurisdiction of the court and it can hardly be supposed that they will now voluntarily submit themselves to process. We therefore contend that there should be a simple reversal of the decree.

POINTS 3, 4, 5 and 6.

The defendant, Fessler, was not a party to any mistake in the making or endorsement of said promissory note, if any mistake there was. The complainant was not a party to any mistake in the making or endorsement of said promissory note, if any mistake there was.

The bill of complaint charges: "5.*** That said promissory note was given, signed and endorsed by all of the aforesaid persons *for the express purpose of obtaining from your orator* the sum of thirty-three hundred (\$3300.) dollars for the use and benefit of said M. William Hilbert, and that said note was made, signed and endorsed by each of said persons *well knowing the purpose thereof and it was their intention then and there to make,*

sign and endorse a good and sufficient written instrument or note for the sum of thirty-three hundred (\$3300.00) dollars, but your orator avers that through the *mutual* mistake of *all* of said parties to the said transaction, and to the making and signing of said promissory note, said instrument contained the mistake or omission therein; that instead of reading thirty-three - hundred (\$3300.00.) dollars same read thirty-three (\$33.00) dollars and that same did not express the true intention and meaning of said parties to said written instrument or note; that the makers or endorsers of said written instrument or note are the *original parties to the granting of said loan*, and the payment by your orators of thirty-three hundred (\$3300.00.) dollars to said M. William Hilbert." (Case p. 9; fol. 30, etc.).

The only evidence adduced to support the charge thus made is as follows:

The complainant produced M. William Hilbert, who testified that the note was written by him with the exception of the signatures (case p. 24); that Purcell lived in Astoria, Long Island, and that he signed the note at the First National Bank of the Town of Union before Dr. Fessler did (case p. 28); that he told Purcell that he would like to have him sign the note as an accommodation and that he had considerable discount at the bank, and that he would be required to have someone else sign the note as a matter of accommodation, and Purcell said he would do it (case p. 26), and that he mentioned the sum of thirty-three hundred (\$3300.00) to Purcell (case p. 26); when the note was drawn and signed by Purcell only Hilbert and Purcell were present (case p. 29).

As to Eastwood's endorsement, Hilbert does not tell us *where* or *when* it was signed, he merely said "I told him that I had a note for thirty-three hundred (\$3300.00.) dollars, and that I was required by the bank to get several endorsers and I asked him whether he would not be kind enough to endorse this note for thirty-three hundred (\$3300.00) dollars as I had endorsed several notes for him; he said he would gladly do it and he signed the note" (case p. 27).

As to the Fessler endorsement, Hilbert testified: "William Fessler signed his name on the back of the note on July 5, 1910, at North Hudson Hospital (case p. 21) some time in the morning (case p. 28). A few days before the note was endorsed by Dr. Fessler I told him that I was in need of money and would require in the neighborhood of thirty-three hundred (\$3300.00) dollars to assist me, and I asked him whether he would not be kind enough to endorse my note and he said he would. The day before he signed I again went over the proceedings with him (case pp. 21-22); on the day the note was signed "I just asked him to endorse the note for me and he said he would do it; that he would endorse it" case p. 22). I told him particularly to endorse this thirty-three hundred (\$3300.00.) dollar note, and he looked at the face of it" (case p. 22). Nothing else was said. "That was practically all there was to it" (case p. 23). Hilbert further testified that Dr. Fessler was not present when Hilbert went to the First National Bank and obtained the money on this note, and that the last that he had anything to do with the paper itself was when he signed it, that that was also the first time he saw it, and that it had been drawn up the same day upon

which Dr. Fessler first saw and signed the note (case p. 27; fol. 30, etc.).

Reformation can only be decreed for a MUTUAL mistake made by ALL parties to the contract to be reformed.

When an agreement has been made, or a transaction has been entered into, or determined upon as intended, *by all the parties interested*, but in reducing such agreement or transaction to writing, through the mistake *common in both (or all the parties)* the written instrument fails to express the real agreement or transaction, the equitable jurisdiction for reformation may be invoked.

The mistake must be *mutual* and must be *in reducing the contract to writing*, and the person to be charged must be one of the parties to the mistake thus complained of.

Gough v. Williamson, 62 N. J. Eq. 526.

Whelan v. Osgoodby, 62 N. J. Eq. 570.

Lutjen v. Lutjen, 64 N. J. Eq. 773.

Wirsching v. Grand Lodge, 67 N. J. Eq. 711.

Leonard v. Bosch, 72 N. J. Eq. 131.

Lesser v. Demarest, 72 At Rep. 14.

Pomeroy's Eq. Rem. Sec. 675, page 1138.

Counsel for complainant realizing that it was necessary to make the mistake alleged a *mutual* mistake, and that it was necessary to make defendant Fessler, and complainant each, parties to it, undertook by his bill to cement the series of transactions against which the bill is filed into a *single* transaction, and charged in pleading, that the note "was drawn, signed and endorsed by *all* for the

express purpose of obtaining from complainant the sum of thirty-three hundred dollars"; that it was made, signed and endorsed *by each of the persons connected with the said note* while knowing the purpose thereof, i. e., to obtain thirty-three hundred dollars from complainant and that it was the intention of *all* "then and there to make, sign and endorse a good and sufficient instrument" for the sum of thirty-three hundred dollars, and that "through the *mutual* mistake of *all* of said parties" the note was made for thirty-three dollars only.

The situation thus pleaded might warrant relief, if maker and endorsers of this note had really come together and *jointly* agreed to raise the sum of thirty-three hundred dollars for the benefit of Hilbert or any one of them, and had then and there drawn, signed, and endorsed the note or had agreed so to do *and had authorized its discount in the First National Bank*. The note as between the bank and the maker and endorsers of it would then have been the mutual agreement of *all*.

The proof in this case, however, does not bear out these allegations. There is nothing to show that Fessler agreed, understood or cared whether the note in question was discounted at the First National Bank. There is nothing to show that Fessler understood or cared about the arrangement which Hilbert had made with the maker and other endorsers of this paper. The evidence plainly indicates that what Fessler did was to lend his credit to Hilbert for such uses as Hilbert might choose to make of it, by endorsing a paper already drawn and *completed*, irrespective and independent of and without coming in contact with the maker or other endorsers thereof.

Fessler became endorser of a completed note as it had been written, not as it was intended to be written.

The mistake, if mistake there was, occurred in the maker's contract.

Fessler was not a party to the contract in which the mistake occurred, if mistake there was.

Between Fessler and the maker there was neither *mutual* mistake nor liability on his part.

Between Fessler and preceding endorsers there was neither mutual mistake nor liability on his part.

Between Fessler and the complainant there was no *mutual* mistake.

Between the complainant and the maker and the endorsers there was no *mutual* mistake.

When the note was endorsed by the first, second, third and fourth endorsers the negotiable instrument act gave to each endorsement the following effect:

“Section 66: Every endorser who endorses without qualification warrants to all subsequent holders *in due course*:

1. x x x

2. x x x

3. x x x

4. x x x

5. And in addition he engages that on due presentation it shall be accepted or paid, or both, as the case may be, *according to its tenor*, and if it be dishonored, etc. he will pay the amount thereof.”

Laws 1902, p. 595.

The tenor of this note was fixed by the same act as follows:

“Section 17:—Rules of Construction—Where the language of an instrument is ambiguous, or there are omissions therein, the following rules of construction apply:

1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, *the sum denoted by the words is the sum payable.*”

Laws 1902, p. 587.

The figures in the margin of a note form no part of the contract or instrument represented by that note.

See cases cited under Section 17 of Crawford's Negotiable Instrument Laws, New Jersey Edition.

The case does not present the situation of a *mutual* mistake in a single contract.

No principal is more fully settled or better understood in commercial law than that the obligation of the endorser is a *new and independent* contract subject to the law of the place where the endorsement is made.

Am. & Eng. Enc. of Law, Vol. 4, p. 477.

We have then, before the paper reaches Fessler, first, the contract of the maker, a complete agreement in itself, for absolute payment of the note,—*if any mistake occurred it occurred in this contract*; and second, a series of three separate and distinct contracts of endorsement in which no mistake occurred; or in two of which, so far as the evidence goes, certainly no mistake occurred.

What is the evidence as to mistake in the maker's contract? What is the evidence as to mistake in the contracts of endorsement of Purcell and Eastwood? There is none.

It is true that Hilbert testified that he requested both Purcell and Eastwood the first to sign, and both to endorse a promissory note for thirty-three hundred (\$3300.) dollars, but the Court distinctly held:

"This testimony as to conversation between the witness (Hilbert) and Purcell and the witness (Hilbert) and Eastwood are admitted only as against the defendant, M. William Hilbert, who is testifying, *but has no force whatever as against the defendant Fessler.*"

If not binding on Fessler it certainly was not binding on Purcell and Eastwood, who were not parties to the cause, and the result is that so far as Purcell, Eastwood and Fessler are concerned *there is no evidence in the cause to show that there was a mistake in the maker's contract or that there was a mistake in the contract of endorsement of either Purcell or Eastwood.* In the face of this status of the evidence the inference *most* favorable to complainant is that Purcell and Eastwood signed and endorsed a note for thirty-three dollars, and that Hilbert in drawing and signing the thirty-three (\$33.) dollar note intended to draw and sign one for thirty-three hundred (\$3300.) dollars. If these premises are correct, what does the contract of endorsement made by Eastwood spell to Fessler, who next puts his name upon the paper? What do Purcell's two contracts, the one as maker, the other as endorser, legally convey to him? He has no

conversation with either of them; he does not know what they *intended* when *they* signed excepting as such intention is conveyed to him by the legal import of the paper—with the knowledge of which he is charged—and the result is, that he endorsed a note for thirty-three (\$33.) dollars. To hold otherwise would be to decide that a promissory note may be for one amount as to the maker and some endorsers, and for another amount as to other endorsers. And if Purcell and Eastwood executed a thirty-three dollar note even Fessler's *intention* to execute one for a different amount would change the tenor of the note actually executed by Purcell and Eastwood.

Again, the most logical inference favoring complainant, to be adduced from the testimony, is that there may have been a series of *independent* mistakes,—the first made by Hilbert when he wrote the note, the second when Fessler endorsed the note, and the third when the bank purchased the paper. But that Fessler took no part in the mistake made by the bank will appear from the following undisputed facts: Fessler did not *authorize* Hilbert to make any representations for him in presenting the note for discount and Fessler made none. Fessler himself was silent and made no representations when the note was presented other than those contained in the note itself; the note had a certain fixed legal effect,—it was a note for thirty-three (\$33.) dollars,—*and this is what Fessler warranted to the bank by his endorsement* when it was presented for discount. If the bank accepted it for \$3300.00, how did Fessler contribute to this mistake? Did the bank accept the note for thirty-three hundred (\$3300.)

dollars because Fessler's name was on the back of it or was it because of an *independent* act on the part of the bank in negligently assuming that the note was really a legal note for \$3300.00?

To us it seems an irresistible conclusion that the note was discounted for \$3300. through the *independent* mistake of the bank without aid or suggestion on the part of Fessler, and that the fact that Fessler also made the same independent mistake, if he did, cannot make him a party to the bank's mistake so as to create from the two independent acts one such *mutual* mistake as will give this court power to exercise its jurisdiction to reform.

If there is no element of fraud, concealment, misrepresentation, undue influence, violation of confidence reposed, or any other inequitable conduct in the transaction, the party who knew, or *had an opportunity to know* the contents of an agreement or other instrument cannot defeat its performance, or obtain its cancellation because he mistook the legal meaning and effect of the whole or any part of its provisions.

Pom. Eq. Juris, Sec. 843, p. 1485.

It is true that the Court below in its opinion says:

"If we give credence to the testimony of Dr. Hellstern that Fessler said to him that the note was only for thirty-three dollars, and to the statement of Fessler to his counsel, testified to by Fessler *and by his counsel* (case, pp. 40; 90) that the note was for thirty three (\$33.) dollars, the result follows that Fessler knew that the note read in figures thirty-three hundred (\$3300.) dollars, and in words thirty-three (\$33.) dollars,

that he knew that Hilbert intended to discount the note as a thirty-three hundred (\$3300.) dollar note, and that he put it in the power of Hilbert to obtain thirty-three hundred (\$3300.) dollars on it, keeping his silence and intending, if the note should go to protest, to avail himself of this defense."

This finding is undoubtedly made to supply that element of fraud in the action of Fessler to hold him for the unilateral mistake of the bank. We believe it is unwarranted. If the testimony of the defendant is to be given credence by the court, *why should not all of his testimony be considered true?* Defendant distinctly testified that he endorsed a \$33.00 note; that he could not say if the marginal figures \$3300.00 were on the paper when he signed (case, p. 40) that he was very busy at the time (case, p. 41, fol. 30, and see testimony of Hilbert, case, p. 23, fol. 1-10), that he thinks there is a difference or change in the note since he endorsed it and that he thinks "that the figures read thirty-three dollars as well as the body of the note read thirty-three dollars" and that he would have noticed it if it had been different (case, p. 48, fol. 30, etc.; case, p. 49, fol. 30, etc.).

The result then, *does not* follow that Fessler *knew* that the note read in figures thirty-three hundred dollars and in words thirty-three dollars, *nor is there one particle of evidence* if his story is to be believed *that he knew* that Hilbert intended to discount this note as a thirty-three hundred dollar note, and that he *deliberately* stood by in silence intending, if the note should go to protest, to avail himself of this defense. Such an inference cannot be drawn from the testimony,

even though credence is not given to defendant's story.

Nor does it follow that by writing his name upon the back of the note "that he put it in the power of Hilbert to obtain thirty-three hundred (\$3300.) dollars on it." As well say that his endorsement put it in Hilbert's power to obtain thirty-three million upon the note! Such an inference must assume, that *this busy doctor*, who seemed ready to endorse for Hilbert, *while doing so*, intended deliberately to defraud the complainant by his endorsement; *that he expected the fraud to succeed by Hilbert's receipt of the \$3300.00*; that Hilbert having received the money would refuse to repay it, that the maker and preceding endorsers would refuse to pay; that he would be called upon to pay, would refuse, would be sued and would then set up the defence that the note was a thirty-three dollar note. In other words, Fessler at the time of endorsement *without receiving any part of the spoils* intended to work himself into a law suit for the purpose of letting Hilbert steal \$3300.00 so that he, Fessler, might be sued upon the note! This to us seems an unreasonable inference to draw in this case.

Nor can the fact that Hilbert induced the bank to make the mistake be charged against Fessler since Hilbert was an officer of the bank fully empowered to discount notes for the bank (case, pp. 37-40) and any act of Hilbert's in discounting the note for more than thirty-three dollars *was the act of the bank*.

In the Court below, counsel for complainant tried to establish the *mutuality* necessary to give the Court jurisdiction by showing that a person is entitled to reformation when it appears that

he is a party or privy to the contract and has a substantial interest therein. He cited the case of an assignee of a contract, referring the Court to 34 Cyc., p. 950-951. The principal of law stated is undoubtedly correct, but it does not apply.

The bank is not a party or privy to the contract of *making* the note which is an independent contract. The bank does not enter by way of assignment, which would create that privity of contract spoken of and place the assignee in the shoes of the party whose place it takes by virtue of the assignment. And in case of assignment it would take subject to *notice* of such defects as it could readily ascertain, namely, the ambiguity, and then open the case to defences.

The bank entered the transaction by means of a separate, distinct, and independent contract, the *terms* and scope of which are *fully and completely* defined by law.

It is not a party nor privy to the transaction in which the alleged mistake occurred.

Mistake is internal,—it is a mental condition, a conception, a conviction of the understanding,—erroneous indeed, but none the less a conviction,—which influences the will and leads to some outward manifestation. * * * It is distinguished from that inattention or absence of thought *which are inherent in negligence*. The erroneous conception or conviction of the understanding which constitutes the equitable determination of mistake has nothing in common with negligence. Equity will not relieve a person from his erroneous acts or omissions resulting from his own negligence.

Pom. Eq. Juris., Sec. 839, p. 1474.

It is generally laid down that reformation will not be awarded on account of a mere unilateral mistake,—a mistake of but one party,—standing alone. The reason is that in such cases there is no meeting of the minds, no contract. A court of equity has no power to alter or reform an agreement since that would be making a contract for the parties. A unilateral mistake may be ground for rescission and sometimes for cancellation, but never for reformation.

Pom. Eq. Rem., Par. 676, p. 1140.

How can it be claimed that Fessler's mind and the mind of the bank ever arrived at an agreement that the note in question was to be discounted by the bank for the sum of thirty-three hundred dollars and that Fessler would be responsible to the bank on this note for thirty-three hundred dollars.

POINT 7.

The evidence produced by the complainant was not sufficient to establish the mistake complained of beyond a reasonable doubt.

The complainant, to succeed, must make out a mutual mistake beyond a reasonable doubt.

The authorities all require that the parol evidence of the mistake and of the alleged modification must be most clear and convincing, in the language of some judges, "the strongest possible," or else the mistake must be admitted by the opposite party; the resulting proof must be established *beyond a reasonable doubt*. Courts of equity do not grant the high remedy of refor-

mation upon a *probability*, nor even upon a mere preponderance of evidence, but only upon a *certainty* of the error.

Pomeroy of Equity, Juris., Par. 859,
Cited in *Hupsch v. Resch*, 45 N. J. Eq., 657,
affirmed by E. & A., 46 N. J. Eq., 609.

The burden of proof rests upon the person asking to have the alleged mistake corrected.

Vreeland v. Bramhall, 28 N. J. Eq., 85.

It needs a degree of evidence stronger than probability to justify the court to reform an instrument to which parties have subscribed their names. The stability of written contracts is guarded by a wholesome rule which requires the clearest evidence of mistake to support a judicial alteration of what the parties themselves have put in writing. The probative force of such testimony must be so convincing as to, in the language of some of the cases, *leave no reasonable doubt* of the terms of the verbal agreement or of the mistake of the facts which would justify its substitution for the written.

Seitz Brewing Co. v. Ayres, 60 N. J. Eq.,
190.

When the evidence, in demonstration of mistake, is doubtful or equivocal, or *strongly contradicted*, so that it is impossible for the mind to reach a *strong* conviction as to the truth, the court will not change what is written. Until a mistake has been established as leaves no rational doubt of the fact, no change in the writing sought to be reformed is entitled to be called a correction.

Towley v. Flannelly, 30 N. J. Eq., 612;
Green v. Stone, 54 N. J. Eq., 399.

When the defendant's witnesses contradicted the plaintiff's witnesses and there was nothing in the case to impeach either, the court said that under such circumstances the complainant's case must fail, provided there was nothing in the character of the transaction to support either.

Whelen v. Osgoodby, 62 N. J. Eq., 571.

To warrant the court to exercise its power to correct a mistake in a deed, proof in *demonstration* of mistake must be clear and satisfactory, such as produces a strong conviction of its truth. That which is written will not be changed on loose, doubtful or equivocal evidence.

Commins v. Bulgin, 37 N. J. Eq., 475.

Before the court will interfere and reform a written instrument it must be *incontrovertibly* proved that there was a mistake. The reason for this rule is that it saves the court the danger of making contracts.

Henderson v. Stokes, 42 N. J. Eq., 586.

When a doubt exists in the mind of the court as to whether a mistake occurred it must be resolved against the party asking for relief.

Hupsch v. Resch, 45 N. J. Eq., 657.

When the complainant alleged a mistake was made and the defendant denied the mistake and there were no other witnesses it was held that the complainant must fail unless he could find other evidence to support his claim.

Goerke v. Diskon, 75 At. Rep., 780.

See also *Ulrich v. Watts*, 69 N. J. L. 604;
71 N. J. Eq., 301.

Can it be said that complainant has sustained this heavy burden of proof?

An examination of his testimony will show that at no time, on the day when he requested Fessler's endorsement, did Hilbert request Fessler to endorse *for the sum of* thirty-three hundred dollars.

On the day the note was signed "I just asked him to endorse *the note* for me and he said he would, that he would endorse it." "I asked him to particularly endorse *this* thirty-three hundred dollar note, and he looked at the face of it" (case, p. 22); "that was practically all there was to it" (case, p. 23).

The nearest Hilbert comes to saying that he requested a thirty-three hundred dollar *endorsement* is to say that he requested Fessler to endorse *this* note for him,—calling it a thirty-three hundred dollar note. Does he thereby mean to say that he *then* told Fessler it was a thirty-three hundred dollar note, or does he mean, in testifying and while testifying, to *designate* it as such. *Any inference to be drawn from this ambiguity must be drawn against Hilbert.*

Towley v. Flannelly, and
Green v. Stone, *supra*.

He might just as well have testified, I told him particularly to endorse this "brown paper note" or this "white paper note." The words are merely descriptive of what the witnesses thought the paper was at the time he was testifying.

Again, if this conversation is true, for how much was Fessler to endorse? Was he to endorse for the whole amount? If so, what was the amount? Was he perhaps to endorse for as much as Hilbert could not raise otherwise? And, can this conversation had *a few days before* have any bearing on what Fessler did on the fifth or sixth of July? Under the circumstances under which this note was made, how many days do the *few* represent? Does it carry one back to the twenty-ninth day of June, when Hilbert induced one Richter to endorse for him a note for twenty-nine hundred dollars and thereby raised his bank balance to within the neighborhood of thirty-three hundred dollars (case, p. 156, fol. 30; case, p. 160, fol. 10-20)? In other words, is it not fair to infer that this first conversation, if it occurred, refers to the transaction which Hilbert cleared up by making the Richter note. Or did he, *in the few days* intervening from the twenty-eighth day of June, when Richter endorsed, and the fifth day of July, when he said Fessler endorsed, really need approximately the sum of sixty-three hundred dollars?

The bank's case must stand on the credit to be given to the Hilbert testimony. If Hilbert really requested a thirty-three hundred dollar endorsement from Fessler, why does he always so carefully say that all he requested of Fessler was an endorsement of *my note, the note, or a note* without attaching thereto the amount? Fessler absolutely denies undertaking to endorse a thirty-three hundred dollar note. Hilbert appears to have endorsed for Fessler, *but in a sum not exceeding one hundred dollars* (case, p. 154, fol.

1-20). Hilbert may have had some claim upon Fessler to endorse for him since he had endorsed for Fessler, *but he certainly did not have a claim for the endorsement exceeding the sum of one hundred dollars.* Hilbert swears that Fessler endorsed on July 5th, and is positive about the date. Ruggles swears, *Hilbert was not at the bank on the fifth day of July,* that he returned on the *sixth of July* and then told him, Ruggles, *that he had just returned from the country.* Hilbert, having heard Ruggles' testimony, *refuses point blank to swear that he was in town on July 5th and that he was not away,* and after Ruggles testified, Hilbert says *the only reason why he thinks Fessler endorsed on July 5th is because the note is dated the fifth of July.* Hilbert in swearing that Fessler signed the note on July 5th says that the day before (July 4th) he went over the matter again with Fessler, *yet there seems no doubt after hearing Ruggles' testimony that Hilbert was not in the State of New Jersey on July 4th.*

Hilbert swears that Fessler wanted security for the endorsement and that he only had an assignment to offer, *if it was any good,* and that Fessler, who demanded security, *then accepted from him the assignment of stock for thirty-three hundred dollars which was delivered to him, Fessler,* when he, Fessler, was then charged with the knowledge that the assignment *in the opinion of the man who gave it was no good.* This seems to be in itself such an irrational proposition as to warrant the court in believing that Fessler, if he really asked for security and really wanted security, *would not have endorsed the note in question for the doubtful security which was of-*

ferred to him. Another inconsistency in relation to this security appears from the testimony of Reissenberger. Conceding that Fessler has *ordinary* business ability and that he knows something about stock transactions, it was impossible for him in the light of reason, to tell Reissenberger *that he was secured* when Hilbert *had warned* him that he was not secured. It was impossible for him to ask Reissenberger whether Hilbert had *bank stock* transferred to his, Fessler's, account, on the bank books when he knew, *according to Hilbert*, that Hilbert had a loan at the Merchants' Bank *on the stock in question*, that *this stock was up as collateral security*, and that he, Fessler, according to Hilbert, had in his possession the only paper which evidenced the rights of Fessler to this stock, and when he also must have known that nothing could have been done by the bank by way of transferring stock to his name, without the production of the stock, or of the assignment which he then had in his possession. Against this testimony we have the flat denial of Fessler that he had *more than one* conversation with Hilbert. We have the unqualified statement that Hilbert asked him to endorse but once, on the morning when he did endorse; that Hilbert *did not* mention the amount for which the endorsement was to be made,—that he, Fessler, took the note, examined, read it, saw that it was for thirty-three dollars, and then signed it,—and in this last point Fessler's testimony agrees with Hilbert's. Fessler further maintains that when he signed the note *he intended to* and *did endorse* a note for thirty-three dollars, and in this Dr. Fessler is supported by Dr. Helstern, a witness

without interest in this transaction, who saw the whole occurrence, described it, *did not mention an assignment*, and who testified that while Hilbert was still there and while he was about to leave the room and could hear he, Helstern, told Fessler that he was a fool for endorsing even a note for thirty-three dollars for Hilbert.

It is perhaps easier to judge the actions and intention of parties by what *they do* than by what they say; and, considering this, it does appear strange that if Fessler had security he certainly did not mention it to Mr. Kappes who he engaged as counsel immediately upon being notified that a note for thirty-three hundred dollars had gone to protest. Nor did he suggest to his counsel to take any action to enforce the alleged security then supposedly in his possession. On the contrary, *doubtful of the fact* that he had really signed a note for thirty-three hundred dollars, he takes his lawyer from his office and goes to the bank for the purpose of *inspecting the instrument*. If he had endorsed a note for thirty-three hundred dollars, had been to Mr. Hannan's and had been told that it was for thirty-three hundred dollars *and interest*, *why was it necessary to take a lawyer to the banking house for the purpose of examining the note?* And when at the banking house, if Fessler had *security* and asked Reissenberger about the security and told Reissenberger he was secured, and asked Reissenberger whether Hilbert had transferred stock to him on the books of the Company, why did not Mr. Kappes hear this conversation and, hearing it, immediately look up the alleged security in order to protect Fessler's interest therein; and

why would not Kappes, knowing the importance of security to his client remember the conversation which is supposed to have taken place between Reissenberger and Fessler when they were at the bank? Why is not the alleged assignment described with more detail? How many shares of stock did it cover? For how much was it secured? What were the terms and conditions of the assignment? What kind of stock, if stock was assigned? When was it dated? When was it delivered? All these are facts within the knowledge of Hilbert, all these are facts which ought to be of record in this case, if such an assignment was executed and delivered.

Fessler testifies that when he saw the paper he saw that it was a note for thirty-three dollars, that he paid no attention to the marginal figures, but to the best of his recollection the marginal figures were not for thirty-three hundred dollars.

Is it not possible that Hilbert, knowing that he would have trouble to obtain endorsements for thirty-three hundred dollars, *left off the decimal point and the two decimal ciphers until after the endorsements had been secured? or left the marginal figures off until all had endorsed?* If this is so, Hilbert could say to the bank that he had a note for thirty-three hundred dollars and could say to Fessler, endorse for me a note for thirty-three dollars. Hilbert's reputation at that time was bad and since then has never been good. His reputation according to one of the reputation witnesses is that of a forger,—it being alleged that he forged the name of one Glandorf. Merely adding a period and two small decimal ciphers and a dash or adding the marginal figures under the circumstances would accomplish the same re-

sult as forging signatures to a note for thirty-three hundred dollars. Knowing Hilbert's reputation and taking into consideration his equivocal testimony, is it reasonable to suppose that Fessler or any reasonable man would endorse accommodation paper for him for \$3300.00?

Hilbert testifies that a few days before the note was endorsed by Fessler he called upon Fessler on the telephone and told him that he was in need of money and would require in the neighborhood of thirty-three hundred dollars to assist him and asked him whether he would not be kind enough to endorse his note and Fessler said he would (case, pp. 21-22). Fessler absolutely denies this conversation (case, p. 58, fol. 1-13), and says there was but one (case, p. 41, fol. 10-40; case, p. 42, fol. 1-20).

Ruggles, a disinterested witness, testifies that Hilbert was not at the bank from June 29—July 6th, 1910; that he had a vacation; that Hilbert told him on June 29th that he was going away; that he told him on July 6th, in the morning, that he had just returned to town; that he had been in Connecticut over the Fourth, in his automobile, and had just returned to town in his machine on July 6th (case, p. 156, fol. 10-20-30-40; case, p. 157, fol. 1-12; case, p. 158, fol. 10-22; case, p. 173, fol. 20-40).

And Hilbert, upon being recalled, does not dare to contradict the testimony of Ruggles (case, p. 174-176).

And Ruggles in his testimony gives cogent reasons for knowing about Hilbert's movements.

POINT 8.

The mistake of which complainant complained which resulted in its loss was caused by the negligence of complainant, and it cannot therefore invoke the remedy of reformation.

The mistake of which the bank complains was caused by its own negligence, and it cannot therefore invoke the remedy of reformation.

The irregularity or ambiguity which the bank now sets up as having caused it to discount the note for thirty-three hundred dollars is plainly apparent. A mere casual inspection of the note would have discovered its existence, and would have brought about inquiry as to whether the note was intended as a thirty-three dollar note or a note for thirty-three hundred dollars. The bank enters the transaction merely as a purchaser for value of negotiable paper offered to it for sale. It purchased the paper in the ordinary course of business, and, independent of the rules of the Law Merchant, the rule of caveat emptor applies in all its force.

There is no claim of fraud, misrepresentations, or inequitable conduct made against Fessler, in the pleadings nor is any attempt made to prove any such claim. Fessler is charged merely with having, in mistake, endorsed a thirty-three dollar note when he intended to endorse a thirty-three hundred dollar note. Conceding for the sake of argument that Fessler did make this mistake, the bank did not purchase this note as a thirty-three hundred dollar note *because of the mistake of Fessler*, but it purchased it as a thirty-three hundred dollar note *solely* because it in turn

negligently made the mistake of considering and taking this note to be a thirty-three hundred dollar note. This is a mistake, not of fact, but of law, for which there is no remedy. With this internal act, with this mental condition of the bank, with this conception and conviction of the understanding of the bank, Fessler had absolutely nothing to do.

The bank had an executive or discount committee whose *duty* it was to examine commercial papers offered to the bank for sale, to pass upon the sufficiency thereof both as to form and security, and to accept or reject commercial paper offered to it in accordance with the *judgment formed* as a result of its examination (case, p. 155). This function the bank, through its executive committee, carelessly and negligently exercised when it examined and passed for acceptance the note in question. This function the bank carelessly and *criminally* negligently *delegated* to Hilbert, assistant cashier (case, pp. 37-38-39), and Hilbert *as agent* of the bank negligently and *fraudulently* exercised it when he accepted for purchase by the bank the note in question for the sum of thirty-three hundred dollars. The bank *as trustee* of the funds of its depositors owed a *legal duty* to examine this note as to form and sufficiency of the maker and endorsers thereof before accepting the same for purchase. This duty the bank plainly violated, and the condition in which the bank finds itself by reason of purchasing this note at thirty-three hundred dollars is due to this criminal negligenc and the criminal violation of the legal duty thus imposed upon it, and not to any mistake in which Dr. Fessler may have taken a part.

The mistake made by Fessler is merely incidental to the mistake made by the bank.

If a mistake is made by one or both parties in reference to some fact which, though connected with the transaction, is merely incidental and not a part of the very subject matter or essential to any of its terms, or *if the complaining party fails to show that his conduct was in reality determined by it*, in either case the mistake will not be ground for any relief affirmative or defensive.

Pom. Eq. Juris., Sec. 856, p. 1509.

There is not one scintilla of evidence in this case to show that the conduct of the bank in purchasing this note was determined by the mistake alleged to have been made by Dr. Fessler. In fact, there is no evidence whatever offered in explanation for the making of the mistake by the bank.

Where the mistake is wholly caused by the want of that *care and diligence* in the transaction, which should be used by every person of reasonable prudence and the absence of which would be a failure of legal duty, a court of equity will not interpose its relief.

Pom. Eq. Juris., Sec. 856, p. 1509.

No one will contend that this note would have been discounted for the sum of thirty-three hundred dollars if the bank had properly performed its duty. No one will contend that the mistake of purchasing the note for thirty-three hundred dollars could have been made without the criminal negligence of the bank officials.

A party will not be given relief against a mistake induced by his own negligence, as where he has failed to avail himself of means of knowledge of the facts.

16 Cyc., 69;

Penna. Co. v. Trimmer, 31 At., 310.

The following cases will illustrate the rule:

Deare v. Carr, 3 N. J. Eq., 315 (Ch. 1836).

The fact which the Court is asked to relieve against must be such as the party could not by reasonable diligence get knowledge of, when he was put upon inquiry; for relief will not be afforded to culpable negligence.

Parkhurst v. Cory, 11 N. J. Eq., 233 (Ch. 1856).

A party to a foreclosure suit asked to have a sheriff's sale set aside because of surprise. He said he was *blind* and could not read the advertisements of sale. Inasmuch as he had notice of the suit, the court held his conduct in not inquiring as to the time of the sale negligence. (*Was the bank blind?*)

Haggerty v. McCanna, 25 N. J. Eq., 48 (Ch. 1874).

Haggerty married Jane McCanna, a widow, who had one child, the issue of her marriage with McCanna. McCanna had died seized of two lots in Trenton. When Haggerty, upon marrying Jane McCanna, found her in possession of the lots, he assumed that she owned them and on that assumption proceeded to improve the lots.

Haggerty, upon the death of his wife, discovered the true circumstances.

The Court, upon a bill filed by him to compel the defendant to pay to him the cost of the improvements on the lands, *held* that the injury he suffered was the result of *inexcusable negligence* and was not a mistake from the effects of which the court would relieve. *Ordinary care would have prevented the injury—this appears to be the criterion.*

Affirmed, 27 N. J. Eq., 497.

Voorhis v. Murphy, 26 N. J. Eq., 434 (Ch. 1875).

A mortgage contained a clause that if the interest thereon became due and remained unpaid for ten days the principal should become due. Interest became due on July 10th, suit was started to foreclose, and on August 11th a tender was made of the interest. The defendant alleged mistake, that he was under the impression that the mortgage contained a thirty day interest clause and that he was misled as to the day the interest became due because of the date on the receipt.

Held to be carelessness and not to be regarded in equity as mistake.

Hays v. Steger, 29 N. J. Eq., (Ch. 1878).

In order to relieve a purchaser from his contract to purchase lands on the ground of mistake it must appear that the mistake was not caused by the purchaser's negligence.

To the same effect *Cook v. Bodine*, 30 Eq., 470 (Ch. 1879).

Foley v. Kirk, 33 N. J. Eq., 170 at p. 179 (Ch. 1880).

Where a party fails to use any degree of care or caution and falls into error, such a mistake cannot be relieved against.

Turning v. Neil, 38 N. J. Eq., 470 (Ch. 1884).

A purchaser bid in property at a foreclosure sale for \$1150—he did not know of the existence of a prior mortgage. He asks to be relieved. *There was no fraud or misrepresentation.* The relief was denied because of the purchaser's negligence.

Serrell v. Rothstein, 49 N. J. Eq., 385 (Ch. 1892).

A mortgage had a thirty day interest clause. Defendant tendered the interest one day after the thirty days had expired. She was an ignorant woman and depended upon the calculation made by her son as to the expiration of the thirty days grace. Her son miscalculated.

The court held that as the lapse of time *was as apparent to her as to any other person* it was because of her carelessness that she made the tender too late and that negligence cannot be regarded as mistake.

Grieve v. Grieve, 9 L. R. A. (N. S.) 1211, Wyoming Sup. C.)

The rule in *Haggerty v. McCanna*, 25 N. J. Eq., 48 was cited and approved.

The Court said: "Courts of equity will grant relief only when the mistake is *mutual*, material and not caused by the negligence of the party

seeking relief, * * * This rule is a just one, and imposes no unreasonable duty. It simply requires that reasonable diligence shall be exercised by parties entering into written contracts to see to it that the writing expresses the true agreement, and they should not be heard in a court of equity to complain of injury resulting from their own *inattention* or *negligence*.

The effect of a different rule would be to destroy in a large measure the value of written instruments as evidence, to encourage negligence, and to open the door for the substitution of parol for written evidence under the claim of mistake.

See also note to 5 L. R. A. (N. S.), 799.

The court below in finding against Dr. Fessler says in speaking about the marginal figures: "And the fact of their being on the note where the endorser could see them, and the fact that he is chargeable with having seen them is an element which we must consider" (p. 187, folio 20-30).

