## NEW JERSEY COURT OF ERRORS AND APPEALS.

THOMAS N. McCARTER,
RECEIVER,
*Plaintiff in Error,*
*vs.*
GEORGE W. KETCHAM,
administrator,
*Defendant in Error.*

*On Error*
*to Essex Circuit Court.*

## BRIEF FOR DEFENDANT IN ERROR.

This is an action brought by the Receiver of the Clinton Hill Lumber & Manufacturing Company, an insolvent corporation, against George W. Ketcham, as administrator of the estate of William S. Ketcham, Sr.

The intestate was one of five persons who executed a certificate of incorporation of said Company which was proved, and is Exhibit P. 1, but is not printed, see p. 52. The certificate will be found printed in the case of McCarter, Rec. vs. Ketcham, argued with this case, on page 28 of the book in that case.

The intestate participated in the organization of the Company and was elected a director and president.

This court has held in McCarter, Rec. vs. Ketcham, Jr., 43 Vr. 247, that the Company became a corporation *de facto* upon facts proved in that case, substantially the same as those proved in this case.

Upon proceedings taken by the Receiver, the Court of Chancery made an order authorizing the Receiver to assess William S. Ketcham, Sr. together with other alleged stockholders, an amount of money ascertained by the Court of Chancery to be due to the creditors of the Company, such assessment to be made out of the shares of the several stockholders including the intestate, which "have not been fully paid up."

The order reserves the right of the intestate to make any defence which he has to any action brought against him on the alleged stock subscription. The order was not intended to be conclusive except as to the amount of money necessary to be raised. See opinion of Vice-chancellor Emery, 19 Dick, 517.

The defendant has throughout the proceedings in the Court of Chancery maintained that there was no corporation at all, and necessarily alleged that there were no stock subscriptions and denied that he as administrator, or the intestate, held any stock, but it is manifest that in view of the ruling of this court that the Company became a corporation de facto, the administrator is not bound by his defence in the Chancery proceedings that there was no corporation and no stock at all. Indeed, the Chancellor in making the order, evidently had in mind the probable defences that would be made in the action at law, and did not wish the stockholders to be estopped by any proceedings or orders in the Court of Chancery. The Receiver declares upon the certificate of incorporation as the subscription of the intestate, and upon the further assessment made by the Receiver.

The defendant pleads payment (p. 11) and also pleads satisfaction and discharge of the subscription by the conveyance to the Company of proper-

ty of the value of the amount of stock subscribed for, pp. 11 and 12.

The replications to the pleas are not printed, but issue was joined. The bill of exceptions shows that the issue that was tried was that of payment and satisfaction and discharge of the subscription by the transfer of property by a deed of sale, executed by Frank D. Holloway.

THE DIRECTION OF A VERDICT FOR THE DEFENDANT WAS ENTIRELY PROPER AND ANY OTHER ACTION WOULD HAVE BEEN ERRONEOUS.

The minutes of the corporation (p. 53) recite that—"A bill of sale was made by Mr. Frank D. Holloway to the Company—said bill of sale representing what Mr. Holloway owed Mr. William S. Ketcham, and to be issued in stock by the Company to Mr. William S. Ketcham."

It is plain that Mr. Ketcham's stock was to be paid for by a transfer of property from Holloway. It was necessary of course, to prove the value of the property and the amount of Ketcham's interest in it, which would be the amount of Holloway's indebtedness to him. The evidence shows that the property was worth about fifteen thousand dollars (pp. 29 and 30).

This would also appear in the record in the case of Strieby, Sprague & Company vs. Clinton Hill Lumber & Manufacturing Company, if the same were printed, but as the plaintiff in error has failed to print all the exhibits I refer to the opinion of Vice-Chancellor Van Fleet, in that case in which he recites the facts, 7 Dick. 576.

The amount of Ketcham's claim against Hollway appears by the evidence to have been more than Ten thousand dollars, which was in the shape

of various promissory notes. An effort was made at the trial by the plaintiff to show that the property which had been transferred to the Company was afterwards sold by William S. Ketcham, Jr. and applied on his father's account, but the proof fell short of any authorization of any such act by the intestate, and it appears clearly in the bill of complaint filed by the creditors, which is not printed, but was an exhibit, on the part of the plaintiff, that the property was disposed of by the corporation. Indeed, the basis of the claims of these creditors, is an order made by the Court of Chancery, which the plaintiff in error has also omitted to print, directing the corporation to pay the value of this property which had been transferred to it by Holloway and disposed of by the corporation.

It also appears in the proof of claim of Strieby, Sprague & Company,which has not been printed. The bill of complaint will be found on page 32 of the printed case of McCarter, Rec. vs. Ketcham argued with this case; and on page 56 of that case will be found the proof of claim of Strieby, Sprague & Company.

Moreover there was no issue made to the effect that the Company had paid back to the defendant's intestate the money paid by him, or returned to him the property that he gave to the Company in satisfaction of his subscription.

Upon the evidence in the case the only action that the court could properly take, was to direct a verdict for the defendant; because it was overwhelming that the subscription had been paid and satisfied, and the jury could not have found any other fact.

Apart from the question of law involved in the case, a verdict for the plaintiff would have been most decidedly against the evidence, and the court

would have been obliged to set it aside. The only question of law that arises and that was discussed at the trial, related to the effect of the decree of the Court of Chancery.

In his assignment of errors, the plaintiff in error says that the trial court should have directed a verdict for the plaintiff, or should have sent the whole case to the jury for its consideration.

It will be observed on pp. 49 and 50 that the attorney of the plaintiff assented to the direction of a verdict one way or the other, so that the question could be passed upon by this court. The only question, as I have stated, was—Is the decree of the Court of Chancery conclusive? If the decree did not contain the clause of reservation at its foot I would still maintain that it was not conclusive, because it does not order the stockholders to pay but directs the Receiver to assess, authorizing the Receiver to take certain judicial action, which must still be confirmed by the Court in order to make it an adjudication and conclusive. But the clause at the foot of the decree shows plainly that the Chancellor did not intend that the decree should be conclusive, and the opinion of the Vice chancellor above referred to, also shows that such was not the intention, that the decree should be conclusive.

The decree was made for the purpose of ascertaining and fixing the amount of money to be raised and the Receiver was authorized to take action, because he had in the opinion of the Vice-chancellor made out a case from which it appeared in the absence of any defence that there were stock subscriptions, which were available for the purpose of paying the debts.

But the Chancellor did not decree that the stockholders should absolutely pay such amount as the Receiver might assess against them, or that they

should not have an opportunity to show that they did not owe the money.

Therefore, I contend that the learned Judge at the trial in directing a verdict, did what was entirely proper, and that the judgment should not be disturbed.

*Respectfully submitted,*

FRANK E. BRADNER,

*of counsel with Defendant in Error.*

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# New Jersey Court of Errors and Appeals.

THOMAS N. MCCARTER, *Receiver, Plaintiff in Error,*
*vs.*
GEORGE W. KETCHAM, *Administrator, Defendant in Error.*

## *BRIEF OF JAMES E. HOWELL ON BEHALF OF PLAINTIFF IN ERROR.*

The litigation out of which the present suit grows was begun in 1895. At that time Strieby, Sprague & Company were creditors of F. D. Holloway, a retail lumber dealer. They obtained judgment against Holloway and on return of the execution, unsatisfied, they brought suit in Chancery to set aside a transfer which Holloway had made of all his stock and merchandise to the Clinton Hill Lumber and Manufacturing Company on the ground that it was fraudulent as to his creditors. There was a decree for the complainant.

*Strieby* v. *Clinton Hill Co.*, 29 Atl. Rep. 589, Affirmed 7 Dick. 596.

At the foot of the decree an order was made appointing a receiver in that cause and upon his report that he could find no property that Court of Chancery made a decree *in personam* in favor of Strieby, Sprague & Company against The Clinton Hill Lumber and Manufacturing Company and ordered execution thereon. This execution was returned wholly unsatisfied.

The Clinton Hill Lumber and Manufacturing Company was organized under the laws of New Jersey on January 21, 1893. The certificate was signed, among others, by William S. Ketcham, now deceased, whose administrator the defendant below is. The capital stock was $40,500. The said William S. Ketcham subscribed for one hundred (100) shares.

On January 23, 1893, Holloway made a bill of sale to The Clinton Hill Lumber and Manufacturing Company of all his stock of lumber in his lumber yard, his lease, building, improvements, good-will, removable fixtures and everything pertaining to his business.

This transfer was accepted by the corporation and is claimed by the receiver to have been a payment of an assessment of 40 per cent. on its capital stock which was levied by the board of directors on February 6, 1893. (Ex. P. 3, page 53).

Subsequently a bill was filed by the Cumberland Lumber Company and Strieby, Sprague & Company, two creditors whose claims had been admitted by the receiver, against The Clinton Hill Lumber and Manufacturing Company alleging its insolvency and praying for the appointment of a receiver to wind up its affairs. Thomas N. McCarter was appointed receiver and is so acting.

By his petition (page 56) he reported to the court an insufficiency of assets to pay the debts of the corporation and alleged that the stockholders, including the defendant in this suit, had paid 40 per cent. of their subscriptions and prayed that an accounting might be had of the amount necessary to pay the debts, and that he might have leave to assess the stockholders to that amount.

The stockholders were notified of this application and, including said defendant, filed answers thereto, (page 62).

The petition came on for hearing and is reported under the name of *Cumberland Lumber Company* v. *The Clinton Hill Lumber & Manufacturing Company*, 18 Dick. 517, S. C. 19 Dick. 521.

A decree was made ordering an assessment, (page 70). An assessment was thereupon made by the receiver which was served on the defendant, and this action is brought for the purpose of collecting the assessment. The declaration is founded on the decree and the assessment.

The pleas are:

1. General issue.

2. That the company was never incorporated.

3. That the incorporators released each other.

4. Payment by William S. Ketcham of his subscription in his lifetime.

5. Payment by the said William S. Ketcham of his subscription by the transfer of the Holloway merchandise.

The action was brought to trial before Judge Adams in the Essex Circuit and the only defense relied upon was that William S. Ketcham, the decedent, had satisfied his subscription either in cash or by the transfer of the Holloway merchandise and that therefore his estate was not liable.

At the end of the defendant's case the trial judge directed a verdict for the defendant, (page 50).

The assignment of errors (page 51) is based on this action of the trial judge.

## I.

### *THE DECREE IN CHANCERY.*

The action is based on a decree of the Court of Chancery made June 9, 1903, (page 70).

This decree was the result of a hearing before a Vice-Chancellor on a petition, answer and replication (page 62 and following) in accordance with the practice laid down by this court in *Cumberland Lumber Co.* v. *The Clinton Hill Lumber and Manufacturing Company,* 12 Dick. 627.

In accordance with that practice the Court of Chancery took an accounting of all the assets of the insolvent corporation and of all its liabilities, ascertained the amount of unpaid subscriptions and who were the parties to be assessed directed the amount to be assessed against them, having also ascertained the number of shares of stock which they held. There was a clear ascertainment of the fact that 60 per cent. of the several subscriptions remained unpaid, (page 71, l. 22).

Under the authority of *Hood* vs. *McNaughton,* 25 Vr. 425, and *Clevenger* v. *Moore,* 42 Vr. 148 this decree can not be attacked when sued upon in the common law action. The only excuse for a defense is the so-called reservation at the end of the decree on page 74 in these words:

> "This order is made however, without prejudice to the rights of any person named in said petition or in this order to any defense which they may have to any action legal or equitable which may be brought against them on such alleged stock subscriptions."

This form of reservation seems to have been invented in *Baraklow* v. *Totten,* 8 Dick, 573.

Plaintiff in error submits that this reservation must have no force because it reserves the whole cause of action and the whole defense. If it should be thought to have any force whatever it must be only a reservation of such defenses as arose since the date of the decree, which the defendant would have under any circumstances. If it is a reservation of all defenses from the beginning then the decree has no force whatever. All the questions are open to inquiry in the common law action. There must be in the common law action a trial *de novo* of all the matters mentioned in the petition, answer and decree. Such a trial would require in the action at law new proof of everything that was in issue before the Court of Chancery. It would require a new ascertainment of the indebtedness of the corporation, a new and independent ascertainment of its liabilities and a submission to the jury of the amount of the assessment or whether any assessment should be made at all. The Court of Chancery by its decree says in effect—we will ascertain the debts of this corporation, its liabilities, who its stockholders are, what assessment is necessary to pay the creditors, whether any of them are to be omitted from the assessment, whether they have fully paid or not; but when we shall have done all this it shall not be binding on anybody, either party may go over all the facts again in an action at law. Thus the litigation which is contemplated, and in fact deemed necessary, in the case of *Cumberland Lumber Company* v. *Clinton Hill Company*, 12 Dick. 627, goes for nought.

The scheme devised in *Barkalow* v. *Totten* (8 Dick. 573) seems to plaintiff in error to have been completely overruled by this court in *Cumberland Lumber Company* v. *Clinton Hill Company*, 12 Dick. 627, above referred to. There (page 629) Mr. Justice Dixon says:

> "The proper tribunal to ascertain the amount necessary for these purposes is a court of equity since courts of law have no procedure adapted to the marshalling of assets and liabilities requisite in such a calculation. The ascertainment may be made on a petition filed by the receiver against the stockholders in the suit wherein the corporation was adjudged to be insolvent, for it seems to be settled that a stockholder is so far an integral part of the corporation that in the view of the law he is to that extent privy to those proceedings, and when in such a suit and assessment of the stock has been ordered by the court to meet corporate liabilities and an action is brought against a stockholder to collect his quota, he cannot there question the propriety of the assessment."

If the inquiry in the Court of Chancery is not conclusive why make it at all?

Observe what the issues on the petition in this cause were: Amount of assets, amount of debts, amount of unpaid subscriptions, parties liable, proportionate liability, proportion of cash to be raised, purposes for which the same are raised. The defendant below had an opportunity in that case and at that time to litigate every possible question which could arise.

The 6th, 7th and 8th paragraphs of the petition (page 58) tender the issue now insisted upon by the defendant below in the common law action and that portion of the decree which is printed on page 71, line 10, and page 74, line 10, and final adjudications thereon.

If this decree has the force that is attributed to it by the receiver, then it was a mistake for the trial judge to order a verdict for the defendant below, rather should have it been ordered for the plaintiff as on a decree which could not be questioned.

In *See* v. *Heppenheimer,* 61 Atl. Rep., 843, 860, 861, Vice Chancellor Pitney deals with the question of procedure, and it would seem in a case like this, where the stockholders can be reached in our own state, that the collection of unpaid subscriptions ought to be a matter of equitable cognizance, and that receivers ought not to be driven, as they are by *Barkalow* v. *Totten,* into almost endless litigation.

## II.

## *THE TESTIMONY.*

On the evidence adduced by the witnesses I do not hesitate to say that there were facts which should have been submitted to the jury. There was a subscription, the stock certificates made by the Secretary, the meetings of the Board of Directors, the corporate action authorized thereat, the levying of the assessment, the finding of the Court of Chancery in relation to the payment thereof. All these things point to the conclusion that it was understood at the time that the Holloway lumber paid, or was meant to pay, 40 per cent. of the subscriptions of all the shareholders.

It is evident that the receiver, in order to prove his case, was obliged to rely largely upon the testimony of the stockholders, whom the Court of Chancery held to be assessable, and, on account of the dangerous character of this kind of testimony, the evidence in the case is perhaps somewhat scrappy. William S. Ketcham, Jr., against whom an assessment was collected, was relied upon largely, in the manner in which he gave his testimony indicates that he concealed more than he told. However, even he says, at the very end of the case, page 49, that there was never any meeting of the stockholders or directors of the Clinton Hill Lumber & Manufacturing Company after February 6th, 1893, and that there

was never any payment whatever of the 40 per cent. assessment. If it is true that there was never any payment of the 40 per cent. assessment, then these stockholders are certainly liable to creditors, not only for the 60 per cent. which was adjudicated against them in the Court of Chancery, but for the full amount of their original subscriptions, in which event the defendant in this case would certainly be liable for the assessment made against him, and this last statement of this witness raised a question of fact which should have been submitted to the jury.

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## New Jersey Court of Errors and Appeals.

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| THOMAS N. McCARTER, Receiver, vs. GEORGE W. KETCHAM, Administrator. | On Writ Of Error. |

New Jersey, ss.:

The State of New Jersey to the Judges of The [L. S.] Essex County Circuit Court, Greeting.

For as much as in the record and proceedings and also in the giving of judgment in a certain action which was in the Essex County Circuit Court, between Thomas N. McCarter, Receiver of The Clinton Hill Lumber and Manufacturing Company, plaintiff, and George W. Ketcham, Administrator of the Estate of William S. Ketcham, defendant in an action upon contract, manifest error has intervened to the damage of the said plaintiff as it is said: We being willing that the said error, if any, should be corrected and justice done to the parties aforesaid command you that the said judgment you do distinctly and openly send under your seal together with the record and proceedings thereon and all things touching the same, to our judges

of our Court of Errors and Appeals in the last resort in all causes at Trenton, on the First Tuesday in September next, together with this writ that the same being inspected, we may cause to be further done thereon what of right and law ought to be done.

Witness our Chancellor and President Judge of our said Court of Errors and Appeals, this 16th day of August, Nineteen Hundred and Six at Trenton.

S. D. DICKINSON,
Clerk.

Coult, Howell & Smith,
Attorneys.

State of New Jersey, }
County of Essex, } ss.:

I, Frederic Adams, Circuit Court Judge, sitting in Essex County, New Jersey, do hereby certify and return to the Court of Errors and Appeals, the court of last resort in all cases in this state, the judgment, record and proceedings, together with all things touching and concerning the same as by the within writ to me directed, I am commanded.

Witness my hand and the seal of said Court
[L. S.] and County, this 25th day of August, A. D., 1906.

FREDERIC ADAMS,
Circuit Court Judge.

ESSEX COUNTY CIRCUIT COURT.

Pleas before the Judge of the Circuit Court, holden at Newark, in and for the County of Essex, of the 24th day of November, A. D., 1904.

Arthur Horton, Clerk.