If these facts are chargeable to Dr. Fessler, are they not equally chargeable to the bank? Do they not prevent relief to the bank?

POINT 9.

The complainant was not a holder in due course for value against the defendant Fessler for more than thirty-three (\$33.) dollars, and the complainant's title to the promissory note in question was for no more than the sum of thirty-three (\$33.) dollars.

The right of the complainant to relief in equity must depend on the title which it has.

As a general endorser and as an accommodation endorser, Fessler is liable only to a holder "in due course," Section 66, Negotiable Instrument Act. The holder *in due course* is a holder who has taken the instrument under the following condition:

1. *That it is complete and regular on its face.*
2. x x x
3. x x x
4. *That at the time it was negotiated to him he had no notice of any infirmity in the instrument,*
x x x Section 52, Negotiable Instrument Act.

The instrument when it was presented to the bank *as a matter of law* was a note for thirty-three dollars. That was apparent on the face of the note. And the complainant is charged with the knowledge of the law. If there is any irregularity it appears on the face of the note.

In addition, it is *conclusively presumed* that the complainant read the note when it was purchased.

Skillman v. Titus, 32 N. J. L., 96.

The general rule is that any irregularity, erasure, ambiguous or uncertain clauses or peculiarity connected with the paper, which is sufficient to excite suspicion or demand inquiry of a person exercising ordinary business prudence and judgment, will operate as *constructive notice* to a purchaser taking the same *without inquiry*.

7 Cyc., 949, and cases cited.

The result of an observation of these rules is that the bank *knew* or *ought to have known* that it was discounting a thirty-three dollar note, that the bank as a *matter of law* is a holder *in due course* of a thirty-three dollar note and not a thirty-three hundred dollar note and that as to a thirty-three hundred dollar note the status of the bank as against Dr. Fessler *is no better than the status of Hilbert* and neither one is in the position to claim thirty-three hundred dollars against Fessler. Hilbert cannot claim it because Fessler merely accommodated him. The bank cannot claim it because they were not a party or privy to the transaction in which the mistake arose, because there was no mutuality between the bank and Fessler in relation to the mistake made by the bank, and because the bank is not a holder of the note *in due course* for more than thirty-three dollars.

POINT 10.

As against the defendant, Fessler, the complainant was not a holder of the promissory note in due course for value because the endorsement of the defendant, Fessler, was an accommodation endorsement for complainant.

THE POINT WHICH DEFENDANT DESIRES TO DISCUSS under this heading arises from the evidence which appears in this case and which seems to point with irresistible force to the proposition that the note in question was endorsed by Fessler *after* it had been discounted by the bank and *after Hilbert had received the money thereon*. If this is so, then the bank parted with nothing on the strength of Fessler's endorsement, and Fessler is protected as against the bank by section twenty-nine of the Negotiable Instrument Act.

The evidence in support of the contention that Fessler was merely an accommodation endorser as against the bank is as follows:

The discount committee of the bank under the by-laws met on Wednesday between 10 A. M. and 12 M. for the purpose of passing upon commercial paper (case, p. 155). Hilbert, under a custom of the bank and as assistant cashier of the bank, was permitted to discount notes presented to the bank for discount provided he would endorse upon the note which was to be discounted his initials (case, pp. 37-38-39). He did so endorse with his initials the note in question (case, p. 38); *that July 6th, 1910, was a Wednesday*; that Hilbert was away from the bank on July 5th and did not return to the institution until the

morning of July 6th (case, p. 158); that the bank, according to the by-laws, was open from 9 A. M. to 3 P. M. for business; that the note was discounted on July 6th, 1910 (case, pp. 109-110-111); that the records of the bank did not show this note as having been discounted (case, p. 110) but do show a note for thirty-three hundred dollars made by Purcell, endorsed by Purcell and Hilbert as having been discounted by the bank on July 6, 1910 (see testimony of Reissenberger case, pp. 110-111), and that to the best of Reissenberger's honest recollection the entry in his book is a true and correct entry of the note made on July 6, 1910, in the course of his official duties (case, pp. 110-111); that it had been passed by the discount or executive committee (case, p. 99); that according to the president, Conway, there was some change in the endorsers and that there was an *extra endorser* (case, p. 101) and that the note in its present form was not passed upon by the executive committee; that Purcell signed the note at the bank (case p. 28) and that Hilbert said to Eastwood who proceeds Fessler as endorser: "I told him that I had a note for thirty-three hundred dollars and that *I was required by the bank to get several endorsers* on it and I asked him to endorse it," etc., (case, p. 26).

That the note immediately after endorsement by Fessler was delivered to the bank (case, p. 23) and that the bank after the extra endorsers (Eastwood and Fessler) had been procured, did not further pass upon the note because it was a renewal (case, p. 101).

Upon the facts thus enumerated and upon the other evidence in the case it would be reasonable to find that Hilbert on or about the twenty-eighth

or twenty-ninth day of June was in need of approximately thirty-three hundred dollars of which two thousand six hundred and twenty-five dollars had to be paid by him on account of surplus on or about the first day of July then next; that Hilbert decided to go to the country over the Fourth of July; that before going on the 29th of June he obtained and discounted Richter's note for twenty-nine hundred dollars; that instead of immediately paying what he owed the surplus account he allowed the balance which the Richter discount gave him to remain to his credit while he went upon his vacation, so that while upon his vacation he would have money enough in the bank to draw his checks; that he returned from the country in the evening of the fifth of July, too late to go to the bank. That he realized that by taking two thousand six hundred and twenty-five dollars out of his account for the surplus which he would be called upon to do the next day, he would be again left without funds; that he thereupon on Wednesday, July 6th, induced Purcell, who, as Hilbert says, would sign anything for him, to sign the note in question for him at the bank; that when the bank opened he delivered this note, bearing only Purcell's and his endorsement, to the bank, discounted it as agent of the bank, and credited his account, under the power conferred on him by the bank, with the proceeds of the note. That pursuant to his power recognized by the bank officials, and pursuant to his order Mr. Reissenberger, on the morning of the sixth of July, entered in the books of the bank *the entry of the note showing the same as having been purchased by the bank with the endorsement of Purcell and Hilbert only*; that the executive committee of the

bank, meeting some time after ten in the morning, examined the paper then to be examined by it for discount; found the Purcell note upon which Hilbert had already received his credit and against which he had there drawn for surplus account; that this executive committee, also interested in making up the surplus account, then told Hilbert that he had better get additional endorsements on this paper and that Hilbert thereupon, and for the first time, *as Fessler swears, called up Fessler and asked him over the telephone to endorse a note*; that Hilbert thereupon took this note from the possession of the bank to Eastwood and told Eastwood *the truth*, namely that he was *required by the bank* to get several endorsers and asked him, Eastwood, to endorse it; that Eastwood thereupon endorsed it and he hurried from Eastwood's office to Fessler's, showed him the note, had him sign it, carried it back to the bank and left it in the custody of the bank officials.

If this is not what happened why should Hilbert testify that *he was required by the bank* to get several endorsers? Why should the president of the bank speak of *extra endorsers* and finally, why should Reissenberger working along at his clerical duty with the *machine like certainty acquired by clerks* enter the note and *fail to enter* two endorsers whose names so plainly appear upon the paper? These facts being true, we contend that the bank parted with nothing on the strength of Fessler's endorsement and therefore complainant has no rights against defendant.

Point 11.

The Court of Chancery erroneously overruled the following questions asked defendant Fessler:

“Q. Did you ever receive any notice of the protest of this note?

“Q. Did you ever receive any notice of protest or non-payment of this note?

“Did you ever at any time hear of any notice of protest for non-payment?” (p. 46-48).

The defendant had pleaded that notice of dishonor was not served upon him and that the note was not duly protested (p. 18, folio 1-20).

The Court in sustaining the objections to these questions ruled, that the only question before the Court was, whether a contract which was clearly valid at the time it was made was for thirty-three dollars or thirty-three hundred dollars, and that whether circumstances have arisen which *invalidate* that contract is a question for a law court to determine. (p. 47, folio 10-30.) See also opinion (p. 180, folio 1-30).

The defendant contends that this ruling was erroneous and prejudicial to defendant Fessler.

The court below in thus ruling did not distinguish between the contract of the maker and endorser. It considered the question of protest and dishonor, acts *subsequent* to the contract *made by Fessler* and held the question, whether the contract became invalid in law because of circumstances which arose subsequent to its inception, a question which the parties are entitled to have tried by a court of law and a jury and not within the scope of the inquiry of this court. (p. 180, folio 20.)

As a matter of law *protest and notice of dishonor constitute the most essential part of an endorser's contract.*

Every endorser *engages* that on *due presentment* a note shall be paid *according to its tenor*, and that if it be dishonored, and the *necessary* proceedings on dishonor be *duly* taken, he will pay the amount thereof to the holder or to any subsequent endorser who may be compelled to pay it.

Sec. 66, L. 1902, p. 595.

If then there were no proceedings on dishonor, or if the proceedings on dishonor were not *duly* taken, i. e., if there was no presentment according to the tenor of the note, or if presented, there was no protest and notice of dishonor as required by law, then Fessler did *not*—in the language of the act—*engage* to pay the amount thereof.

Presentment and notice of protest and non-payment are conditions precedent to liability on the part of the endorser.

The objection to the questions amounts to a demurrer to evidence and admits the truth of the allegation that the note was not protested or dishonored and that the necessary proceedings on dishonor had not been taken. This being so, there is no contract of endorsement upon which Fessler can be held; there is no contract of endorsement *in which* a mistake occurred; *there is no contract of endorsement upon which the equitable remedy of mistake can operate.*

Let us suppose that this note, due on the fifth day of November, 1910, *was never presented* for payment, then certainly none of the endorsers could be held to the contract as made and it would

be futile to come into a Court of Chancery to have it amended or corrected.

The Court of Chancery will not amend or correct a contract when the result will be futile and useless.

Lex nil frustra jubet.

Hussey v. Moore, 3 Bulstr., 275, 280.

Lex nil facit frustrá.

And these maxims are as applicable in equity as in law.

Holbrook v. Winson, 23 Mich., 397;

Gloucester City v. Greene, 18 Stew., 747;

Black v. Del. & Rar. Canal Co., 9 C. E. Gr., 455, 489;

Camden & Atl. R. R. Co., v. Elkins, 10 Stew., 273.

Thus, in a case where a bill was filed to rescind a deed for a slave on an allegation of fraud, upon the emancipation of the slave by act of law, and Court declined to hear the cause, and ordered the bill dismissed without prejudice, and that each party should pay his own costs, as if the suit had abated.

Kidd v. Morrison, 62 N. C., 31.

In the case at bar if the cause had been at issue before the due date of the note and upon the due date the note had not been presented for payment, had not been protested and notice of dishonor according to the tenor had not been given to the endorsers, would not this bill, upon presentation of these facts, be dismissed.

For these reasons we contend that the questions were material to the issue and should have been allowed and their rejection was prejudicial to the defendant Fessler.

It is respectfully submitted that the decree below be reversed and that the bill of complaint be dismissed with costs.

March Term, 1914.

Respectfully submitted,

J. EMIL WALSCHEID,
Of counsel With Defendant Fessler.

New Jersey Court of Errors and Appeals

Between, The FIRST NATIONAL BANK OF TOWN OF UNION, Complainant-Respondent, and WILLIAM FESSLER et als., Defendants-Appellant.	}	On Bill, etc., On Appeal from Court of Chancery.	10
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POINTS FOR COMPLAINANT-RESPONDENT.

As to the Facts. 20

The complainant-respondent filed a bill of complaint against Thomas F. Purcell, M. William Hilbert, John S. Eastwood and William Fessler, defendants, to obtain a decree for the reformation of a promissory note of which the following is a copy :

N	"\$3300.00	Weehawken Post Office, N. J.,	
E		July 5, 1910	
W	Four months after date I promise to pay to	the order of Myself, Thirty-three #	30
JDollars, at First National Bank,	Town of Union, N. J., with interest.	
R	Value received.		
S		THOMAS F. PURCELL"	
E			
Y			

No. 809, Due Nov. 5.

Endorsed: "Thomas F. Purcell; M. William Hilbert; John S. Eastwood; William Fessler M. D." 40

The defendants, Thomas F. Purcell and John S. Eastwood, have not been served with process, and are non-residents. The complainant-respondent obtained a decree against the defendants, M. William Hilbert and William Fessler.

10 From the testimony of William Hilbert (case, pages 21-22) it appears that a few days before July 5, 1910, he told the defendant-appellant, Fessler, that he was in need of money, and that he would require something in the neighborhood of \$3300.00 to assist him, and asked Fessler whether he would not be kind enough to endorse his note, and Fessler said he would.

The day before the note was signed, Hilbert went over the matter with Fessler again.

20 On July 5th, 1910, Hilbert called at the North Hudson Hospital and there the defendant-appellant Fessler endorsed the note (Exhibit C-1). Hilbert told Fessler to endorse this \$3300.00 note, and Fessler looked at the face of the note and said, "this is for Thomas F. Purcell," and Hilbert said it was not, that Thomas F. Purcell had made the note for his, Hilbert's, accommodation, and therefore if Fessler would endorse the note it would not be for Thomas F. Purcell's accommodation, but for Hilbert's accommodation. Fessler then said, "I will endorse the note for you if that is the case" (case, 30 page 22). Fessler asked Hilbert for some security and Hilbert told him that he did not have anything to offer only an assignment, if it was any good, of some stock which he had a loan on at the Merchant's Bank, and that assignment was drawn up and signed by Hilbert to Fessler; the said assignment was delivered by Hilbert to Fessler, (case, page 23).

Hilbert discounted the note in question with the complainant-respondent and received \$3300.00

therefor. The note in question while reading \$3300.00 in figures and \$33.00 in words at length, was undoubtedly intended as a note for \$3300.00, and was so understood by the parties to the note.

Several weeks before the note became due Fessler called Hilbert up on the telephone and asked him if he would not be good enough to secure some other endorser on the note; that that was a considerable amount of money * * * and Hilbert told Fessler that he would make an effort to get somebody else to endorse the note, (case, page 25). 10

On cross-examination Hilbert testified that he told Fessler that he had a note for \$3300.00, and that he was required by the bank to get several endorsers upon it, and asked him, Fessler, whether he would not be kind enough to endorse this note for him for \$3300.00, as he, Hilbert, had endorsed several notes for him, Fessler, and Fessler said he would gladly do it, and he signed the note, (case, page 27). 20

The solicitor of the defendant-appellant undertook to show, on cross-examination of the defendant Hilbert, that Fessler was reluctant to endorse the note in question, and Hilbert admitted in his testimony that Fessler was reluctant to endorse said note, (case, page 28).

Hilbert testifies positively (case, page 30) that the \$3300.00 in figures was on the note in question when the defendant-appellant Fessler signed same. 30

The defendant-appellant Fessler, as will be noted from his testimony, is not certain as to the circumstances attending the endorsement by him of the note in question, except that he speaks positively that the note which he endorsed was for \$33.00. He said (case, pages 40-41) that he signed the note in question Exhibit C-1, and when asked: "Q. Were the figures \$3300.00 upon that paper 40

when you signed it? A. I can't exactly say that; but I know I didn't sign anything else than a \$33.00 note."

10 Fessler (case, pages 41, 42, 48) corroborates the testimony of Hilbert to the effect that Hilbert asked him over the 'phone if he would endorse a note for him and says, "this was the note that was presented to me" (referring to Exhibit C-1).

Fessler says that he was informed by John Han-
nan, one of the directors of the complainant-res-
pondent bank, that a note had gone to protest for
\$3300.00 (case, page 45) and he then immediately
got Mr. Kappes, his attorney, with whom he went to
the bank and asked to see the note. Fessler says
that when he and Kappes called at the bank and
saw Mr. Reisenberger, he showed them the
note in question; that no conversation passed be-
20 tween Mr. Fessler, Mr. Kappes and Mr. Reisen-
berger. He is most positive about this (case, page
51). He was asked "Q. Well, do you remember
what conversation you had with Mr. Reisenberger.
A. There was no further conversation that I know
of, and I know that there was no conversation abso-
lutely. I know that it is not so. Q. Then do you
mean to say that the only conversation that passed
between you, Mr. Kappes and Mr. Reisenberger was
that Mr. Kappes asked whether there was a note
30 that you had endorsed for Hilbert, and that upon
Reisenberger then showing him this note, C-1, noth-
ing further was said by you and Mr. Kappes what-
ever? A. Yes, sir; that was all" (case, pages 51-52).
When Fessler went to the bank with Kappes he
saw the particular note in question. He says "I
know I saw the note just as it is now" (case, page
52).

Fessler is undoubtedly mistaken as to there hav-
ing been no conversation between himself, Mr.
40

Kappes and Mr. Reisenberger on the occasion of their visit to the bank to see the note. The testimony of Mr. Kappes (case, pages 90-91) and Mr. Reisenberger (case, pages 31-32) clearly evidences that Fessler is mistaken.

Fessler was very well acquainted with Hilbert, and Hilbert had endorsed notes for Fessler prior to July 5, 1910, although Fessler undertook to deny the fact. The evidence clearly shows that Fessler is also in error as to his said denial. 10

Mr. Reisenberger testifies (case pages 31-32) that about the time when the note in question fell due, Mr. Kappes and Fessler called at the complainant-respondent bank and asked to see the note that Fessler had endorsed for Mr. Hilbert, and Reisenberger held up the note in question, so that Fessler and Kappes could see it. Mr. Kappes said, "well, that note is only for \$33.00." 20

Mr. Reisenberger testified (case page 32) that Fessler said, that he was secured, that Hilbert had assigned some stock to him, and Fessler asked Reisenberger whether said stock had been transferred on the books of the bank, and Reisenberger replied that he couldn't answer that question, that Mr. Hilbert, as assistant cashier, attended to the transfer of stock.

Hilbert's testimony about giving Fessler security for his endorsement of the \$3300.00 note in question is not only corroborated by Reisenberger, as above mentioned, but is corroborated also by John M. Hannan, who testified (case, pages 61-62) that Fessler informed him that he had received an assignment as collateral security for the equity Hilbert had in some stock; that Fessler showed Hannan an assignment which he, Fessler, had in his pocket, and Hannan informed him that it was not any good unless he had the assignment in the 30 40

bank where Hilbert had the equity. Hannan recalled from memory that the assignment read that Hilbert's equity in stock was thereby assigned to William Fessler as collateral security, for the endorsement of a note (case, page 63). Hannan says he didn't call it an assignment, that Fessler called it an assignment (case, page 64), and says to the

10 best of his recollection the assignment read "I hereby assign my equity in stock as collateral for a note signed by William Fessler."

Hannan says (case, page 61) that he first talked with the defendant Fessler about the note in question after Fessler had endorsed said note, and it had been discounted at the First National Bank, and the next conversation he had with Fessler was when the note had gone to protest. Hannan says (case, page 67), that Fessler when told

20 by Hannan that the note had gone to protest, asked Hannan what the amount was, and Hannan told him that he was not positive, and he then went to the bank and found out and told Fessler that it was for \$3300.00.

It appears from Hannan's testimony that Fessler remained in Hannan's office right near the bank at the time Hannan went to the bank to ascertain the amount of the note which had been protested (case, page 61).

30 From the entire testimony it appears that the defendant-appellant Fessler did not inquire of the bank as to the true amount of the note which he endorsed for Hilbert, and did not even ask if the note had gone to protest. He did not make inquiry of the bank in regard thereto.

It is manifest that the defendant-appellant Fessler had been informed that the amount of the note which he was asked to endorse by Hilbert was \$3300.00, and that Fessler had not only asked Hil-

40

bert for security therefor, but that Hilbert gave to Fessler an assignment of his equity in some shares of bank stock in the Merchants National Bank. The fact that Fessler received from Hilbert an assignment as collateral security for the endorsement in question, is borne out by the testimony of Mr. Reisenberger, the former paying teller of the complainant-respondent bank, and by Mr. John M. Hannan, to both of whom Fessler stated that he had received from Hilbert an assignment as security (case, pages 32 and 62). 10

It is inconceivable that the defendant Fessler, if his testimony to the effect that he believed the note he was endorsing for Hilbert, was only for \$33.00, would have considered it necessary for Hilbert, who was at the time assistant cashier of the complainant-respondent bank, to have several endorsers upon such note, and also for Fessler to ask security from Hilbert for his endorsement of the note for such a trivial sum. 20

It is incredible that Fessler should have been reluctant, as was testified to, to endorse a note for Hilbert for *only* \$33.00 bearing three other prior endorsers, and that he should also require security therefor (See Hannan testimony).

Mrs. Hilbert testified that the defendant Fessler spoke to her over the telephone and said he wanted to see Mr. Hilbert about a note. She said to him, "Why that note is not due yet," and he said, "It doesn't have to be due, but I want to know what he is going to do about it." She said that Fessler was very angry and excited (case, page 133). Mrs. Hilbert asked Fessler, "How much was the note?" and Fessler replied, "The note was for \$3300.00" (case, page 134), and Mrs. Hilbert says that the aforesaid conversation which she had with the defendant-ap- 30

pellant Fessler was "about a week before the note was due" (case, page 137).

James McClelland testified that he recalled the conversation had between Mr. Reisenberger, Mr. Fessler and Mr. Kappes concerning the note Exhibit C-1; that Mr. Fessler and Mr. Kappes went into the bank, and Mr. Kappes asked Mr. Reisenberger to let him see the note; that Mr. Reisenberger went and got the note and show it to Mr. Kappes; that in the meantime Mr. Fessler pulled a piece of paper out of his pocket and told Mr. Reisenberger that he had an assignment for some stock (case, page 145).

It will be borne in mind that Mr. Kappes when testifying stated that when he went to the bank with Fessler to see the note, his conversation was with Mr. McClelland. But McClelland evidences that such was not the fact, and corroborates the testimony of Mr. Reisenberger to the effect that the conversation was with him, Reisenberger (case, pages 145-146).

The testimony of the witness Ephraim C. Hellstern must be regarded as of little or no consequence. This witness would have the Court believe that he was present at the time Mr. Fessler endorsed the note in question for Hilbert, but it will appear from his testimony that this talk with Mr. Fessler was had after Hilbert had left the room and after Mr. Fessler had endorsed the note in question (case, page 80).

Mr. Hellstern was very much prejudiced against Mr. Hilbert and he regarded Mr. Fessler as "a damn fool" for having endorsed the note for Hilbert (case, page 81). It is not quite likely that Dr. Hellstern would regard his friend, Mr. Fessler, as such a fool for endorsing a note *for only thirty-three dollars* having three prior endorsers. Doctor

Hellstern (case, page 88) says that, notwithstanding that he regarded Hilbert's reputation to be bad, yet when he knew that Hilbert had submitted a note to Mr. Fessler for his endorsement, he permitted his friend Mr. Fessler to endorse same without saying a word to Mr. Fessler until after it had been done, and after Hilbert had departed. He says that it was no concern of his, and he only asked Mr. Fessler what he was doing, "just as a matter of friendship" (case, page 88). 10

John Conway, former president of the complainant-respondent, called as a witness in behalf of the defendant-appellant, Fessler testified (case, page 100) that the note in question was a renewal of a previous note. He says he knew the history of the note and he knew there was a note previous and he knew that this was a renewal of it. And in answer to the question, "What makes you say this was a renewal note," he answered, "because that note made previous to this came due and this was put in its place, with the extra endorser." (Case, page 101.) 20

It is apparent from the evidence in behalf of the complainant-respondent that Mr. Fessler had himself discounted through its bank several notes which had been endorsed by Hilbert, notwithstanding that in the first instance Fessler insisted that Hilbert *had never endorsed a note for him*, but thereafter stated, *to the best of his recollection*, Hilbert had not endorsed any note for him. The notes which were discounted by Mr. Fessler and endorsed by Hilbert are mentioned in the testimony (case, page 154). 30

There can be no doubt whatever but that the defendant Hilbert had requested the defendant-appellant Fessler to endorse a note *for thirty-three*

hundred dollars, which he, Hilbert, was to discount through the complainant-respondent bank, of which he was the assistant cashier, and that Fessler in endorsing the note in question, Exhibit C-1, intended to endorse a note for such amount.

AS TO THE LAW.

10

POINTS 1 AND 2.

The Court below had full and complete jurisdiction to decree reformation of said note, notwithstanding that Purcell and Eastwood were not within the jurisdiction of the Court.

20 The Court below had full and complete jurisdiction to decree reformation of said promissory note, notwithstanding that Thomas F. Purcell and John S. Eastwood, the maker, and one of the endorsers of said note, are non-residents and not within the jurisdiction of the Court. In an *action at law* complainant-respondent is not obliged to exhaust its remedy against Purcell, the maker, and Eastwood, an endorser, before charging defendants Fessler and Hilbert. Rule 7, Practice Act of 1912, provides:

30

“Persons severally and immediately liable on the same obligation or instrument, including parties to bill of exchange and promissory notes; also endorsers, guarantors and sureties, whether on the same or by a separate instrument, may all, or any of them, be joined as defendants, and a joint judgment may be rendered against those so joined.”

40

P. L. 1912, page 385.

This rule is in effect a re-enactment of the provisions of §29, of the Practice Act of 1903.

Defendant-appellant's contention that he is entitled, upon paying the amount of the judgment, to an assignment from the judgment creditor, of the judgment against the maker, only applies in cases in which suit is brought and judgment obtained by the holder against two or more parties to an instrument, one or more of whom are primarily liable, and one or more of whom are secondarily liable; and the case of McKenna vs. Corcoran, 70 N. J. Eq., 627, cited by appellant, so holds. 10

Stripped of all technicalities, the contract of Fessler stands on no other ground than that of suretyship, and it is settled in this State that equity will reform an instrument against a surety.

Smith vs. Allen, Saxton, 43. 20

See also

Berg vs. Radcliff, 6 John Ch., 302-307.

In the McLaughlin case (21 N. J. Eq., 379) cited by appellant, the Court reversed the decree upon the ground that the decree, if affirmed, would not be effective, as an assignee of an interest in real property, alleged to be assigned in fraud of creditors, was not made a party. 30

This case differs from the case at bar. In the case at bar complainant may at law enforce payment of the note against any or all of the parties to it, and it follows should be entitled, in equity, to reform the note as against any of the parties to it within the jurisdiction of the Court.

Defendant-appellant urges in his brief that as the note was made by Purcell no decree can be made

changing this note to a \$3300 note without his presence in Court, and contends that, as it seems to be impossible to bring in Eastwood and Purcell, since they appear to be beyond the jurisdiction of our Court, there should be a simple reversal of the decree.

10 *As no objection to the want of parties was made below, this Court should not permit the question to be now raised, unless the parties omitted are indispensable parties, and justice cannot be done without them.*

Berryman vs. Graham, 21 N. J. Eq., 370-378.

20 The Court below would not acquire jurisdiction over Purcell and Eastwood by publication and order for appearance, should they fail to appear or answer, and a decree against them would not be valid or effectual.

Hill vs. Henry, 21 Dick. Ch., 151.
Citing Pennoyer vs. Neff, 95 U. S., 733.
Freeman vs. Alderson, 119 U. S., 185.
Hart vs. Sansom, 110 U. S., 151.

30 Should this Court hold, however, that Purcell and Eastwood are indispensable parties, and further hold that the Court below would acquire jurisdiction over them as absent defendants by an order for appearance and publication, and that its decree would be valid and binding upon them, then it is submitted the decree should not be reversed, but the case should be remitted to the Court below, that said parties may be brought in by such procedure.

POINT 3.

Where a mistake is made out by satisfactory proofs, equity will reform a contract so as to make it conformable to the precise intent of the parties.

A blank left for the amount in a promissory note may be filled in by a bona fide holder with the sum stated in the margin, unless it was left by mistake, when it may be corrected by a court of equity.

10

Chestnut vs. Chestnut, 2 L. R. A., 879,
and cases cited in note.

If by fraud or mistake, or accident the paper should not contain the true agreement or the whole agreement, then, undoubtedly, it may be supplied by parol.

20

Chetwood vs. Britain, 2 N. J. Eq., 438-449.

In Snyder vs. Warbasse, 11 N. J. Eq., 463-469, in the will before the Court, the word "dollars" was omitted after the words "fifteen hundred." It was held by the Court to be a mistake of the scrivener and the omission supplied.

1 Story Eq. Jur. (5 ed.) §152.

30

POINT 4.

A court of equity will reform a contract in the case of a mistake by one party accompanied by fraud or other inequitable conduct of the other party.

If credence be given to the testimony of Fessler and on his behalf that the note was only for

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thirty-three dollars, the result, when taken in connection with all of the other evidence and circumstances surrounding the transaction, follows that Fessler knew that the note read in figures \$3300.00, and in words thirty-three dollars, that he knew Hilbert believed it to be a note for thirty-three hundred dollars and that he intended to discount it as a thirty-three hundred dollar note, and that he put it in the power of Hilbert to obtain thirty-three hundred dollars from the complainant on it, keeping his silence and intending, if the note should go to protest, to avail himself of this defense.

A court of equity will reform a contract in the case of a mistake by one party accompanied by fraud or other inequitable conduct of the other party.

4 Pom. Eq. Jur. (3rd ed.,) §1376, Chelsea Nat. Bank vs. Smith, 74 N. J. Eq., 275-278;
Sloss-Sheffield Steel & Iron Co. vs. Aetna Life Ins. Co., 74 N. J. Eq., 635-644, et seq.

POINT 5.

The mistake was mutual.

At the time of the endorsement of the note by the defendant Fessler, the word "hundred" was left out in the body of the note. Fessler had agreed with Hilbert to endorse a note for \$3,300.00, and it was his intention when he endorsed the note to endorse a note for that amount. This is borne out by the evidence of Hilbert, the circum-

stances under which the note was made and endorsed, and Fessler's subsequent conduct.

Proof beyond a reasonable doubt, as in criminal cases, is not required. Mistake may be established by evidence of the circumstances and nature of the transaction and conduct of the parties in relation thereto, provided the natural and reasonable inferences therefrom clearly and decidedly prove the alleged mistake. 10

16 Cyc., 71.

POINT 6.

Proof beyond a reasonable doubt is not necessary in an action to reform a written contract because of mistake. 20

In delivering the opinion of the New York Court of Appeals (June 7, 1892), in *SOUTHARD vs. CURLEY*, 16 L. R. A., 561,—Parker, J., after collecting and quoting many authorities on the subject, said:

“The quotations made indicate a universal agreement that a contract shall not be reformed on loose, contradictory and unsatisfactory evidence; a settled determination that, when a mistake is alleged, it must be clearly established by satisfactory proof, or the contract will stand as made. But, in giving expression to the necessity of observing such caution, some judges have employed conservative language; others, extreme,—a difference doubtless due to the fact that the question 30

before the court for discussion in the different cases was not what is the abstract rule as to the degree or quality of the evidence required but rather whether the particular evidence under consideration justifies a reformation. While in a few instances apparently unconsidered expressions may be found to the effect that the mistake must be established beyond a reasonable doubt, so may a variety of other expressions, different in form, but equally well supported, be found, such as: 'It must be proved as much to the satisfaction of the Court as if admitted'; 'the proof must be clear, irrefragable, and the strongest possible'; or 'there must be a plain mistake established by satisfactory proofs.' A situation which suggests that we heed the caution of Folger, J., in *Taylor vs. New York*, 82 N. Y., 17: 'It is not always well to take particular phrases and sentences from an opinion, and read them as giving the core of the judgment.' The same thought was expressed in *Bank vs. Hibbard*, 48 Mich., 457; 'It must always be remembered that general language in legal discussions is to be construed with its surroundings, and cannot be dealt with in the abstract.'

Bearing in mind these admonitions as we examine the opinions alluded to, we reach the conclusion that they do not require us to declare that this strong rule of criminal procedure has become a part of the practice in civil actions. Certainly, this need not be done, in view of the many authorities which, both before and since Judge Story penned the rule that 'relief will be granted in cases of written

instruments only when there is a plain mistake, clearly made out by satisfactory proofs' have asserted the same doctrines in terms or in substance."

See also

16 Cyc., 71.

10

In *WHELEN* vs. *OSGOODBY*, 62 N. J. Eq. (17 Dick. Ch., 571-575), a suit for the reformation of a mortgage, the Court in commenting on the evidence, said:

"As to the matter of mistake, Mr. Osgoodby swears that there was an agreement that the interest was to be paid at the end of five years. In this he directly contradicts Mr. Ryerson. There being nothing to impeach the character of either Mr. Ryerson or Mr. Osgoodby, it follows that, *if there was nothing in the character of the transaction itself to support the statement of either of these parties, the complainant's case must fail.*

20

But while the testimony of an unimpeached witness is not to be arbitrarily disregarded, it must be measured by the standard of common experience and business usage.

30

The statement that a man, under certain circumstances, did nothing which we know from experience not one in a thousand would do, under the same circumstances, is discredited by the inherent improbability of the statement. It is more rational to believe that the testimony is intentionally or mistakenly untrue, than it is to believe that the marvelous occurred."

40

POINT 7.

The failure of the complainant's officers and employees to discover the omission in the note before payment is not such negligence, as will disentitle complainant to relief.

10 While the general rule is that a party will not be given relief against a mistake induced by his own negligence, the degree of carelessness which will prevent relief is stated in varying terms and depends largely upon the circumstances of the case.

16 Cyc., page 69.

In *Lloyd vs. Hudlick*, (N. J. Ct. Er. & Ap., May, 1906), 63 Atl. Rep., 616:

20 "Where complainants have under a contract with defendants for the purchase from the latter of lands, paid the consideration, their acceptance, without reading the same, of a deed containing covenants inconsistent with the contract of sale, did not disentitle them to the reformation thereof."

Gummere, C. J., in delivering the opinion of the Court, said:

30 "It is true that complainants might readily have discovered, by an examination of the deed before accepting it, that it was not what they had bargained for, and it may be conceded that prudence upon their part required a scrutiny of the deed before its acceptance by them. But I am not able to perceive that their failure to discover the fraud disentitles them to relief. In the transaction of business, men ordinarily deal with one another in the
40 belief that each is honest. If the opposite belief prevailed in such dealings, attempted

frauds would rarely be successfully carried into execution, and courts would seldom be called upon to grant relief against them. Failure to discover an intended fraud before it has been actually perpetrated must necessarily exist in every case where the courts are appealed to, to relieve the wronged party from its effects; and the fact that the exercise of a greater degree of prudence on the part of him who has been defrauded, would have prevented the fraud from being successfully carried through, affords no ground for refusing relief." 10

It has been held by some courts that the neglect of complainant, to be a bar, must be so gross as to amount to a violation of a positive legal duty.

34 Cyc., page 949. 20

As was stated in the opinion of the court below, in the case at bar, the law is well stated in a case in Connecticut, where complainant sought to reform an issue of bonds by inserting therein a redemption period:

"This negligence is not of the extremest kind which the courts sometimes characterize as the equivalent of fraud. It was not recklessness; it was more want of care. There was not indifference to the effect; it was simply an honest assumption that all was right. It is to be classed only with those incautious and unbusinesslike acts which are constantly presenting themselves and could not have been noticed but for some mischief that they have wrought. Thus a man carelessly signs a note for a thousand dollars which he supposed to be for a hundred dollars. Through a mistake of the scrivener it is thus written, when it would be written a 30 40

“hundred, and he signs it without reading it.
 “This is certainly gross carelessness; but
 “should it debar him from all remedy against
 “a party who receives the note knowing of
 “the mistake?”

Town of Essex vs. Day, 52 Conn., 483.

10

POINT 8.

A holder for value of a promissory note may maintain an action to reform the note, against an accommodation endorser.

The Negotiable Instruments Law, Comp Stat., 3734 et seq., §§29, 51.

20 To entitle a person to reformation it should appear that he is a party or privy to the transaction, in question, and has a substantial interest therein.

34 Cyc., 950.

The assignee of a contract acting under the same mistake as his assignor is a privy and may maintain action.

34 Cyc., 951.

30 Subdivision IV of §17 of the Negotiable Instruments Law is no more applicable to the case at bar, than is the rule of law excluding parol evidence to vary or control written contracts.

The decree of the Court of Chancery should be affirmed, with costs.

Respectfully submitted,

JOHN J. FALLON,
 Solicitor of Complainant-Respondent.

40

June Term, 1914.