Essex County, ss.:

George W. Ketcham, Administrator of the estate of William S. Ketcham, Sr., the defendant in this suit, was summoned to answer Thomas N. McCarter, Jr., Receiver of the Clinton Hill Lumber and Manufacturing Company, in an action upon contract, and thereupon the plaintiff, by Coult Howell and Ten Eyck, his attorneys, complains:

For that whereas, heretofore, to wit, on the Twenty-first day of January, eighteen hundred and ninety-three, at Newark in said County, the said William S. Ketcham, Sr., and certain other persons were desirous of associating themselves together as a corporation for the purpose of manufacturing and selling sashes, doors, blinds and all planing mill and carpenters' supplies, and to buy and sell lumber for the benefit of those who should become members of the said corporation, and afterwards, to wit, on the same day and year, in consideration thereof, for the purpose of effecting the said object, the said William S. Ketcham, Sr., with George W. Ketcham, Frank D. Holloway, Edward E. Campfield and William S. Ketcham, Jr., made and subscribed a certain certificate of incorporation wherein and whereby they certified that they did associate themselves into a corporation under the provisions of law, and that they had assumed as the name to designate such corporation, and to be used in its business and deal-

ings, "The Clinton Hill Lumber and Manufacturing Company," and that the place in this State where the business of such company should be conducted was the City of Newark in said County, and that the objects for which said Company was formed were to manufacture and sell sashes, doors, blinds, and all planing mill and carpenters' supplies, and to buy and sell lumber, and that the total amount of the capital stock of said Company was $75,000, divided into 750 shares of the par value of $100 each, and that the said company would commence business with $40,500 divided into four hundred and five (405) shares of the par value of $100 each, and that the names of the stockholders and the number of shares of stock in said corporation held by each were as follows:

| | | |
|---|---|---|
| William S. Ketcham, Sr. | 100 | Shares |
| William S. Ketcham, Jr. | 100 | " |
| Edward D. Campfield | 100 | " |
| Frank D. Holloway | 100 | " |
| George W. Ketcham | 5 | " |

and that the said company would commence business on the Twenty-third day of January, Eighteen Hundred and ninety-three and terminate on the Twenty-third day of January, Nineteen hundred and forty-three, as by the said certificate of incorporation now on record in the office of the County Clerk of said County, reference being hereunto had, will more fully and at large appear.

And the plaintiff avers that the said William S. Ketcham, Sr., at the time of subscribing to the said certificate of incorporation set opposite to his name, thereto subscribed, the number of one hundred shares of the capital stock and agreed to pay therefor in cash at their par value whenever thereunto lawfully required, and that the said certificate of incorporation being so made as aforesaid, afterwards, to wit, on the same day and year, in con-

sideration thereof and of the aforesaid premises, the said William S. Ketcham, Sr., undertook and then and there faithfully promised the said corporation to perform and fulfill the agreement contained in the said certificate of incorporation in all things on his part and behalf to be performed and fulfilled, and although the said corporation has from the time of the making and execution of the said certificate of incorporation well and truly performed and fulfilled the same according to the tenor and effect, true intent and meaning thereof, and although four hundred and five shares of the capital stock of said company were subscribed for at the time of the subscription of the said William S. Ketcham, Sr., and although the said corporation, relying upon the subscription of the said William S. Ketcham, Sr. and said other persons, did make large purchases of merchandise and lumber and did enter into contracts and subject itself to liabilities to a large amount, to wit, the sum of six thousand dollars, yet the plaintiff says that the said William S. Ketcham, Sr. did not perform and fulfill the part of the said agreement so made by him in the said certificate of incorporation and did not and has not paid the said corporation the amount of the said subscription.

And the plaintiff avers that subsequently to the said subscription and the organization of the said corporation the said William S. Ketcham, Sr. departed this life intestate and that thereupon the defendant George W. Ketcham was appointed administrator of the estate of the said William S. Ketcham, Sr. and he qualified therefor and took upon himself the burden of the administration of the effects of the said William S. Ketcham, Sr., and from thence hitherto has acted and is now acting as such administrator.

And the plaintiff avers that prior to the ninth

day of April, Eighteen Hundred and Ninety-five, the said corporation became insolvent and suspended its ordinary business for want of funds to carry on the same and that thereupon the Cumberland Lumber Company and other creditors of the said corporation filed their bill of complaint on the day and year last aforesaid in the Court of Chancery of this State, alleging among other things, that the said company had become insolvent and had suspended its ordinary business for want of funds to carry on the same, and praying that a receiver might be appointed with full power and authority to demand, sue for, collect receive and take into his possession all the goods and chattels, rights and credits, moneys and effects and other assets of the said corporation for the benefit of the creditors of the said corporation, and that thereupon, and on the Thirteenth day of May, Eighteen hundred and ninety-five, the said Court of Chancery made an order in the said cause adjudging that the said corporation has suspended its ordinary business and was insolvent and appointing the plaintiff receiver thereof, with full power to demand, sue for, collect, receive and take into his possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books and papers, choses in action, bills, notes and property of every description belonging to the said corporation at the time of its suspension of business, and to do and perform all the duties imposed upon him and required by law as such receiver and that he should take the oath prescribed by law and give bond to the Chancellor in the sum of Five Thousand dollars, conditioned for the faithful performance of his duties to be approved by one of the Masters of said Court.

And the plaintiff avers that he accepted such appointment, took the oath required by law and

executed and filed in the Court of Chancery the bond required by the said order the same having been first approved by a Master in Chancery, and that the plaintiff thereupon became qualified to act as such receiver and took upon himself the burden of the administration of the estate of the said insolvent corporation.

And the plaintiff avers that in the month of November, Eighteen Hundred and Ninety-nine, upon notice to the said defendant the plaintiff made in due form of law a representation to the said Court of Chancery that claims against the said corporation aggregating Thirty-five Hundred Dollars, or thereabouts, had been presented to him and had been duly proved before him and had been allowed by him as such receiver and that he as such receiver had no money belonging to the said corporation from which he could obtain money with which to pay the said claims and prayed that he might have the aid and direction of the said Court of Chancery and be allowed to levy an assessment upon the said defendant, as administrator of said William S. Ketcham, Sr., and the other incorporators and stockholders of the said corporation requiring them to pay to the plaintiff as such receiver the amount of their said several subscriptions to the capital stock of the said corporation remaining unpaid, and that the plaintiff should be allowed to bring actions to recover the money so assessed, to the end that the same might be applied under the directions of the said Court to the payment of the debts of the said corporation, and that on the ninth day of June, nineteen hundred and three, the Court of Chancery by its decree bearing date on that day, ordered, adjudged and decreed that the plaintiff as such receiver be and he thereby was directed and authorized to call and collect the sum of Six Thousand three hundred and forty-four dol-

lars and ninety-seven cents, with interest, from the said defendants George W. Ketcham, George W. Ketcham, Administrator of the Estate of William S. Ketcham, Sr., and William S. Ketcham out of their respective subscriptions as incorporators and stockholders of the Clinton Hill Lumber and Manufacturing Company which had not been fully paid up, but not to exceed Sixty per cent. thereof and to enforce payment of such assessment and collect by suit, if necessary, against each of the above-named delinquent subscribers and stockholders of the said corporation.

And the plaintiff avers that in pursuance of the said decree, he as such receiver, made an assessment against the said George W. Ketcham, Administrator of the Estate of William S. Ketcham, Sr., of the sum of Three thousand and ninety-five dollars ($3,095) on the seventeenth day of July, nineteen hundred and three, and that on the twenty-third day of July, nineteen hundred and three, he notified the said defendant that he had levied such an assessment upon him as administrator of the Estate of William S. Ketcham, Sr., on the original subscription of the said William S. Ketcham, Sr., to the certificate of organization of the Clinton Hill Lumber and Manufacturing Company, and demanded that the said defendant pay the same within thirty days from the service of that notice upon him.

And the plaintiff avers that by reason thereof the defendant became indebted to the plaintiff as such receiver in the said sum of Six Thousand Dollars, and being so indebted the defendant then and there promised the plaintiff to pay him the said sum of money on request, yet the plaintiff avers that the defendant, intending to injure the plaintiff in this regard, did not nor would perform his said agreement nor his said promises and undertakings but

wholly neglected and refused to pay the same according to the form and effect of the said agreement and of his said promises and undertakings.

For that whereas, also, the defendant heretofore, to wit, on the tenth day of December, eighteen hundred and ninety-five, at Newark, in said County, was indebted to the plaintiff in Six Thousand Dollars, for goods sold and delivered by the plaintiff to the defendant at his request; and in like sum for work done and materials furnished by the plaintiff for the defendant at his request; and in the like sum for money lent by the plaintiff to the defendant at his request; and in the like sum for money paid by the plaintiff for the use of the defendant at his request; and in the like sum for money received by the defendant for the use of the plaintiff; and in the like sum for interest for the forbearance by the plaintiff at the defendant's request of money due and owing from the defendant to the plaintiff, and in the like sum for money due from the defendant to the plaintiff on an account stated between them, and being so indebted, the defendant in consideration thereof, then and there promised the plaintiff to pay him the said several sums of money on request. Yet the defendant has disregarded his said several promises and has not paid the said several sums of money nor any of them, or any part thereof, although often requested so to do, but to do so has hitherto wholly refused and still does refuse to the damage of the plaintiff Six Thousand dollars, and therefore he brings his suit, &c.

COULT, HOWELL & TEN EYCK,
Plaintiff's Attorneys.

And the said defendant George W. Ketcham, administrator of the goods and chattels of William S. Ketcham, Sr., deceased, by Frank E. Bradner, his attorney comes and defends the wrong and in-

jury when, &c., and says that the said William S. Ketcham, Sr., did not in his lifetime undertake or promise in manner and form as the said plaintiff has above thereof complained against him, and of this he, the said defendant puts himself upon the country, &c.

And the said defendant comes and defends the wrong and injury when, &c., and says that he as administrator of the goods and chattels of said William S. Ketcham, Sr., deceased, did not undertake or promise in manner and form as the said plaintiff has above thereof complained against him, and of this he, the said defendant puts himself upon the country, &c.

And for a further plea in this behalf, by leave of the Court for that purpose first had and obtained according to the form of the statute in such case made and provided, the said defendant says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that the said The Clinton Hill Lumber and Manufacturing Company, of which the said plaintiff claims to be the Receiver, was never incorporated and the several persons who signed said certificate mentioned in said declaration, never became a body corporate of the State of New Jersey, and this he, the said defendant is ready to verify, wherefore he prays judgment whether the said plaintiff as Receiver aforesaid, should have his aforesaid action against him.

And for a further plea in this behalf by like leave of the Court for that purpose first had and obtained according to the form of the statute in such case made and provided, the said defendant says that the said plaintiff ought not to have or maintain his aforesaid action against him because he says that on the twenty-fifth day of February, Eighteen hundred and ninety-three, at Newark, in the County of Essex aforesaid the several persons who have sub-

scribed for the stock of said alleged Clinton Hill Lumber and Manufacturing Company, and who at that time were all the stockholders of said Company (the said Frank D. Holloway having before that time surrendered his stock and withdrawn from said company) agreed among themselves to waive and cancel the subscription of said William S. Ketcham, Sr., for the stock of said Clinton Hill Lumber and Manufacturing Company, and then and there all of the stockholders of said Company released the said William S. Ketcham, Sr., of and from any liability to perform his said subscription and cancelled the said subscription, and that at the time last mentioned the said Clinton Hill Lumber and Manufacturing Company was not indebted to any person or persons or corporation in any sum of money whatever and this he the said defendant is ready to verify, wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

And for a further plea in this behalf by like leave of the Court for that purpose first had and obtained according to the form of the statute in such case made and provided, the said defendant says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him because he says that the said William S. Ketcham, Sr., in his lifetime to wit, at Newark, in the County of Essex aforesaid, on the twenty-third day of January in the year eighteen hundred and ninety-three, paid to the said Clinton Hill Lumber and Manufacturing Company the whole amount of his said subscription for the stock of said company, to wit, the sum of Ten Thousand Dollars, and this he, the said defendant is ready to verify, wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

And for a further plea in this behalf by like leave of the court for that purpose first had and obtained

according to the form of the statute in such case made and provided, the said defendant says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that the said William S. Ketcham, Sr., in his lifetime, to wit, at Newark, in the County of Essex aforesaid, on the Twenty-third day of January, in the year Eighteen hundred and ninety-three delivered to the said Clinton Hill Lumber and Manufacturing Company a deed of sale of certain goods and chattels of the value of Ten Thousand dollars, which deed of sale was executed by Frank D. Holloway in full satisfaction and discharge of the said subscription of said William S. Ketcham, Sr., for the stock of said Clinton Hill Lumber and Manufacturing Company in the said declaration mentioned, and which said goods and chattels and said deed of sale the said Clinton Hill Lumber and Manufacturing Company then and there accepted and received of and from the said William S. Ketcham, Sr., in full satisfaction and discharge of his said subscription in the said declaration mentioned, and this he, the said defendant is ready to verify, wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c. And for a further plea in this behalf by like leave of the court for that purpose first had and obtained according to the form of the statute in such case made and provided, the said defendant says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because, he says, that the said several supposed causes of action in the said declaration mentioned did not nor did any or either of them accrue to the said plaintiff at any time within six years next before the commencement of this suit in manner and form as the said plaintiff has above thereof complained against him, the said defendant, and this he, the said defendant, is ready

to verify, wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

FRANK E. BRADNER,
Attorney of Defendant.

Therefore let a Jury thereupon come before the Judge aforesaid at Newark, aforesaid, the Tuesday of next, who neither, &c., to recognize, &c., because, &c., and the same day is given to the parties here, &c.

At which time, before the Judge aforesaid, at Newark, aforesaid, came the parties, aforesaid, by their attorneys, aforesaid, and the Sheriff hath not sent here the writ to him in this behalf directed nor hath he done anything thereupon.

And now at this day, that is to say, the 17th day of April, A. D., Nineteen hundred and Six, until which day the issue as aforesaid joined had been continued before the Judge aforesaid at Newark aforesaid, come the parties, aforesaid, by their attorneys, aforesaid, and the jurors of the jury, of whom mention is before made, being summoned also, who to speak the truth of the matter within contained being chosen, tried and sworn upon their oath, say, they find for the defendant, and so they say all.

Whereupon it is considered that the said plaintiff take nothing by his said writ and that the defendant do go without day, and that the said defendant do recover against the said plaintiff the sum of Thirty-three dollars and fourteen cents, as for his costs and charges by him about his defense in this behalf laid out and expended by the Court, now here adjudged to him with his assent, and that the said defendant have execution thereof, &c.

Judgment signed April 17, 1906. Wm. S. Gummere, Judge.

And the said defendant in Mercy, &c.

ESSEX CIRCUIT COURT.

Monday, April 16, 1906.

| | | |
|---|---|---|
| THOMAS N. McCARTER, Receiver, | | |
| vs. | | On Contract. |
| GEORGE W. KETCHAM, Administrator. | | |

Before—Hon. FREDERIC ADAMS, J., and a Jury.
For Plaintiff appear COULT & HOWELL.
For Defendant appear FRANK E. BRADNER and Chandler W. Riker.

Mr. Howell opens for plaintiff.

WILLIAM S. KETCHAM, JR., sworn in behalf of plaintiff:

Direct-examination by Mr. Howell:

Q. Mr. Ketcham, you are a resident of Newark? A. Yes, sir.

Q. And you were once concerned with a so-called corporation named the Clinton Hill Lumber & Manufacturing Company? A. Yes, sir.

Q. Do you remember the signing of a certificate of incorporation for that company? A. Yes, sir.

Q. Where was that signed by you? A. In Lawyer Macdonald's office.

Q. In Newark? A. Yes, sir.

Q. Who signed it besides yourself, if anybody?

Mr. Riker: One moment. Preliminary to making an objection to Mr. Ketcham's competency as a witness, I would like to ask him a question, whether, in signing the cer-

tificate, there was any number of shares stated as being held by him in the certificate.

Mr. Howell: Well, I suppose that is a matter of cross-examination, not this sort of a preliminary cross-examination, but a cross-examination in full.

Mr. Riker: I wish to make objection to the competency of Mr. Ketcham as a witness, on the ground that he is a party to the suit, suing an Administrator; that the Receiver in this suit is the corporation, and he is the creditors, and he is the stockholders, and that, therefore, Mr. Ketcham is a plaintiff in the suit, in the eyes of the law, suing an Administrator, and is incompetent as a witness.

Mr. Bradner: He is incompetent to testify to any transaction with or statement made by the testator. I suppose that the object of this question would be to ask who signed it. That would be a statement made by the testator—proving the signature of a deceased person. I do not think he is a competent witness.

The Court (After discussion): I think that he is not a party to the suit within the meaning of the Evidence Act, and I, therefore, overrule your objection.

Exception by defendant.

(Question read.)

A. I signed it myself; I think the others can answer for themselves.

Q. What do you mean by answering me in that way? Don't you know who signed this paper? A. I signed it; that is all I have got to say.

Q. Did anybody else sign it? A. They may have done it.

Q. Don't you know that somebody else signed it? A. I don't know positively.

Q. Have you not testified here this morning in the other case that your father signed it? A. I said that they were present there; I don't recall whether they signed it or not.

Q. Didn't you say in the former case that your father signed—the case that was tried here inside of two hours? A. I don't think I saw the paper after I signed it myself.

Q. Do you remember being sworn in a case brought by this same Receiver against yourself a term or two ago in this Court? A. I do.

Q. Do you remember the testimony that you gave then? A. Well, I can recall some of it, perhaps.

Q. Do you remember whether this question was asked: "Who signed the paper in Mr. Macdonald's office?" And you answered, "My father"? Do you remember that?

Objected to as cross-examining plaintiff's own witness; objection overruled; exception by defendant.

(Question read.)

A. I don't recall it now.

Q. And then do you remember being asked: "What is his name?" and you answered, "William S. Ketcham"?

Objected to as improper direct-examination, as leading and as putting words into the witness' mouth; objection overruled; exception by defendant.

Q. I show you what purports to be a copy of a certificate of incorporation of the Clinton Hill Lumber & Manufacturing Company (shown to witness), and ask you if you ever saw the original paper of which that is a copy? A. I presume I did, if that is a copy of it.