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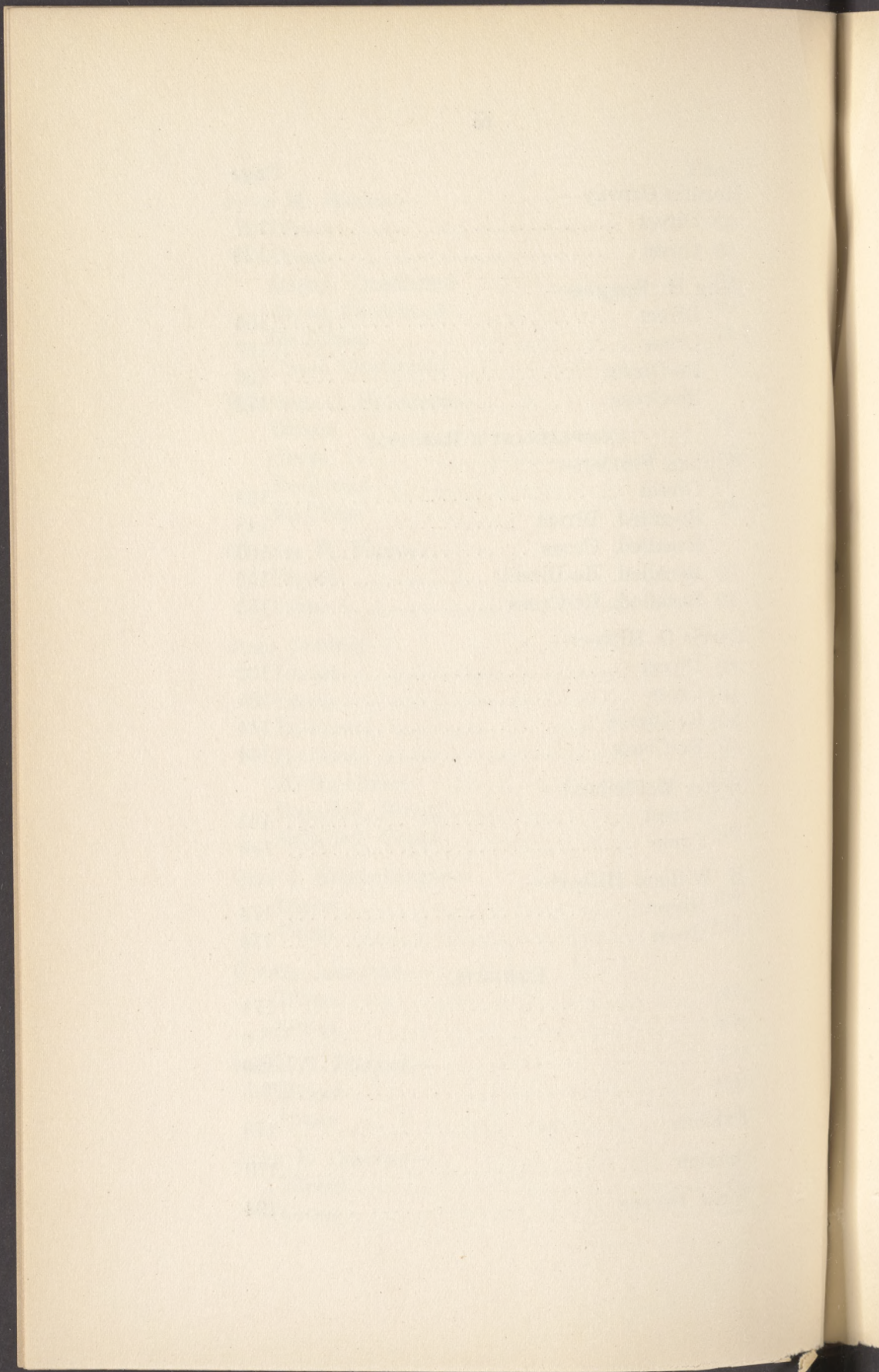
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(Filed June 11, 1913.)

In Chancery of New Jersey

Between

FIRST NATIONAL BANK OF THE
TOWN OF UNION,

Complainant,

and

THOMAS F. PURCELL, et. als.,

Defendants.

On Bill, etc. 10
Notice of
Appeal.

Notice of Appeal.

To

JOHN J. FALLON, ESQ.,
Solicitor of Complainant.

20

Sir:

The defendant, William Fessler, hereby appeals from the final decree and every part thereof made in this Court in the above-entitled cause of the 5th day of June, 1913, to the Court of Errors and Appeals in the last resort in all causes.

Dated, June 11th, 1913.

J. EMIL WALSCHEID,
*Solicitor and of Counsel with
the Defendant William Fessler.*

30

I conceive that there is good cause for appeal in the above-stated cause.

J. EMIL WALSCHEID,
*Of Counsel with the
Defendant, William Fessler.*

40

(Filed August 1, 1913.)

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10 THE FIRST NATIONAL BANK OF
THE TOWN OF UNION,
Complainant-Appellee,

vs.

WILLIAM FESSLER, impleaded
with THOMAS F. PURCELL, et
als.,
Defendant-Appellant.

On Appeal
from the Cour
of Chancery.

20

Petition of Appeal.

TO THE HONORABLE THE COURT OF ERRORS AND
APPEALS IN THE LAST RESORT IN ALL CAUSES:

The petition of William Fessler, appellant in
this case, respectfully shows:

30 That your petitioner, impleaded with Thomas
F. Purcell, M. William Hilbert and John East-
wood, finds himself aggrieved by a final decree
made in the Court of Chancery by his Honor,
Edwin Robert Walker, Chancellor of the State of
New Jersey, bearing date the fifth day of June,
A. D. Nineteen hundred and thirteen, in a cause
wherein the First National Bank of the Town of
Union was complainant and Thomas F. Purcell,
M. William Hilbert, John Eastwood and your
petitioner, William Fessler, were defendants, in
40 this respect, to wit:

Petition of Appeal.

That the said decree, after reciting that a certain promissory note in words and figures as follows:

N
E
W "\$3300.00. 10

Weehawken Post Office, N. J., July 5, 1910.

J Four months after date I promise to pay to
E the order of myself, Thirty-three Dollars, at
R First National Bank, Town of Union, N. J.,
S with interest. Value received.

E
Y

No. 809. Due Nov. 5. Thomas F. Purcell." 20
and endorsed "Thomas F. Purcell, M. William
Hilbert, John S. Eastwood, William Fessler, M.
D.," was through the mutual mistake of the parties thereto drawn for the sum of thirty-three (\$33) dollars instead of the sum of thirty-three hundred (\$3300) dollars, and that it was the intention of the parties to make, sign and endorse said promissory note for the sum of thirty-three hundred (\$3300) dollars, and that through the mutual mistake of the parties thereto said promissory note contained the mistake or omission 30
therein of the word "hundred" after the words "thirty-three," and did not express the true intention and meaning of the parties to it, does thereupon order, adjudge and decree that the said promissory note be corrected and reformed so as to read as follows:

Petition of Appeal.

N

E

W "\$3300.00.

Weehawken Post Office, N. J., July 15, 1910.

10 J Four months after date I promise to pay to
 E the order of myself Thirty-three hundred dol-
 R lars, at First National Bank, Town of Union,
 S N. J., with interest. Value received.

E

Y

No. 809. Due Nov. 5. Thomas F. Purcell."

Endorsed: "Thomas F. Purcell, M. William
 Hilbert, John S. Eastwood, William Fessler,
 M.D."

20 and to express the true intention and meaning of
 the parties to said note.

Your petitioner therefore humbly appeals from
 all of the said decree of the said Chancellor which
 decrees as aforesaid upon the ground that the
 same is erroneous for the following reasons:

1. The Court of Chancery had no jurisdiction
 to make the decree in question because Thomas
 F. Purcell, a necessary and indispensable party to
 30 the suit, was not served with process therein nor
 did he enter an appearance or appear therein.

2. The Court of Chancery had no jurisdiction
 to make the decree in question because John S.
 Eastwood, a necessary and indispensable party to
 the suit, was not served with process therein nor
 did he enter an appearance or appear therein.

3. The defendant Fessler was not a party to
 any mistake in the making of said promissory
 40 note, if any mistake there was.

Petition of Appeal.

4. The defendant Fessler was not a party to any mistake in the endorsement of said promissory note, if any mistake there was.

5. The complainant was not a party to any mistake in the making of said promissory note, if any mistake there was. 10

6. The complainant was not a party to any mistake in the making of any endorsement upon said promissory note, if any mistake there was.

7. The evidence produced by the complainant was not sufficient to establish the mistake complained of beyond a reasonable doubt.

8. The mistake of which complainant complained which resulted in its loss was caused by the negligence of complainant, and it cannot therefore invoke the remedy of reformation. 20

9. The complainant was not a holder in due course for value against the defendant Fessler for more than thirty-three (\$33) dollars, and the complainant's title to the promissory note in question was for no more than the sum of thirty-three (\$33) dollars.

10. As against the defendant Fessler the complainant was not a holder of the promissory note in due course for value because the endorsement of the defendant Fessler was an accommodation endorsement for the complainant. 30

11. The Court of Chancery erroneously overruled the following questions asked defendant Fessler:

Petition of Appeal.

Q. "Did you ever receive any notice of the protest of this note"?

Q. "Did you ever receive any notice of protest or non-payment of this note"?

10 Q. "Did you ever at any time hear of any notice of protest for non-payment"?

Your petitioner therefore prays that the said decree of the said Chancellor may be in all things reversed, set aside and for nothing holden, and that your petitioner may have such other relief in the premises as to this Honorable Court shall seem meet.

And your petitioner will ever pray.

J. EMIL WALSCHEID,
*Solicitor and of
Counsel with Petitioner.*

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NEW JERSEY COURT OF ERRORS AND
APPEALS.

THE FIRST NATIONAL BANK OF
THE TOWN OF UNION,
Complainant-Respoondent,

and

WILLIAM FESSLER, impleaded
with THOMAS F. PURCELL,
et als.,
Defendant-Appellant.

Answer to 10
Petition of
Appeal.

Answer to Petition of Appeal.

The answer of the above named respondent to 20
the petition of appeal of the above named ap-
pellant.

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 nev-
ertheless, says and admits that a decree was, on
the fifth day of June last past, made and entered
in the Court of Chancery, in the cause for that
purpose mentioned in the said petition, as is
therein stated; but as to the substance and form 30
thereof, this respondent prays to refer thereto
when the same shall be produced. And this re-
spondent 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 ad-
judged to this respondent.

JOHN J. FALLON,
Solicitor for and of
Counsel with Respondent.

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Bill of Complaint.

IN CHANCERY OF NEW JERSEY.

TO HIS HONOR, MAHLON PITNEY, CHANCELLOR OF
THE STATE OF NEW JERSEY:

10 Humbly complaining, shows unto your Honor,
your orator, The First National Bank, of the
Town of Union, N. J., a corporation under and by
virtue of the Banking Laws of the United States
of America, and having its place of business at
the Town of Union, County of Hudson, and State
of New Jersey.

1. That on or about the fifth day of July,
nineteen hundred and ten, Thomas F. Purcell
20 drew up, made and signed a certain promissory
note, for the sum of thirty-three hundred dollars,
which note was payable four months after date,
at the place of business of your orator, in the
Town of Union, County of Hudson aforesaid; and
that said promissory note is endorsed by Thomas
F. Purcell, M. William Hilbert, John S. Eastwood
and William Fessler, M. D.

2. That the following is a true description of
said promissory note, viz:

30 N
E
W "\$3300.00.

Weehawken Post Office, N. J., July 5, 1910.
J Four months after date I promise to pay to
E the order of myself Thirty-three Dollars, at
R First National Bank, Town of Union, N. J.,
S with interest. Value received.

E
Y
40 No. 809. Due Nov. 5. Thomas F. Purcell."

Bill of Complaint.

Endorsed: "Thomas F. Purcell, M. William Hilbert, John S. Eastwood, William Fessler, M. D."

3. And your orator further shows that on the day of the date thereof, M. William Hilbert presented said promissory note to your orator, The First National Bank, of Town of Union, N. J., and your orator relying upon the promises of said maker and endorsers, and that said written instrument was drawn in proper form, paid upon said promissory note to M. William Hilbert, the sum of thirty-three hundred dollars. 10

4. Your orator further shows, that your orator did not discover, at the time of the payment by your orator to said M. William Hilbert, said sum of thirty-three hundred dollars, that said written instrument or note contained a mistake or omission therein, but your orator subsequent and after the payment by your orator aforesaid, discovered that said written instrument or note instead of reading thirty-three hundred dollars, same read thirty-three dollars. 20

5. Your orator further shows that said promissory note was drawn, signed and endorsed by all of the aforesaid persons for the express purpose of obtaining from your orator the sum of thirty-three hundred dollars, for the use and benefit of said M. William Hilbert, and that said note was made, signed and endorsed by each of said persons well knowing the purpose thereof, and it was their intention then and there to make, sign and endorse a good and sufficient written instrument or note for the sum of thirty-three hundred dollars, but your orator avers, that through the mutual mistake of all of said parties to said 30 40

Bill of Complaint.

10 transaction, and to the making and signing of said promissory note, said instrument contained a mistake or omission therein, that instead of reading thirty-three hundred dollars same read thirty-three dollars, and that same did not express the true intention and meaning of said parties to said written instrument or note. That the maker and endorsers of said written instrument or note are the original parties to the granting of said loan and the payment by your orator of said thirty-three hundred dollars to said M. William Hilbert, and that no endorser has innocently accepted said promissory note, nor has been prejudiced by said mistake or omission therein.

20 6. Your orator further shows, that your orator upon discovering said mistake or omission in said written instrument or promissory note, called upon the maker and each of said endorsers of said promissory note, to correct the mistake or omission so made as aforesaid, and your orator well hoped that they, said maker and endorsers of said note, would have complied with such reasonable requests of your orator, as in equity and good conscience they ought to have done, but they
30 refused so to do.

7. Your orator further shows that upon the refusal of said maker and endorsers of said promissory note, to correct said mistake or omission in said instrument so made as aforesaid, your orator is deprived of its right to enforce against and recover from said maker and endorsers, the sum of thirty-three hundred dollars, so paid by your orator as aforesaid, but can only
40 have recourse, according to said instrument,

Bill of Complaint.

against said maker and endorsers, to the extent of the sum of thirty-three dollars.

In consideration whereof, and inasmuch as your orator is without adequate remedy in the premises in the courts of law, and can only obtain relief in this honorable Court, where matters of this nature are particularly cognizable and relievable, and to the end,— 10

1. That the said defendants, Thomas F. Purcell, M. William Hilbert, John S. Eastwood and William Fessler, and each of them, may, without oath, full, true and perfect answer make to all and singular the matters aforesaid, as well as if the same were here repeated; and 20

2. That it may be decreed that said promissory note be corrected and reformed, so as to read thirty-three hundred dollars, instead of "thirty-three dollars," and to express the true intention of the parties thereto. 20

And your orator may have such other or further relief in the premises, as shall be agreeable to equity and good conscience.

May it please your Honor, to grant unto your orator the State's writ or writs of subpcena, issuing out of and under the seal of this honorable Court, to be directed to the said Thomas F. Purcell, M. William Hilbert, John S. Eastwood and William Fessler, commanding them, and each of them, by a certain day and under a certain penalty therein to be expressed, to be and appear before your Honor, in this honorable Court, then and there to answer all and singular the premises 30

Bill of Complaint.

and to stand to, abide by and perform such order and decree therein, as to your Honor shall seem meet and as shall be agreeable to equity and good conscience.

10 And your orator, as in duty bound, will ever pray, &c.

JOHN J. FALLON,
Solicitor for and of Counsel with Complainant.

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Subpoena and Return.

Chancery No. 59.

NEW JERSEY,

[SEAL] To wit: The State of New Jersey, to
 THOMAS F. PURCELL, M. WILLIAM HILBERT, JOHN
 S. EASTWOOD and WILLIAM FESSLER: 10

GREETING.—We command you, that you appear
 in manner and form required by law in our Court
 of Chancery, on the second day of January next,
 at Trenton, to answer to a bill of complaint ex-
 hibited against you in our said court by The First
 National Bank of the Town of Union, N. J., and
 to do further and receive what our said Court
 shall have considered in that behalf; and this you
 are not to omit, under the penalty that may fall
 thereon. 20

Witness, his Honor, Edwin Robert Walker,
 Chancellor of our said State, at Trenton, the sev-
 enth day of December, in the year of our Lord
 one thousand nine hundred and thirteen.

JOHN J. FALLON,
Solicitor.

SAM'L K. ROBBINS,
Clerk. 30

NOTICE.—The defendant is NOT required to
 appear at Trenton in person, at the return day,
 but if he intends to make a defence it is only
 necessary for him to answer, plead or demur to
 the bill within the time required by law.

SAM'L K. ROBBINS,
Clerk.

Subpœna and Return.

State of New Jersey, ss.:
County of Hudson.

10 DAVID LUBASH, of full age, being duly sworn according to law, on his oath says that he was present and saw the within named M. William Hilbert sign the within acknowledgment of service of a copy of the within subpœna; that he has several times seen said M. William Hilbert sign his name and is familiar with his handwriting; that the within signature by said M. William Hilbert is genuine.

DAVID LUBASH.

20 Sworn and subscribed before me this seventh day of December, A. D. 1911.

GEORGE A. ENRIGHT,
Master in Chancery of N. J.

Served within subpœna December 11, 1911, on the defendant William Fessler by leaving a true copy thereof for him at his usual place of abode with a member of his family above the age of fourteen years, whom I informed of the contents thereof.

30

NICHOLAS P. WEDIN,
Sheriff.

By

JOHN CRUDDEN,
S. D. S.

I hereby acknowledge service of a copy of the within subpœna this seventh day of December, A. D. 1911.

40

M. WILLIAM HILBERT,
Defendant.

Subpœna and Return.

I hereby deputize John Crudden to serve the within writ.

Witness my hand and seal this 11th day of December, 1911.

NICHOLAS P. WEDIN,
Sheriff. 10

New Jersey,
Hudson County. } ss:

JOHN CRUDDEN, Special Deputy Sheriff of Hudson County, being duly sworn, on his oath saith that he has inquired for Thomas F. Purcell and John S. Eastwood, named in the annexed process, for the purpose of serving them therewith, and has not been able to find them in said county; and this deponent is credibly informed and verily believes that they cannot be found in this State. 20

JOHN CRUDDEN,
Special Deputy Sheriff.

Subscribed and sworn to this 12th day of December, 1911 at Jersey City, before me.

JOS. M. SHARKEY,
Notary Public of New Jersey. 30

IN CHANCERY OF NEW JERSEY.

Between

FIRST NATIONAL BANK OF THE
TOWN OF UNION,
Complainant,

10

and

THOMAS F. PURCELL et als.,
Defendants.

Answer of William Fessler.

20 The answer of William Fessler, one of the defendants to the bill of complaint filed by the complainant in the above-named cause, shows:

1. This defendant admits that a promissory note dated July 5th, 1910, payable four months after date at the place of business of the complainant purported to be made by one Thomas F. Purcell and endorsed by one M. William Hilbert and John S. Eastwood was presented to him and at the request of the said M. William Hilbert was endorsed by him; but this defendant denies that

30 the said promissory note was for the sum of thirty-three hundred dollars, as is alleged, and says that the said promissory note endorsed by him was for the sum of thirty-three dollars.

2. This defendant admits that the description of said promissory note contained in paragraph No. 2 of the bill of complaint is accurate.

Answer of William Fessler.

3. This defendant for want of information neither admits nor denies that the said M. William Hilbert presented the said promissory note to the complainant and that the complainant paid to said M. William Hilbert the sum of thirty-three hundred dollars and prays proof thereof. 10

4. This defendant, for want of information, denies that there was any mistake or omission in the said written promissory note (a description of which is contained in paragraph No. 2 of the bill of complaint) and says that the promissory note endorsed by him at the request of M. William Hilbert was a promissory note dated July 5th, 1910, payable four months after date at the First National Bank of the Town of Union, N. J., with interest and for the sum of thirty-three dollars. 20

5. This defendant denies that the said promissory note did not express the true intention and belief of this defendant and alleges that one M. William Hilbert, who at that time was the assistant cashier of the First National Bank of the Town of Union N. J., the complainant herein, requested this defendant to become an accommodation endorser of a certain promissory note, an accurate description of which is contained in paragraph number two of the bill of complaint, for the sum of thirty-three dollars and that when said promissory note was handed to this defendant for his endorsement it was made out as a promissory note for the sum of thirty-three dollars, thereupon he endorsed it, and he had no intention, understanding or agreement to become an accommodation endorser on a promissory note for any other sum of money. 30
40

Answer of William Fessler.

6. This defendant denies that he ever was called upon by the complainant to correct the alleged mistake in said promissory note, and says that when said promissory note became due and was unpaid the same was not protested according to the requirements of law and this defendant had no knowledge whatever of the dishonor of said note until upwards of four months after the time the said promissory note was dishonored.

Wherefore this defendant prays that said bill of complaint be dismissed with his costs and charges in this behalf sustained.

J. EMIL WALSCHEID,
Solicitor of Defendant William Fessler.

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IN CHANCERY OF NEW JERSEY.

FIRST NATIONAL BANK OF THE Between TOWN OF UNION, <i>Complainant,</i> and THOMAS F. PURCELL, et. als., <i>Defendants.</i>	}	On Bill, &c., Replication.	10
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Replication.

The complainant joins issue on the answer of the defendant, William Fessler.

JOHN J. FALLON, 20
Solicitor of Complainant.

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IN CHANCERY OF NEW JERSEY.

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Between

FIRST NATIONAL BANK OF THE
TOWN OF UNION,
Complainant,

and

THOMAS F. PURCELL, et. als.,
Defendants.

Testimony.

20 Transcript of testimony taken at the hearing of the above-entitled cause, before M. T. Rosenberg, Esquire, Advisory Master, at the Chancery Chambers, Jersey City, New Jersey, on the sixth day of December, nineteen hundred and twelve, at ten o'clock in the forenoon.

APPEARANCES:

JOHN J. FALLON, ESQUIRE, Socilitor of the Complainant;

30 J. EMIL WALSCHEID, ESQUIRE, Solicitor of the Defendant, William Fessler.

M. WILLIAM HILBERT, a witness called on behalf of the complainant, being duly sworn according to law, testified as follows:

Direct Examination by Mr. Fallon:

Q. Mr. Hilbert, where do you reside?

40 A. I reside at 252 Armstrong Avenue, Jersey City.

M. William Hilbert—for Complainant—Direct.

- Q. Where are you employed?
 A. At the American Bond Company in New York City.
- Q. Do you know William Fessler, M. D.?
 A. Yes, sir, I do.
- Q. How long have you known him? 10
 A. For several years.
- Q. I show you a paper purporting to be a promissory note signed by Thomas F. Purcell and endorsed Thomas F. Purcell, M. William Hilbert, John S. Eastwood and William Fessler, M. D., and ask you if you ever saw that paper before?
- A. Yes, sir, I did.
- Q. Who is Thomas F. Purcell? 20
 A. A friend of mine.
- Q. This note is dated July 5th, 1910?
 A. Yes, sir.
- Q. When did William Fessler sign his name on the back of the note?
 A. On that date, July 5th, 1910.
- Q. And where did you see Doctor Fessler that day to have him endorse the note?
 A. At the North Hudson Hospital.
- Q. In Weehawken? 30
 A. Yes, sir, in Weehawken.
- Q. Just state what conversation passed between you and Doctor Fessler at or about the time when this note was endorsed by him?
 A. I told him that I was in need of money and that I would require something in the neighborhood of thirty-three hundred dollars to assist me, and I asked him whether he would not be kind enough to endorse my note, and he said he would. This was a conversation I had a few days before 40

M. William Hilbert—for Complainant—Direct.

the note was signed by him or endorsed by him. The day before he signed this note I went over the proceeding with him again relative to my requiring this—

10 MR. WALSCHEID: I object to that and ask that it be stricken out.

Q. Just state what you said on the day the note was signed?

A. I just asked him to endorse the note for me and he said he would do it, that he would endorse the note.

Q. Was the amount stated?

20 MR. WALSCHEID: I object to that question as leading.

Q. Just tell us what was said on that day?

A. Do you want the exact conversation?

Q. As nearly as you can give it.

30 A. Well, I told him to particularly endorse this thirty-three hundred dollar note, and he looked at the face of it. He said, "This is for Thomas F. Purcell," and I said it was not, that Thomas F. Purcell had made this note for my accommodation, and therefore if he would endorse the note it would not be for Thomas F. Purcell's accommodation, but for my accommodation.

Q. Tell us then what was said?

A. Well, he said all right and he said, "I will endorse the note for you if that is the case."

Q. What else did he say and what did you say to him on that occasion?

40 A. Well, it is pretty hard to recollect all the

M. William Hilbert—for Complainant—Direct.

conversation. He was busy at the time at the hospital, and he came to one side into one of the ante-rooms—sort of a visiting room; and he endorsed the note for me and I went away. That was practically all there was to it.

Q. Did he at that time, that is, the day he endorsed the note, or at the previous conversation you had with him respecting the endorsement of said note, say anything to you about your giving him security for the note? 10

MR. WALSCHEID: That is objected to as immaterial. Question allowed.

A. He asked me for some security and I told him I didn't have anything to offer, only an assignment, if it was any good, on some stock which I had a loan on at the Merchants' Bank, and that assignment was drawn up and signed by me to Doctor Fessler. 20

Q. Was the number of shares that was in the Merchants' National Bank mentioned?

MR. WALSCHEID: I object to that, as the assignment is the best evidence. 30

Q. What did you do with the assignment?

A. Why, I delivered it to Doctor Fessler.

Q. When Mr. Fessler endorsed the note what did you do with it?

A. I delivered it to the First National Bank of the Town of Union.

Q. And what did you receive for it—anything?

MR. WALSCHEID: I object to that as immaterial. Question allowed. 40

M. William Hilbert—for Complainant—Direct.

A. I received thirty-three hundred dollars.

Q. From whom?

A. From the First National Bank of the Town of Union.

10 Q. In whose handwriting is this note, other than the signatures?

A. It is in my handwriting.

Q. The figures "\$3300.00," is that in your handwriting?

A. Yes, sir.

Q. And the body of the note where it says "Thirty-three" with a cross after the "Thirty-three," and after that the word "Dollars," is that in your handwriting?

20 A. Yes, sir.

Q. When you wrote out this note did you intend it to be a note for thirty-three dollars or thirty-three hundred dollars?

A. Thirty-three hundred dollars.

Q. How well had you known Doctor Fessler before he endorsed this note for you?

MR. WALSCHEID: Objected to as immaterial. Question overruled.

30 Q. After that note was made and delivered by you to the First National Bank of the Town of Union and you received the thirty-three hundred dollars from the bank for it, did you ever hear anything from Doctor Fessler afterwards with respect to the amount of the note, or any question about the amount of the note?

A. Why, several weeks before the note became due.

40 Q. Tell us then what conversation you had with

M. William Hilbert—for Complainant—Direct.

him and what transaction you had with him with respect to this note?

A. He called me up on the telephone and he asked me if I would not be good enough to secure some other endorser on the note, that that was a considerable amount of money, and I believe he was having some difficulty with some firm he was interested in, where they had drawn up some agreement that none of the partners were to sign any notes of any character. I then told him that I would make an effort to get somebody else to endorse the note. 10

Q. That, you say, was several weeks before the note became due?

A. Yes, sir.

Q. Did you talk to him afterwards—after that time? 20

A. I did not.

Q. Now, after the note became due, or when the note became due, you did not pay it, did you?

A. No, sir.

Q. Did you receive a notice of the protest of the note at that time?

A. I believe I did.

Q. Did Doctor Fessler at any time after the note became due ever speak to you about this note? 30

A. No, sir, he did not.

Q. When was the first time you noticed or was informed that the body of this note read or had written in it the words "Thirty-three" in front of the word "Dollars"?

A. The day that it became due.

Q. And how did you then learn it? I mean did 40

M. William Hilbert—for Complainant—Direct.

you learn it through Doctor Fessler or through some other person?

A. I learned it through the Cashier of the Bank.

Q. Now, you were connected with that bank at the time that this note was made, were you not?

10 A. Yes, sir.

Q. In what capacity?

A. As Assistant Cashier.

Q. Was Doctor Fessler a depositor in the bank at that time?

A. Yes, sir.

Q. Did you say that you had Mr. Purcell sign this note for you as an accommodation maker of the note?

A. Yes, sir.

20 Q. And when the note was made did you state to Mr. Purcell the amount for which the note was being signed by him?

A. Yes, sir.

Q. What did you say to him?

A. I told him that I would like to have him sign the note for me for an accommodation; that I had a considerable amount of discount at the bank, and that I would be required to have somebody else sign the note for me for a matter of accom-

30

modation, and he said he would do it.

Q. Was the amount mentioned?

A. Yes, sir, thirty-three hundred dollars.

Q. And Mr. Eastwood when he signed the note was there a conversation with him with respect to the amount of the note?

MR. WALSCHEID: That is objected to as immaterial.

40

THE COURT: I will admit the question

M. William Hilbert—for Compl't.—Direct—Cross.

for what it is worth, but it clearly does not bind the defendant Fessler.

A. Yes, sir, there was.

Q. What was said to him as to the amount of the note? 10

A. Why, I told him that I had a note for thirty-three hundred dollars and that I was required by the bank to get several endorsers on it, and I asked him whether he would not be kind enough to endorse this note for me for thirty-three hundred dollars, as I had endorsed several notes for him. He said he would gladly do it, and he signed the note.

THE COURT: This testimony as to conversations between the witness and Purcell and the witness and Eastwood are admitted only as against the defendant William Hilbert, who is testifying, but has no force whatever as against the defendant Fessler. 20

MR. FALLON: I now offer this note in evidence.

Note marked Exhibit C-1. 30

Cross-Examination by Mr. Walscheid:

Q. Mr. Fessler was not present when you went to the First National Bank and obtained the money on this note?

A. No, he was not present.

Q. And the last that he had anything to do with the paper itself was when he signed it?

A. Yes, sir, when he signed it.

Q. That also was the first time he saw it? 40

M. William Hilbert—for Complainant—Cross.

- A. Yes, sir, that was the first time he saw it.
- Q. And how long prior to that time had it been drawn up?
- A. Why, the same day—the date of the note.
- Q. Where did Mr. Purcell live?
- 10 A. He lived in Astoria, Long Island.
- Q. And where did he sign it?
- A. He signed it at the First National of the Town of Union.
- Q. Before or after Doctor Fessler?
- A. Before Fessler.
- Q. And what time of day was it that Doctor Fessler signed it?
- A. Some time in the morning.
- Q. Between nine and ten?
- 20 A. I can't give you the exact time; I don't recollect.
- Q. You are sure that Fessler read that note?
- A. I am very positive.
- Q. You are very positive that he read it through carefully?
- A. I don't know whether he read it through carefully.
- Q. But you had considerable trouble to get an endorsement out of him, didn't you?
- 30 A. Yes, sir, I did.
- Q. He was a reluctant endorser?
- A. Well, I wouldn't say exactly he was.
- Q. Well, before you got him to finally sign it he was reluctant?

40 MR. FALLON: That is objected to as immaterial and irrelevant; and upon the ground that the witness should be asked to state what was said or done there at that time, and should not be required to

M. William Hilbert—for Complainant—Cross.

state that which would be a conclusion.

Question allowed.

A. Why, yes.

Q. And when you handed him the note he took it in his own hands, didn't he?

A. Yes, sir. 10

Q. And held the face of it as if he was reading it?

A. Yes, sir.

Q. And how long do you think that he held it in that manner, with the face of the note towards himself?

A. I should judge for some moments.

Q. He held it in that manner long enough to read the whole body of the note, didn't he? 20

A. Yes, sir.

Q. And there is no trouble in seeing that that note is written "Thirty Three Dollars," is there?

A. There is no trouble in reading it, but it is liable to be overlooked.

Q. If a man started to read a paper like that he could miss Thirty-three Dollars on it; you couldn't miss it?

A. I did miss it.

Q. Well, you didn't really look at it; you were 30
anxious to get the money?

A. No, I don't believe I did look at it very attentive?

Q. If you had looked at it you would have seen that it was thirty-three wouldn't you?

A. Yes, sir, I certainly would, I guess.

Q. When this note was drawn up and when Purcell signed it, only you and Purcell were there?

A. Yes, sir. 40

Q. And Purcell also read it?

M. William Hilbert—for Complainant—Cross.

A. I don't believe he did. He signed all right.

Q. Purcell was a man who would sign anything for you, I suppose?

A. I believe he would.

10 Q. You didn't write that thirty-three hundred in figures?

A. I did.

Q. When did you write that thirty-three hundred in figures?

A. The same time I made the note.

Q. When you presented that note to the bank is that the time you wrote that in there—the thirty-three hundred dollars in figures?

A. No, sir.

20 Q. The "\$3300.00" in figures was not in this note when Mr. Fessler signed it?

A. Yes, sir, it was.

Q. You are sure of that?

A. Positive.

Q. Now, who was present when Doctor Fessler signed the note?

A. Only myself and Mr. Fessler.

Q. Do you remember another doctor being present?

30 A. No, sir, there was no other doctor there.

Q. Do you not remember a very stout doctor being in the room?

A. No, sir. There was nobody else in the room with Doctor Fessler and myself.

Q. Do you know Doctor Hellstern?

A. Yes, sir.

By Mr. Fallon:

40 Q. Was Doctor Hellstern in the room?

A. No, sir, he was not.

Otto J. Riesenbergr—for Complainant—Direct.

OTTO J. RIESENBERG, a witness on behalf of the complainant, being duly sworn according to law, testified as follows:

Direct Examination by Mr. Fallon:

Q. Mr. Riesenbergr, where do you live? 10

A. 546 Union Place, Union Hill, New Jersey.

Q. In July, 1910, were you employed by the First National Bank of the Town of Union?

A. Yes, sir.

Q. In what capacity?

A. As Paying Teller.

Q. I show you a note bearing date July 5th, 1910, signed Thomas F. Purcell and bearing the endorsement of Thomas F. Purcell, M. William Hilbert, John S. Eastwood, and William Fessler, M. D., and marked Exhibit C-1, and ask you if you recall having that note in your possession as Paying Teller of the bank some time in the year 1910? 20

A. Yes, sir.

Q. Do you recall a visit at the bank by Doctor Fessler and Charles Kappes, an Attorney-at-Law?

A. Yes, sir. 30

Q. Do you recall when it was that they called at the bank?

A. About the time that this note fell due.

Q. Now, just state what was said by Doctor Fessler to you and what was said by Mr. Kappes to you while they were at the bank at that time?

A. Doctor Fessler and his attorney came in and asked to see the note that Doctor Fessler had endorsed for Mr. Hilbert, and I held this note up 40

Otto J. Riesenbergl—for Complt.—Direct—Cross.

10 so that Doctor Fessler and Mr. Kappes could see it. Mr. Kappes said, "Well that note is only for thirty-three dollars." He examined it and saw that the filling was "Thirty Three." Doctor Fessler said that he was secured, that Mr. Hilbert had assigned some stock to him, and he asked me had this stock been transferred on the books of the bank. I said I couldn't answer that question for him, that Mr. Hilbert, as Assistant Cashier, attended to the transfer of stock. Then to the best of my recollection Doctor Fessler and Mr. Kappes left the bank.

Q. That is all you know about this note, is it?

A. Yes, sir.

20 *Cross-Examination by Mr. Walscheid:*

Q. You could readily see that the filling of the note read "Thirty Three Dollars," couldn't you?

A. Yes, sir.

Q. No trouble about that, was there?

A. No, sir.

Q. And when had you seen this note before?

A. To the best of my recollection that is the first time that I saw this note.

30 Q. You had nothing to do with the discounting of it?

A. No, sir.

Q. You had nothing to do with the note whatever, except that you received it on the date that it was due, I suppose, in order to receive payment on it in some shape or other,—is that right?

A. Yes, sir.

Q. You had nothing to do with the protesting of this note?

40 A. No, sir.

*Otto J. Riesenberg—for Complainant—Re-Direct
—Re-Cross.*

Q. You don't know when it was protested?

A. No, sir.

By the Court:

Q. At the time that you showed this note to Mr. Kappes and Doctor Fessler was that note in the same shape that it is in now? 10

A. No, sir.

Q. It was not?

A. No, sir.

Q. How did it differ from the shape it is in now?

A. Why, there was a protest paper attached to it. 20

Re-Direct Examination by Mr. Fallon:

Q. I show you this paper and ask you if that is the paper you refer to as having been attached to it? (Handing witness paper)

A. Yes, sir, that is the paper.

By the Court:

Q. But the note itself leaving off the protest paper is in the same shape that it is in now? 30

A. To the best of my recollection, yes.

Re-Cross-Examination by Mr. Walscheid:

Q. Is there any doubt in your recollection as to whether it is or not?

A. No, sir.

Q. Then why do you say to the best of your recollection?

A. Wel, there may have been some technical 40

Otto J. Riesenbergl—for Complt.—Re-Re-Direct.
Leon L. Darling—for Complainant—Direct.

point that may have changed that note that I can't possibly recollect.