Q. Do you observe that the name "William S. Ketcham" appears to be signed at the bottom of that paper as shown by that copy? A. This?

Q. That. A. They are all typewritten here.

Q. You find William S. Ketcham's name, do you not? A. Yes, sir; they are all typewritten.

Q. Who is that William S. Ketcham? A. My father.

Q. And is he the gentleman of whose estate George W. Ketcham is Administrator? A. Yes, sir.

Q. What became of the original paper which purported to be a certificate of incorporation of the Clinton Hill Lumber & Manufacturing Company after you signed it? A. Mr. Macdonald had it; I don't know what he did with it.

Q. Did it ever come into your possession again? A. I don't think it did; I understand it was destroyed after that, when the company did not go on.

Q. Who destroyed it? A. I don't recall whether Mr. Macdonald did or not. I told him not to go on any further—

Mr. Howell: Never mind that. I move to strike that out; that is not responsive to my question.

The Court: Strike it out.

Q. Have you not testified on former occasions, and more than once, that you destroyed that paper yourself? A. I don't recall saying I destroyed it; I recall saying it was destroyed. I don't think I said who.

Mr. Howell: Now, if the Court please, I offer in evidence this copy of the certificate of incorporation.

Mr. Riker: I object. I do not think there has been any proper proof that this is a copy of a paper signed by William S. Ketcham, Sr. "William S. Ketcham" is the name here.

What does appear is that there was some paper signed, whether by William S. Ketcham or not, this witness is unable to state, and he presumes that this is a copy. Now, I submit that that does not prove that it is a copy of any paper that was signed by William S. Ketcham.

The Court: I overrule your objection and I will receive the paper that is offered as an exhibit.

Exception by defendant.

Paper referred to is marked Exhibit P1.

Mr. Howell: I call upon the other side to produce the minutes of the corporation.

(Produced by defendant's counsel.)

Q. Now, Mr. Ketcham, after you signed this certificate of incorporation of the Clinton Hill Lumber & Manufacturing Company was there ever a meeting of the incorporators? A. Yes, sir.

Q. Where was that held? A. In Macdonald's office, I believe.

Q. Was it held at the time of the signing or afterwards, or don't you remember? A. The same time, I think.

Q. I show you a paper dated January 23, 1893, and ask you if you know what that is (shown to witness)? A. Yes, sir; that is the minute that I wrote at that time.

Q. That is in your handwriting? A. Yes, sir.

Q. Well, the first page appears to be minutes of the stockholders or incorporators. What is the second page? A. Directors' meeting, it says.

Q. Was your father, William S. Ketcham, Sr., present at this meeting? A. Yes, sir.

The Court: There are two meetings; which one do you refer to?

Mr. Howell: The stockholders' meeting.

Q. Was he present also at the meeting of the directors held on the same day? A. Yes, sir.

Mr. Howell: I offer in evidence the minutes which the witness has proved.

Marked Exhibit P2.

(Plaintiff's counsel reads Exhibit P2.)

Q. Did you see the bill of sale that this minute refers to on that occasion? A. I may have seen it. Mr. Macdonald had charge of all the papers.

Q. Well, look at this instrument which I show you, and I will ask you if that is the bill of sale referred to (shown to witness)? A. There is no signature of mine on it, or nothing I had to do with it.

Q. Will you answer my question? A. That is all I can say.

Q. Will you answer my question, please? A. I will answer what I know, nothing more.

Q. (Question read.) A. I don't know anything further about it. There was a bill of sale, I think, drawn up; that is all I recall.

Q. You do not know anything about this one? A. No, sir.

Q. Was this never in your possession? A. I don't think it was.

Q. Didn't you have this recorded in the office of the County Clerk yourself? A. Mr. Macdonald did.

Q. Didn't you do it yourself? A. I don't recall that I did. It is thirteen years ago; that is quite some time.

Q. I show you another paper which purports to be minutes of a corporation, and ask you what that is (shown to witness)? A. That is some writing by Mr. Holloway, I believe.

Q. Is that minutes of the meeting of the stockholders of this corporation? A. I believe it is, so far as I recall—not written by me, that wasn't.

The Court: Is that the first meeting?

Mr. Howell: That is the meeting on February 6th.

I offer this in evidence.

Marked Exhibit P3.

(Plaintiff's Counsel reads Exhibit P3.)

Q. I show you three papers purporting to be certificates of stock, and ask you in whose writing those are (shown to witness)? A. My writing.

Q. Who signed the name "William S. Ketcham, Jr."? A. I did.

Q. Who signed the name "William S. Ketcham, Sr."? A. I did.

Q. Who put on the company's seal? A. I did.

Q. And when did you do all that? A. February 6, 1893.

Q. That is, on the day on which this Directors' meeting was held? A. I presume they were written that same day; it might have been written the day before. Of course, they are dated—

Q. It might have been written the day before? A. Yes; I don't recall just the day.

Q. Well, did you have these papers at the meeting on that day? A. That date, you mean?

Q. Yes, the date of this stockholders' meeting or Directors' meeting, whatever it was, of February 6th? A. Well, I must have had them, if that is the date on the paper; I presume I had them that date.

Q. Yes, they are both dated February 6th. A. I presume I had them that date.

Mr. Howell: I offer these in evidence as one exhibit.

Mr. Bradner: We object to them as being merely acts of this witness, not any act of the defendant and not corporate acts.

The Court: I will admit them.

Exception by defendant.
Marked Exhibit P4.
(Plaintiff's counsel reads Exhibit P4.)

At one o'clock P. M., the Court took a recess of one hour.

After recess.

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WILLIAM S. KETCHAM, JR., resumes the stand in behalf of plaintiff:

Direct-examination (continued) by Mr. Howell:

Q. Now, Mr. Ketcham, was it before or after February 6th that the original certificate of incorporation was destroyed? A. I think it was after that, as I understand.

Q. Well, how soon after? A. Well, I guess pretty soon after that, because that date was the culmination of our failure to—

Q. Now, you have answered the question. You think it was pretty soon after February 6th? A. Yes.

Q. Well, I observe at that meeting on February 6th, you and Mr. Campfield were appointed a committee to dispose of—the minutes provide that "On motion, William S. Ketcham, Jr., and Edward E. Campfield were appointed to take temporary charge of the affairs of the company until the next meeting of the Board of Directors." Did you and Mr. Campfield do anything in pursuance of that authority? A. No, sir; there was nothing to be done, that I recall.

Q. Well, there was a stock of lumber in this yard of the company, was there not, up on Jeliff Avenue? A. Yes, sir.

Q. What became of that? A. Well, I sold that for my father.

Mr. Bradner: How is that relevant?

Mr. Howell: It shows what became of the company's property.

Mr. Bradner: We object to it because it is not relevant to any issue in this case—what became of the company's property.

The Court: I conceive that the line of inquiry might throw light on the question whether the corporation was a *de facto* corporation.

Mr. Howell: That is the point of it.

The Court: I overrule your objection.

Exception by defendant.

Q. Did you get money for it? A. Yes, sir.

Q. To whom did you pay the money?

Mr. Bradner: That is objected to.

The Court: I will allow it.

Mr. Bradner: He says that he sold some lumber on his father's account. It is not shown that it was the lumber of the corporation even.

Mr. Howell: I expect to show it by the next witness.

The Court: So far, that is all that appears. I will not stop Mr. Howell in developing this side of his case. He cannot do it all at once.

(Question read.)

A. Well I would like to preface what I am saying—

Q. Mr. Ketcham, please answer my question. A. Well, I want to get at the truth of the thing; I don't want to twist it and I don't intend that it shall be.

Q. The question is to whom you paid the money. Now, the truth about that is within your own knowledge; let us have it. A. This was months

after the company was disbanded—had no connection with the company at all.

Q. Well, will you answer my question, please?

The Court: To whom was the money paid? That is the question, and that is a question that is susceptible of a direct answer, if you remember.

A. The money was paid to my father or on his account, or notes that he had.

Mr. Bradner: It is understood that this evidence is objected to also on the ground that he is a party to the suit, and is testifying to a transaction with the testator.

The Court: I will rule on that objection the same as I did before, and give you the same exception.

Exception by defendant.

Q. Mr. Ketcham, attached to the minutes of February 6th is a paper, which I will show you (shown to witness). Please read it? A. Read it, you say?

Q. Yes, read it to yourself, so that you know what it is. A. (After examining paper.) Yes, sir.

Q. Was that paper produced at that meeting of February 6th? A. I don't remember whether Mr. Holloway verbally resigned and wrote that afterwards or at that time; I don't recall it.

Q. Well, this, somehow or other, came into your possession as Secretary of the company, did it not? A. Yes, sir.

Mr. Howell: If the Court please, that is Mr. Holloway's resignation as Secretary and Director of the company, on February 6th; it is the same paper that is referred to in the minutes. I offer that in evidence.

Not marked.

Cross-examination by Mr. Bradner:

Q. Mr. Ketcham, did you ever give this paper purporting to be a certificate of one hundred shares of stock, made out to your father, to your father? A. No, sir.

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ROYALSTON A. TOMPKINS, sworn in behalf of plaintiff:

Direct-examination by Mr. Howell:

Q. You are employed in the office of the Clerk in Chancery, in Trenton? A. Yes, sir.

Q. Have you produced here the files in the case of Striebe, Sprague & Company against the Clinton Hill Lumber & Manufacturing Company? A. Yes, Jonathan F. Striebe against the—

Q. Striebe and others? A. Yes, sir (producing papers).

Q. This is the bundle? A. That is the bundle.

Mr. Howell: Out of this bundle, if the Court please, I offer the bill of complaint, filed March 18, 1903. That shows, if the Court please, that the Clinton Hill Lumber & Manufacturing Company was the sole defendant.

Then I offer in evidence the answer of the Clinton Hill Lumber & Manufacturing Company, filed in that case on May 16th, 1893.

I offer in evidence also the final decree made in that case, which was filed on November 16, 1893; and also the remittitur from the Court of Appeals, showing that the defendant appealed and that there was an affirmance of the decree.

The Court: We will not mark those papers.

Q. Now, Mr. Tompkins, will you also produce the files in the case of the Cumberland Lumber Company against the Clinton Hill Lumber & Manufacturing Company? A. Yes, sir (producing papers).

Q. This is the bundle? A. Yes, sir.

Mr. Howell: Out of that bundle, if the Court please, I offer, first, the bill of complaint, filed April 9, 1895, which is an ordinary bill for the administration of the affairs of an insolvent corporation;

Second, an order to show cause why a Receiver should not be appointed;

Third, an order appointing a Receiver, dated May 13, 1895;

Fourth, the Receiver's oath and bond;

Fifth, a petition of appeal to the Court of Chancery appealing from the determination of the Receiver in allowing the claim of Striebe, Sprague & Company and another claim in favor of the Cumberland Lumber Company—the petition being filed by William S. Ketcham, William S. Ketcham, Jr., and George W. Ketcham, on July 14, 1895;

Sixth, a similar petition of appeal by Edward E. Campfield;

Seventh, an order made by the Court of Chancery sustaining the decision of the Receiver and directing that his determination be affirmed and that these two claims should stand as valid claims—that order being dated October 30, 1895;

Eighth, an order to limit creditors, dated April 11, 1899;

Ninth, an order barring creditors, dated May 23, 1899;

Tenth, the Receiver's petition, asking leave to make an assessment against these stockholders, filed November 9, 1899;

Eleventh, a rule to show cause, made on that petition on November 9, 1899, requiring William S. Ketcham, Jr., Edward E. Campfield, George W. Ketcham, Frank D. Holloway and George W. Ketcham, as Administrator, of the estate of William S. Ketcham, to show cause why the prayer of the petition should not be granted;

Twelfth, an order, without date, but filed November 15, 1899, continuing this order to show cause;

Thirteenth, an order, dated December 27, 1899, requiring George W. Ketcham, individually and as Administrator of William S. Ketcham, deceased, Edward E. Campfield and William S. Ketcham, Jr., to file their answer within thirty days, and directing that the hearing be brought on at the Chancery Chambers;

Fourteenth, an answer filed to the Receiver's petition by George W. Ketcham, as Administrator of the estate of William S. Ketcham, Sr., and individually, and William S. Ketcham, Jr.

Fifteenth, a replication to that answer;

Sixteenth, a stipulation, first, that Edward E. Campfield signed and properly executed the certificate of incorporation of the Clinton Hill Lumber & Manufacturing Company, and, second, that he is in such mental condi-

tion that he cannot be examined as a witness;

Seventeenth, a final decree directing the assessment to be made, dated June 9, 1903;

Eighteenth, a paper withdrawing the claim of the Cumberland Lumber Company.

Mr. Bradner: I would like to have Mr. William S. Ketcham, Jr., identify that answer as sworn to by him, and then we can use the copy.

Mr. Howell: I will agree to that, that the answer was sworn to by William S. Ketcham, Jr. It is printed in the book that way, is it not? Yes.

(Mr. Howell reads the answer referred to.)

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FRANK D. HOLLOWAY, sworn in behalf of plaintiff:

Direct-examination by Mr. Howell:

Q. Mr. Holloway, were you one of the persons who signed the certificate of incorporation of the Clinton Hill Lumber & Manufacturing Company? A. I was.

Q. Where was it signed? A. In the office of Mr. Macdonald.

Q. Who signed it in your presence besides yourself? A. William S. Ketcham, Sr., William S. Ketcham, Jr., and Edward E. Campfield.

Q. Do you know what became of the paper after it was signed? A. I know nothing of it.

Q. The minutes of the corporation, which are in evidence, refer to a bill of sale made by you to the company. I show you a document, and ask you if that is the document (shown to witness)? A. That is.

Q. Where was "all the stock of lumber now in the yard of Frank D. Holloway & Company and in course of shipment?" A. Corner of Jelliff Avenue and Rose Street.

Q. Where was this "lease of premises corner of Rose Street and Jelliff Avenue" that is spoken of here? A. Corner of Rose Street and Jelliff Avenue.

Mr. Howell: Do you want me to prove this signature?

Mr. Bradner: I do not care.

Mr. Howell: I will offer this bill of sale in evidence.

(Marked Ex. P5.)

Q. When this bill of sale was delivered, do you know who took possession of the property mentioned in it? A. Clinton Hill Lumber Company.

Q. And do you know what became of the property? A. It was sold.

Q. Who sold it? A. William S. Ketcham, Jr.

Q. The witness who has been sworn here to-day? A. Yes, sir.

Cross-examination by Mr. Bradner:

Q. Mr. Holloway, you say that the company took possession of the property transferred to it by the bill of sale? A. Yes, sir.

Q. Mr. William S. Ketcham, Jr., was the Secretary of the company, was he not? A. He was.

Q. And the Treasurer? A. No, I am mistaken about that, he was Treasurer and I was Secretary at that time.

Q. But after you resigned he was made Secretary? A. Yes, that is right.

Q. Mr. Ketcham, Jr., and Mr. Campfield were appointed to take charge of the affairs of the company; you remember that, do you? A. Yes.

Q. Well, is it not a fact that they carried on the

business at this lumber yard for the company? A. That I couldn't say, that they did.

Q. Well, have you not in a previous case testified that goods were sold there by this company? A. That might have been; it is a good many years ago.

Q. I refer to your testimony given in a hearing before Vice-Chancellor Emery, on March 30, 1900, in which you were asked the question: "Who took possession of it?"—referring to the property mentioned in this bill of sale—"What was done with it? What became of it?" and you answered: "The Clinton Hill Lumber Company took absolute possession of it." A. That is what I said.

Q. That is the fact, is it? A. That is a fact.

Q. What was the approximate value of that property? A. That has gone by.

Q. What is that? A. That has gone by; I can't remember that.

Q. You cannot remember? A. No.

Q. On this occasion, too, when you testified, you were asked the question: "What was its approximate value as property?" and you answered: "In the neighborhood of $15,000, as near as I can remember." Is that right? A. Well, if I said that at that time, that must have been correct.

Q. That was correct. This is the bill of sale, Exhibit P5, that you signed (shown to witness)? A. Yes, sir.

Q. It recites that "Being the goods and chattels described and mentioned, being all the stock of lumber now in the yard of Frank H. Holloway & Company or in the course of shipment, the lease of premises, good-will, accounts receivable, fixtures, and everything appertaining to the business of the said Frank D. Holloway & Company." Were those articles mentioned there in your possession at the time you made the bill of sale? A. They were.

Q. Stock of lumber in the yard? A. Yes.

Q. Fixtures there? A. Yes.

Q. You had the lease of the premises? A. Yes.

Q. And your recollection now is that all this property was worth at least $15,000? A. Yes.

Q. Do you recall what the lumber itself was worth? A. No, I do not.

Q. Well, about how much? A. Why, I think in the neighborhood of $10,000, something like that.

Q. You were present at the meeting of the Directors on January 23, 1893, were you not? A. I was.

Q. The minute recites that "A bill of sale was made by Mr. F. D. Holloway to the company, said bill of sale representing what Mr. Holloway owed Mr. Ketcham, and to be issued in stock by the company to Mr. W. S. Ketcham." Do you know whether the bill of sale that has been shown to you is the same bill of sale referred to in that minute? A. That is.

Q. At the time you were indebted to Mr. Ketcham, were you not? A. I was.

Mr. Howell: This is a matter, if the Court please, concerning which he was not asked on his direct-examination, and it scarcely seems to be cross-examination.

Mr. Bradner: The bill of sale was offered in connection with the minutes, and the consideration expressed in the bill of sale is One dollar.

Mr. Howell: I do not object to your going that far.

Q. What was the real consideration for that bill of sale, Mr. Holloway?

Mr. Howell: I do not think that is important in this case.

(Question withdrawn.)

Q. Was not the real consideration for the bill

of sale the consideration as stated in the minute adopted by the Directors? A. Whether that is the real consideration?

Q. Yes. A. No, it is not—it was not.

Q. Was the real consideration stock to be issued to Mr. Ketcham, Sr., and to you for the property? A. Partly.

Q. Partly? A. Yes.

Q. Was it a fact that Mr. Ketcham was to have stock to the extent of the amount of his claim against you? A. He was.

Q. If the propery was worth that much? A. He was.

Q. The balance of the value of the property was to be issued to you in stock, was it not? A. No, sir.

Q. That is not the fact? A. No.

Q. You had been borrowing money from him, had you not, for some time?

Mr. Howell: I object to this line of examination, if the Court please; I think it is entirely immaterial and irrelevant to the issue in this case.