Q. Well, look at it and see?

10 A. (Witness looks at note) Well, that note is in the same shape as it was.

Re-Direct Examination by Mr. Fallon:

Q. You are not now in the employ of the bank?

A. No, sir.

Q. How long have you been away from that bank?

A. Since February, 1911.

20

LEON L. DARLING, a witness on behalf of the complainant, being duly sworn according to law, testified as follows:

Direct-Examination by Mr. Fallon:

Q. Mr. Darling, you are connected with the First National Bank of the Town of Union?

A. Yes, sir.

30 Q. In what capacity?

A. Cashier.

Q. How long have you been connected with that bank?

A. Since November 16th, 1910.

Q. I show you a paper or note which has been marked C-1, and ask you if that paper was taken by you from the files of the bank?

A. Yes, sir, it was.

40 Q. That note is still held by the bank?

Leon L. Darling—for Complainant—Direct.

A. Yes, sir.

Q. It has not been paid?

A. No, sir.

Q. You know nothing about the making of this note or anything about the endorsements upon it, and you never talked to Doctor Fessler about it? 10

A. No, sir, I have never had any conversation with Doctor Fessler about this note at all.

MR. FALLON: I offer this notice of protest which was attached to the note at the time that Mr. Reisenberg says he saw it. I don't suppose it is of much materiality.

MR. WALSCHEID: I object to it as immaterial to this cause. 20

Paper admitted and marked Exhibit C-2.

Complainant Rests.

30

40

John J. Fallon—for Defendant—Direct.

JOHN J. FALLON, a witness called on behalf of the defendant, being duly sworn according to law, testified as follows:

Direct Examination by Mr. Walscheid:

10 Q. Mr. Fallon, you are a director of the First National Bank, the complainant in this cause?

A. Yes, sir.

Q. And as such take part in the allowing of discount?

A. No.

Q. Who, in July, 1910, passed upon notes which were offered for discount?

A. I am not sure.

20 Q. But a committee of the Board of Directors would pass them?

A. The principal ones that had to do that at that time, I recall, was John Conway and M. William Hilbert.

Q. Who was your Discount Committee at that time?

A. I believe it was Hilbert and Conway.

Q. Mr. Conway was at that time the President of the bank?

30 A. Yes, sir.

Q. And nobody else was associated with him as a member of the discount committee?

A. I am not certain as to that; but I am sure that notes were discounted by both Conway and Hilbert. Before they were discounted they would endorse their initials on the note.

Q. But the rule was that no notes were to be discounted without having been passed by this committee?

40 A. That is not so.

John J. Fallon—for Defendant—Direct.

Q. Do your by-laws provide for any discount committee?

A. I do not know; I believe that they do, but whether they did at that time I don't know.

Q. Well, they have not been changed since then? 10

A. Yes, sir, they were in some respects, but I don't know in just what respects.

By Mr. Fallon:

I desire to say that Mr. Hilbert at the time that this note in question, marked C-1, was discounted, or at the time that he obtained from the bank the money upon it, had authority to discount—

MR. WALSCHEID: I object to any proof of authority in this form. 20

Objection overruled.

MR. FALLON: He had authority to discount notes. It was the custom of the bank—

MR. WALSCHEID: I object to the custom.

MR. FALLON: At the time that this note was discounted— 30

By the Court:

Q. How do you know there was a custom?

A. As a Director of the bank I knew that it was the custom of the bank to permit Mr. Hilbert, who was then the Assistant Cashier of the bank, to discount notes presented to the bank for discount, providing he would endorse upon the note which was to be discounted his initials, and he did 40

John J. Fallon—for Defendant—Re-Direct.

so endorse with his initials the note in question marked Exhibit C-1.

By the Court:

Q. Where are those initials?

10 A. This mark on the top here "O. K. W. H." (Indicating on note Exhibit C-1.) I know also as a Director of the bank at that time that John Conway, who was then the President of the bank, had similar authority to discount notes by writing his initials upon them. As to this particular note I have no knowledge whatever and had no knowledge of it until it was presented to me for the purpose of suit.

20 *Re-Direct Examination by Mr. Walscheid:*

Q. So that lettering "O. K. W. H." constituted the seal of approval of the bank for this note?

A. It indicates that the Teller of the bank would have a right to pay out of the bank thirty-three hundred dollars.

(Question read.)

A. I don't know what you mean by seal of approval.

30 Q. The letters "O. K. W. H." are marks of the bank, are they?

A. No, sir, they are marks of William Hilbert.

Q. Placed there by him for the bank?

A. Placed there by him as Assistant Cashier of the bank.

Q. In the interest of the bank?

A. In the interest of the bank and for the person for whom the note was to be discounted.

Q. And in the performance of his official duties?

40 A. Part performance.

John J. Fallon—for Defendant—Re-Direct.
William Fessler—for Defendant—Direct.

A. Yes, sir.

Q. You mean by that that he had other duties to perform besides that, is that it?

Q. Then this "O. K." was placed upon that note as one of his duties? 10

A. It was a duty that was cast upon him by the bank, yes.

Q. As an official of the bank it was his duty for the bank to examine the face and filling of every note that he accepted for discount, was it not?

A. I can't say that. All I can say is that if a note was to be presented for discount Mr. Hilbert or Mr. Conway was in authority to say whether or not that note should be discounted, but whether he examined this note or whether it was his duty to examine it, I can't say. 20

WILLIAM FESSLER, a witness called on behalf of the defendants, being duly sworn according to law, testified as follows:

Direct Examination by Mr. Walscheid:

Q. Mr. Fessler, do you know Mr. M. William Hilbert? 30

A. Yes, sir.

Q. And did you sign a note for him?

A. Yes, sir; I endorsed a note for him.

Q. Do you remember the date when you signed it, or don't you remember that?

A. No, sir, I don't exactly remember that.

Q. You don't remember what date?

A. No, sir. 40

William Fessler—for Defendant—Direct.

Q. Where did you sign it?

A. At the North Hudson Hospital.

Q. When you signed it did you read it?

A. Yes, sir.

Q. For how much was the note?

10

MR. FALLON: I object to that on the ground that the paper itself is the best evidence.

Q. I show you a note which has been marked Exhibit C-1; did you read that note at that time?

A. Yes, sir.

Q. For how much was the note?

20

MR. FALLON: I object to that as the note speaks for itself.

Q. Was that note in that shape, when you saw it, or has anything been added to the writing?

A. The note was for thirty-three dollars.

MR. FALLON: I object to that—the statement of the witness.

30 *By the Court:*

Q. Is that the note that you signed,—the note which is now shown to you?

A. Yes, sir, I signed that paper.

Direct Examination Continued:

Q. Were the figures “\$3300.00” in figures upon that paper when you signed it?

A. I can't exactly say that, but I know that I

40

William Fessler—for Defendant—Direct.

didn't sign anything else than a thirty-three dollar note.

Q. When you read it you read a thirty-three dollar note?

A. Yes, sir.

10

MR. FALLON: I object to what he read.
Objection sustained.

Q. Tell us what took place at the hospital with reference to this note?

A. Why, I was called up to endorse a note.

Q. Called up by whom?

A. By Mr. Hilbert.

Q. When?

A. On this particular date—the date I signed it. 20

Q. Called you up how?

A. By telephone.

Q. And where were you when he called you?

A. At the hospital.

Q. And what did he say to you?

A. He asked me if I would endorse a note for him.

Q. And what happened next; what did you say?

A. I said yes, I thought I would. I was very busy at the time; I was in the dispensary and I came out when he came over. He came up to the Doctor's room and I asked him to wait there for me. 30

Q. When he called you on the telephone did he state for how much the note was to be that you were to endorse?

MR. FALLON: I object to any leading question. 40

William Fessler—for Defendant—Direct.

By the Court:

Q. What did he say to you about the note?

10 A. He asked me if I would endorse a note for him and I said I thought so. He asked me where I would be and I said at the hospital, and he said all right he would be right over. He then came over to the hospital and he waited for me in the doctors' room. We have a dispensary on the lower floor where the telephone is and where the telephone call was answered. I came upstairs to the doctors' room with Doctor Hellstern and I looked at this note. This was the note that was presented to me. I looked at it and saw it was for thirty-three dollars and I endorsed it. Doctor
20 Hellstern said to me at the time—

Q. Mr. Hilbert being present?

A. Yes, sir.

Q. Go ahead; what did Doctor Hellstern say to you at the time?

A. This conversation with him, was Mr. Hilbert present?

Q. Yes.

A. No, I don't think Mr. Hilbert was present. This was a subsequent conversation.

30

MR. FALLON: I object to anything that was stated when Mr. Hilbert was not present.

Objection sustained.

(Witness) Doctor Hellstern asked me what I was doing—

By the Court:

Q. Was Mr. Hilbert there then?

40

A. No, sir.

William Fessler—for Defendant—Direct.

Direct Examination Continued:

Q. At the time when you signed this note who was in the room?

A. Mr. Hilbert and Doctor Hellstern and myself.

10

Q. And after you signed the note and while you remained in that room did you have any talk with Doctor Hellstern about what you had done?

A. Yes, sir.

Q. And how long after was that?

A. Directly after.

Q. Was Mr. Hilbert still there or had he left?

A. Mr. Hilbert was probably then just walking out of the door to the vestibule.

Q. What took place between you and Doctor Hellstern at that time?

20

MR. FALLON: I want to interpose an objection that anything that may have been said between Doctor Hellstern and Doctor Fessler in the absence of Mr. Hilbert would be in the nature of hearsay evidence and that it is no part of the *res geste*.

THE COURT: I will admit it for the present and rule upon it later.

30

A. He asked me immediately what I was doing, and I said, "Endorsing a note for Hilbert," and he said, "You are a damn fool." I said, "The amount is only for thirty-three dollars." "Well," he said, "you know what trouble he had with getting a charter." I said, "The amount is not much and it is all right."

Q. Now, Doctor Hellstern is a practicing physician where?

40

William Fessler—for Defendant—Direct.

A. In Hudson Heights.

Q. After you signed this note for Hilbert did you ever see him again or speak to him again?

A. No.

10 Q. Have any subsequent conversation with him?

A. After I had signed the note I might have met him, but nothing in reference to the note.

Q. You never spoke to him again in reference to the note?

A. No, sir; I don't know that I met him; I can't say I did.

20 Q. Did you shortly before this note became due call up Mr. Hilbert and ask him to take your name off the note, as it was too big an endorsement for you and you wanted him to get another endorser, or words to that effect?

A. I never paid any more attention to it.

Q. Did you have such a conversation with him?

A. No, sir.

Q. Did you ever receive any security by way of the assignment of stock of any kind for making this endorsement?

A. No, sir.

30 Q. Did you ever tell anybody that you had such security?

A. No, sir, I never had any; I couldn't tell them I had it.

Q. Did you go to the First National Bank with Charles W. Kappes?

A. Yes, sir.

Q. Charles W. Kappes is an attorney and counsellor of this state, is he not?

A. Yes, sir.

40 Q. And did he then represent you?

William Fessler—for Defendant—Direct.

A. Yes, sir.

Q. Did you at that time say to the Paying Teller, or to any of the officials, that you held security for this note by way of an assignment of stock to you?

A. No, sir.

10

Q. And did you at that time inquire whether such stock had been transferred on the books of the bank from Hilbert to you?

A. No, sir, I did not.

Q. And did this man, Paying Teller or whoever he might be, then say, "I don't know, Mr. Hilbert attends to that himself"?

A. No, I don't remember having any conversation with him. Mr. Kappes merely asked for that note.

20

Q. Don't say you don't remember, if you know he didn't.

A. No, he didn't.

Q. How did you happen to go with Mr. Kappes to the bank?

A. One of the directors told me that a note had gone to protest for thirty-three hundred dollars.

Q. What director was that?

A. John Hannan.

Q. Well, what did you do then?

30

A. I then immediately got Mr. Kappes.

Q. And what did you do when you got Mr. Kappes?

A. He went up to the bank with me and asked to see the note.

Q. And was the note shown to you?

A. Yes, sir, I saw it.

Q. Why did you engage counsel to go up to see the note?

40

William Fessler—for Defendant—Direct.

A. Well, when a man tells me a note has gone to protest for thirty-three hundred dollars, and if I had not endorsed any such note, why, I thought I ought to see somebody.

10 Q. Did you receive any consideration whatever for signing this note?

A. Absolutely none.

Q. Did you receive any money or any other consideration?

A. No, sir, absolutely none,—friendship or anything else.

By Mr. Fallon:

20 Q. You signed the note merely as accommodation for Hilbert?

A. Yes, sir.

Direct Continued:

Q. Did you ever receive any notice of the protest of this note?

MR. FALLON: I object to that as immaterial to this suit.

Objection sustained.

30 MR. WALSCHEID: I offer this evidence for the purpose of showing that the bank has no standing in this Court to ask for a reformation of this note. It goes directly to the right of the bank. In other words, the contract with the endorser is simply that he will pay providing the preceding endorsers have not paid and the maker has not paid, and providing that he has received due notice of protest. That, generally stated, I think, is the contract of en-

40

William Fessler—for Defendant—Direct.

dorsement. Now, before the bank can come in and ask to have this contract reformed as against the endorser, it must show that it has performed and done all that is incumbent upon it to give it a standing.

THE COURT: I will sustain the objection. The only question before this Court is whether a contract which was clearly valid at the time it was made was for thirty-three dollars or thirty-three hundred dollars, and that is the only question. Whether any circumstances have arisen which invalidate that contract is a question for a law court to determine, and is not within the scope of this investigation.

10

20

Q. Doctor, did you ever receive any notice of the non-payment of this note by Thomas F. Purcell, M. W. Hilbert or John S. Eastwood from the First National Bank of the Town of Union or from any other person whatsoever prior to the time or at the time when this note became due?

MR. FALLON: I object to that on the ground that it is immaterial.

Objection sustained.

30

Q. Did you ever receive any notice of protest or non-payment of this note?

MR. FALLON: I make the same objection upon the same ground.

Objection sustained.

Q. Did you ever at any time hear of any notice of protest for non-payment?

40

William Fessler—for Defendant—Cross.

MR. FALLON: The same objection, upon the same ground.

Objection sustained.

Cross-Examination by Mr. Fallon:

10 Q. Now, Doctor Fessler, did you sign the note which is now before you, C-1, without hesitation after Mr. Hilbert presented it to you?

A. I looked at it and read and signed it.

Q. You were not in anywise disinclined to sign it after having looked at it and read it?

A. No.

20 Q. And before you did sign it as it was presented to you for signing, Mr. Hilbert had called you up on the 'phone and asked you if you would endorse a note for him?

A. Yes, sir, he did.

Q. Did he not then mention to you the amount of the note over the 'phone?

A. No, sir.

Q. You did not ask him the amount of the note over the 'phone?

A. No further conversation than I said yes, I would.

30 Q. Now, is there any difference or change in this note, C-1, as it now appears before you from what it was at the time you read it and signed it?

A. Well, I think that there is.

Q. Tell me what you think is changed about it?

A. I think that the figures read thirty-three dollars as well as the body of the note read thirty-three dollars.

Q. You think so?

40 A. Yes, sir, because I could have noticed it, I think, if it were not the case.

William Fessler—for Defendant—Cross.

Q. Did you look particularly at the figures on this note at the time you signed it?

A. No, not particularly.

Q. Did you read particularly any part of the note at the time you signed it?

A. Yes, sir, I knew that the note was for thirty-three dollars. 10

Q. You mean when you say that that you know that "thirty-three" was written in the body of the note?

A. I know that I endorsed and had no intention of endorsing anything but a thirty-three dollar note.

Q. All you know is that you endorsed this very note that is now before you?

A. Yes, sir, I endorsed that note. 20

Q. There was nothing to distract your attention at the time you signed that note, was there?

A. That is too far back to remember whether there was or not.

Q. Then am I to understand that you don't clearly remember all that transpired in the room at that time?

A. I remember everything clearly bearing on this matter. 30

Q. You said on your direct examination that you didn't remember whether or not the figures "\$3300.00" were in there at the time you signed the note?

A. Yes, I remember that question being put to me.

Q. But do you remember making that answer?

A. I think I do, yes, sir.

Q. And you meant what you then said, did you not, that you didn't remember it? 40

William Fessler—for Defendant—Cross.

A. Yes, I did.

Q. Well, what has occurred to you since you made that answer which now indicates to you the fact that thirty-three dollars was in there at the time in figures?

10 A. I have absolute knowledge that I only endorsed a thirty-three dollar note; that makes me conclude that it was a thirty-three dollar note.

Q. But you have no absolute knowledge as to the figures that were on the note, have you, at that time?

A. No, absolutely I have not.

Q. Do you remember asking Mr. Hilbert at the time for security for your endorsement?

A. No, I never asked for any security.

20 Q. Are you sure you didn't ask for any security?

A. Positive.

Q. Didn't you have a talk with him about some bank stock that was to be given as security for the note?

A. No, sir.

Q. Do you know this young man here, Mr. Riesenberg? (Mr. Riesenberg asked to stand up.)

30 A. Yes.

Q. You know he was the Paying Teller of the First National Bank of the Town of Union?

A. I know he was employed there, yes.

Q. Do you know he is the one that you and Mr. Kappes saw at the time you went to the bank about this note?

A. I think he was the young man that handed out the note to Mr. Kappes.

40 Q. And don't you know that when you went there you asked Mr. Riesenberg to let you see the

William Fessler—for Defendant—Cross.

note which you had endorsed for Hilbert?

A. Mr. Kappes may, —I didn't.

Q. Well, you were present and heard what Mr. Kappes said?

A. I was present with Mr. Kappes.

Q. Well, you heard what was said?

10

A. That was all that was said, yes.

Q. But did you hear Mr. Kappes ask to see the note which you had endorsed for Mr. Hilbert?

A. Yes, sir.

Q. Mr. Riesenbergr then held this note up to you and Mr. Kappes?

A. Yes, sir.

Q. What did Mr. Kappes then say to Mr. Riesenbergr after he had held this note up to you?

20

A. Nothing further; we saw it and went out.

Q. You didn't say anything to him,—you just went away?

A. No, sir, no further conversation.

Q. Didn't you ask Mr. Riesenbergr—didn't you say to Mr. Riesenbergr that Hilbert had promised to secure you by some stock for the endorsement of this note, and ask him whether that stock had been transferred on the books of the bank?

A. No.

Q. You say no?

30

A. No, sir.

Q. Well, do you remember what conversation you had with Mr. Riesenbergr?

A. There was no further conversation that I know of, and I know that there was not any such conversation absolutely. I know that is not so.

Q. Then do you mean to say that the only conversation that passed between you, Mr. Kappes and Mr. Riesenbergr was that Mr. Kappes asked

40

William Fessler—for Defendant—Cross.

whether there was a note which you had endorsed for Hilbert, and upon Riesenber then showing him this note, C-1, nothing further was said by you and Mr. Kappes whatever?

A. Yes, sir, that was all.

10 Q. You saw the note at the time it was shown to Mr. Kappes?

A. Yes, sir.

Q. And you saw that thirty-three hundred dollars was in it in figures, did you not?

A. I didn't pay specific attention, but I saw the note. Mr. Kappes picked up the note and I stood behind Mr. Kappes. Mr. Kappes said, "All right, that is all,—come on."

Q. Had you examined the note at all?

20 A. No, sir, he picked up the note.

Q. But you were right by Mr. Kappes where you could see and did see it?

A. Yes, sir, I saw the note.

Q. And you want the Court to understand that you did not look at that note particularly to see what was upon it?

A. No, sir, I don't want the Court to understand that. I know I saw the note just as it is now.

30 Q. Will you say now that it plainly stated thirty-three hundred dollars in figures?

A. Yes, sir.

Q. Did you make any comment to Mr. Riesenber at that time?

A. There was not any further conversation about it at the time—absolutely none.

40 Q. Well, after you had been informed that a note for thirty-three hundred dollars which you had endorsed for Hilbert had gone to protest, did

William Fessler—for Defendant—Cross.

you go and look for Hilbert and ascertain anything about the note?

A. No, sir.

Q. Why not?

A. My first move was to see a lawyer.

Q. Why didn't you go to see Mr. Hilbert? 10

A. I don't know why I didn't. Was there any special reason why I should?

Q. I am asking you why you didn't go.

A. I have no special reason why I didn't go.

Q. You knew that Mr. Hilbert resided in Weehawken at the time?

A. Yes, sir.

Q. And you had known him very well for some time before that?

A. I knew him. 20

Q. You knew him so well that you visited his house before that time?

A. Yes, sir.

Q. With your wife?

A. Yes, sir.

Q. And he and his wife visited your house?

A. Yes, sir, once or twice.

Q. And he had endorsed a note for you before this note was endorsed by you for him? 30

A. No, sir, he had not.

Q. What was your purpose in getting a lawyer to go to the bank when you were informed that the note had gone to protest?

A. I was told that a note for thirty-three hundred dollars had gone to protest.

Q. What was your purpose then in going to see a lawyer?

A. Because I had not endorsed a note for

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thirty-three hundred dollars, but only one for thirty-three dollars.

10 Q. And when you and the lawyer went to the bank and saw this note which in figures was thirty-three hundred dollars, what did you do afterwards with respect to informing the bank or anyone else about what you believed to be a mistake in the note?

A. The thing was entirely in my lawyer's hands then.

Q. Did you do anything yourself by way of informing the bank?

A. One of the directors, John M. Hannan, at that time knew it, and I believed the bank knew all about it.

20 Q. Hannan said that a note had gone to protest?

A. Yes, sir.

Q. And you never went to the bank and asked them whether or not a note signed by you for Hilbert had gone to protest?

A. No, sir. I asked Mr. Hannan when this note had gone to protest. It was after it was due.

Q. After its due date?

30 A. Yes, sir.

Q. Do you know when its due date is?

A. I learned the date; Mr. Hannan said you have a note due there, and it has gone to protest for thirty-three hundred dollars; and it seems to me that it was seven or eight or ten days after.

Q. Tell us all the conversation, and state when the note became due and when it was protested, if you know?

40 A. He said you have got a note there which has been protested, and he said that the amount was

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thirty-three hundred dollars. I was surprised and asked him when it had gone to protest. "Why," he said, "didn't you receive any notice." I said, "No, I didn't receive any notice, or I would not be asking you here now." So I think he went to the bank—

10

MR. FALLON: I object to what you think.

He went to the bank to look it up.

Q. How do you know this—did he tell you he went to the bank?

A. I waited in his office until he went there. He went and found out for me, and, as I remember it now, that note was then over due.

20

Q. I am asking you to state what conversation you had?

A. It was over due seven or eight days. There was not any further conversation then, and I immediately engaged Mr. Kappes.

Q. You waited, you say, at Mr. Hannan's office?

A. Yes, sir.

Q. Mr. Hannan's office was just four doors away from the bank?

30

A. Yes, sir.

Q. On Fourth Street, Union Hill?

A. Yes, sir.

Q. Why didn't you go to the bank, and not Mr. Hannan?

A. I don't know.

Q. Did Mr. Hannan tell you when the note went to protest; did he tell you the date when it went to protest?

40

William Fessler—for Defendant—Cross.

A. He did at that time; I think he did at that time, and it seems like it was seven or eight or ten days after.

10 Q. When he told you why didn't you go to the bank and ascertain yourself the facts in regard to the matter?

A. I didn't care to involve myself in any way with anyone there, and so I immediately engaged a lawyer, because the amount was for so much more than that which I had intended to sign for.

Q. Mr. Hannan was your personal friend, was he not?

A. Yes, sir. Mr. Hannan might have asked me to remain there until he found that out.

20 Q. Did you think that Mr. Hannan, if you went with Mr. Hannan to the bank, that he would involve you wrongly?

A. No.

Q. Now, when Mr. Kappes saw the note, on the day that he went to the bank with you, didn't Mr. Kappes remark to Mr. Riesenberg, "Why that note is only for thirty-three dollars"?

30 A. I can't say that; my memory does not serve me so far as that, but he probably did. I remember saying before that there was not anything further said, but I can't tell you.

Q. Then your mind is not clear on all that transpired at that time—all that was said?

A. My mind is not clear on that—possibly he did refer to that. It was some time ago.

Q. You distinctly said before that there was no conversation between Mr. Kappes and Mr. Riesenberg other than that Mr. Kappes asked to see this note that you had endorsed for Hilbert?

40 A. The three of us didn't have any conversa-

William Fessler—for Defendant—Cross.
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tion; there was no general conversation; Mr. Kappes might have said to him, "Why this note is for thirty-three dollars."

Q. But did he say that?

A. As you recall it, I think he did.

10

Q. And now that I have refreshed your memory somewhat as to some of the things that were said there, do you now recall talking with Mr. Riesenbergh about Hilbert's stock?

A. No, sir.

Q. You say that you don't recall talking to him about that?

A. No, sir, I didn't talk to him about it.

Q. So that after you and Mr. Kappes went to the bank and saw this note you never did anything thereafter about it?

20

A. It was entirely up to my attorney.

Re-Direct Examination by Mr. Walscheid:

Q. Doctor, was it through Hannan that you first ascertained that there was a thirty-three hundred dollar note against you in the First National Bank?

30

MR. FALLON: I object to that as improper.

Question allowed.

A. Yes, sir.

By the Court:

Q. Do you mean to say absolutely that you never had an assignment of any collateral to secure you for your endorsement on this note, and

40

William Fessler—for Defendant—Re-Direct.

that nothing was ever said between you and Mr. Hilbert as to giving you any assignment?

A. Absolutely not.

10 Q. How many conversations did you have with Mr. Hilbert before you endorsed this note with respect to your endorsement,—only the one over the telephone?

A. That was the only conversation.

Q. Mr. Hilbert was at that time the Assistant Cashier of the bank?

A. Yes, sir.

Q. Didn't it strike you as peculiar that he should come to you with a note with all of these endorsements for merely the sum of thirty-three dollars?

20 A. No, sir, it did not. Mr. Hilbert would often tell me of many peculiar transactions about that bank at that time, and I considered it was merely a merry whirl.

Q. Did you think the Assistant Cashier of the bank would have to get an endorsement for a note for as small a sum as thirty-three dollars?

30 A. He told me at that time that there was much disruption there and that they were trying to oust him, and that he was having difficulty there, and so on. That was the general impression I got.

Q. But I asked you whether you did not consider that peculiar that a man would have to get an endorsement on a note for so small an amount as thirty-three dollars?

A. No, sir, I didn't think that peculiar.

Q. You paid no attention to that?

A. No, sir.

*William Fessler—for Deft—Re-Direct—Re-Cross**Re-Direct Examination by Mr. Walscheid:*

Q. What were you doing at the hospital at that time?

A. I was on the hospital service that month.

Q. And in order to sign this note did you leave your work? 10

A. Yes, sir, while he was there I did work that I had to do, and he waited for me until I got through.

Q. Did you have any other work immediately afterwards?

A. Only my private calls to make.

Re-Cross-Examination by Mr. Fallon:

Q. Did you say that this conversation between you and Hilbert wherein he said he was having trouble in the bank and that they were trying to oust him was had at the time that you endorsed that note? 20

A. No, sir, this was the general impression I got.

Q. Did you get that impression from the conversation you had with him that day?

A. No, sir.

Q. Then although you got the impression from him previously that he was having difficulty with the bank and that they were trying to oust him, you unhesitatingly signed this note which he requested you to sign? 30

A. Yes, sir, I signed this note.

Q. And the amount of it he had not stated to you over the 'phone when he asked you to endorse the note for him?

A. No, sir, he didn't mention the amount. 40

William Fessler—for Defendant—Re-Cross.
John M. Hannan—for Complainant—Direct.

Adjourned until Thursday, December 12, 1912, at 12 M.

10 Further adjourned until Wednesday, December 18, 1912, at 10 A. M.

Continuation of the hearing of the above-entitled cause, this eighteenth day of December, nineteen hundred and twelve, at ten o'clock in the forenoon, pursuant to adjournment.

Appearances as heretofore.

20 JOHN M. HANNAN, a witness called on behalf of the complainant by consent at this time, being duly sworn according to law, testified as follows:

Direct Examination by Mr. Fallon:

Q. What is your business, Mr. Hannan?

A. Real estate.

Q. You are also holding a state position?

A. Yes, sir.

30 Q. What is that position?

A. Deputy Supreme Court Clerk.

Q. Are you acquainted with M. William Hilbert and Doctor William Fessler?

A. Yes, sir.

40 Q. And do you recall a conversation you had with Doctor Fessler concerning a note made by M. William Hilbert and endorsed by Doctor Fessler and payable at the First National Bank of the Town of Union, N. J.?

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A. Why, I had a conversation with Doctor Fessler on a couple of occasions in reference to his endorsement on the back of that note.

Q. And do you recall when these conversations were had and where?

A. One of them was in my former place of business on Union Street and Park Avenue. 10

Q. And the other one?

A. In my office—my real estate office on Fourth Street.

Q. And your real estate office on Fourth Street was right near the First National Bank Building?

A. Yes, sir.

Q. Will you state to the Court what conversation you had with Doctor Fessler about a note, the so-called Hilbert note? Can you tell us first about when these conversations were had? 20

A. Well, I don't know the date, but the time that the first conversation was held was after he had endorsed the note and the note had been discounted in the First National Bank; and the next conversation we had was when the note had gone to protest.

Q. Well, will you tell us now what conversation you had with him; tell us about the first conversation you had at Park Avenue and Union Street? 30

A. That took place after the note had been discounted; and I then asked Doctor Fessler why he had been so foolish to endorse a note for Mr. Hilbert. He informed me that he had received an assignment for collateral security for the equity he had in some stock; and I said if that was the case probably it would be all right, if he had the assignment in some bank where he had equity in 40

John M. Hannan—for Compl't.—Direct—Cross.

the stock. He showed me an assignment which he had in his pocket, and I said it was not any good unless he had the assignment in the bank where he had the equity.

10 Q. Did you look at the paper that he showed you at that time and read it or read part of it?

A. I think I did, if I am not mistaken.

MR. FALLON: I now call upon the other side to produce an assignment made by M. William Hilbert relative to stock of the First National Bank, which assignment was given as collateral security for the endorsement of this note.

20 MR. WALSCHEID: We have no such paper.

Q. Will you state to the Court, if you recall, the language of that paper that you then saw and which you say was an assignment?

A. It was to the effect—

MR. WALSCHEID: I would like to cross-examine the witness on this paper first.

30 Request allowed.

Cross-Examination by Mr. Walscheid:

Q. What part of the paper did you read—this assignment?

A. Well, it is so long ago, but I think I just read the assignment,—just looked through it, the body of it.

40 Q. You didn't see who that assignment was signed by, if anybody, did you?

John M. Hannan—for Complainant—Cross.

A. I can't recall to my knowledge whether it was signed or not—you mean by Mr. Hilbert?

Q. Yes.

A. I really couldn't say it was signed by him.

Q. You won't say it was signed by him?

A. No, sir.

10

Q. You saw a paper that you and he discussed as an assignment?

A. Yes, sir.

Q. But you can't tell us now what the contents of that paper was?

A. Well, I can't tell you exactly anything more than I recall to my memory that it read his equity in stock was hereby assigned to William Fessler as collateral security for the endorsement of a note.

20

Q. That the language?

A. I don't recall actually that that was the language, but I imagine to the best of my knowledge that that was the language.

Q. You will not now say that was the language?

A. No, sir, not now; I can't recall every little detail, but it was an assignment of his equity in the stock.

By the Court:

30

Q. Did it recite a note in it?

A. It recited, if I remember rightly, that it was collateral security for the endorsement upon a note.

Q. Was that all it said, simply "a note"?

A. I don't recall that was the language stated in the assignment.

40

John M. Hannan—for Complainant—Cross.

By Mr. Walscheid:

10 Q. Is not this the situation, that the paper in question read that on all notes or on any notes that Fessler might endorse for Hilbert that he, Hilbert, agreed to hold Fessler harmless, and that Fessler was only an accommodation endorser; don't you remember that language?

A. I can't say that I do.

Q. And do you know when you saw that paper—upon what occasion?

A. After the endorsement—after the note was discounted.

Q. After the note was discounted?

A. Yes, sir.

20 Q. And do you know about when the note was discounted?

A. No, I have not tried to refresh my memory on that.

Q. So that as a matter of fact you at the present time have no definite idea as to what the contents of that paper was, have you?

A. Well, definite—I feel positive that it stated that it was an assignment for an equity in stock, as collateral for an endorsement upon a note.

30 Q. And you say that because that was discussed between you?

A. Yes, sir.

Q. And that is the only reason why you do say that?

A. Because we talked about it?

Q. Yes, and because you saw a paper?

A. Yes, I saw the paper.

Q. And which you and he called an assignment?

40 A. I didn't call it an assignment,—he called it an assignment.

John M. Hannan—for Complainant—Cross.

Q. And that is the reason why you now call it an assignment?

A. Yes, sir.

Q. That is the only reason why you call it an assignment?

A. Yes, sir. 10

Q. And you at that time didn't charge your memory with the contents of that paper, did you?

A. Well, I had no reason to, no, sir. I didn't feel that I would be called upon in the future to repeat the contents of the paper.

Q. You were not interested?

A. Well, I was interested to this extent, that I was connected with the institution and I was interested as a matter of friendship towards Fessler. 20

Q. But you were not interested personally to the extent that you would charge your mind with the contents of the paper?

A. No, sir.

Q. And if that paper had not been discussed between you and Fessler as an assignment, is it not a fact, Mr. Hannan, that you would not now talk of it as an assignment?

A. Why, I wouldn't know anything about it. 30

By the Court:

Q. Do you mean to say that that is the only reason you know that it was an assignment, because you and Fessler when you were talking about it and called it an assignment?

A. Yes, sir.

John M. Hannan—for Complainant—Direct.

Direct Examination Continued:

Q. Just tell us as well as you can what the language of the paper was that you call an assignment and which he called an assignment?

10 A. Well, to the best of my recollection that paper stated, as I have already stated before, that the assignment read, "I hereby assign my equity in stock as collateral for a note signed by William Fessler." I don't recall that there was any amount stated in it, and I am not positive about it being signed.

Q. But you are quite sure of that which you have stated as being the contents of the paper?

A. Yes, sir.

20

By the Court:

Q. Are you sure that you saw the word assign in that paper?

A. I think so. I feel quite satisfied that I saw that or what was synonymous of assignment.

Q. But do you remember whether you saw the word assign in it?

A. Yes, sir, I believe I saw the word assign.

30 *Direct Examination Continued:*

Q. Now will you tell us the rest of the conversation that you had with Doctor Fessler on that first occasion concerning that note?

A. Why, that, I think, is about all, if I can recall. We very often were in one another's company in that way, and I don't recall just what other conversation we had pertaining to that or any other business.

40

John M. Hannan—for Complainant—Direct.

Q. Will you state what the conversation was that you had with Doctor Fessler at your Fourth Street office, after, as you say, the note went to protest?

A. Well, I told him that the note had gone to protest, and I think he then asked me what the amount was and I told him that I was not positive, and I then went to the bank and found out and I told him it was for thirty-three hundred dollars. 10

Q. When you told him that the note was for thirty-three hundred dollars what did he then say, if anything?

A. I don't recall that he said anything. I don't recall his conversation after that. 20

Q. Did you leave your place of business and go to the bank to ascertain the amount of the note?

A. Yes, sir.

Q. And did Doctor Fessler remain in your place of business while you were absent?

A. Yes, sir.

Q. Did Doctor Fessler express any desire to you to accompany you to the bank to ascertain the amount of the note?

A. Not to my knowledge. 30

Q. And you say that when you told him the amount of the note which had gone to protest was thirty-three hundred dollars you don't recall that he said anything?

A. I do not.

Q. Was the meeting which you had with him at the Fourth Street office a prearranged meeting or was it a casual meeting?

A. A casual meeting.

Q. Do you recall how the conversation was 40

John M. Hannan—for Complainant—Direct.
John M. Hannan—for Complainant—Cross.

started between you concerning the note?