The Court: I suppose it has thus far been introduced for the purpose of explaining the minutes on January 23d in connection with the bill of sale. Beyond that I do not see that it is cross-examination.

Mr. Bradner: I think we have a right to go into the consideration of that bill of sale very fully.

Mr. Howell: That is not one of the issues raised by the pleadings.

The Court: You offered the bill of sale as tending to show that the corporation was a corporation *de facto* and did business.

Mr. Howell: And for that purpose only.

The Court: Now, that being so, how can

the Court restrict the inquiry into the nature of that transaction? I do not see how I can limit counsel. You may proceed.

Q. You borrowed notes from Mr. Ketcham, did you not? A. Yes, sir.

Q. You borrowed his notes and had them discounted? A. Yes, sir.

Q. Now, I show you twelve notes; look at them, and tell me whether they are notes made by William S. Ketcham and indorsed by you (shown to witness)? A. Yes, sir.

The twelve notes referred to are marked D1 for identification.

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SAMUEL J. MACDONALD, sworn in behalf of plaintiff:

Direct-examination by Mr. Howell:

Q. Mr. Macdonald, you are a counsellor-at-law, practicing in this city? A. Yes, sir.

Q. Do you know William S. Ketcham, Jr.? A. Yes, sir.

Q. And did you know his father, William S. Ketcham, Sr.? A. Yes, sir; I did.

Q. Do you remember having to do with the organization of a corporation for them, called the Clinton Hill Lumber & Manufacturing Company? A. I do.

Q. Where was that done? A. In my office, which was then in the Prudential Building in this city.

Q. Who drew the form of certificate? A. I presume that I did.

Q. Do you remember whether it was signed in your presence? A. Yes, sir; it was; I think, if I remember right, that I took the acknowledgment.

Q. Do you remember who signed it? A. It was

signed by the old gentleman, it was signed by William S., Jr., by George W. Ketcham, by Frank D. Holloway and by Mr. Campfield.

Q. All signed in your presence? A. Yes, sir.

Q. By "the old gentleman" you mean who? A. William S. Ketcham, Sr.

Q. Did you have anything to do with the corporation after that? A. I think there were one or two meetings held in my office after that; and I had something to do with the defence of a chancery litigation after that.

Q. Well, you filed the answer— A. I filed an answer in the chancery litigation that was brought, if I recollect right, to set aside this bill of sale that has been offered in evidence.

Cross-examination by Mr. Bradner:

Q. Mr. Macdonald, you testified at the last trial, did you not? A. I testified at two or three, I don't know whether it was the last or not.

Q. The bill of sale expresses the nominal consideration of One dollar, do you recall that? A. That is my recollection; yes, sir.

Mr. Howell: He was not asked anything about the bill of sale by me, if your Honor please.

Mr. Bradner: I thought he was.

Mr. Howell: No.

Mr. Bradner: You did not ask him in this case anything about the bill of sale?

Mr. Howell: No.

Witness: I think I mentioned it in one of my answers; in fact, I know I did; I mentioned it. As I recollect, the answer was not exactly responsive; perhaps it is my fault.

Q. Do you remember what the real consideration was for the bill of sale? A. What was told me at the time.

Q. You mean what took place in your presence? A. Yes, among all the parties.

Q. Were you present at the first meeting of the Directors of the company? A. I think so.

Q. The minute of the meeting refers to a bill of sale made by F. D. Holloway to the company. Can you say whether that refers to this bill of sale which you prepared and of which you are the subscribing witness? A. I think it does.

Q. Well, is it a fact that the bill of sale represented what Mr. Holloway owed Mr. Ketcham? A. I don't know whether it is a fact or not, Mr. Bradner, I know that that was the agreement between the parties at the time.

Q. And that was to be issued to Mr. Ketcham in stock? A. That is my recollection, that the entire amount of it was to be issued. I think—well, perhaps I am volunteering.

Q. You prepared the answer to the original bill filed by Striebe, Sprague and others to set aside this bill of sale, did you not? A. Yes, sir.

Q. On behalf of the company? A. Yes, sir.

Q. You received your information in order to prepare that answer, from the officers of the company? A. Yes.

Q. Or from this company? A. Yes.

Mr. Howell: I offer in evidence the claim of Striebe, Sprague & Company.

Marked Exhibit P6.

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WILLIAM A. SMITH, sworn in behalf of plaintiff:

Mr. Howell: I called Mr. Smith for the purpose of proving the service of the notice of assessment, and the other side admit it. It is admitted that a notice of this assessment, signed by Mr. McCarter, the Receiver,

was served personally on George W. Ketcham, Administrator of the estate of William S. Ketcham, Sr., by delivering the same to him personally on the 22d day of July, 1903.

Mr. Bradner: We do not admit that that is an effective assessment.

Mr. Howell: No.

Mr. Bradner: We admit that we received the paper.

Mr. Howell: I offer the notice of assessment in evidence.

Marked Exhibit P7.

Plaintiff rests.

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Defendant's counsel move that plaintiff be nonsuited on the following grounds:

(1) That the assessment purporting to have been made by the Receiver was not an effective assessment, not having been made by order of the Court or reported to the Court, or approved by the Court.

(2) That the plea of payment is completely proved.

Adjourned until to-morrow, Tuesday, April 17, 1906, at ten o'clock A. M.

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SECOND DAY.

Tuesday, April 17, 1906.

Met pursuant to adjournment.

Present—Counsel as before stated.

After argument, the Court said:

ADAMS, J.:

The motion is to nonsuit on the ground

that it clearly appears from the plaintiff's case that the plea of payment is sustained.

I shall deny this motion, for two reasons, one a legal reason and the other a practical reason, if I may so express myself. I think it is not entirely clear, under the evidence, what the consideration was; there seems to be some contradiction. I have not had an opportunity of looking over the testimony, but that certainly is my recollection. And, in the next place, I do not think this case ought to be disposed of on a motion to nonsuit. If I should nonsuit and turn out to be wrong, the suit would have to be brought over again. It is, therefore, better, I think, that the case should go to a definite conclusion, so that there may be an end to the strife—a strife that has lasted, I think, some thirteen years already; and it is about time it was concluded. I, therefore, deny the motion.

Exception by defendant.

Mr. Bradner opens for defendant.

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FRANK D. HOLLOWAY recalled in behalf of defendant:

Direct-examination by Mr. Riker:

Q. Mr. Holloway, I show you twelve notes, which you saw yesterday, and which you identify as notes signed by William S. Ketcham and indorsed by you (shown to witness)? A. Yes, sir.

Q. Did you receive the money on those notes? A. I did.

Q. Were they outstanding notes at the time of making the bill of sale, which is marked Exhibit P5 and dated January 23, 1893? A. I think they were.

Q. They amount to $10,126.77 or thereabouts

(another paper shown to witness)? A. I haven't footed them up; if you have—

Q. Well, that is your memory in regard to it, is it not? A. That is the way it foots up there, it must be.

Q. Who paid those notes? A. William S. Ketcham.

By the Court:

Q. Notes made by Holloway to Ketcham and taken up by Ketcham? A. No, Ketcham to me.

Q. And paid by the maker? A. Paid by the maker.

By Mr. Riker:

Q. And they represented money loaned to you by William S. Ketcham? A. Yes, sir.

Q. For part of the consideration of the bill of sale? A. Yes.

Mr. Riker: I offer the notes in evidence.

(Twelve notes fastened together are marked Ex. D1.)

Mr. Riker: Now, I have a schedule of these notes here, do you mind my attaching the schedule?

Mr. Howell: No.

Mr. Riker: If the Court thinks it is proper, I will attach the schedule of the notes.

The Court: Oh, yes; it is a mere matter of detail.

Mr. Bradner: I made that out, and it is a correct statement of the amounts and dates and total.

Cross-examination by Mr. Howell:

Q. Mr. Holloway, did Mr. Ketcham loan you the money, or did he loan you the money that is rep-

resented by these notes? A. He loaned me the money represented by these notes.

Q. It was not a case, then, of accommodation indorsement— A. No.

Q. —of your notes? A. No.

Q. He gave you the money, the cash? A. He gave me the notes and I had the notes discounted.

Q. The proceeds of the notes went to your credit in your bank, then? A. Yes, sir.

Q. So you did not get the money from him directly? A. Not directly.

Q. You got it from him indirectly? A. Indirectly.

Q. Where were these notes at the time of the attempted formation of this corporation? A. I don't remember whether any of them were due at that time or not.

The Court: The notes will speak for themselves on that subject.

Q. Did Mr. Ketcham have any of these notes in his possession at the time this corporation was organized? A. That I couldn't tell, unless some of them were due and paid by him.

Q. You do not remember? A. I don't remember. The notes will speak for themselves; if they were due at that time they will show on the face of it.

Q. Don't you recall the fact that these notes were not taken up out of the bank by Mr. Ketcham until after this corporation was organized? A. That I couldn't say unless I look at the notes.