10 A. No, no more than my being connected with the bank and naturally I was interested in the outcome of the note, and he being one of the interested parties I naturally started the conversation myself by telling him that the note had gone to protest.

Q. You were at that time a director of the First National Bank of the Town of Union?

A. Yes, sir.

Q. And had you known Doctor Fessler very well before that?

A. Yes, sir.

20 Q. And had you met Doctor Fessler frequently before that?

A. Quite frequently.

Q. Was Doctor Fessler accustomed to stop at your place of business on Fourth Street and talk to you about matters generally?

A. Well, it is a transfer station there and the trolley cars stop there, and if it happened that the Doctor was passing there he would generally come in.

30 *Cross-Examination by Mr. Walscheid:*

Q. It is a fact, is it not, Mr. Hannan, that you did call to Doctor Fessler's attention the fact that a note which he had endorsed had gone to protest in the First National Bank on this second occasion?

A. Yes, sir.

40 Q. And how long after it had gone to protest was it that you spoke to him about it—three or four days?

John M. Hannan—for Complainant—Cross.

A. No, I think it was the following day.

Q. The following day?

A. Yes, sir.

Q. Do you remember when the note did go to protest?

A. The day before I saw him, but I don't recall the date. 10

Q. You had been to a meeting, had you not, and ascertained that this note had gone to protest—a bank meeting?

A. No, sir, not necessarily a bank meeting, but it was a daily visit I paid to the institution.

Q. Well, then, it was on the day after you happened to have been at this bank and had ascertained that this note had gone to protest? 20

A. Yes, sir.

Q. And you had seen the note at the bank?

A. Yes, sir.

Q. And then on this same day, during the day, you met Doctor Fessler?

A. It was the following morning I met Doctor Fessler.

Q. And he immediately asked you how much the note was for?

A. He didn't immediately ask me, but I told him first that the note had gone to protest. 30

Q. But he did ask you for what amount the note was made?

A. Yes, sir.

Q. And did you tell him?

A. I went back to the bank to find out.

Q. But you had been there the day before, had you not?

A. Yes, sir.

Q. And the day before you had seen the note? 40

John M. Hannan—for Complainant—Cross.

A. Yes, sir.

Q. So that as a matter of fact, you then knew that the note in question was for thirty-three hundred dollars, having seen it the day before?

A. Yes, sir.

10 Q. And you told Doctor Fessler right then and there that the note as for thirty-three hundred dollars, and he was not satisfied with that and asked you to go in and look at it again,—is not that so?

A. No, sir, it was not that way at all; he asked me what was the amount of the note.

Q. Then why should you go back and look at it again to tell what the amount of the note was?

20 A. Well, some notes are discounted with interest and some notes are discounted without interest, and I went back to find out how this note was discounted, and I think the note was discounted with interest. That was what I went to find out, what the face value of the note was. Sometimes a note might call for thirty-three hundred dollars and the note may have been protested for thirty-three hundred and sixty-six dollars, or whatever the interest would amount to.

30 Q. You had just seen the note the day before, had you not?

A. There was a great many notes I saw the day before.

Q. Were there a great many notes you saw the day before?

A. Yes, sir.

Q. Then it must have been at a committee meeting?

40 A. No, sir, it was not necessarily a committee meeting. I had access to the institution and I

*John M. Hannan—for Complainant—Cross—
Re-Direct.*

had access to the papers, and we had quite some trouble going on in the institution at that time, and it was customary for us to go in there and look over the notes quite often.

Q. Are you still interested in this bank? 10

A. As a stockholder, no.

Q. In any other capacity?

A. I do business with the institution.

Q. When did you cease being a stockholder?

A. Well, I sold my stock, but I don't know exactly how long ago.

Q. You mean you sold your stock outright and you have no further interest in the stock?

A. No, sir, I have no further interest in the stock. 20

Re-Direct Examination by Mr. Fallon:

Q. I show you a note and ask you if you recall whether that is the note that you saw at the time you speak of at the bank? (Handing witness Exhibit C-1.)

A. Yes, that is the note.

Cross-Examination Continued:

30

Q. When did you last see this note before it was produced here to you now?

A. I can't recall that.

Q. Did you see it this week?

A. No, sir.

Q. Did you see it last week?

A. No, I didn't see it last week.

Q. Did you see it the week before?

A. No, I don't recall when I saw it before. 40

John M. Hannan—for Complainant—Cross.

Q. Have you seen it recently?

A. No, sir, I have not.

Q. Have the contents of the note been explained to you recently?

10 A. Why, Doctor Fessler and I was talking about it.

Q. Have you received a letter from Mr. Fallon with reference to this note recently?

A. Yes, sir.

Q. Where is that letter?

A. I don't know where it is. I don't know whether I have it now or not; I know I did have. I have got two letters from him.

20 Q. Do either one of these letters describe this note?

MR. FALLON: I object to that, unless the letter is produced.

A. Yes, I have got the letter here. (Witness produces letter.)

By the Court:

30 Q. You received two letters from Mr. Fallon. have you got both letter with you, Mr. Hannan?

A. Yes. (Witness produces another letter.)

Cross-Examination Continued:

Q. Will you now look at these letters and refresh your memory by them and tell me whether or not one of these letters discuss the terms of the note, so as to refresh your memory as to the terms of the note?

40

MR. FALLON: I object to that upon the ground that this is not a proper way

John M. Hannan—for Complainant—Cross.

of introducing evidence of the contents of these letters, that the letter itself is the best evidence of its contents, and this witness's statement as to the contents after having looked at it, is inadmissible.

THE COURT: I will sustain the objection. Mr. Walscheid may ask the witness whether his memory concerning the terms of the note was refreshed by means of these letters; but otherwise the letters themselves will be the best evidence. 10

Q. Will you look at the letters, Mr. Hannan, and say whether your memory as to the terms of this note was refreshed thereby? 20

MR. FALLON: I object to that on the same ground as before, that the letter itself is the best evidence of its contents.

THE COURT: The question is simply as to the mental condition of the witness, as to his memory. I will overrule the objection.

A. There was not anything in the letter but what I knew all about, with the exception of where it says he went to Lawyer Kappes' office. That part I didn't recall. 30

By the Court:

Q. But everything except that part of the letter you did remember yourself?

A. Yes, sir.

THE COURT: I will rule that the letters may be introduced in evidence. 40

John M. Hannan—for Complainant—Cross.

Cross-Examination Continued:

10 Q. Mr. Hannan, what I desire to obtain from you now is the fact whether or not, without having seen the letters in question, you would have known the amount of this note and the terms of it; would you or would you not?

A. What do you mean by terms?

Q. You know what the terms of a note is—the day when it is payable?

A. I wouldn't know the date from my memory, and I wouldn't know when it was protested from my memory, but I would know the amount, because it has received considerable discussion by the bank directors for some time back.

20 Q. That is the only thing that you would know without being refreshed by these letters—the amount of the note?

A. I don't know anything about when the note was made or when it was protested. There is no statement in the letter about that, and I don't know it now. I don't know the date of that note now.

Q. Then you have not been refreshed by this letter as to any of the terms of the note?

30 A. I would have to read the letter over to find out.

Q. Well, read the letter over.

(Witness reads letter.)

Q. Having read this letter, did it refresh your memory as to any portion of the transaction?

A. No, sir.

Q. So far as it relates to you?

A. No, sir.

John M. Hannan—for Complainant—Cross.

MR. FALLON: I offer these letters in evidence.

MR. WALSCHEID: I object to the offer of the letters.

THE COURT: I will admit the letters, but simply for the purpose of explaining the testimony of Mr. Hannan, but not on the merits of the case. 10

Letters marked Exhibits C-a and C-b.

Cross-Examination Continued:

Q. Mr. Hannan, do you know Mr. Hilbert?

A. Yes, sir.

Q. The Hilbert who was connected with the First National Bank of the Town of Union? 20

A. Yes, sir.

Q. Do you know that he lived in North Hudson?

A. I don't know where he lives now.

Q. You knew he lived in Weehawken?

A. He did live there.

Q. How long have you known him?

A. I really don't know how long I have known him, but probably a year or so before the bank organized, and I don't know how long the bank has been organized, but probably four or five years. 30

Q. Four or five years you have known him?

A. Yes, sir.

MR. FALLON: I object to this examination if it is a continuation of the cross-examination.

MR. WALSCHEID: No, I am now making him my own witness.

John M. Hannan—for Complainant—Cross.

Q. And do you know the people with whom he associated in that community?

A. Yes, I knew some of them.

Q. And do you know his reputation in that community for truth and veracity?

10

MR. FALLON: I object upon the ground that it is immaterial and irrelevant.

Objection overruled.

A. Well, it was not very good at this particular time.

Q. Well, do you know his reputation for truth and veracity in that community at the present time?

20

MR. FALLON: I object upon the further ground that it must first appear that it is the community in which he lives at the present time. In fact, he does not live there at the present time.

Q. Do you know where he lives now?

A. No, sir.

Q. You have known him in North Hudson for
30 five years?

A. Yes, sir, about that time.

Q. And you have seen him around North Hudson for five years?

A. About that time.

Q. And during the last five years you have heard people talk about him and discuss him, have you not?

A. Yes, sir.

Q. And the people that discussed him and
40 talked about him were people whom you knew?

John M. Hannan—for Complainant—Cross.

A. Yes, sir.

Q. Now, I ask you whether you knew this man's reputation for truth and veracity in North Hudson?

MR. FALLON: I object upon the ground that a time must be stated, and also it must be shown that this witness knows of this man's reputation for truth and veracity in the community in which he lives, and no such proof has yet been shown. 10

Objection overruled.

(Question read.)

Q. Yes or no. 20

A. I can't answer it yes or no. I would be telling a lie if I said no, and I might be telling the truth if I said yes.

MR. WALSCHEID: May it please the Court this witness has testified that he has heard Mr. Hilbert and his reputation discussed in the community where he resides; that this discussion was among people whom he, the witness, knew. I think under the circumstances I am entitled to an answer yes or no, whether he knows his reputation, and I insist upon the question being put and answered. 30

MR. FALLON: I submit that the witness has already stated that he can't answer the question yes or no.

THE COURT: The witness may be in this position that he has heard the reputa- 40

John M. Hannan—for Complainant—Cross.

tion of this man discussed, and it might be that some people have said one thing and others have said another, and he has not made up his mind on the subject, and in that event he doesn't know.

10

By the Court:

Q. Do you know or don't you know what the reputation of Mr. Hilbert is?

A. If I have got to say yes or no I can't give it to you as short as that.

Q. State what you do know.

MR. WALSCHEID: I object to his stating anything except yes or no.

20

THE COURT: If the witness has acquired a knowledge as to this man's reputation he can answer yes; if he has not acquired a knowledge he can answer no.

MR. FALLON: From the knowledge which the witness has acquired he has testified that he can't answer yes or no,—therefore he has not acquired any knowledge.

30

MR. WALSCHEID: He has no business to make that statement.

THE COURT: Well, under the circumstances I will allow the witness to make an explanation.

MR. WALSCHEID: I object to any explanation.

THE WITNESS: I have been asked if I knew this man for five years and I have, and at times within that five years his reputation has been good in my judgment, but

40

John M. Hannan—for Complainant—Cross.
Ephriam C. Hellstern—for Defendants—Direct.

the latter part of my acquaintance with him up until the time of his trouble, why, his reputation was not good.

Cross-Examination Continued: 10

Q. Well, now, I again ask you the question whether you know this man's reputation for truth and veracity in this community?

A. It is bad at the present time.

Q. Would you at the present time, from what you know of his reputation, believe him under oath,—yes or no?

A. Yes, I would believe him under oath.

20

EPHRIAM C. HELLSTERN, a witness called on behalf of the defendant, being duly sworn according to law, testified as follows:

Direct Examination by Mr. Walscheid:

Q. Mr. Hellstern, where do you live?

A. Hudson Heights, New Jersey.

Q. And your address?

A. Hudson Heights, New Jersey. 30

Q. And you are by profession a doctor?

A. Yes, sir.

Q. Practicing in North Hudson?

A. Yes, sir.

Q. Do you know M. William Hilbert?

A. Yes, sir.

Q. And do you know Doctor Fessler?

A. Yes, sir.

Q. Do you remember an occasion in the sum- 40

Ephriam C. Hellstern—for Defendants—Direct.

mer of 1910 when Mr. Hilbert was present with Doctor Fessler at the North Hudson Hospital?

A. Yes, sir.

Q. Did you see them there together?

A. Yes, sir.

10 Q. Did you see them doing anything there together?

A. Yes, sir.

Q. What did you see them do?

A. I saw Doctor Fessler sign a paper.

Q. And who else was there besides you three?

A. Nobody but Hilbert, Fessler and I.

Q. Did you see the face of the paper at all?

A. No, sir.

20 Q. Did you at that time have any talk with Doctor Fessler as to what he was signing?

MR. FALLON: I object, unless this talk was in the presence of Hilbert.

Q. Was Mr. Hilbert there?

A. Yes, sir, he was just leaving the door of the room.

30 Q. Well, what did you say to Doctor Fessler and what did he say to you?

MR. FALLON: I object, unless it was in the hearing of Hilbert.

Q. Was Mr. Hilbert in such distance that he might have heard?

A. Yes, sir.

Q. Well, what was said?

40 A. I asked Doctor Fessler what he was doing, and he said he signed a note. I said he was a

Ephriam C. Hellstern—for Defendants—Direct.

damn fool to sign a note for him. He said it was only for thirty-three dollars. I said I wouldn't endorse a note for a cent for him.

Q. How long have you known Mr. Hilbert?

A. Why, I was introduced to him not more than six months before that, but I had known of him. 10

Q. And you have seen him around North Hudson?

A. Yes, sir.

Q. And you knew people who have known him and associated with him?

A. Yes, sir.

Q. Do you know where he happens to live at the present time?

A. No, sir, I do not. 20

Q. How long have you known him in North Hudson?

A. Well, probably two or three years.

Q. Do you know his reputation in that community for truth and veracity?

MR. FALLON: I object, unless I have an opportunity of ascertaining first whether he was a resident of North Hudson. 30

By Mr. Fallon:

Q. Do you know whether he was a resident of North Hudson?

A. Yes, sir.

Q. Where did he live?

A. Highwood Park.

Q. How do you know?

A. From conversation I had with people. 40

Ephriam C. Hellstern—for Defendants—Direct.

Q. Who were the people with whom you had the conversation?

A. I can't recall.

Q. When did he live in Highwood Park?

A. About two or three years ago.

10 Q. You don't know whether it was two or three years ago?

A. Between two and three years.

Q. And you don't know who the people were that were talking with you and told you he lived in Highwood Park?

A. No, sir. One, I think, was Doctor Fessler.

Q. This conversation that you had with Fessler was that before or after the signing of this note, as to his residence?

20 A. Before.

Q. Then you don't know of your own knowledge where he lived?

A. Yes, he lived in Highwood Park.

Q. You only knew from what the people had told you?

A. No, sir, his house was pointed out to me.

Q. By who?

A. I don't know.

30 Q. Then all you know about his place of residence is what some people had told you, and you don't remember who told you, and you don't remember when you were told?

A. I would say about two and a half years ago.

MR. FALLON: I object to the witness testifying. It has not been shown that he knows that Hilbert resided in North Hudson during that time.

Obection overruled.

*Ephriam C. Hellstern—for Defts—Direct—Cross**Direct Examination Continued:*

Q. Do you know his reputation for truth and veracity in that community?

A. Yes, sir.

Q. What is that reputation,—is it good or bad? 10

A. Bad.

Q. From that reputation as you know it, would you believe him under oath?

A. I would not.

Cross-Examination by Mr. Fallon:

Q. Who did you hear discuss his reputation?

A. Various people the time the First National Bank was started.

Q. Mention some of them? 20

A. Why, I spoke to my brother-in-law about him, Mr. Heller, and had him make inquiries about him.

Q. What is his first name?

A. William.

Q. When did you speak to him?

A. Around the time the bank was started.

Q. What was the occasion of your speaking to him?

A. My mother was going to take stock in it. I told her before she did so she should investigate it, and she asked me to investigate it. 30

Q. But I am asking you about Hilbert now; tell us what you know about Hilbert and from whom you found it out?

A. The people I found out about him, I can't recall them.

Q. But I want to know the names of the people?

A. Well, I can't tell you.

Q. Then you can't remember the names of any 40

Ephriam C. Hellstern—for Defendants—Cross.

of the persons with whom you talked about the reputation of Hilbert for truth and veracity, can you?

A. No, sir.

10 Q. And you don't remember when these talks were had, either, do you?

A. Well, some of the talks were had just before the bank was started.

Q. Do you know when that was?

A. It was just about four or five years ago.

Q. Have you ever talked with anybody since about Hilbert?

A. No, sir; I have had no occasion to.

Q. You have never heard his character discussed since that time?

20 A. Yes, sir, I have.

Q. Have you ever heard his reputation for truth and veracity discussed since?

A. The time when Mr. Glanoff was being sued.

Q. Was his truth and veracity discussed at that time?

A. Yes, sir.

Q. In what respect?

A. Mr. Glanoff said he forged his signature-- that Hilbert had forged his signature to a note.

30 Q. That is what he said, that he forged his signature to a note?

A. He said he didn't endorse any of the notes.

Q. Were you in court at that time?

A. No, sir.

Q. Then the only conversation you had with anybody concerning Hilbert was one with your brother-in-law and the other with Mr. Glanoff about that time?

40 A. No, sir.

Ephriam C. Hellstern—for Defendants—Cross.

- Q. What other conversation did you have?
 A. I told you with people I can't recall.
 Q. Why can't you recall?
 A. Well, it was only just at this time that I was interested.
 Q. Well, in what way were you interested when you talked with Glanoff? 10
 A. Well, I just stopped in his place to have a glass of soda.
 Q. Now, then, you say that when Fessler endorsed the note for Hilbert at the North Hudson Hospital you told Fessler that he was a damn fool?
 A. Yes, sir.
 Q. For endorsing a note for that fellow?
 A. Yes, sir. 20
 Q. Hilbert was then within hearing of you?
 A. Yes, sir.
 Q. And did Fessler make an attempt to recall Mr. Hilbert?
 A. No, sir; he said it was only for thirty-three dollars.
 Q. And did you see the note?
 A. No, sir.
 Q. Is that all the conversation that passed between you and Doctor Fessler about the note? 30
 A. Yes. And then I got through there and I got in my machine and went home.
 Q. Did you know Hilbert when you were in the room there?
 A. Yes, sir.
 Q. How long had you known him?
 A. I should think about six months.
 Q. Did you greet him when you went in the room? 40

Ephriam C. Hellstern—for Defendants—Cross.

- A. Yes, sir.
- Q. What did you say to him?
- A. "How do you do?"
- Q. You are sure of that?
- A. Yes, sir.
- 10 Q. Was he seated in the room or standing when you went in there?
- A. He was seated.
- Q. What did Hilbert say to Fessler in the room?
- A. When Fessler and I came up Hilbert was sitting there in the room.
- Q. What conversation passed between them?
- A. Hilbert said, "Here is the note," and Fessler took it and endorsed it.
- 20 Q. When he said, "Here is the note," did he hand Fessler a paper?
- A. Yes, sir.
- Q. What did Fessler do with it?
- A. He signed it.
- Q. Did he look at it?
- A. That I can't tell you. Fessler and Hilbert were in front of me.
- Q. Did he pick it up in front of you and look at it?
- 30 A. I didn't see that.
- Q. Did you say that Hilbert said to Fessler, "Here is the note, sign it,"—is that what he said?
- A. Yes, sir.
- Q. Well, you say that when he was going out you asked Fessler what he was doing?
- A. Yes, sir.
- Q. Did he tell you he had endorsed a note for Hilbert?
- A. Yes, sir.
- 40 Q. And you said he was a damn fool for en-

*Ephriam C. Hellstern—for Defendants—Cross—
Re-Direct.*

dorsing a note for Hilbert?

A. Yes, sir.

Q. And you wouldn't give him a nickel?

A. No, sir. I wouldn't endorse for him.

Q. Is that what you said?

10

A. Yes, sir.

Re-Direct Examination by Mr. Walscheid:

Q. When you were investigating for your mother the question of the bank stock, Mr. Hilbert at that time was organizing the bank, was he not?

A. Yes, sir.

Q. And did you at that time investigate Mr. Hilbert's reputation?

20

A. Yes, sir.

Q. And as a result of that investigation you advised your mother not to take stock?

MR. FALLON: I object upon the ground that it is immaterial.

Question withdrawn.

Q. Did you at that time from that investigation make up your mind as to Mr. Hilbert's reputation?

30

A. Yes, sir.

Q. And at that time what opinion did you form as to his reputation?

A. I wouldn't have anything to do with him.

Ephriam C. Hellstern—for Defendants—

Re-Cross.

Charles W. Kappes—for Defendants—Direct.

Re-Cross-Examination by Mr. Fallon:

- 10 Q. You are speaking of his general reputation?
 A. Yes, sir.
 Q. You say that his general reputation is bad?
 A. Yes, sir.
 Q. And notwithstanding that you knew his reputation was so bad, yet when you knew that he had submitted a note to Doctor Fessler to endorse you permitted Fessler to endorse it without saying a word until after it was done?
 A. Well, it was no concern of mine.
 Q. If it was no concern of yours, why did you
 20 ask him what he was doing?
 A. Just as a matter of friendship.
 Q. That was the only reason you had for it?
 A. Yes, sir.

CHARLES W. KAPPES, a witness called on behalf of the defendant, being duly sworn according to law, testified as follows:

30 *Direct Examination by Mr. Walscheid:*

- Q. Mr. Kappes, what is your profession?
 A. I am a Counsellor-at-Law of the State of New Jersey.
 Q. Do you know Doctor William Fessler?
 A. I do.
 Q. Did he consult with you in the month of November, 1910, in regard to a note endorsed by him for one M. William Hilbert?
 40 A. He consulted me, but I won't say it was

Charles W. Kappes—for Defendants—Direct.

November, 1910; I am not sure of the date.

Q. Was it in relation to a note which was in the First National Bank of the Town of Union?

A. Yes, sir.

Q. When did he first come to you, can you tell?

A. No, sir, I can't say.

10

Q. When he came to you what did you do?

A. After having some conversation with him we went to the First National Bank together.

Q. And what took place there?

A. It was close to three o'clock. I went in accompanied by Mr. Fessler, and I went to the Paying Teller's window and I asked if the Cashier was in. I think it was this young man I see over here in the corner. (Indicating Mr. James McClelland, who is sitting in the room.) He said no, and I asked if any of the officers were in and he said no. At that point Mr. Reisenberg came in the cage and I think Mr. McClelland went in the next cage. I said to Mr. Reisenberg, "I understand you have a note upon which Doctor Fessler is endorser and that it has been protested,—may I see that note." I think he asked a question or two before he produced it, but he finally got the note and laid it down on the slide at the window just behind the grating. I said I would like to see it, and so I took hold of the paper and saw the note. I looked at it and examined it and handed it back to him. I think that was all that happened and then we left.

20

30

Q. Do you remember the face of the note?

A. Well, I took particular care to look at the note at the time, but I don't think I could now make a copy of it.

Q. Did you notice anything peculiar about it,

40

Charles W. Kappes—for Defendants—Direct.

or what you considered peculiar?

A. Yes, I remarked two things,—one in reference to the protest and the discrepancy between the figures on the face of the note and the words indicating the amount.

10 Q. What did you notice about the words indicating the amount?

A. My memory is that the words were "Thirty Three" and then two of those crosses that we use as an abbreviation for number, and then an irregular line to the word "Dollars," and the figures up in the upper left hand corner were "\$3300." with a dollar sign and I think a period and two small ciphers, with the denomination of 100 under a line.

20 Q. When did you see this note last?

A. That was the first and only time that I saw the note.

Q. Do you know whether the words "with interest" were written on it?

A. No, I don't recall that.

Q. Did you say anything about the note and about its discrepancy as to amount when you looked at it?

30 A. Yes; I think the protest was made up by McClelland and I asked him about the question of protest, and I think I asked Mr. Reisenberg about the amount of the note.

Q. What did he say about the amount of the note?

40 A. I can't give you the exact words; my recollection does not serve me, but the effect of it was that a great mistake had been made. The protest called for thirty-three hundred dollars and I think interest, whereas the note as a matter of

Charles W. Kappes—for Defendants—Direct.

law was a thirty-three dollar note, and that was what Fessler had told me it was.

By the Court:

Q. This as I understand it is a conversation with Mr. Reisenberg? 10

A. Yes, sir. Mr. Fessler was right there with me.

Direct Examination Continued:

Q. And why had you gone up to the bank to look at the note?

A. Because of the consultation that Fessler had had with me.

Q. Well, what were you looking for when you went up to look at the note? 20

A. Two things, first the amount of the note and second whether the note had been properly protested.

Q. How many days after the protest or after the due date of the note was it that you went to this bank?

A. I can't be positive, but I think it was between a week and ten days; I think it was nine days. I have some recollection now about the apparent discrepancy between the due date of the note as it appeared on its face and the date of the protest, and I then said something about that. It had been due on Saturday and was protested two days after its due date. I am not positive how much of this was said— 30

Q. To whom?

A. After having examined the note I talked I think first with McClelland, because he was the 40

Charles W. Kappes—for Defendants—Direct.

protesting notary, but Reisenberg was there after. Subsequently there was some talk with Reisenberg; but whether they were both present during the entire conversation, I won't say,—I don't remember.

10 Q. But you did talk with either one of them about the discrepancy between the due date on the face of the note and the date of its protest?

A. Yes, sir, but I think that conversation was all with the protesting notary.

Q. Did you have any conversation with him about the claim of Fessler that he had not received notice of protest?

A. Yes, sir.

20 Q. You made such a statement to Mr. McClelland?

A. Yes. And I am pretty sure I interrogated him as to his knowledge of the residence of Fessler at the time, and I told him that Fessler had told me that he had received no notice. That is how we came to go to the bank; when Fessler came to me I asked him for his notice of protest and he said he had none and had not received any. I said then let us go to the bank. That I am sure I discussed with Mr. McClelland.

30 Q. When Mr. Fessler came to you did he tell you the amount of the note that he had signed for Hilbert?

MR. FALLON: I object upon the ground that it is immaterial and irrelevant as to what the conversation was.

Objection sustained.

MR. WALSCHEID: I then offer it upon the theory that it is admissible to show the

Charles W. Kappes—for Defendants—Direct.

intention and the state of mind of Fessler.

MR. FALLON: I object to it upon that ground.

Objection sustained.

Q. At the time when you were in the bank was there any time when Mr. Fessler was not in your immediate presence? 10

A. Oh, no, he was right beside me.

Q. All the time?

A. Yes, sir.

Q. At any time while you were in the bank with Doctor Fessler did Doctor Fessler speak to anybody connected with the bank about an assignment of stock?

A. I don't think Doctor Fessler said a word to anybody while we were in there. 20

Q. And is that your best recollection?

A. Yes, that is my best present recollection.

Q. That he said nothing at all about stock?

A. That he said nothing about anything. He may have said something, but I didn't hear it if he did. My attention was directed to two particular matters and as to those matters I did all the talking I think that was done. 30

By the Court:

Q. Did you say anything about an assignment of stock?

A. No, sir.

Direct Examination Continued:

Q. Did you know anything about an assignment of stock?

40

*Charles W. Kappes—for Defendants—Direct—
Cross.*

A. I didn't hear anything about it until a couple of days ago when I met Mr. Fallon at the Court House.

10 *Cross-Examination by Mr. Fallon:*

Q. Did Doctor Fessler tell you that he had received a paper of any kind from Mr. Hilbert, or that he held security for this endorsement by him?

A. No, sir.

Q. Have you in your possession or have you had in your possession a paper which Doctor Fessler told you was a paper to secure him for endorsement on notes?

20 A. No, sir.

Q. Now, you say that Doctor Fessler was within hearing of everything that was said between you and Mr. McClelland and Mr. Reisenberg?

A. Yes, sir, I am very positive about that.

Q. And all of this conversation which you have now detailed was had at that time?

A. Yes, sir.

Q. Now, did you say that Doctor Fessler told you that he had not received any notice whatever of the protest of the note in question?

30 A. Yes, sir.

Q. Did he tell you that Mr. Hannan had informed him of the protest of the note?

A. I can't say exactly that in those words, but he came to me because Mr. Hannan had told him something.

Q. You heard Mr. Hannan say here to-day that that conversation that he had with Doctor Fessler was the day after the note came due?

40

Charles W. Kappes—for Defendants—Cross.

A. I didn't hear that; I was not here then.

Q. Did Doctor Fessler tell you that he had heard about the protest of the note from Mr. Hannan the day after the note became due?

A. We had some conversation along that line.

Q. Answer it yes or no.

10

A. I can't answer it exactly.

(Question read.)

Q. Can't you answer that yes or no?

A. No, I don't think I can. I can answer part of the question yes. Fessler told me that he had heard from Hannan that a note had been protested, and there was some question about the amount, but I don't think he said anything as to the date of protest, or the time when Hannan had told him in relation to the date of the protest.

20

Q. Did you ask him when it was that Hannan had so informed him?

A. Yes, sir.

Q. And you say he didn't tell you?

A. Well, whatever Hannan had told him. Hannan had told him on the morning of the day that he consulted with me.

Q. Then Doctor Fessler had told you on the day that he consulted you about this matter that he had in the morning of that day been informed by Mr. Hannan of the protest of the note in question?

30

A. Yes, sir.

Q. And you on that day went to the bank about this note?

A. Yes, sir.

Q. Don't you know that was the day after the note became due?

40

Charles W. Kappes—for Defendants—Cross.

A. I am very positive it was not.

Q. Why are you positive when you said a moment ago you didn't know just how soon after the note became due you went to the bank?

10 A. You asked me if Fessler had told me if Han-
nan had said anything about the particular day
in question—the day of the protest; I remember
no such remark. I do remember that when Fess-
ler came to me I at once went with him to the
bank, and then when we got to the bank I had
some discussion with the protesting notary as to
the discrepancy in time appearing on the face
of the note as the due date and the date when the
protest was made, and at the time of the mailing
20 of the protest my recollection is that it was at
least a week or ten days before the day I was in
the bank.

Q. Will you swear to that?

A. I can't swear to it; I don't remember the
date.

Q. Will you swear that the day of this visit of
yours to the bank, which has been testified to,
was not the very day after the day when the note
became due?

30 A. No, sir. I don't want to swear to that; it
is only a matter of recollection, but my recollec-
tion is very strong.

Q. Well, you are willing to swear to the best of
your recollection?

A. Yes, sir.

Q. And you won't swear to that?

A. I feel very positive it was at least a week.

Q. What makes you feel so positive?

40 A. Because of my discussion with the notary
in the bank at the time I was there.

Charles W. Kappes—for Defendants—Cross.

Q. And you are quite positive that the day that you went to the bank with Doctor Fessler with reference to this note was the day that Doctor Fessler had informed you that he had been told by Mr. Hannan of the protest of the note?

A. Yes, I am very sure of that.

10

Q. Now, didn't Doctor Fessler ask Mr. Reisenberg whether there had been any stock assigned to him as security for this note?

A. I think not.

Q. Well, will you say you don't remember any such conversation, or will you swear that no such conversation took place?

A. I can swear that I have no recollection that that happened.

Q. You won't swear that no such conversation as that took place?

20

A. No, sir, I won't swear it didn't happen, although if it had I undoubtedly would remember it.

Q. If Doctor Fessler has testified that when you and he entered the bank and either you or he asked to be shown this note in question and it was shown to you, you said, "Why, this note is for thirty-three dollars," then Doctor Fessler is wrong, is he?

30

A. Undoubtedly.

Q. Then you think that your recollection of what transpired on that day or what occurred on that day is the true version of the affair?

A. Yes, sir.

40

John Conway—for Defendants—Direct.

JOHN CONWAY, a witness called on behalf of the defendant, being duly sworn according to law, testified as follows:

Direct Examination by Mr. Walscheid:

- 10 Q. Mr. Conway, you were President of the First National Bank of the Town of Union?
 A. Yes, sir.
 Q. Where do you live, Mr. Conway?
 A. I live in Fairview Terrace, West New York.
 Q. You were President of the First National Bank of the Town of Union when?
 A. From 1909 until the early part of 1911.
 Q. In July, 1910, was Mr. Hilbert connected
 20 with your banking institution?
 A. Yes, sir.
 Q. In what capacity?
 A. Assistant Cashier.
 Q. And who was the Cashier?
 A. A man named Mr. Ruggles.
 Q. In July, 1910, what was the course of procedure as to discount of notes; who would have to pass upon the discount of notes to have them properly passed by the bank?
 30 A. The bank allowed me to pass upon it as high as one hundred and fifty dollars, but anything over that had to go before the Discount Committee.
 Q. And did Mr. Hilbert have any authority to discount notes for the bank at that time?
 A. No, sir, no authority, before it came before the Committee, and a note to be renewed had to come before the Committee.
 Q. But as I understand you, you as the Presi-
 40 dent of the bank had authority from the bank to

John Conway—for Defendants—Direct.

discount for the bank up to one hundred and fifty dollars?

A. Yes, sir.

Q. And anything over one hundred and fifty dollars had to come before the Committee?

A. Yes, sir.

10

Q. And that Mr. Hilbert had no authority to discount for the bank?

MR. FALLON: That is objected to as leading.

Question withdrawn.

Q. What authority, if any, did Mr. Hilbert have to pass or accept notes for discount for the bank at that time?

20

A. He was the Assistant Cashier and it was his duty to take notes and submit them to the Executive Committee for discount.

Q. Did he himself have any authority to accept for the bank and pass for the bank by means of his O. K., or by any other means, whatever, notes for discount?

A. No, sir, he had no authority.

Q. Who was on the Discount Committee at that time?

30

A. I think John M. Hannan, M. W. Hilbert, Alfred Hoffman and Charles Guth, and I was ex-officio on that committee.

Q. I show you a note marked Exhibit C-1, and ask you whether your discount committee passed upon that note?

A. Yes, sir.

Q. It did?

A. Yes, sir.

40

John Conway—for Defendants—Direct.

Q. And at a regular meeting of the Discount Committee?

A. At a meeting of the Discount Committee.

10 Q. Do you keep any records of the notes discounted by you in your minutes, or did you at that time?

A. No, sir, we didn't. We didn't keep a minute of the Discount Committee's meetings.

Q. Is the Executive Committee and the Discount Committee the same thing?

A. Yes, sir.

Q. Do you remember who was present when this note was passed by the Executive or Discount Committee?

20 A. This was a renewal of a previous note, and I was not present when that note went through.

Q. You was not present when the original note went through?

A. Yes, sir, the original note I was, but when this note went through I was not there. This is July 5th, and I was not in the bank at the time that note was renewed.

Q. How did you know it went before the Executive Committee?

30 A. I knew the history of the note and I knew there was a note previous and I knew that this was a renewal of it.

Q. You mean there was another note made by Thomas F. Purcell?

MR. FALLON: That is objected to as leading.

40 Q. What makes you say this was a renewal note?

John Conway—for Defendants--Direct.

A. Because that note made previous to this came due and this was put in its place, with the extra endorser.

Q. Have you any record of this note in your books of account?

A. I think you will find it in the minute book. 10

Q. Look through your minutes and see if you find any record of that note?

(Witness examines minute book.)

By the Court:

Q. Who kept these minutes?

A. M. W. Hilbert.

Q. There is no meeting here between June 2nd, 1910, and July 11, 1910. (Referring to minute book.) Then the next meeting is a special meeting under July 22nd, 1910, and then August 8th, 1910, and then August 12th simply an adjournment, and August 22nd there was a meeting. Those are all directors' meetings? 20

A. Yes, sir.

Direct Examination Continued:

Q. Are there any other kinds of meetings at which there is minutes kept besides the Directors' meetings? 30

A. No, sir, of the Executive Committee meetings there was no minutes kept.

By the Court:

Q. There is a book here before us marked "Executive Committee": you say the discount committee and the executive committee were the same?

A. Yes, sir, one and the same.

*John Conway—for Defendants—Direct.**Direct Examination Continued:*

Q. Mr. Conway, I call attention to a book marked "Executive Committee" and I ask you to examine the same; have you done so?

10 A. Yes, sir.

Q. Now having examined this book do you still say that the Executive Committee kept no record of the notes passed and discounted by it for the bank, or is that the record?

A. The discount book is the best record.

Q. Is that a record of the Executive Committee of the notes passed by the Executive Committee and of the action and work done by the Executive Committee?

20 A. Well I might say yes and no both; some is entered here and some is not.

Q. Is this the record?

A. Yes, that is the record.

Q. But is this in the ordinary course of business supposed to contain a complete record of notes discounted by the bank?

A. Yes, sir, it should.

30 Q. Now I ask you to examine what purports to be and what you state are the minutes of a meeting held July 6th, 1910, present Messrs. W. F. Guth, John Conway, M. William Hilbert, Albert Hoffman and Doctor William Menger, and ask you whether these minutes show that the bank, through its executive committee, passed upon this note?

A. They wouldn't pass upon that note because that was a renewal of another note.

RECESS.

*John Conway—for Defendants--Direct.**Direct Examination Continued:*

Q. Mr. Conway, you said something before of the minutes of the Executive Committee not having been kept; do you want to correct that or does that stand as your answer? 10

A. That stands as my answer; they were not kept in this book.

Q. Referring now to the Executive Committee book?

A. Yes, sir.

Q. You mean by that that there was no minutes kept of the transactions of the executive committee during your time?

A. No, sir, I didn't see it. That book was not in the meeting of the Executive Committee. That may have been filled in after from slips. 20

Q. Do you know anything about the minutes of the Executive Committee themselves in this book—did you ever see them?

A. I never saw them in that book, no.

Q. When you were no longer President of the bank, or when you were last President of the bank, had the minutes in this book been written out?

MR. FALLON: That is objected to unless he can say of his own knowledge. 30

A. At the meeting I never saw the book.

Q. When you were last connected with the bank as its President at that time had the entries of the Executive Committee book of the transactions of the Executive Committee been written up?

A. That I don't know.

Q. Now will you look through the minutes of 40

John Conway—for Defendants—Direct—Cross.

the Executive Committee and see whether you can find any meeting there as of July 5th, 1910?

A. On July 1st, 1911.

Q. On July 1st you find a meeting?

A. Yes, sir, there is a meeting there.

10 Q. You are supposed to have been present at that meeting?

A. No, sir, I was not President, but I was present at the meeting.

Q. Do the minutes of that meeting show any action upon this note of July 5th by the Executive Committee?

THE COURT: The minutes speak for themselves.

20 MR. WALSCHEID: I want to establish the fact whether or not this note was ever passed upon by the Committee.

MR. FALLON: It is admitted that there is no entry in the minutes of the Executive Committee of this bank with reference to this note.

30 MR. WALSCHEID: It is also admitted that there is no entry on the minutes of the Board of Directors in reference to this note.

MR. FALLON: Yes, I will admit that too.

Cross-Examination by Mr. Fallon:

Q. Mr. Conway, were you President of the bank in July, 1910?

A. Yes, sir.

40 Q. Didn't I understand you to say a moment ago when you were looking at the minutes of July,

John Conway—for Defendants—Cross.

1910, that you were not at that time president?

A. That was 1911.

Q. You were president in the year 1910?

A. Yes, sir.

Q. You say that this book that you have referred to, the minute book of the Directors and the minute book of the Executive Committee, are not a complete record of the transactions of the bank with reference to promissory notes? 10

A. No, sir, they are not complete.

Q. Are you not mistaken when you say that Mr. Hilbert or yourself had no authority to discount a note above the amount of one hundred and fifty dollars without referring it to the Executive Committee or Discount Committee?

A. I don't think so. 20

Q. Is it not a fact that you and Mr. Hoffman, who was the Vice-President of the bank, and Mr. Hilbert had authority to pass upon notes without reference to the Discount Committee, and that any notes so passed upon the initials of either yourself or Hilbert or Hoffman would have to be placed upon the note before it was given to Mr. Ruggles, the Cashier?

A. No. 30

Q. Is it not a fact that you and Hoffman and Hilbert passed upon notes in that way, and particularly the note of Glen Engineering Company?

MR. WALSCHEID: I object to that as immaterial.

Question overruled.

Q. Was there any written rule such as you have stated here to the effect that you and Mr. Hilbert 40

*John Conway—for Defendants—Cross.
Re-Direct.*

had no authority to discount a note for more than one hundred and fifty dollars without referring such note to the Executive Committee?

A. No, no written rule.

10 Q. Was there any rule to that effect established, and if so, when?

A. I can't give you a date unless I look in the minute book.

Q. Look in the minute book and show me anything of that kind?

A. I will have to go through all the meetings.

Q. Is your recollection very clear of transactions relating to this note at the present time, Mr. Conway?

20 A. No, sir.

Q. That is the thirty-three hundred dollar Purcell or Hilbert note?

A. No, sir, it is not very clear.

Redirect Examination by Mr. Walscheid:

Q. Mr. Conway, after the Executive Committee would pass upon a note to whom would the note be given?

A. To the Cashier.

30 Q. Mr. Ruggles?

A. I would put my O. K. on it and give it to the Cashier.

Q. That O. K. meant what?

A. Meant it passed the majority of the Executive Committee.

Q. So that you put your O. K. John Conway on it?

A. J. C.

40 Q. That meant that the note had been passed by a majority of the Executive Committee?

John Conway—for Defendants—Re-Direct.

A. Yes, sir.

Q. Who else had the right in that manner to signify to the Cashier that the note or notes had been passed by a majority of the Executive Committee?

A. Mr. Hilbert.

10

Q. Anybody else?

A. No, sir.

Q. Mr. Hoffman have that right as Vice-President?

A. No, sir, he didn't have.

Q. Mr. Hilbert while he was Assistant Cashier was also Secretary of the Executive Committee?

A. Yes, sir, and Secretary of the Board of Directors.

Q. So that the President and Secretary had the right to O. K. to the Cashier by their initials notes which had been passed by the Executive Committee, or a majority of the Executive Committee?

20

A. Yes, sir.

Q. Now I show you upon this note, Exhibit C. 1., the letters "O. K. W. H."; do you know who wrote that?

A. That is Mr. Hilbert's.

Q. And that meant what?

A. That it was passed by a majority of the Committee.

30

Q. Passed by a majority of the Executive Committee?

A. Yes, sir.

Q. You said that this was not a renewal note; what did you mean by that?

A. No, sir, I didn't say that; I said it was a renewal note.

Q. In what sense was it a renewal note?

40

John Conway—for Defts.—Re-Direct—Re-Cross.

A. If my memory serves me right there was a man named Sheridan on the old note; he is not the present endorser on it. I think such a note was made previously with another endorser.

Q. And who was the other endorser?

10 A. I think his name was Sheridan, if I remember right.

Q. And was it the same maker?

A. Yes, sir, the same maker and same note.

Q. Do you mean to say that this was a substitute note which had been passed?

Question objected to. Question withdrawn.

20 *Re-Cross Examination by Mr. Fallon:*

Q. Mr. Conway, you will swear that there was a note for thirty-three hundred dollars in the bank with Doctor Fessler's endorsement on it, will you?

MR. WALSCHEID: Objected to as calling for a conclusion.

Q. I show you Exhibit C-1, and ask you if you recall that note being in the institution?

30 A. Yes, sir.

Q. And that note to your knowledge went through the regular course of the bank?

A. Yes, sir.

Q. And was discounted?

A. Yes, sir.

*John Conway—for Defendants—Re-Direct
Otto J. Reisenberg—for Defendant—Direct.*

Re-Direct by Mr. Walscheid:

Q. Mr. Conway, you have no trouble in reading that that note was for thirty-three dollars in the body of it?

A. No, sir.

10

OTTO J. REISENBERG, a witness heretofore sworn on behalf of the complainant, being called on behalf of the defendant, testified as follows:

Direct Examination by Mr. Walscheid:

Q. Mr. Reisenberg, I show you a book and ask you what it is? 20

A. That is a record of the bills purchased by the bank.

Q. Have you a record of Exhibit C-1 in that book?

A. Yes, sir.

Q. Who kept that record?

A. I did.

Q. And did you make that record at the time when the note came in?

A. I made it at the time it was discounted. 30

Q. That is on or about July 5th, 1910?

A. July 6th, 1910, it was entered.

Q. It was entered on July 6th, 1910?

A. Yes, sir.

MR. WALSCHEID: I now desire to read this record in evidence.

MR. FALLON: I object to that as the note itself is the best evidence as to its 40

Otto J. Reisenberg—for Defendant—Direct.

10 contents, and that this book cannot be offered in evidence as to the contents of the note or as to the endorsement upon it or as to the amount upon it. That book is simply the secondary evidence of the note in question, and the primary evidence is the only one that is properly admissible.

THE COURT: I will overrule the objection and allow the entry to go in.

(Copy of record read by Mr. Walscheid as follows:)

<i>Date</i>	<i>Check No.</i>	<i>To the order of</i>	<i>Reg. No.</i>	<i>Maker.</i>
July 6	763	Thomas F. Purcell	809	Thos. F. Purcell
<i>Endorser or Guarantor.</i>	<i>Collateral.</i>	<i>Payable.</i>	<i>Date.</i>	
Thomas F. Purcell.	X		July 5.	
20 M. William Hilbert.				
<i>Term.</i>	<i>Due.</i>	<i>Rate.</i>	<i>Amount.</i>	<i>Interest.</i>
4 mos.	Nov. 5.		3368.75	68.75
<i>Exchange.</i>			<i>Net amount purchased.</i>	
			3300.00	

MR. WALSCHEID: This is read from page 41 of the discount book.

Q. When you made that entry you had this note before you, didn't you?

A. Yes, sir.

30 Q. And you made that entry from this note?

A. Yes, sir.

Q. And you made a correct transcript from that note of the things which you had to take from it, didn't you?

A. Subject to error of course.

Q. What is the error?

A. I am not sure that there is any error. There may have been, but I don't know.

40 Q. To the best of your honest recollection there is no error?

Otto J. Reisenberg—for Defendant—Direct.

A. No, sir.

Q. To the best of your recollection when the note was presented to the bank on the sixth day of July, 1910, Eastwood's name and Fessler's name were not on it, or you would have entered them under the column "Endorser or Guarantor," under the names of Thomas F. Purcell and M. William Hilbert, wouldn't you? 10

Objected to. Question allowed.

A. Yes, I would have.

Q. Now at that time to your knowledge did Mr. Hilbert have physical access to the notes of the bank? Could he get them and take them in his hands? 20

A. I really don't remember about the notes, who kept them or where they were kept.

Q. In whose knowledge would that rest?

A. The Cashier.

Q. Mr. Ruggles?

A. Yes, sir.

Q. You knew that Mr. Hilbert was Secretary of the Executive Committee at that time?

A. No, sir, I didn't.

Q. You knew that he was Secretary of the Board of Directors? 30

A. Yes, sir.

Q. Don't you know that as Secretary of the Board of Directors that he has access to all the papers of the bank?

A. No.

Q. You don't know that?

A. Physical access?

Q. Yes, so that he could pick them up and look at them? 40

Otto J. Reisenberg—for Defendant—Direct.

A. No, sir.

Q. Were these notes kept in the safe?

A. Yes, sir.

Q. And were they in any particular compartment of the safe?

10 A. I don't know.

Q. Are there any particular locked compartments in the safe?

A. Yes, sir.

Q. And were these notes kept in any one of those particular locked compartments of the safe?

A. I don't remember that either.

Q. Where are they kept now?

A. I don't know.

Q. Have you any charge of them?

20 A. No, sir; I am not connected with the bank now.

Q. But you do know, however, that Mr. Ruggles had access to all the notes of the bank at that time—physical access?

A. Yes, sir.

Q. And you knew that Mr. Hilbert at that time was Assistant Cashier?

A. Yes, sir.

Q. Mr. Ruggles being the Cashier?

30 A. Yes, sir.

Q. Now is it not a fact, Mr. Reisenberg, that when this note was put through this bank and after it was put through this bank, Mr. Hilbert was requested by the bank officials to get additional endorsers upon the paper, because it was not in satisfactory form?

A. Not from my knowledge.

Q. Are you sure that you knew nothing about that?

40 A. No, sir.

Otto J. Reisenberg—for Deft.—Direct—Cross.

Q. You never heard anything like that?

A. Not at that time, no.

Q. Since then?

A. I heard it mentioned in court this morning.

Q. By whom?

A. By Mr. Conway. 10

Q. Then that is what Mr. Conway refers to?

A. I don't know what he refers to.

MR. FALLON: That is objected to as irrelevant.

Q. I show you Exhibit C-1, this note now before you, and I ask you whether the record upon page 41 of your bills purchased book was taken from this note Exhibit C-1? 20

A. Yes, sir.

Q. I find in your bills purchased book a registry number 809?

A. Yes, sir.

Q. And on the note C-1 the number 809?

A. Yes, sir.

Q. Does the number upon the note C-1 refer to the registry number 809?

A. Yes, sir.

Cross-Examination by Mr. Fallon: 30

Q. Is there any entry in that book of July 5th or thereabouts of a note made by Thomas F. Purcell and endorsed by M. William Hilbert and John S. Eastwood and William Fessler for the sum of thirty-three dollars?

A. No, sir.

Q. Have you any recollection of ever having seen any such note while you were in charge of the book which you now have before you? 40

A. No, sir.

*Otto J. Reisenberg—for Defendant—Cross.
John Conway—recalled for Defendant—Direct.*

By the Court:

- Q. What does the lead pencil X mean?
 A. I think Mr. McClelland just made that now
 10 in order to mark the place.
 Q. At the time that you made the entry how
 often did you see that note?
 A. Just that once.
 Q. And when you made the entry what did you
 do with the note?
 A. Gave it to Mr. Ruggles.
-

- 20 JOHN CONWAY, heretofore sworn, being re-
 called on behalf of the defendant, testified as fol-
 lows:

Direct Examination by Mr. Walscheid:

- Q. Mr. Conway, in July, 1910, did M. William
 Hilbert, the then Assistant Cashier of the bank,
 have access to the discounted notes and securities
 of the bank, either in his capacity as Secretary to
 the Board of Directors, or as Secretary to the
 30 Executive Committee, or as Assistant Cashier, or
 in any other capacity?
 A. Except in the absence of the Cashier, then
 as Assistant Cashier he had charge.
 Q. Then in the absence of the Cashier he had
 access to the discounted notes in the possession
 of the bank?
 A. Yes, sir.
 Q. And by absence of the Cashier did you mean
 temporary absence for a few hours during the
 40 day or absence for an extended period?
 A. An extended period.

John Conway—recalled for Defendant—Direct.

Q. Wouldn't he have access to the notes of the bank if the Cashier was out to lunch and he was taking his place?

A. No, sir; the Cashier locked them up.

Q. Do you know whether or not Hilbert had a key of his own? 10

A. No, sir, he didn't have a key.

Q. Do you know whether or not during the month of July, 1910, Ruggles was away from duty?

A. That I don't remember; I don't remember of his being away.

Q. Didn't he ever go on a vacation?

A. No, sir, I don't think he took a vacation at all.

Q. I call your attention to page 41 of the bills purchased book, and to an entry under date of July 6th, beginning with the numerals 763 and continuing "Thomas F. Purcell," and I ask you to read the entry across the page. 20

(Witness read entry to himself.)

A. I have read it.

Q. Now I call your attention to a portion of that entry under "Endorser or Guarantor," and to the fact that the names there mentioned as endorser or guarantor are Thomas F. Purcell and M. William Hilbert, and that the names of Eastwood and Fessler do not appear there; do you know why that is? 30

A. It is an error on the part of the man who made the entry.

Q. That portion of the record has nothing to do with the statement that you made before that a note was first presented which was not satisfactory in form and upon which other endorsers were requested? 40

*John Conway—recalled for Defendant—Direct—
Cross.*

MR. FALLON: I object upon the ground that he has not stated any such thing.

10 THE COURT: I don't remember that the witness has said that. I will overrule the question.

Q. Does this record upon page 41 refresh your mind as to anything that you said in reference to the other Purcell note, or is this record in any way connected with what you said about the other Purcell note?

A. It is connected; it is the same thing, but I think Sheridan was on that first note.

20 Q. Was this note presented to your bank first off in the shape in which it is entered in this record?

A. There was more names on it then.

Q. When you saw it there was more names on it?

A. Yes, sir, when it was first presented.

Q. Did you see it when it was first presented?

A. Yes, sir, I did.

Q. What other names do you think were on it?

30 A. Eastwood was on it, and I think Sheridan was on it.

Cross-Examination by Mr. Fallon:

Q. You don't remember whose names were on it?

A. I remember Sheridan was on a note in question such as this.

Q. But you won't swear what names was on the thirty-three hundred dollar note made by Purcell?

40 A. No, sir, I can't swear to that positively.

George Limouze—for Defendant—Direct.

GEORGE LIMOUZE, a witness called on behalf of the defendant, being duly sworn according to law, testified as follows:

Direct Examination by Mr. Walscheid:

- Q. Mr. Limouze, where do you live? 10
 A. 43 Columbia Terrace, Weehawken.
 Q. And your business is what?
 A. Real estate broker.
 Q. Do you hold any position in the County of Hudson?
 A. Chairman of the County Board of Elections.
 Q. Do you know William M. Hilbert?
 A. Yes, sir.
 Q. How long have you known him? 20
 A. About fifteen years.
 Q. Do you know about where he lived during that period of time?
 A. Yes, sir.
 Q. Do you know the people that knew him and with whom he associated?
 A. Yes, sir.
 Q. Do you know his reputation in the community in which he lives for truth and veracity?
 A. Yes, sir, I do. 30
 Q. Is it good or bad?

MR. FALLON: I object unless he states that he knows where he lives.

- Q. Do you know where he lived in 1910?
 A. I think it was in 151 Nesbit Street, Weehawken.
 Q. And do you know where he moved to from there? 40

George Limouze—for Deft.—Direct—Cross.

A. No, sir.

Q. Have you seen him around North Hudson?

A. Yes, sir, occasionally.

Q. How recently?

A. I think I saw him in the last six months.

10 Q. You have testified that you knew his reputation for truth and veracity?

A. Yes, sir.

Q. Is it good or bad?

A. It is not good.

Q. From what you know of his reputation for truth and veracity would you believe him under oath?

A. No, sir.

20 *Cross-Examination by Mr. Fallon:*

Q. Whom did you hear discussing his veracity?

A. Well, Trojan, the tea merchant.

Q. When?

A. In the last two years.

Q. When?

A. Just what date?

Q. Yes.

30 A. I can't give you the date, but I guess within the last two years several times.

Q. Is he the man whom Hilbert had been connected with in business?

A. I don't know whether he was connected in business with him.

Q. You knew that Hilbert was in the tea business at one time?

A. Yes, sir.

Q. That is not the man whom he was in business with?

George Limouze—for Defendant—Cross.

A. No, sir; all I know he was in business for himself.

Q. What talk did you have with Trojan?

A. Why I had talks with him.

Q. Well what was it about?

A. Well, Mr. Trojan, I believe endorsed a note 10
for him and had to pay it, and he said that Hilbert
promised several times to make good but he didn't.

Q. And what else?

A. And that Hilbert was a liar.

Q. And who else did you hear discussing his
veracity?

A. John Callery.

Q. Did he also endorse a note?

A. Yes, sir, and had to pay it.

Q. And what did he say about the note? 20

A. He thought he was untruthful.

Q. Do you mean that Callery said he believed
that Hilbert would lie?

A. Yes, sir.

Q. In the conversation?

A. Yes, sir.

Q. Did you have more than one conversation
with him about the note he had to pay?

A. Yes, several times.

Q. About the same thing? 30

A. About Hilbert.

Q. Anybody else that discussed his character
and reputation?

A. Yes, sir.

Q. Who?

A. Doctor Menger, who is now dead.

Q. When did you discuss Hilbert's reputation
for veracity with Doctor Menger?

A. Shortly before the Doctor went away. 40

George Limouze—for Defendant—Cross.

Q. How long ago was that?

A. It may have been a year ago.

Q. Do you mean to say he is only dead one year?

A. I don't think it is quite a year.

10 Q. You think that Hilbert's reputation for veracity is not very good?

A. No, it is bad in my estimation.

Q. Is it any worse than any other man's reputation who had had people endorse notes and other people have to pay them?

A. Yes, sir, it is a whole lot worse.

Q. And you say it is worse because of what these three people have said to you?

A. Well I think the husband of his aunt told me he wouldn't believe him.

20 Q. And you say that you wouldn't believe him under oath?

A. No, sir, I wouldn't believe him.

Q. But you have never found him to be a liar in any dealings with you?

A. Well, he promised me several times to do things and he didn't do them.

Q. Tell me some of the things?

A. Well, one particular thing where he had collected money of Ottway and several times he—

30 Q. You mean that he owed you money and you tried to collect it?

A. He promised to pay it and he wouldn't pay it.

Q. He promised you that he would pay it and he didn't pay it?

A. No, sir, he didn't pay.

Q. And because of these matters that you refer to you say that you would not believe him under oath, because he didn't keep these promises?

40

George Limouze—for Defendant—Cross.

A. Sure,—any man that will lie once will lie again.

Q. You think his reputation is not good because he has lied to you several times?

A. Yes, sir.

Q. Do you know where Mr. Hilbert lives now? 10

A. No, sir, I am not interested enough to know where he lives.

Q. Where did he live the last time you knew?

A. Nesbit Street.

Q. That was in 1910?

A. I think it was later than that.

Q. I understood you to say before it was 1910?

A. I thought it was.

Q. Are you sure that it was?

A. I think that is about the time. 20

Q. And was it after 1910 that you had these conversations with these people you speak of?

A. Some of the people.

Q. Well, who?

A. Why I have mentioned them to you?

Q. Those three?

A. Yes, sir; and several others I can't remember. I didn't make any particular point of it. I didn't know I was going to be subpoenaed in this case. 30

Q. Do you know where Hilbert lived at the time these men spoke to you?

A. I understood he lived in Weehawken.

Q. Do you know where he lived?

A. I know he lived in Weehawken.

Q. If you knew he lived in Weehawken tell how you knew it?

A. I saw him coming from there and I understood he lived over there. 40

Silas W. Platner—for Defendant—Direct—Cross

SILAS W. PLATNER, a witness called on behalf of the defendant, being duly sworn according to law, testified as follows:

Direct Examination by Mr. Walscheid:

10

Q. Where do you live?

A. 33 First Street, Weehawken.

Q. How long have you lived there?

A. Eleven years.

Q. What is your business?

A. Marine engineer.

Q. Do you hold any office in the Town of Weehawken?

A. Yes, sir, I am on the Township Committee.

20

Q. Do you know M. William Hilbert?

A. Yes, sir, I do.

Q. How long have you known him?

A. For the past five years.

Q. And do you know people in Weehawken that knew him?

A. I do.

Q. Do you know his reputation for truth and veracity in that community?

A. Well, what people are saying; yes, I do.

30

Q. Well, is it good or bad?

A. Bad.

Q. Would you believe him under oath?

A. According to what the people have told me and what I have heard, I would not.

Cross-Examination by Mr. Fallon:

Q. You have known him a number of years?

A. Yes, sir, for the past five years.

Q. And wouldn't you believe him under oath?

40

A. Not from what I have heard the people tell.

Silas W. Platner—for Defendant—Cross.

Q. Tell what they said?

A. Well I have heard Mr. Conway say he wouldn't believe him under oath, and I have heard it from men like Mr. Lamson and Mr. Glandoff and Mr. Ottway.

Q. When did you hear this? 10

A. Well since these things came out.

Q. Did you speak to Mr. Hilbert on the street before he was in court?

A. Yes, sir.

Q. And in the presence of Mrs. Hilbert?

A. Yes.

Q. Do you remember saying to him, I don't know what I am expected to prove, and that you always found him all right?

A. Myself, personally? 20

Q. Yes.

A. I had no dealings with Mr. Hilbert and for that reason I found him all right.

Q. And there would not be any hesitation on your part in believing him yourself?

A. Well as far as I ever was concerned I would not.

Q. Didn't you say that you would not hesitate in believing him?

A. I did not. 30

John H. Conway—for Defendant—Direct.

JOHN H. CONWAY, a witness called on behalf of the defendant, being duly sworn according to law, testified as follows:

Direct Examination by Mr. Walscheid:

- 10 Q. Mr. Conway, where do you live?
 A. At 527 Fourth Street, Union Hill.
 Q. What is your business?
 A. Well, I am in the real estate business now.
 Q. Do you know M. William Hilbert?
 A. Yes, sir.
 Q. How long have you known him?
 A. About ten years.
 Q. Do you know where he has lived during that
 time?
 20 A. Until about eight years ago he lived in a
 house on Fifth Street, near Park Avenue.
 Q. Since that time do you know where he has
 lived?
 A. Yes, sir.
 Q. Where has he lived?
 A. He lived in Weehawken Heights, on Nesbit
 Street.
 Q. He has lived in North Hudson during all of
 the time until a short time ago?
 30 A. I don't know whether he is living there now.
 Q. At last reports he still lived there?
 A. Yes, sir.
 Q. Do you know any of the people that know
 him?
 A. Yes, sir.
 Q. And do you know his reputation for truth
 and veracity in that community?
 A. Yes, sir.
 40 Q. Is it good or bad?

John H. Conway—for Deft.—Direct—Cross.

A. Bad.

Q. Would you believe him under oath?

A. No, sir.

Cross-Examination by Mr. Fallon:

Q. You and Hilbert were old friends? 10

A. Yes, sir.

Q. You have no feeling against him?

A. No, sir.

Q. You are not friendly with him now?

A. I always was.

Q. You have not been friendly with him for some time?

A. I have not been friendly with him in eight years.

20

By the Court:

Q. How long has he had that reputation?

A. When he gave me bogus checks.

Q. When was that?

A. Eight years ago.

Q. You are a son of John Conway, the President of the bank?

A. Yes, sir.

Q. You knew that your father was the President of the bank? 30

A. Yes, sir.

Q. You knew that Mr. Hilbert was Assistant Cashier?

A. Yes, sir.

Q. Did you say anything to your father about having a man of that kind as Assistant Cashier?

A. Yes, sir, I told him in the beginning not to have anything to do with him or he would be sorry for it.

40

*John H. Conway—for Defendant—Cross.**Cross-Examination Continued:*

Q. Then your idea of his reputation for veracity and its being bad dates back eight years ago when he gave you a bad check?

10 A. Yes, sir.

Q. And because of that you think his reputation for truth and veracity was very bad?

A. Not that alone; I said that was one reason, but there is other reasons.

Q. What are the other reasons?

A. The other reasons are the way that he swindled a friend of mine out of some money.

20 Q. Tell me the name of the friend that he swindled out of money, and tell me how that has got anything to do with his truth and veracity?

A. He got some money from Thomas Maher.

Q. Who is he and where does he live?

A. He lives on Broadway, Union Hill.

Q. Tell me about that?

A. He gave him some money to get him a position with Aetna Company and he failed to do it, and so I think that would pretty well satisfy me.

Q. Tell me some more?

30 A. A party by the name of Hannes had some dealings with him. He had a tea store and that party worked there for him and he couldn't get his pay for it.

Q. That is all you know?

A. Yes, sir.

Q. And from that you say his reputation for truth and veracity is very bad?

A. Yes, sir, I do.

Horatio Ottway—for Defendant—Direct.

HORATIO OTTWAY, a witness called on behalf of the defendant, being duly sworn according to law, testified as follows:

Direct Examination by Mr. Walscheid:

- Q. Mr. Ottway, where do you live? 10
 A. 330 Third Street, Union Hill.
 Q. What is your business?
 A. Building construction.
 Q. Do you know M. William Hilbert?
 A. Yes, sir.
 Q. How long have you known him?
 A. About ten years.
 Q. Has he lived in North Hudson during those
 ten years? 20
 A. I don't know.
 Q. Have you seen him around North Hudson?
 A. Yes, sir, I have seen him around.
 Q. Where would you see him?
 A. On the Avenue sometimes and in different
 places.
 Q. What do you mean by the Avenue?
 A. Bergenline Avenue.
 Q. In Union Hill?
 A. Yes, sir. 30
 Q. Do you know people in that community that
 knew him?
 A. Yes, sir.
 Q. Have you ever discussed him with them?
 A. Well, not much. I never discussed him much.
 Q. Do you know his reputation for truth and
 veracity in that community?

Horatio Ottway—for Deft.—Direct—Cross.

MR. FALLON: I object upon the ground that the proper foundation has not been laid.

Question allowed.

10

A. Yes, sir.

Q. Is it good or bad?

A. Bad.

Q. Would you believe him under oath?

A. No, sir.

Cross-Examination by Mr. Fallon:

Q. What do you understand by the word reputation?

20

A. I understand whether the man's character is good or bad.

Q. But what does the word "reputation" mean?

A. If a man will do what he says he will do—what he promises to do.

DEFENDANT RESTS.

30

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William Fessler—Rebuttal—Direct.

WILLIAM FESSLER, hertofore sworn, being called on behalf of the complainant, testified as follows:

Direct Examination by Mr. Fallon:

Q. Doctor, I believe I asked you on your former examination as to whether you had not other note transactions with Hilbert and I believe you said no; am I right in that statement? 10

A. Yes, sir.

Q. Do you still say that you never had any other note transactions with Hilbert?

A. No, sir, I never had any note transactions with him.

Q. Did you ever sign any note for Hilbert other than the note which is now shown you, C-1? 20

A. No, sir, not that I know of.

Q. Hilbert endorsed for you, didn't he?

A. No, sir.

Q. Are you sure?

A. No, he didn't.

Q. Do you mean to say that Hilbert never endorsed a note for you?

A. No, sir, he didn't.

Q. Will you say that on the seventh of July, 1910, that you didn't discount a note through the First National Bank of the Town of Union bearing Mr. William Hilbert's endorsement, a note for the sum of seventy-five dollars, due August 6th? 30

A. No, not that I know of.

Q. You have discounted notes through the First National Bank of the Town of Union?

A. Yes, sir.

William Fessler—Rebuttal—Direct.

Q. Bearing Hilbert's endorsement?

A. No, sir, Mr. Hilbert never endorsed notes for me.

10 Q. Will you swear that you never discounted a note in that bank bearing M. William Hilbert's endorsement and particularly a note being dated July 7th, 1910, payable thirty days after that date, for the sum of seventy-five dollars, and due August 6th, 1910?

A. If you can refresh my memory better than that.

Q. Will you swear that you didn't discount a note through the First National Bank of that kind?

20 A. No.

By the Court:

Q. Did you ever discount any notes at the First National Bank of the Town of Union?

A. Yes, sir, I did.

Q. And what officer or agent attended to the discount of the note for you—Hilbert? Who did you do it through?

30 A. I was asked to open a deposit at the bank, which I did, and that note was given in to Mr. Reisenberg.

Q. What note?

A. That I discounted; the note discounted and endorsed by the Fessler Company.

Q. At that time you opened your account?

A. Around about that time.

Q. And you gave that note to Mr. Reisenberg, did you?

40 A. Yes, sir, I think I did.

William Fessler—Rebuttal—Direct.

Q. Did you ever give any notes to Mr. Hilbert for discount?

A. No, sir, not to my knowledge I did not.

Direct Continued:

Q. Do you recall a conversation that you had with Mrs. Hilbert one night about eleven o'clock over the telephone concerning or relative to this note in question, C-1? 10

A. No, I had no conversation with her.

Q. Didn't you call up Hilbert's house a number of times before this note C-1 became due?

A. No, sir.

Q. Didn't you talk with Mrs. Hilbert over the

A. No, sir.

telephone, saying that you wanted to see Will? 20

Q. Didn't Mrs. Hilbert ask you what it was that you wanted to see him about and didn't you say that you had endorsed for him for thirty-three hundred dollars which was about to come due and you wanted him to take care of it?

A. No, sir.

Q. Didn't you tell her over the telephone that you were then, at the time you telephoned, taking lunch with your lawyer, Mr. Kappes? 30

A. No, sir.

Q. You say you never had any such conversation with her?

A. The only conversation I ever had with Mrs. Hilbert was on the street, and then Mrs. Hilbert remarked to me that she was very sorry for all Bill had done.

Q. Did she say what he had done?

A. That he had got everybody in bad.

William Fessler—Rebuttal—Direct.
Carrie D. Hilbert—Rebuttal—Direct.

- Q. Did you say anything to her about this note?
 A. No, sir.
 Q. You didn't say anything about this note?
 A. No, sir, I didn't remark about it; I shut up
 10 about it.

By the Court:

- Q. This interview with Mrs. Hilbert was after that note had become due?
 A. Yes, I think the bank was suing. I don't know whether they were suing, but they were about to.

20 *By Mr. Walscheid:*

- Q. Suing you?
 A. Yes, sir.

CARRIE D. HILBERT, a witness called on behalf of the complainant, in rebuttal, being duly sworn according to law, testified as follows:

30 *Direct Examination by Mr. Fallon:*

- Q. Mrs. Hilbert, where do you live?
 A. 252 Armstrong Avenue, Jersey City.
 Q. You are the wife of M. William Hilbert?
 A. Yes, sir, I am.
 Q. You are acquainted with Doctor Fessler?
 A. Yes, sir.
 Q. How long have you known Doctor Fessler?
 A. About four years.

Carrie D. Hilbert—Rebuttal—Direct.

Q. And how well had you known him, he and his family?

A. We were very intimate for a time.

Q. And did he and his wife visit at your house?

A. Yes, often.

Q. Do you recall any conversation that you had with Doctor Fessler over the telephone about your husband and about a promissory note? 10

A. Yes, sir.

Q. How often did you have such conversation, or how many times, if you remember?

A. Once.

Q. Tell us what the conversation was and when it was, if you remember?

A. One night about eleven o'clock the telephone bell rang and Mr. Hilbert was not in and so I answered, and it was the Doctor. 20

Q. When you say the Doctor to whom do you refer?

A. Doctor Fessler. He wanted to know if Will was in and I said no. He said he was just having a bite to eat with his lawyer.

Q. Did he mention the name?

A. No, sir. And he said he would like to speak to Will. I told him he was not in and I asked if there was anything I could do for him, and the note matter was mentioned. 30

Q. Just state what he said. What was the first thing he said and what did you say to him—give us the conversation?

A. He said he wanted to see Mr. Hilbert about a note. I said, "Why, that note is not due yet," and he said, "It doesn't have to be due, but I want to know what he is going to do about it." He was very angry and excited. 40

Carrie D. Hilbert—Rebuttal—Direct—Cross.

Q. Was the amount of the note mentioned?

A. I said, "How much was the note?" and he said, "The note was for thirty-three hundred dollars."

Q. And what else?

10 A. "And I want to know what he is going to do about it."

Q. But you told him that it was not due yet, and he said it didn't have to be due yet?

A. Yes.

Q. Did you have any further conversation with him about any note that your husband was on with him?

A. That evening?

Q. Yes, at that time?

20 A. Why, I told him that I would speak to Mr. Hilbert as soon as he came in and have him call him up. Then at a later day I was returning some book Mrs. Fessler had loaned me and the Doctor came in while I was there, or I met him on the street while I was leaving his home. I told him I was very sorry this difficulty had arisen.

Q. What did he say?

30 A. I don't remember just what he said. He wanted to know where my lovely husband was. That was one of the things he said.

Cross-Examination by Mr. Walscheid:

Q. The first conversation you had with Doctor Fessler was over the telephone?

A. Yes, sir.

Q. About eleven o'clock at night?

A. Yes, sir.

Q. And Mr. Hilbert was in the house?

40 A. He was not in the house.

Carrie D. Hilbert—Rebuttal—Cross.

- Q. I thought you said he was sick in bed?
- A. No, sir; he had not returned yet; he was out.
- Q. You said Mr. Hilbert was sick?
- A. No, sir, I didn't.
- Q. You don't remember the month that was in, 10
do you?
- A. It was right before the note became due.
- Q. You don't remember what month it was in?
- A. The early part of November, I believe.
- Q. And that is as near as you can get to it?
- A. Yes, sir.
- Q. And he told you that he was having something to eat with his counsel?
- A. Yes, sir.
- Q. Did he use the word counsel or lawyer? 20
- A. Counsel.
- Q. You are sure he said counsel?
- A. Yes, sir, I am positive.
- Q. Did he tell you where he was eating with his counsel?
- A. No, sir.
- Q. Had you talked with the Doctor before that over the 'phone?
- A. He had been trying to see Mr. Hilbert several times. 30
- Q. He had called up several times before—several times over the telephone and asked for Mr. Hilbert?
- A. Yes, sir.
- Q. But he had not been able to get Mr. Hilbert?
- A. No, sir.
- Q. And upon each of those occasions had he ever mentioned counsel before?
- A. No, sir, that was the first time? 40

Carrie D. Hilbert—Rebuttal—Cross.

Q. You said, "The note is not due yet"?

A. Yes, sir.

Q. And he said what?

A. He said, "It don't have to be due yet,—I want to know what he is going to do about it."

10 Q. Is this after your husband had gotten into bankruptcy difficulties?

A. That was before.

Q. How long before?

A. About a month, I guess.

Q. Is it not a fact that it was after the bank had started suit against Doctor Fessler upon the note?

A. No, it was before.

Q. How long before?

20 A. About a week before the note was due.

Q. In relation to the starting of suit, how long before?

A. I don't know when the bank started the suit.

Q. You never discovered that fact?

A. No, sir.

By the Court:

30 Q. How did you know when the note was due?

A. The Doctor had been calling Mr. Hilbert up and when Mr. Hilbert came in I said, "The Doctor is very anxious to speak to you." He said, "There is a note coming due in a month."

Cross-Examination Continued:

40 Q. Is not this what happened, Mrs. Hilbert: Mr. Hilbert came home and the Doctor had had rather an angry conversation with you over the telephone, had he not?

Carrie D. Hilbert—Rebuttal—Cross.

A. Yes, sir.

Q. And you spoke to Mr. Hilbert about this thirty-three hundred dollar note, didn't you, when he came home, and about the fact that the Doctor had spoken to you about it?

A. Yes.

10

Q. And you upbraided your husband for neglecting the Doctor's note, didn't you?

A. Yes, sir. I had spoken to him before about it.

Q. And it was then that your husband said, "That note is not due yet"?

A. No, sir, it was not at that time.

Q. When did he say that to you?

A. About a week before that.

Q. About a week before he told you that note was not due yet?

20

A. Yes, sir.

Q. The Doctor had not spoken to you in angry tones a week before?

A. He had been telephoning and once he stopped at the house about it, and I said to Mr. Hilbert, "What does the Doctor want to see you about?" Mr. Hilbert said, "There is a note coming due at the bank which he endorsed for me in about a week."

30

Q. And you believed your husband that that note was coming due, didn't you?

A. Yes, I asked him the amount and he was angry and wouldn't tell me the amount.

Q. And the only information as to the due date of the note came from your husband?

A. Yes, sir, and the Doctor.

Q. The Doctor didn't say when it was due?

A. Yes, sir, the night he 'phoned.

40

Carrie D. Hilbert—Rebuttal—Cross.

Q. He said then that it didn't make any difference when it was due; is not that what he said?

A. Yes.

Q. "It makes no difference to me when it is due, but what is your husband going to do about it"?

10

A. Yes, sir.

Q. And the only information you had as to the due date of the note came from your husband?

A. Yes.

By the Court:

Q. How do you fix the time as early in November of the telephone conversation?

20

A. Because it was before the trouble arose with the bank, and the difficulty that I knew of didn't arise until the latter part of November.

Q. What was that difficulty?

A. Mr. Hilbert had to meet the bank officials.

Q. And you knew that was in the latter part of November?

A. Yes, sir. I had a conversation with Mr. Hannan on the 24th of November and I asked him what the difficulty was at the bank.

30

Q. But how do you know that this interview with Doctor Fessler over the telephone was before the interview that you had with Mr. Hannan?

A. Because Mr. Hannan spoke to me and said that the note had gone to protest that the Doctor had endorsed for Mr. Hilbert.

Cross-Examination Continued:

Q. That is the only reason why you know the conversation with Doctor Fessler preceded the

40

conversation with Mr. Hannan?

Carrie D. Hilbert—Rebuttal—Cross.

A. Yes, sir.

By the Court:

Q. How do you know that was the same note Doctor Fessler had spoken to you about? 10

A. Because he mentioned the amount of thirty-three hundred dollars, and Mr. Hannan on the 23rd or 24th of November mentioned the same amount.

Q. Didn't you say a little while ago when you were under cross-examination that nothing was said about the amount of the note in the conversation between you and Doctor Fessler?

A. No, sir.

Cross-Examination Continued:

20

Q. Mrs. Hilbert, you had never paid any attention to your husband's banking affairs, had you, prior to the time when the trouble arose?

A. Very little.

Q. And you were not in any way interested in the details of his affairs, were you?

A. Only as it was necessary for me to be in answering the telephone.

Q. But you didn't know anything about his note transactions? 30

A. Not until the different parties began to telephone.

Q. Not until the trouble arose or trouble began to develop.

A. Doctor Fessler was the first.

Q. And that was the first time that you began to pay attention to your husband's business affairs?

40

Carrie D. Hilbert—Rebuttal—Cross.

- A. Well, I paid some attention before that.
- Q. But I mean the details of it?
- A. Yes.
- Q. You have children, have you not?
- A. Yes, one.
- 10 Q. And you were engaged in your own house?
- A. Yes.
- Q. You were seeing to your household affairs and Mr. Hilbert was seeing to his business affairs?
- A. Yes, sir.
- Q. And he told you as much as he chose and you received as much as he chose to tell you?
- A. Yes.
- Q. The usual home conditions?
- A. Yes, sir.
- 20 Q. And you didn't begin to ask questions, did you, until the people began to telephone and until you began to hear things on the outside,—is not that so?
- A. I began to hear things before the people started to telephone.
- Q. And just as soon as you began to hear things about your husband and the people began to telephone, then you began to ask questions?
- A. Yes.
- 30 Q. And it was after you had begun to hear things about your husband's financial standing that Doctor Fessler telephoned?
- A. I don't know.
- Q. Well, you just said so a minute ago; you just said so, Mrs. Hilbert, that you first began to hear things and then Doctor Fessler telephoned; why do you say now that you don't know?

Carrie D. Hilbert—Rebuttal—Cross.

By the Court:

Q. Was it before or after you first heard of your husband's trouble that Doctor Fessler telephoned you?

A. Why, just about the time—everything came with a rush. 10

Cross-Examination Continued:

Q. The whole thing came with a rush, didn't it?

A. Yes, sir.

Q. And as a matter of fact you can't tell whether Hannan's communication to you preceded Fessler's or whether Fessler's telephone preceded Hannan?

A. Oh, yes, I can. 20

Q. Well, how long a time was there between them?

A. A couple of weeks or more.

Q. When was Hannan's?

A. On the 23rd or 24th of November.

Q. And by a couple of weeks you mean two weeks?

MR. FALLON: I object that that; she has stated a couple of weeks or more. 30

A. It was more than that.

Q. By the word couple do you mean a month?

A. No, sir.

Q. What do you mean by the words "couple of weeks"?

A. Well, I spoke that quickly; I should have considered a little bit longer. It was the early part of November when I talked to the Doctor over the telephone. 40

Carrie D. Hilbert—Rebuttal—Cross.

Q. Now, this telephone conversation which occurred at eleven o'clock at night you say was the first conversation you had with Doctor Fessler?

A. On the note matter, yes.

10 Q. That was the first conversation on the note matter?

A. Yes, sir.

Q. And that is the time he said he was dining with his counsel or eating with his counsel?

A. Yes, sir, having a bite.

Q. And he associated his counsel with the request for information with regard to this note, didn't he?

A. Yes, sir. I think he used that apology for calling me at that hour of the night.

20 Q. You think that he called up at that hour of the night because he was with his counsel?

A. No, because he wanted to see Mr. Hilbert.

Q. Because he was with his counsel?

A. Yes, sir.

Q. And because he and his counsel wanted that information,—that is right, is it not?

A. I had not given that much thought.

30 Q. When did you first start to give this thing thought?

MR. FALLON: This is objected to as not proper cross-examination.

Question allowed.

MR. FALLON: I object to any expression of thought.

Objection overruled.

40 Q. Will you please tell me what thing? I am rattled now.

Carrie D. Hilbert—Rebuttal—Cross.

Q. He called you up at eleven o'clock that night and he told you that he was with his counsel, and he gave that as an excuse for calling up Mr. Hilbert at that hour?

A. He didn't make any excuse.

Q. Didn't he say to you at that time that he called you up at that time because he was dining with his counsel and wanted Mr. Hilbert because he was with his counsel? 10

A. No.

Q. What did he say about his counsel?

A. "I am just having a bite with my counsel and would like to see Mr. Hilbert."

Q. Are you sure of those words?

A. Yes, sir.

Q. And what next did he say then? 20

A. "Is he in?"

Q. And you said no?

A. "What can I do for you?"

Q. And what did he say then?

A. The matter of the note was brought up.

Q. What did he say?

A. He said, "Mr. Hilbert endorsed a note for me for thirty-three hundred dollars and I want to know what he is going to do about it." 30

Q. And then what did you say?

A. I said, "Why, that note is not due yet."

Q. And then what did he say?

A. "It doesn't have to be due yet; I want to know what he is going to do about it."

Q. And that was the whole conversation?

A. Yes, sir.

*Carrie D. Hilbert—Rebuttal—Re-Direct.
Re-Cross.*

Re-Direct Examination by Mr. Fallon:

10 Q. Did you receive any information from any source other than Doctor Fessler as to the amount of that note?

A. Yes, sir.

Q. From what other source?

A. Mr. Hannan mentioned the amount of the note to me on the afternoon of November 23rd and 24th.

Q. Before you received the telephone message from Doctor Fessler had the amount of the note then been mentioned to you by any one?

A. No, sir.

20

Re-Cross-Examination by Mr. Walscheid:

Q. Had the note been mentioned to you at all?

A. Yes, sir.

Q. And its due date?

A. I don't remember the date, but it was due in about a week when it was mentioned to me by my husband.

30 Q. And then the due date had been mentioned to you by your husband before this telephone conversation?

A. Yes, sir.

Q. And the amount had not?

A. Yes, sir.

James McClelland—Rebuttal—Direct.

JAMES McCLELLAND, a witness called on behalf of the complainant, in rebuttal, being duly sworn according to law, testified as follows:

Direct Examination by Mr. Fallon:

- Q. Mr. McClelland, where do you live? 10
 A. 242 Second Street, Town of Union, N. J.
 Q. You are employed by the First National Bank of the Town of Union?
 A. Yes, sir.
 Q. Were you in the employ of the bank in November, 1910?
 A. Yes, sir.
 Q. Were you employed by the bank on the 5th and 6th of November, 1910? 20
 A. Yes, sir, I was.
 Q. Were you also in the employ of the bank on the 7th of November, 1910?
 A. Yes, sir.
 Q. Do you recall the conversation had between Mr. Reisenberg and Doctor Fessler and Mr. Kappes concerning this note which is now shown you and marked Exhibit C-1?
 A. Yes, sir.
 Q. Just tell the court what you recall of that 30 conversation, and all about it?
 A. Why, Doctor Fessler and Mr. Kappes came in the bank and Mr. Reisenberg was teller at the time and they came up and Mr. Kappes asked Mr. Reisenberg to let him see the note, and so Mr. Reisenberg went and got the note and showed it to Mr. Kappes. In the meanwhile Doctor Fessler pulled a piece of paper out of his pocket and told Mr. Reisenberg that he had an assignment for 40 some stock. I don't know what the paper con-

James McClelland—Rebuttal—Direct.

tained, only I remember I heard him say it was an assignment for some stock. After Doctor Fessler and Mr. Kappes went out Mr. Reisenberg and I discussed the matter—

10 MR. WALSCHEID: Objected to.

Q. Just tell the conversation that passed between Mr. Kappes and Doctor Fessler and Mr. Reisenberg at that time.

A. That was all the conversation there was.

Q. Did Mr. Kappes talk to you about the date of the protest of the note?

A. No, sir.

20 Q. Did Mr. Kappes call your attention to any discrepancy as between the note and the date of the protest of the note?

A. No, sir.

Q. Were you the person that Mr. Kappes first addressed himself to when he first entered the bank with Doctor Fessler?

A. No, sir.

Q. You are the McClelland whom he testified this morning was the person whom he first addressed?

30 A. Yes, sir.

Q. Whom did he address when he first entered?

A. Mr. Reisenberg.

Q. Did Mr. Kappes ask you if any of the officers of the bank were in?

A. No, sir.

Q. Did Mr. Kappes say to Mr. Reisenberg or to you, "I understand you have a note here that Doctor Fessler endorsed and which has gone to protest?"

40 A. He said that to Mr. Reisenberg.

James McClelland—Rebuttal—Direct.

Q. Who said it?

A. Mr. Kappes.

Q. Did Mr. Kappes talk to you about the notice of protest and also as to the amount of the note?

A. No, sir.

Q. Did he have any conversation with you at all? 10

A. No, sir. I only bid him the time of day.

Q. His conversation then was only addressed to Reisenberg?

A. Yes, sir.

Q. Where were you when you heard this conversation?

A. I was standing right outside of the cage. The cage is about six feet wide.

Q. Did Mr. Kappes say anything to the effect that there was a great mistake made, that Doctor Fessler had said there was a great mistake made, that the note which he had signed was only for thirty-three dollars? 20

A. No, sir.

Q. Do you recall when it was that Doctor Fessler and Mr. Kappes came to the bank about that note—how soon after its protest?

A. No, I don't know.

Q. You are the one who protested the note—the notary? 30

A. Yes, sir.

Q. And did you mail notice of the protest?

MR. WALSCHEID: I object to that, no proper foundation being laid for the question.

THE COURT: All that testimony is excluded.

Question withdrawn.

*James McClelland—Rebuttal—Direct—Cross.
William Fessler—Recalled—Rebuttal—Direct.*

Q. Did Mr. Kappes say to you in that conversation that Doctor Fessler had told him that he had not received any notice of the protest?

A. No, sir.

10

Cross-Examination by Mr. Walscheid:

Q. Your cage is immediately adjacent to the cage in which Mr. Reisenberg was?

A. Yes, sir.

Q. And each one was in his respective cage—you and Mr. Reisenberg?

A. Yes, sir.

20 Q. And Mr. Kappes and Mr. Fessler were on the outside of the two cages?

A. Yes, sir.

Q. Between the two cages?

A. Yes, sir.

Q. And so when Mr. Kappes was talking to Mr. Reisenberg you could see him and he could see you?

A. Exactly, yes, sir.

Q. And it was really all one party, as close together as you could get together?

30 A. Yes, sir.

WILLIAM FESSLER, heretofore sworn, being recalled on behalf of the complainant, testified as follows:

Direct Examination by Mr. Fallon:

40 Q. Doctor Fessler, I ask you whether on the seventh of June, 1910, you didn't discount a note

William Fessler—Recalled—Rebuttal—Direct

in the First National Bank of the Town of Union for the sum of one hundred dollars, which note was payable thirty days afterward on July 7th, and which note was endorsed by yourself and M. William Hilbert?

A. Not that I know of, Mr. Fallon. 10

Q. And the note that I called your attention to before of seventy-five dollars was not that a renewal of the note which I now call your attention to?

MR. WALSCHEID: I object to the question.

MR. FALLON: I now ask the other side to produce those two notes, one dated June 7th for \$100 and one dated July 7th for \$75; and I ask the court now to continue this matter and give them an opportunity to produce those notes. I submit that this is a matter of some moment and I ask to have the Doctor produce those notes. I will close my case now with leave to produce this evidence. 20

By the Court:

Q. When did you open your account with the bank? 30

A. I don't exactly know, but I think a short time after the bank had been in existence.

Q. Doctor, you paid off the Fessler Company note, didn't you?

A. Yes, sir, I believe I did.

Case closed with the exception of the production of the notes referred to.

Adjourned until Tuesday, January 14, 1913. 40

William Fessler—Recalled—Rebuttal—Cross

Further testimony taken at the hearing of the above entitled cause, before M. T. Rosenberg, Esquire, Advisory Master, at the Chancery Chambers, Jersey City, New Jersey, on the fifth day of February, nineteen hundred and thirteen, at
 10 two o'clock in the afternoon.

Appearances:

John J. Fallon, Esquire, Solicitor for the Complainant.

J. Emil Walscheid, Esquire, Solicitor for the Defendant.

20 WILLIAM FESSLER, heretofore sworn, being recalled for further cross-examination, testified as follows:

Cross-Examination by Mr. Fallon:

Q. Doctor, I ask you again whether since the last hearing you have refreshed your recollection as to your having made a note on the seventh of June, 1910, which had been endorsed by Mr. Hilbert?

A. No, I don't remember such note.

30 Q. Did you look for it?

A. Yes, sir.

Q. You did discount a note of one hundred dollars in the First National Bank of the Town of Union on the seventh of June, 1910, did you not, payable one month thereafter?

A. No, not to my recollection I didn't.

Q. Well, you recall a note for one hundred dollars that you had discounted with that bank and which you had renewed several times thereafter?

40 A. No, sir, I don't remember that; I don't recall it.

William Fessler—Recalled—Rebuttal—Cross.

Q. Will you swear now that M. William Hilbert never endorsed a note for you?

A. Well, as near as I can remember he did not, but if they have it on the records I will not dispute it, but I don't remember it now.

Q. Don't you recall having in the First National Bank of the Town of Union, some time before July 7th, 1910, a note for one hundred dollars, which you then took up by the payment of twenty-five dollars in cash and giving a new note for seventy-five dollars? 10

A. Well, if I had it I don't remember it.

Q. Do you remember having a note for seventy-five dollars in the First National Bank of the Town of Union?

A. No, sir, I didn't have any note as far as my recollection serves me now. That is why I testify he never endorsed a note for me. 20

Q. Have you looked among your returned vouchers for a note or notes which were returned to you by the First National Bank of the Town of Union?

A. Yes, sir. I looked for my book but I have not got it any more.

Q. You have not got it any more?

A. Yes, sir. 30

Q. Isn't it a fact you told me lately that bank book was being used by your wife for keeping her household expenses in?

A. No, sir, I don't know that it has been used that way for her household expenses. After 1910 not having any necessity for it any more I told you that jokingly that possibly that was the way it was used.

*William Fessler—Recalled—Rebuttal—Cross.
—Re-Direct.*

Q. You don't recall Mr. Hilbert having endorsed a note for you at any time?

A. No, sir, as far as I can remember he has not.

10 Q. Are you prepared to say that he didn't endorse a note for you dated June 7th, 1910, which note was for one hundred dollars, payable on July 7th, 1910?

A. Yes, sir, as near as my recollection serves me he didn't endorse any note for me.

Q. But you won't swear as a fact that he didn't?

A. Well, it might be in the record.

Q. Well, answer the question?

A. No, sir, he didn't.

20 Q. You say now he didn't?

A. Yes, sir.

Q. And you are sure of that?

A. Yes, to the best of my knowledge.

Q. And on July 7th, 1910, will you say that you didn't negotiate a note for seventy-five dollars in that bank which had been endorsed by Mr. Hilbert?

A. No, sir, he didn't do that either.

Re-Direct Examination by Mr. Walscheid:

30 Q. What you mean to testify to is that at the present moment you have no recollection of Mr. Hilbert ever having endorsed any note for you?

A. No, sir, he didn't as near as I can remember endorse any note for me in 1910. If he did I don't know it at this time.

Q. Did he ever endorse a note for you for any such sum as three thousand dollars, or anything in that neighborhood?

40 A. No, sir, he didn't.

William Fessler—Recalled—Rebuttal—Re-Direct—Re-Cross.

Q. You are positive as to that?

A. Yes, sir, I am sure of that. I am sure that he never endorsed any note as far as I can remember.

Q. So that if Mr. Hilbert testified and claimed that when he asked you to endorse a note for thirty-three hundred dollars he called your attention to the fact that he had endorsed a similar note or similar notes for you before that time and that therefore you were simply doing him a return favor, that is not so, is it? 10

MR. FALLON: I object to that upon the ground that it is assuming something which has not been testified to. 20

Objection sustained.

Re-Cross Examination by Mr. Fallon:

Q. You received a subpoena duces tecum, did you not, directing you to produce here today these notes which I have examined you about?

A. Yes, sir.

Q. And you say that you looked for them and couldn't find them?

A. No, sir, I couldn't. 30

Q. And you don't remember any such notes?

A. No, sir.

MR. FALLON: I now offer in evidence Discount Book of the First National Bank of the Town of Union, running from September 20, 1909, to September 12, 1912, and particularly the following entry on page 36 thereof: 40

*William Fessler—Recalled—Rebuttal—Re-Cross.
John H. Ruggles—Rebuttal—Direct.*

<i>Date</i>	<i>Check No.</i>	<i>To Order of</i>	<i>Reg. No.</i>	
June 8	666	William Fessler M. D.	704	
	<i>Maker.</i>	<i>Endorser or Guarantor</i>		
	William Fessler, M. D.	William Fessler, M. D.		
		M. William Hilbert.		
<i>Date.</i>	<i>Term.</i>	<i>Due</i>	<i>Amount.</i>	<i>Interest.</i>
June 7	30 days	July 7	\$100	.50
10	<i>Net amount purchased.</i>			
	\$99.50			

And on page 41 the following entry:

<i>Date</i>	<i>Check No.</i>	<i>To Order of</i>	<i>Reg. No.</i>
July 7	770	W. Fessler	
	<i>Maker</i>	<i>Endorser or Guarantor</i>	<i>Date</i>
	W. Fessler	W. W. Hilbert	Aug. 6
<i>Amount.</i>	<i>Interest.</i>	<i>Net amount purchased.</i>	
\$75	.40	\$74.60	

20

JOHN H. RUGGLES, a witness called on behalf of the defendant, being duly sworn according to law, testified as follows:

Direct Examination by Mr. Walscheid:

Q. Mr. Ruggles, where do you live?

A. 549 Pavonia Avenue, Jersey City.

Q. Were you in the year 1910 the Cashier of the First National Bank of the Town of Union?

30

A. Yes, until August 23rd.

Q. Of what year?

A. 1910, from about September, 1909.

Q. I show you a pamphlet and ask you whether that is a set of the by-laws of that bank, which set was then in force?

A. Yes, sir.

40

John H. Ruggles—Rebuttal—Direct.

MR. WALSCHEID: I desire to read in evidence Section 18 of these by-laws, (Reading).

Sec. 18. There shall be a committee to be known as the Executive and Discount Committee, who shall meet between the hours of 10 a. m. and 12 a. m. Wednesday mornings; said Committee to consist of the President, First and Second Vice-President, Third Vice-President, and five Directors, not officers, appointed by the Board; to continue to act until succeeded, and who shall have power to discount and purchase bills, notes and other evidence of debt, and to buy and sell bills of exchange; and who shall at each regular meeting of the Board of Directors make report of all bills, notes and other evidences of debt discounted and purchased by them for the bank since their last report.”

Book from which Section 18 has been read offered in evidence and marked Exhibit D-1.

Q. Mr. Ruggles, do you know M. William Hilbert?

A. I do.

Q. And did you know him in the summer of 1910?

A. I did.

Q. He was at that time connected with the First National Bank of the Town of Union as Assistant Cashier?

A. He was.

Q. To your knowledge was he in town over the Fourth of July, 1910?

John H. Ruggles—Rebuttal—Direct.

MR. FALLON: I object upon the ground that it is immaterial and irrelevant.

Question withdrawn.

10 Q. Do you know whether or not during the summer of 1910 Mr. Hilbert was away from the bank for any extended period of time?

A. About one week.

Q. And when was that one week?

A. From about June 29th to July 6th.

Q. And how do you know it was June 29th to July 6th?

20 A. Well on June 29th there was a note for about twenty-nine hundred dollars discounted of which a certain part was to be applied to surplus, and that amount was not applied to surplus until July 6th.

Q. What was the amount that was to be applied to surplus?

A. About twenty-six hundred and twenty-five dollars.

Q. And who was to apply that amount to surplus?

A. Why Hilbert.

30 Q. This note which was discounted on the 29th of June for whose benefit was it discounted on that day?

MR. FALLON: That is objected to as immaterial.

Question allowed.

A. Mr. Hilbert's.

40 Q. And how do you fix the sixth day of July as the date that Mr. Hilbert returned?

John H. Ruggles—Rebuttal—Direct—Cross.

A. Because that was the first day that I saw him after the note was discounted.

Q. After the note of June 29th was discounted?

A. Yes, sir.

Q. Did you have any talk with him then as to where he had been?

10

A. He made the remark that he had been down in Connecticut over the Fourth.

Q. Why does this surplus item of twenty-six hundred and twenty-five dollars, why does that fix the date of Mr. Hilbert's return in your memory?

A. Well, because about that time we needed the surplus account built up.

Q. Well, did Mr. Hilbert have to do anything in connection with this twenty-six hundred and twenty-five dollars?

20

A. Yes, he had to give me a check for that amount.

Q. And did he give you that check on the sixth day of July?

A. Yes, sir.

Q. And that was the first day he returned to the bank?

A. Yes, sir, as near as I can recall.

Q. Well, I want to know, yes or no?

A. Yes.

30

Cross-Examination by Mr. Fallon:

Q. Now are you sure of what you have just said, Mr. Ruggles, or are you in doubt about it?

A. No, I will stick to it.

Q. Well, give me an answer to that; you don't mean you are certain now?

A. Well, I think I am right.

40

John H. Ruggles—Rebuttal—Cross.

Q. Why did you say a moment ago that you thought it was the sixth to the best of your recollection, or words to that effect; you seemed to be in some doubt about it, didn't you?

A. Well, he couldn't get back before the 6th.

10 Q. Well, that is not the question; you are only to state what you have personal knowledge of as a fact. I want to know from you whether you are prepared to swear now that Mr. Hilbert was out of town on June 29th and did not return until July 6th, 1910?

A. Yes, sir.

Q. Why do you say that?

A. For the simple reason he said he was away over the Fourth and speaking of the time he had.

20 Q. Over the Fourth?

A. Yes, sir.

Q. What day of the week was June 29th—do you remember?

A. I think about Wednesday.

Q. And what day of the week was July 6th?

A. I think that must have been about Wednesday.

Q. Why do you think it was Wednesday?

A. Because it was one week after.

30 Q. Why do you think June 29th was Wednesday?

A. Because I am pretty positive.

Q. Did you look it up to see?

A. No, sir, I did not.

Q. And notwithstanding the fact that you have not looked it up you are certain that June 29th, 1910, was on Wednesday?

A. Yes, sir.

John H. Ruggles—Rebuttal—Cross.

Q. What day of the week was the 29th of May, of 1910?

A. It would be about Tuesday.

Q. Why are you so positive the 29th of June was on Wednesday?

A. Well, I had occasion about a month or two 10 months ago to look that up.

Q. You said a moment ago that you didn't look it up.

A. I didn't think.

Q. But as a fact you did look it up and that is the way you are sure that you remember Wednesday was the 29th of June?

A. Yes, sir.

Q. Are you prepared to swear that Mr. Hilbert was not in the bank on the 5th of July, 1910? 20

A. Yes, sir.

Q. Why?

A. Well, because I know he was not.

Q. Why do you know it; how do you know it?

A. Because he didn't come in until the sixth.

Q. Then you say that he was away one entire week, from June 29th to July 6th?

A. Yes, sir.

Q. Did he go away on the 28th of June or the 29th of June? 30

A. I won't say he went away on the 28th of June?

Q. Do you know when he went on the 29th of June?

A. No, sir, I don't know what time he went away.

Q. All you know is he went away on the 29th?

A. I only know he went off.

Q. Before he went did he send you word? 40

John H. Ruggles—Rebuttal—Cross.

A. That he was going out of town that day.

Q. But you don't remember what time and had no talk with him?

A. No, sir, I did not.

10 Q. Was there any business transactions that you had with him on that day that would refresh your recollection?

A. Yes, there was a note for twenty-nine hundred dollars put through the bank that day, and dated on the 28th of June.

Q. That is the Richter note you have reference to?

A. Yes, sir.

20 Q. I show you this note, Exhibit C-1, which was offered in evidence in this cause, and ask you if you recall having seen that note at the time you were connected with the bank?

MR. WALSCHEID: That is objected to as not cross-examination.

MR. FALLON: I will make him my own witness.

A. I think I must have seen it.

Q. Do you know whether you did or not?

30 A. No, I am not positive.

Q. You say that you are not positive that you saw that note when you were connected with the bank and still you were the cashier of the bank?

A. That could be.

Q. Well, is it not a fact that you paid out the money on that note?

MR. WALSCHEID: Objected to as leading.

40 Question withdrawn.

John H. Ruggles—Rebuttal—Cross.

Q. You are not very friendly with the bank, the First National Bank of the Town of Union?

A. I don't know; I guess I am as friendly to them as they are to me.

Q. You know they are not friendly with you?

A. I don't know anything about that. 10

Q. But you know that you are unfriendly towards the bank and have been for the past year or so?

A. No, sir.

Q. Is it not a fact that you have been taking an interest against the bank on the so-called Richter note recently?

A. I did not.

Q. I show you this check, Mr. Ruggles, and ask you if that check is signed by you showing the payment of thirty-three hundred dollars on this note which was shown you a moment ago marked Exhibit C-1? 20

A. Yes, sir, this check was signed by me.

Q. And in whose handwriting is the body of that check?

A. It looks very much like Mr. Reisenberg's.

Q. And whose handwriting is the thirty-three hundred? 30

A. It looks as if it might be Mr. Reisenberg's.

Q. Do you recall that check now that you have looked at it?

A. I can't recall the check, but that is my signature.

Q. You didn't put through more than one note of thirty-three hundred dollars at the bank while you were Cashier made to Purcell and endorsed by Hilbert and others?

John H. Ruggles—Rebuttal—Cross.

A. I can't recall all the transactions that took place in the bank at that time.

Q. Whose handwriting is on the back of this check?

A. It looks like Mr. Reisenberg's.

10 Q. You would know to what that check was credited, would you not?

A. I wouldn't have to know.

Q. Did any person in the bank attend to your work as Cashier?

A. No, sir.

Q. What were your duties as Cashier at that time?

A. I was supposed to have control of the bank, but I didn't have.

20 Q. Tell us what your duties were?

A. Well, they are enumerated in the by-laws.

Q. And do you mean to say that you didn't carry out the duties enumerated in the by-laws?

A. As far as I was allowed.

Q. Tell what you were not allowed to carry out of your duties?

A. Well, a great many things.

Q. Tell us some of them and all of them, if you can?

30 A. Well, a great many times I was not allowed to run the bank.

Q. Tell us what duties you were to perform by the by-laws which you were prevented from carrying out?

A. Well, I might simply say that I was not allowed to run the bank as a cashier should be allowed to run it.

Q. Is that the answer you desire to make?

40 A. I think that answer is sufficient.

John H. Ruggles—Rebuttal—Cross.

Q. You know that you had trouble with the bank as Cashier in converting to your own use money which didn't belong to you?

A. No, sir, I don't know anything of the kind.

Q. Mr. Ruggles, you say that this twenty-nine hundred dollar note was discounted by Hilbert on the 29th of June, 1910; is that so? 10

A. Yes, sir.

Q. Now, you say that on July 6th, \$2650. of that amount was credited?

A. No, sir, I didn't say that; I said \$2625.

Q. Well, \$2625. of that note of \$2900. was credited on July 6th to the account of Hilbert, was it?

A. No, sir; credited to the account of surplus. 20

Q. Why was this money held over from June 29th to July 6th?

A. For the simple reason that I didn't have the check to put through to the surplus account—Mr. Hilbert's check.

Q. And when did you get the check from Mr. Hilbert?

A. July 6th.

Q. Now, you have had trouble with the bank, have you not? 30

MR. WALSCHEID: That is objected to as immaterial.

Q. Stolen money from the bank, with which you were charged?

MR. WALSCHEID: I withdraw my objection to the question now in its present form for the protection of the witness. 40

John H. Ruggles—Rebuttal—Cross.

A. No, sir.

10 Q. Is it not a fact that you took twelve hundred and fifty dollars that was paid into the bank to you as Cashier of the bank by Doctor Menger in payment of an indebtedness of Doctor Menger, and applied that twelve hundred and fifty dollars to your own account in the First National Bank of the Town of Union, and wrote out in your own handwriting a deposit slip for that twelve hundred and fifty dollars and on that same day drew your own check and forwarded your check to a New York bank in payment of an indebtedness by you to that bank, which I believe was the Irving National Bank?

20 MR. WALSCHEID: That is objected to as immaterial and not proper {cross-examination.

Question withdrawn.

Q. When did you say that thirty-three hundred dollar note, Exhibit C-1, was discounted by the First National Bank of the Town of Union?

30 MR. WALSCHEID: I object to that. The witness has not said it was discounted by the First National Bank.

Question withdrawn.

Q. I show you Exhibit C-1, and ask you if this note which I now show you was discounted by the First National Bank of the Town of Union for the sum of thirty-three hundred dollars?

A. According to this it was.

40 Q. Can you say that that note was discounted?

John H. Ruggles—Rebuttal—Cross—Re-Direct.

A. No more than the note itself.

Q. Not by any book? What book would show it?

A. The discount journal.

Re-Direct Examination by Mr. Walscheid: 10

Q. And what would the discount journal show you?

A. Why, whatever date the note was discounted.

Q. It would show the record of this note, would it not?

A. Yes, sir, it certainly would.

Q. Will you look under July 6th in this book (Discount Journal), and examine the record of July 6th and examine this note; and after having examined the record do you say that this identical note, Exhibit C-1, was discounted on that date? 20

A. Well, there are two endorsements missing in the book.

Q. Is there any other difference between the book and Exhibit C-1?

MR. FALLON: I object upon the ground that the book and note will show whether there is or not. 30

Objection sustained.

Q. Examine the record for your own purpose and say whether or not there is any other difference—whether this identical note was discounted according to the record upon this book?

Objected to.

40

John H. Ruggles—Rebuttal—Re-Direct.

A. The record gives only two guarantors of the note and the note shows four.

Q. The record also shows thirty-three hundred dollars and the note shows thirty-three?

10 MR. FALLON: I object to the statement of counsel and ask that it be stricken out. Question ordered stricken out.

Q. Now, Mr. Ruggles, having examined the record of the bank and having examined C-1, can you now state from what you know of the course of business of the bank whether that C-1 was the note which was discounted on that day?

20 A. Well, according to the note and the record of the bank, with the exception of these two endorsements lacking it is the same piece of paper.

Q. With the exception of two endorsements lacking?

A. Yes, sir.

Q. Well, will you say it was discounted on that day?

By the Court:

30 Q. Can you or can you not say whether or not this paper, Exhibit C-1, this note, was discounted by the First National Bank of the Town of Union on the sixth day of July, 1910?

A. From the note in front of me that note went through on that date.

Re-Direct Examination Continued:

Q. That identical piece of paper?

A. Yes, sir.

40 Q. Now, in the ordinary course of business

John H. Ruggles—Rebuttal—Re-Direct.

from an examination of that note to whom would the credit on that note go?

A. To William Fessler.

Q. William Fessler, M. D.?

A. Yes, sir.

10

By the Court:

Q. He was the last endorser?

A. Yes, sir.

Re-Direct Examination Continued:

Q. Is there any record of the bank, outside of this check which was shown you, showing to whom the credit on the note went—any books?

A. The book in which deposits were entered and the note ledger. 20

MR. WALSCHEID: Can I have that book?

Book produced.

Q. I show you a book marked "Credit Book" Sept. 18th, 1907, to Sept. 19, 1910," and ask you to say whether you can find in that book to whom the proceeds of this note were credited. 30

(Witness examines book.)

Q. Have you examined the book?

A. Yes, I have.

Q. Do you find under date of July 6th, 1910, a record of any credit to Thomas F. Purcell of thirty-three hundred dollars?

A. I do not.

40

*John H. Ruggles—Rebuttal—Re-Direct.**By the Court:*

Q. Do you find any credit there of thirty-three hundred dollars on the sixth day of July?

A. I do.

10 Q. To whom?

A. William Hilbert.

Re-Direct Examination Continued:

Q. Will you read that record?

A. "B. D. Hilbert, William, \$3300."

By the Court:

Q. What does the B. D. mean?

20 A. Bills discounted.

Re-Direct Examination Continued:

Q. And do you find that under a heading July 7, 1910, which has been crossed off?

A. I do.

By the Court:

Q. And the same page below there is a heading July 7th and then a number of items?

30 A. Yes, sir.

Re-Direct Examination Continued:

Q. And the July 7, 1910, which has been crossed off follows a totalization of the day's credits amounting to \$36048.50 immediately above the July 7, 1910, which has been crossed off?

A. Yes, sir.

John H. Ruggles—Rebuttal—Re-Direct.

By the Court:

Q. Can you account for the shape of that page, that there should be a totalization of thirty-six thousand and some odd dollars, and July 7th, 1910, after that crossed off, and then a number of items after that before the new heading July 7th, 1910? 10

A. Simply they tacked on the B. D.s at night; the discount bills were added at night.

Re-Direct Examination Continued:

Q. This check which I now desire to offer in evidence, does not in any way indicate that the credit there given to Thomas F. Purcell was transferred in any way to Hilbert? 20

A. No, sir, not according to that check. The check shows a credit to Thomas F. Purcell.

Q. Now, is there any book which shows Purcell's account?

A. The ledger.

Check above referred to marked Exhibit D-2.

MR. WALSCHEID: May I have the ledger? 30

Ledger produced.

Q. Is this the Purcell ledger sheet?

A. Yes; there is no thirty-three hundred dollars there.

Q. That is according to the ledger account of the bank there is no thirty-three hundred dollars credited to the account of Thomas F. Purcell?

A. No, sir, there is not.

John H. Ruggles—Rebuttal—Re-Direct.

Q. Mr. Ruggles, what book would you require in order to find the entry showing the so-called Richter note which you have mentioned?

A. Debit and Credit Journal.

10 MR. WALSCHEID: May I have the Debit and Credit Journal? Book produced.

Q. I show you general ledger of 1909 to 1910; see if you can trace it through this book.

(Witness examines book.)

Q. I ask you now for the entry of the Richter note of \$2900.

20 A. There is an item under the head of "Demand Loans" of twenty-nine hundred dollars.

Q. And does that show who gets the benefit of it? That doesn't show whose note it is and who it goes to?

A. No, sir, not there.

Q. Or does it show on what date that note came in?

A. No, sir.

Q. What book would show that?

30 A. The Credit Book. (Witness indicates in book.)

Q. June 29th in the Credit Book you find Hilbert, M. W., \$2900.?

A. Yes, sir.

Q. You say that is the Richter note?

A. Yes, sir.

MR. WALSCHEID: I now ask for the Richter note.

40 MR. FALLON: We haven't got that here.

John H. Ruggles—Rebuttal—Re-Direct.

Q. Will you find the record in Bills Purchased of this note?

A. I don't think you can find it in Bills Purchased. There is no \$2900. on June 29th. That goes into Demand Loans.

Q. Is there anything in this book designated 10
as a general ledger which will show you the item of \$2625. which you have spoken about?

A. Well, the Debit and Credit Journal will show it, and the General Ledger may show it.

Q. Well, look.

A. Referring to General Balance Ledger on July 6th, 1910, I find an item of \$2625. credited to surplus.

Q. Now, what would show in what manner 20
that got into that account, whether by check or other fashion?

A. Well, the Debit Book, if there is such a book here.

Q. On page 233 of the Debit Book, under date of July 6th, will you tell us what item you find there for M. William Hilbert?

A. Several items, and one of them \$2625.00.

Q. Will you read the items you find?

A. (Witness reading from book) "Hilbert, M. 30
W. 25.00. \$17.50, \$250.00, \$2525.00, \$45.00, total \$2962.50"—

Q. And those items which you have read are checks of Hilbert's presented to the bank on that day?

A. Yes, sir.

*John H. Ruggles—Rebuttal—Re-Cross.**Re-Cross-Examination by Mr. Fallon:*

Q. I show you a ledger sheet or balance of the account of M. William Hilbert; that account was kept under your supervision as Cashier of the bank, was it not?

10

A. I suppose I was in control of the bank and it was under my supervision.

Q. I note in that account entries after June 29, 1910,—two items of June 30th, three items of July 1st and two items of July 5th, and I ask you if that will refresh your recollection as to whether Mr. Hilbert was in or out of town at that time?

A. No, sir.

Q. Do you recall what these transactions were which I have just referred to?

20

A. No, sir.

Q. Mr. Ruggles, you know as a matter of fact that that thirty-three hundred dollars went in the Hilbert account, don't you, instead of in the Purcell account?

A. According to the record.

Q. As a matter of fact at that time you and Hilbert were very friendly?

A. Yes, sir.

30

Q. And you and he had financial transactions together at that time?

A. I don't know.

Objected to.

Q. Did Mr. Hilbert get the credit?

A. The bank books shows that.

*John H. Ruggles—Rebuttal—Re-Cross.**By Mr. Walscheid:*

Q. From your own personal knowledge do you know who got credit for it?

A. Only from the books.

Account of Mr. Hilbert offered in evidence and marked D-3. 10

THE COURT: There is a credit item of \$250. on the first of July, and the next credit item is \$200. on the sixth of July. There is no credit item on June 30, 1910, of \$50.

By the Court:

Q. Mr. Ruggles, where were you living in July, 1910? 20

A. In Hackensack.

Q. You don't know whether Mr. Hilbert was in Town of Union on the fifth or not, do you? All you know is he didn't come to the bank until the sixth.

A. He told me he was out of town over the Fourth.

Q. But he didn't say he was out of town over the fifth, did he? 30

A. I didn't get the check until the sixth.

Q. But he might have been in the Town of Union on the fifth and you not know it?

A. When he came in he said he just got back in his machine.

M. William Hilbert—Rebuttal—Direct—Cross.

M. WILLIAM HILBERT, heretofore sworn, being recalled on behalf of the complainant, testified as follows:

Direct Examination by Mr. Fallon:

10

Q. Mr. Hilbert, were you out of town on the fifth day of July, 1910, or were you in the town of Weehawken?

A. To the best of my knowledge and belief I was in the town of Weehawken on July 5th, 1910.

By the Court:

Q. At what time of day was it you saw Doctor Fessler as you say at the hospital?

20

A. Why it was some time in the forenoon—in the morning some time. I don't recollect just what hour it was, but it was the forenoon of the fifth of July.

Cross-Examination by Mr. Walscheid:

Q. You had been away over the Fourth?

A. It may be possible. I think I was.

30

Q. Don't you know you was away over the Fourth?

A. No, I don't recall it.

Q. Don't you know you went away in your machine?

A. No, sir.

Q. Did you ever spend any Fourth in the State of Connecticut?

A. I don't know.

Q. Did you ever spend any Fourth in the State of Connecticut, leaving the Town of Union in your

40

M. William Hilbert—Rebuttal—Cross.

car and coming back after the Fourth in your car?

A. No, I don't think so.

Q. Didn't you spend the Fourth that year with John M. Hannan at Fairfield, Connecticut?

A. I won't swear to it.

Q. Will you swear that you didn't? 10

A. No, I won't swear that I didn't.

Q. Didn't you take Mr. Hannan out there in your machine?

A. I did at one time, but I don't know whether it was that Fourth or not.

Q. You did spend a period of time with John M. Hannan at Fairfield, Connecticut?

A. I did.

Q. How many days did you spend there with him? 20

A. One day.

Q. You know that the Fourth of July came on Monday in 1910?

A. No, sir, I do not.

Q. You want to swear positively now, do you, that you did not spend the Fourth of July, 1910, with John M. Hannan at his cottage at Fairfield, Connecticut?

A. I won't swear to that because I don't know what time it was that I spent there. 30

Q. Will you swear positively that you were not on your way back to New York on the fifth day of July, 1910, from Fairfield, Connecticut?

A. No, I won't swear to anything of that character.

Q. Is it not a fact that you started out on the fifth day of July, 1910, from Fairfield, Connecticut, with John M. Hannan in your machine, and that you were held up by reason of rain and couldn't get through? 40

M. William Hilbert—Rebuttal—Cross.

A. I can't swear to that; I don't know.

Q. You won't swear to anything about the fifth of July, will you?

10 A. I will when a note is given me and my mind is refreshed as to the date, that that note was signed at the time it was made out—the morning of that date.

Q. That is the only reason you will swear it was the fifth of July?

A. Yes, sir.

Q. And you couldn't have done that on the sixth or seventh?

A. No, sir, I could not have.

By the Court:

20 Q. When did you present that note for discount to the bank—the very day it was made or the next day?

A. I believe it was the same day. It might have possibly been the next day. I don't know, it is back so far.

Q. What day of the week did the discount committee sit?

30 A. Why they sit at various times,—sometimes Thursday and sometimes Tuesday, but most of the time it was Thursday.

By Mr. Walscheid:

Q. Don't you know that they sat on Wednesday morning?

A. They sat at various times.

Q. Do not your by-laws provide that they sit on Wednesday morning?

40 A. The by-laws may provide for that but they would sit at other times.

M. William Hilbert—Rebuttal—Cross.

By Mr. Fallon:

Q. Mr. Hilbert, do you know whether Thomas F. Purcell is a resident of the State of New Jersey?

A. I am pretty sure that he is not a resident of the State of New Jersey. 10

Q. Where does he live, or where did he live when you last heard of him?

A. Astoria, Long Island.

Q. John S. Eastwood, do you know where his residence is?

A. The last I heard of him he was in Boston.

Q. He is a non-resident of New Jersey?

A. Yes, sir.

CASE CLOSED.

20

30

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Exhibit C-1

N

E

W "\$3300.00.

Weehawken Post Office, N. J., July 5, 1910.

10 J Four months after date I promise to pay to
 E the order of myself Thirty-three Dollars, at
 R First National Bank, Town of Union, N. J.,
 S with interest. Value received.

E

Y

20

30

40

Exhibit D-1

“Sec. 18. There shall be a committee to be known as the Executive and Discount Committee, who shall meet between the hours of 10 a. m. and 12 a. m. Wednesday mornings; said Committee to consist of the President, First and Second Vice-President, Third Vice-President, and five Directors, not officers, appointed by the Board; to continue to act until succeeded, and who shall have power to discount and purchase bills, notes and other evidence of debt, and to buy and sell bills of exchange; and who shall at each regular meeting of the Board of Directors make report of all bills, notes and other evidences of debt discounted and purchased by them for the bank since their last report.”

10

20

Exhibit D-2

FIRST NATIONAL BANK, TOWN OF UNION.

No. 762

763

Weehawken P. O., N. J., July 6, 1910.

Pay to the order of Thomas F. Purcell \$3300./00 30

Thirty-three Hundred and 00/100.....Dollars

JOHN C. H. RUGGLES, Cashier.

Am't & Filling

Guaranteed O. K. J. R.

Endorsed

D-2

C. R. A/C

Thos. F. Purcell.

40

Exhibit D-3

M. WM. HILBERT

		WITHDRAWALS.		DEPOSITS.	
			1910.		
	May 31	\$103	May 26—Balance		153.44
	31—Note	200	May 28		60
	June 1	4.25	31		3
10	2	1.25	31—Note		172.32
	3	10	June 9		100
	3	14	10		50
	4	2	15		500
	9	60	15		150
	9	75	17		100
	10	18	17		50
	10	35	18		1200
	10	10	18—Note		590.80
	11	2.50	20		75
	14	100	21		300
	14	5	23		625
	15	500	23		100
	15	25	23		245
	15	15	29—Note		2900
	17	10	29—Note		198.97
20	17	16	29		3000
	18	600	30		50
	18	125	July 1		250
	20	1262.50	6		200
	21	35	6—Note		3300
	22	41.12	7		19
	23	125	7		1500
	23	300	8		450
	23	100	8		49
	24	500	12		625
	24	10	14		100
	24	1.25	19—Note		787.74
	24	140	20		15
	28	15.50	21		538.88
	29—2 Notes	3145			
30	30	10			
	July 1	3000			
		\$10,616.37			\$18,458.15

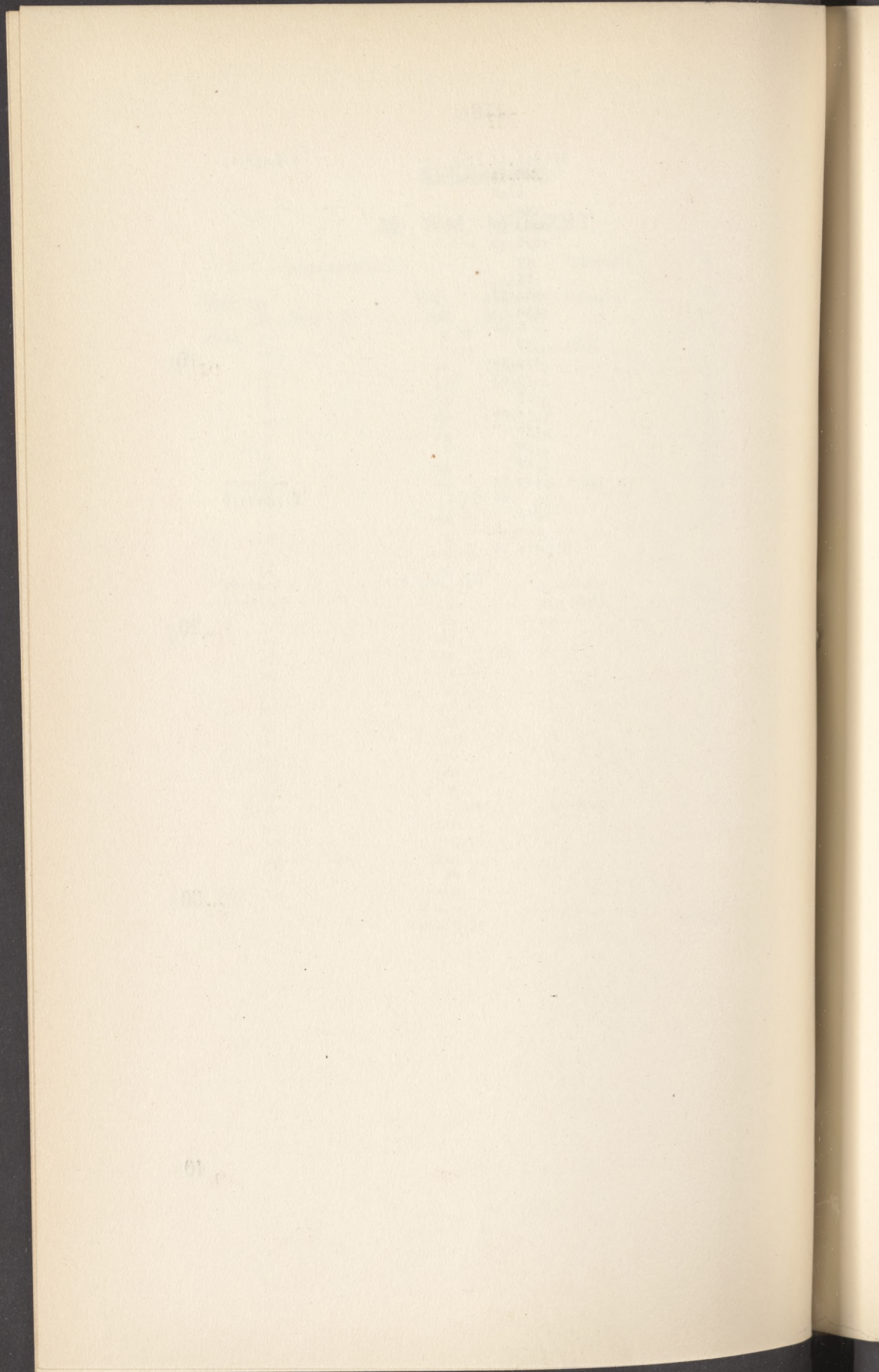
178-c

July	1	\$10,616.37	July	21	\$18,458.15
	5	\$98.58			
	5	9.48			
	6	150			
	7	2962.50			
	8	1628.30			
	8	40			
	8	75			
	9	564.53			
	12	150			
	12	8.96			
	13	58			
	14	179.50			10
	14	79.03			
	15	35			
	15	12.20			
	18	150			
	18	30			
	19	16			
	20	549.75			
	20	.96			
	20	500			
		<u> </u>			
		\$17,914.16			\$17,914.16
			Bal. July 21		<u> </u>
					\$543.99

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Opinion.

M. T. Rosenberg, Advisory Master. The bill of complaint seeks to have reformed a promissory note reading as follows:

“\$3300.00 Weehawken Post Office, N. J.

“July 5, 1910.

“Four months after date I promise to pay to the 10
“order of myself Thirty-three.....Dollars,
“at First National Bank, Town of Union, N. J.,
“with interest.

“THOMAS F. PURCELL.

“No. 809 Due Nov. 5.”

Endorsed, Thomas F. Purcell, W. William Hilbert,
John S. Eastwood, William Fessler, M. D.

The allegations of the bill of complaint are 20
that the note was intended to be a note for thirty-
three hundred dollars; that it was discounted by
the defendant, Hilbert, with the complainant as a
note for thirty-three hundred dollars, and thirty-
three hundred dollars was paid by the complain-
ant thereon, and the prayer is that the note may
be reformed into a note for thirty-three hundred
dollars.

The bill names as defendants the maker and 30
endorsers, but the only defendants who were
brought into court were Hilbert and Fessler. No
objection for want of parties was made by the
answering defendant, Fessler.

It was stated in the course of the hearing and
not controverted that Purcell and Eastwood were
non-resident and that a decree of this court based
on publication would be of no efficacy against
them.

Decree pro confesso was taken against Hilbert,
and in the testimony given by him he admitted the 40
truth of the allegations of the bill.

Opinion.

10 The defendant, Fessler, filed an answer setting up that so far as he was concerned the note was intended to be a note for thirty-three dollars and not for thirty-three hundred dollars. He also alleges in his answer that notice of dishonor was not served upon him and that the note has not been duly protested.

So far as this last point is concerned I have refused to permit the defendant to offer evidence, as the only question for this court to determine is, it seems to me, whether a contract, which was clearly valid at the time it was made was intended to be one for thirty-three dollars or one for thirty-three hundred dollars.

20 The question whether or not the contract became invalid in law because of circumstances which arose subsequently to its inception is a question which the parties are entitled to have tried by a court of law and a jury, and is not within the scope of the inquiry of this court.

The note in its present shape is a note for thirty-three dollars only, not thirty-three hundred.

Negotiable Inst. Act., Compiled Stat. p. 3737, Sec. 17.

30 The issue of fact between the parties litigant is then what was the amount for which the defendant, Fessler, intended to become liable when he executed the endorsement—thirty-three or thirty-three hundred dollars?

Considerable testimony has been taken on both sides, much of which is absolutely irreconcilable—so much so as to make it impossible to avoid the conclusion that one or more of the witnesses have deliberately falsified.

40 The note in question was made for the accommodation of the defendant, Hilbert, who was at

Opinion.

that time the Assistant Cashier of the complainant. He testifies that a few days before the note was endorsed by Fessler he called up Fessler on the telephone and told him that he was in need of money and that he would require something in the neighborhood of thirty-three hundred dollars to assist him, and asked Fessler whether he would not be kind enough to endorse his note, and he said he would; that on the day in question he saw Fessler at the hospital and handed him the note. He then testifies: "He looked at the face of it and said, 'This is for Thomas F. Purcell' and I said it was not, that Thomas F. Purcell had made this note for my accommodation, and therefore if he would endorse the note it would not be for Thomas F. Purcell's accommodation but for my accommodation. He then said, 'all right, I will endorse this note for you, if that is the case.'" Fessler then endorsed the note.

This interview occurred at the hospital at a time when the defendant was, it is admitted, very busy, but Hilbert says that Fessler read the note carefully. Hilbert further testifies that at this time Fessler asked him for some security, and that he, Hilbert, told him that he didn't have anything to offer except an assignment, if it was any good, on some stock on which he had a loan at the Merchants' Bank, and that that assignment was drawn up, signed by him and given to Fessler. At that interview nothing was said between the parties as to the amount of the note. The evidence does not disclose any alteration of the face of the note since that time.

Fessler testifies that he intended to endorse a thirty-three dollar note and no more. He says

Opinion.

that the telephone conversation was on the same day that the note was endorsed and that nothing was said to him in that conversation as to the amount of the note, and that what he intended to endorse was a thirty-three dollars note and nothing more. Hilbert testifies that there was no one else in the room. Fessler testifies that Doctor Hellstern was in the room, and that conversation took place between him and Doctor Hellstern just as Hilbert was leaving, in which he said to Hellstern, who reproached him for being foolish, that "the amount is only thirty-three dollars." In this he is corroborated by Hellstern. Fessler denies the conversation as to the stock assignment in toto and denies that there was ever any such assignment.

We come then to the conduct of the parties at or just before the note came due and after its maturity.

Hilbert testifies that several weeks before the note came due Fessler called him up on the telephone and asked him if he would not be good enough to secure some other endorser on the note, that it was a considerable sum of money, etc., to which he replied that he would make an effort to get somebody else to endorse it, that he never talked to him about it afterwards.

This conversation is denied by Fessler.

As to what happened after the note had become due, the testimony is once more contradictory. Reisenberger, who was then paying teller of the complainant, testifies that Doctor Fessler and his attorney, Mr. Kappes, came to the bank and asked to see the note; that he held it up so that they could see it; that Mr. Kappes then said, "Why, that note is only for thirty-three dollars;" that

Opinion.

Fessler then said that he was secured and that Mr. Hilbert has assigned some stock to him, and asked whether this stock had been transferred on the books of the bank; the witness said he couldn't answer that question, that Hilbert as assistant cashier attended to the transfer of stock, and that was all that took place. 10

Fessler says that he heard that a note of his had gone to protest for thirty-three hundred dollars, and not having endorsed any note for thirty-three hundred dollars he went to the bank with Mr. Kappes, and that there was not conversation at the bank, but that Kappes simply asked to see the note. He admitted on cross-examination that when he learned that the note was claimed to be \$3,300 instead of \$33.00, he never went to Hilbert, who had gotten him to endorse the note, to ask about the nature of the transaction, although he and Hilbert had been on visiting terms before that time, and Hilbert was living near him. 20

John H. Hannan, Deputy Clerk of the Supreme Court of this State, who was a Director in the Complainant, testifies that he had at least two conversations with the defendant, that Doctor Fessler told him that he knew the note had been discounted, and the witness asked Fessler why he had been so foolish as to endorse a note for Hilbert; that Fessler informed him that he had received as collateral security an assignment of the equity that Hilbert had in some stock, and that Fessler showed him a paper which he said was an assignment, and which Fessler had in his pocket; that after the note went to protest he saw Fessler and told him that the note had gone to protest and that Fessler had asked him how much the note was for, and he went back to the bank 30 40

Opinion.

and ascertained that the note was for thirty-three hundred dollars and told Fessler that that was the amount.

10 Mr. Kappes testified that when he went to the bank with Doctor Fessler nothing was said about any assignment, but that he saw the note. He was asked, "Q. What did he say about the amount
"of the note? A. I can't give you the exact
"words,—my recollection does not serve me, but
"the effect of it was that a great mistake had
"been made. The protest called for thirty-three
"hundred dollars, and I think interest whereas the
"note as a matter of law was a thirty-three dollar
"note, and that was what Fessler had told me it
"was."

20 The evidence of Hilbert's wife was also introduced by the complainant of a telephone conversation between Fessler and herself at a time just prior to the coming due of the note, and in which Fessler referred to the note as being a thirty-three hundred dollar note. This in turn is denied by Fessler, who says that he had no interview with Mrs. Hilbert at all about the note until after its maturity.

30 This sums up what seems to be the material parts of the evidence.

There is another element in the case. It was claimed on behalf of Fessler and proof was ad-
duced to the effect that the note was given to take
up a previous note of Hilbert, on which the de-
fendant, Fessler, was not an endorser; that the
note when first presented to the bank had only
the endorsement on it of Purcell and Hilbert and
it was in fact so entered in the discount book, but
40 that the bank officials being dissatisfied demanded

Opinion.

additional endorsers and thereupon the two endorsements of Eastwood and Fessler were obtained. Whether that be so or not does not in my opinion affect the question. If Fessler endorsed the note for the express purpose of binding himself in the sum of thirty-three hundred dollars with the understanding that on the faith of his endorsement the complainant or any one else would lend thirty-three hundred dollars, and the complainant did on the faith of that endorsement make the loan, the contract must be corrected as to him to read thirty-three hundred dollars. 10

Evidence tending to discredit the reputation of Hilbert for truth and veracity was also introduced. I have given this very scant consideration. It is given largely by witnesses who have had unfortunate financial transactions with Hilbert, and is not sufficient to my mind to turn the scale. 20

The question presented on the facts is, does the whole case show beyond a rational doubt that what Fessler intended was to endorse for thirty-three hundred dollars? For it is undisputably the law of this state that in order to grant a reformation the evidence of the mistake must be a clear and convincing character. Mere preponderance of evidence is not sufficient. 30

In *Rowley v. Flannelly*, 3 Stew, 614, Vice-Chancellor Van Fleet says, "Until a mistake has been established by such force of proof as leaves no rational doubt of the fact, no change in the writing sought to be reformed is entitled to be called a correction."

Vice Chancellor Pitney in *Hupsch v. Resch*, 18 40

Opinion.

10 Stew. 657 and 663, adopts the rule laid down in Pomeroy's Equity Jurisprudence, 859, that "Courts of equity do not grant the high remedy of reformation upon a probability, nor even upon a mere preponderance of evidence but only upon a certainty of the error."

And in the case of *Green v. Stone*, 9 Dick, 387, Justice Depue, in speaking for the Court of Errors and Appeals, adopts the language of Vice Chancellor Van Fleet in *Rowley v. Flannelly*, *supra*.

20 Leaving out the testimony of the parties, Hilbert and Fessler, I am convinced by the testimony of Hannan that Fessler knew the amount of the note before its maturity, and that Fessler had some kind of security. His testimony as to the security is confirmed by Reisenberger, (who has apparently no motive in the matter) who testifies to Fessler's statement at the bank.

It is true that Mr. Kappes, the attorney of Fessler says that he heard no such statement, but it is reasonable to conceive that his mind was fixed particularly on the amount of the note and its protest.

30 His testimony is:

"At any time you were in the bank did Doctor Fessler speak to anybody connected with the bank about an assignment of stock? A. I don't think Doctor Fessler said a word to anybody while we were in there.

'Q. And is that your best recollection? A. Yes, that is my best present recollection.

"Q. That he said nothing at all about stock?

40 "A. That he said nothing about anything. He "may have said something but I didn't hear it if

Opinion.

“he did. My intention was directed to two particular matters and as to those matters I did all the talking I think that was done.”

We have also the testimony of Hilbert's wife, as to her telephone conversations with Fessler. Though they are denied by him, I am inclined to give credence to her evidence. 10

But we are not restricted to the oral testimony. We have the circumstances, and the circumstances in cases of this kind are often much more conclusive than the testimony of the witnesses. In the first place this is not a case where the paper is to be reformed entirely by reference to extraneous matters. While it is true that the figures are strictly no part of the instrument and are not necessary to its completeness, it has been held in a number of cases that they may help to clear an obscurity or to indicate or supply an omission. 7 Cyc. page 596. 20

And the fact of their being on the note where the endorser could see them, and the fact that he is chargeable with having seen them, is an element which we must consider. In the next place the note was presented to him with three endorsers already on it. Is it reasonable to assume that any one, especially the Assistant Cashier of a bank, would have to obtain three endorsers to get a loan of thirty-three dollars? Would it be necessary for him to get a note for thirty-three dollars discounted at all in order to raise the money? 30

It seems to me that the presence of these endorsements must have shown to Doctor Fessler that the note was intended to be for more than thirty-three dollars.

Is it reasonable to assume that any one having 40

Opinion.

a note for thirty-three dollars with three endorsers presented to him would not at once call attention to the fact and say something about the necessity of obtaining so many endorsements for so small an amount?

10 He was asked by the Court:

“Q. Didn’t it strike you as peculiar that he “should come to you with a note with all of these “endorsements for merely the sum of thirty-three “dollars?

“A. No, sir, it did not. Mr. Hilbert would often “tell me of many peculiar transactions about that “bank at that time and I considered it was merely a merry whirl.

20 “Q. Did you think the Assistant Cashier of the “bank would have to get an endorsement for a “note for as small a sum as thirty-three dollars?

“A. He told me at that time that there was “much disruption there and that they were trying “to oust him, and that he was having difficulty “there, and so on.. That was the general impression I got.”

30 “Q. But I asked you whether you did not consider it peculiar that a man would have to get “an endorsement on a note for so small an amount “as thirty-three dollars?

“A. No, sir, I didn’t think that peculiar.

“Q. You paid no attention to that?

“A. No, sir.”

Such a statement on the part of any man who knew anything about money matters is absolutely inconceivable. And we may here also take into consideration the fact above adverted to, admitted by him, that when Fessler learned for the first time as he claims that the note was claimed

Opinion.

to be thirty-three hundred dollars and not thirty-three dollars he did not go to Hilbert who had gotten him to endorse it and mention that fact to him, although they had been on visiting terms and were living quite near together. And we have the fact of which I am convinced by the evidence that Doctor Fessler had some kind of security for his endorsement. Why should he take security for so small an amount as thirty-three dollars. 10

On the whole case I am satisfied beyond a reasonable doubt that when he put his name on the note Fessler intended to pledge himself for thirty-three hundred dollars.

As was said in the case of *Whelan v. Osgoodby*, 62 N. J. Eq. 575, "But while the testimony of an unimpeached witness is not to be arbitrarily disregarded, it must be measured by the standard of common experience and business usage." 20

If we give credence to the testimony of Doctor Hellstern that Fessler said to him that the note was only for thirty-three dollars, and to the statement of Fessler (testified to by him) to his counsel that the note was for thirty-three dollars, the result follows that Fessler knew that the note read in figures thirty-three hundred dollars and in words thirty-three dollars, that he knew that Hilbert intended to discount the note as a thirty-three hundred dollar note, and that he put it in the power of Hilbert to obtain thirty-three hundred dollars on it, keeping his silence and intending if the note should go to protest to avail himself of this defense. 30

To such a state of facts the law applied by Vice-Chancellor Leaming in *Chelsea National Bank v. Smith*.

Opinion.

“A court of equity will reform a contract in the case of mistake of one party, accompanied by fraud or other inequitable conduct of the other.”

Citing 4 Pom. Eq. Jur. (3rd Ed.) 1376.

10 This would dispose of the case but for two propositions of law insisted upon by defendant. One claim is that there was no contract between Fessler and the complainant; that Fessler put his name to a contract that was already completed, and that he did not agree or know that this note was to be discounted with the complainant, and that there was no privity between him and the complainant so as to entitle the complainant to obtain the relief in this suit. I cannot take this view. The testimony discloses that Fessler knew
20 what disposition Hilbert intended to make of this note, and that it was to be discounted with the complainant. It was a contract which Fessler made for the benefit of the complainant, but even without that knowledge the endorsement constituted a contract with whomsoever should discount the note.

30 “If a note has effect the substantial purpose for which it was designed by the parties, an accommodation endorser cannot object that the accommodation was not effected in the precise manner contemplated where there is no fraud and the interest of the endorser is not prejudiced.

Duncan-Sherman Co. v. Gilbert 5 Dutch, 521.

Stripped of technicalities the contract of Fessler stands on no other ground than that of suretyship.

Equity looks at the substance and not at the form.

40 The form was an endorsement under the law

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merchant, the object was the security of the liability of Hilbert.

Fessler under the forms of the law merchant intended to bind himself as surety for Hilbert—no more and no less. I can see no difference in principle between the two cases. 10

That equity will reform a contract as against a surety is settled in this State. *Smith v. Allen*, Saxton, 43.

In *Berg v. Radcliff*, 6 Johns Ch. 302, 307, Chancellor Kent uses this language: "There is as little color for the suggestion that a court of equity will never enforce a bond or contract against a surety. A party who joins in a bond as surety is as much bound in law and equity as the principal. Such contracts are of every day occurrence in the business of life, and recognized as valid in every system of jurisprudence; and it would be most extraordinary and a very great blemish upon the administration of justice if the protection of a court of equity was altogether denied to a creditor requiring equitable assistance against the surety * * * * * So long as the contract remains unvaried by any act of the creditor he is as much entitled to equitable relief when equitable relief becomes necessary against the surety as against the principal debtor." 20 30

The defendant also claims that the complainant was so negligent in not observing the error on the face of the note as to disentitle itself to relief, and has cited a number of cases on that point.

Leaving out the fact that there was a statement on the note in figures "\$3300.", which would palliate the negligence I do not think that the negli- 40

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gence of the defendant was so great as to bar it from its remedy.

If the ordinary negligence were to be a bar, it is easy to see that few, if any, complainants could ever obtain a reformation.

10 The courts have held, therefore, in this class of cases, i. e., where reformation is sought, that the negligence of the complainant to be a bar must be culpable; that, in the language of some courts, it must be gross as to amount to a violation of a positive legal duty. Cyc. Vol. 34, p. 949.

The law, it seems to me, is well stated in a case in Connecticut, where complainant sought to reform an issue of bonds by inserting therein a redemption period:

20 “This negligence is not of the extremest kind
 “which the courts sometimes characterize as the
 “equivalent of fraud. It was not recklessness; it
 “was more want of care. There was not indif-
 “ference to the effect; it was simply an honest
 “assumption that all was right. It is to be classed
 “only with those incautious and unbusinesslike
 “acts which are constantly presenting themselves
 “and could not have been noticed but for some
 “mischief that they have wrought. Thus a man
 30 “carelessly signs a note for a thousand dollars
 “which he supposed to be for a hundred dollars.
 “Through a mistake of the scrivener it is thus
 “written, when it would be written a hundred,
 “and he signs it without reading it. This is cer-
 “tainly gross carelessness; but should it debar
 “him from all remedy against a party who re-
 “ceives the note knowing of the mistake?”

Town of Essex v. Day, 52 Conn. 483.

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I cannot find that complainant has been guilty of such negligence as to disentitle it to relief.

I have been a little in doubt as to the effect of this proceeding, the other endorsers, Purcell and Eastwood, not being in Court, and the defendant, Fessler, having no standing as against them, if he pays the note, to claim payment or contribution as the case may be on a basis of thirty-three hundred dollars. 10

No point was made of this by the defendant and I cannot assume that another tribunal would reach any result different from that which I have arrived at.

The result is that the complainant is entitled to the decree prayed for, and I shall so advise.

Decree may be settled on two days' notice, if not agreed upon. 20

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IN CHANCERY OF NEW JERSEY.

10	<p><i>Between</i> THE FIRST NATIONAL BANK OF THE TOWN OF UNION, <i>Complainant-Appellee,</i></p> <p style="text-align: center;">vs.</p> <p>WILLIAM FESSLER, impleaded with THOMAS F. PURCELL, et als., <i>Defendant-Appellant.</i></p>	}	On Bill, etc.
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Final Decree.

20 This cause having been set down for hearing and coming on to be heard in the presence of John J. Fallon, of counsel with complainant, and J. Emil Walscheid, of counsel with defendant, William Fessler, and the pleadings having been read and the testimony orally taken before the court, and the Chancellor having considered the same and the arguments and briefs of counsel thereon, and it appearing that the promissory note mentioned and described in complainant's bill of complaint as follows:

30 N
 E
 W "\$3300.00.

Weehawken Post Office, N. J., July 5, 1910.

J Four months after date I promise to pay to
 E the order of myself Thirty-three Dollars, at
 R First National Bank, Town of Union, N. J.,
 S with interest. Value received.

E
 40 Y

Final Decree.

No. 809. Due Nov. 5. Thomas F. Purcell."

Endorsed: "Thomas F. Purcell, M. William Hilbert, John S. Eastwood, William Fessler, M.D."

through a mutual mistake of the parties thereto
 was drawn for the sum of thirty-three dollars, instead of the sum of thirty-three hundred dollars,
 and that it was the intention of the parties to
 make, sign and endorse said promissory note for
 the sum of thirty-three hundred dollars, and
 through the mutual mistake of the parties thereto
 said promissory note contained a mistake or
 omission therein of the word "hundred" after the
 words "thirty-three" and did not express the
 true intention and meaning of the parties to it,
 and the Chancellor being of the opinion that said
 promissory note ought to be corrected and re-
 formed to express the true intention and meaning
 of the parties to it;

It is thereupon on this day
 of May, nineteen hundred and thirteen, on motion
 of John J. Fallon, of counsel with complainant,
 ordered, adjudged and decreed, and the Chancel-
 lor by virtue of the power and authority of this
 court does hereby order, adjudge and decree that
 the said promissory note in said bill of complaint
 mentioned and described be and the same is hereby
 corrected and reformed so as to read as follows:

Final Decree.

N

E

W "\$3300.00.

Weehawken Post Office, N. J., July 15, 1910.

10 J Four months after date I promise to pay to
 E the order of myself Thirty-three Hundred
 R Dollars, at First National Bank, Town of
 S Union, N. J., with interest. Value received.

E

Y

No. 809. Due Nov. 5. Thomas F. Purcell."

Endorsed: "Thomas F. Purcell, M. William
 Hilbert, John S. Eastwood, William Fessler,
 M.D."

20 and to so express the true intention and meaning
 of the parties to said note, with costs to be taxed.

E. R. WALKER,
Chancellor.

Respectfully advised.

M. T. ROSENBERG,
Advisory Master.

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