Q. Well, look at the notes (shown to witness). Now, remember, the corporation was organized on the 21st day of January, 1893.

Mr. Bradner: Speak from your knowledge of the fact, Mr. Holloway, and not from any inference you draw from the note itself.

Q. The question is Mr. Holloway, whether these

notes had been taken out of the bank by Mr. Ketcham on or before the 21st day of January, 1893? A. There is one that wasn't (indicating).

Q. What? A. Here is one that wasn't, the first one; it wasn't due at that time.

By the Court:

Q. You may mention the date of that note and the amount. A. September 14, 1892, at six months.

Q. What is the amount? A. $1,186.67.

By Mr. Howell:

Q. Now, just take that note. Where did that note go, can you tell? A. The North Ward National Bank discounted it.

Q. That was discounted at the North Ward Bank? A. Yes, sir.

Q. Go on to the next one.

Mr. Bradner: Is that note certified? Is there a certification on it?

Witness: Yes (indicating on paper).

Q. But there is no date to it, is there? A. No date to it.

Q. No date to the certification, no. Well, now about the next one? A. The next note was dated October 7th, at four months; that was not due on the 23d of January.

By the Court:

Q. What is the amount of that? A. $1,000.

By Mr. Howell:

Q. And the next one? A. The next one was dated October 14th, at six months, $750; that was not due. The next one is dated October 18th, at six months, $750; that was not due. The next one is dated October 18th, at four months, $1,000; that was not due. The next one was dated November

28th, four months, $850; that was not due. The next one was dated November 14th, at four months, $755; that was not due. The next one was dated November 28th, at four months, $1,000; that was not due. The next one was dated December 5th, at four months, $773.72; that was not due. Here is one note of a Thousand dollars, dated September 8th, for $1,000, which was due evidently.

By the Court:

Q. What time? A. September 8th.

Q. What is the date of maturity? A. January 8th.

By Mr. Howell:

Q. That one was due? A. That one was due.

Q. How much was that? A. A Thousand dollars. Here is another one, August 19th, $491.38; that was not due. Here is one, July 27th, $580, at six months; that was not due.

Q. Now you have been all over those notes? A. Yes, sir.

Q. And there is only one of them, and that was a Thousand dollar note, that was due at the time this corporation was organized? A. Yes, sir.

Q. Now, can you tell where that note was held (indicating)? A. This one here (indicating)?

Q. Yes, that is the $1,000 note. A. The North Ward Bank.

Q. Do you observe that the bank indorsement or some indorsement on the back has been erased? A. No.

Q. What? A. No, that is only a stamp of the certification mark.

Q. Oh, it went through? A. It is touched onto it somehow or other, I guess.

By the Court:

Q. You say that note was certified? A. That note was certified.

Mr. Howell: Yes, certified by the Newark City National Bank.

Witness: Yes.

By Mr. Howell:

Q. Do you have any knowledge of the time or place or circumstances under which Mr. Ketcham paid those notes—took them up out of the bank? A. No, I have no knowledge of that.

Redirect-examination by Mr. Riker:

Q. Now, as I have understood your testimony, the amount of your indebtedness, stock was to be issued to the amount of these notes—your indebtedness to Mr. William S. Ketcham—and the balance of the lumber was to go to your credit, is that as I understand it? A. No, it was to pay the creditors.

Q. It was to go to the creditors? A. Yes, sir.

Q. The balance? A. Yes, sir.

Q. After paying these notes? A. After paying whatever was due Mr. Ketcham, the balance was to go to the creditors.

Q. And what was due Mr. Ketcham was represented by those notes? A. Yes, sir.

Q. By the notes you have been speaking of? A. Yes, sir.

Q. Some due and some not due? A. Some due and some not due.

By the Court:

Q. Are there any other certifications than the two that you have mentioned? A. I guess they are all certified perhaps.

Q. You say they are all certified? A. I will look

and see. Here is one that isn't, and here is another that isn't (indicating).

By Mr. Howell:

Q. They are all certified by the old City Bank, are they not? A. Yes, sir.

Q. Did you have an account at that bank? A. Yes, sir.

The Court: I understood the witness to say that two are not certified.

Witness: Four are not, but they were paid.

By the Court:

Q. Four are not certified? A. Four.

By Mr. Howell:

Q. Did you have an account in the City Bank? A. Yes, sir.

Q. Were these, then, certified against your account? A. No.

Q. Against whose account? A. William S. Ketcham's

The Court: I do not know that I am enough of a financier to understand this. I know what it is to certify a check. You certify a note by setting apart money in the account to meet it when it comes due, is that the idea?

Mr. Howell: No, that is not quite the idea.

The Court: What does it mean?

Mr. Howell: The notes are not certified until the day when they come due, on the due day; they are presented then by the bank which holds them to the bank at which they are made payable, on the due day, and if the money is there to meet the note—if the

money has been provided to meet the note—the paying bank marks the note certified. That is a very common practice among banks.

The Court: These notes were made payable where, in the North Ward Bank?

Mr. Bradner: No, the City Bank.

Witness: No, sir; they are not made payable at any bank.

Mr. Bradner: Aren't they? I did not notice that. I know he kept an account in the City Bank. (Examines notes.) Well, he was a Director of the City Bank.

By the Court:

Q. Which was the paying bank, if you know? A. The Newark City National Bank paid them.

By Mr. Riker:

Q. That was Mr. Ketcham's Bank, was it? A. That was Mr. Ketcham's bank.

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GEORGE W. KETCHAM, sworn in behalf of defendant:

Direct-examination by Mr. Riker:

Q. Mr. Ketcham, you are the son of William S. Ketcham? A. Yes, sir.

Q. And you are the Administrator of his estate? A. Yes, sir.

Q. When did your father die? A. In September, 1896.

Q. And as Administrator of the estate did you come into possession of his effects? A. Yes, sir.

Q. Papers? A. Yes, sir.

Q. I show you twelve notes, which are marked Exhibit D1, and ask you whether among his assets you found those papers (shown to witness)?

A. Yes, sir; I hunted in his desk and sought out all his papers when I became Administrator, and found all these in one little place in his desk.

Q. By "all these" you mean the notes? A. Yes, sir.

Q. In the bundle, D1? A. Yes, sir; I found these and took them to Mr. Bradner.

Cross-examination waived.

Defendant rests.

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FRANK D. HOLLOWAY, recalled in behalf of plaintiff in rebuttal:

Direct-examination by Mr. Howell:

Q. Mr. Holloway, did you ever attend any meeting of the corporation, the Clinton Hill Lumber & Manufacturing Company, after February 6, 1893? A. I don't think I did.

Objected to as not rebuttal.

Mr. Howell: I propose to show by Mr. Holloway the disposition that was made of these notes.

The Court: This is an introductory question, then?

Mr. Howell: Oh, yes, certainly.

The Court: In that view, you may ask it.

(Question and answer read.)

Q. You were present at the meeting of the Directors of this company on February 6th, at which the Directors made a call upon the stockholders for forty per cent. of the amount of their subscription? A. Yes, sir.

Mr. Riker: Is that offered for the purpose of showing that there was a call?

Mr. Howell: Yes.

Objected to as contradictory of plaintiff's own evidence.

Q. Do you remember such a resolution as that? A. I do.

Q. Was anything done at that time in the way of paying up that call, so far as you remember?

The Court: You mean at that meeting?

Mr. Howell: At that meeting.

A. Not at that meeting.

Q. Well, your connection with the corporation ceased on that day, did it not? A. Yes, sir.

Q. Do you know whether there was any agreement made on that day between William S. Ketcham, and William S. Ketcham, Jr., and the other Directors who were present as to the manner in which that forty per cent. call should be paid up?

Mr. Bradner: We do not object to his saying whether he knows or not, but we object to any evidence as to any proceeding between William S. Ketcham and William S. Ketcham, Jr.

Mr. Howell: And, I say, "and the others at the meeting."

(Question read.)

The Court: Do you object to it?

Mr. Bradner: I do not object to his saying whether he knows or not, but when he does know I will object.

By the Court:

Q. Do you know—say either yes or no—whether there was any— A. Any arrangement between the Directors?

By Mr. Howell:

Q. Yes, as to the manner in which this forty per cent. call should be paid up.

Mr. Bradner: At that meeting?

Mr. Howell: At that meeting.

(Former question read.)

A. Not at that day.

The Court: That would refer to February 6th.

Q. Were you present at any time when any agreement was made by anybody with reference to the manner in which that forty per cent. call should be paid up? A. I was never present when any agreement was made.

Q. Did you ever see in the office of the company any evidence of the manner in which this forty per cent. call was paid up? A. I did.

Q. When was that? A. I think it was the day that the stockholders had to make their forty per cent. payment; I don't remember how soon after February 6th.

The Court: How long after February 6th did he say?

Witness: It was the day that the—the minutes will show what day the call was made for the stockholders to pay their subscriptions.

By the Court:

Q. You think it was at the time of the maturity of the call which the minutes state? A. Yes, sir.

Mr. Howell: I may say that the minutes in evidence show that the call was to be paid on February 7th, on the day after the call was made.

Mr. Riker: Well, now, I do not understand that you claim that there was any legal call on the stockholders. A resolution of that kind was not a call.

Mr. Howell: Well, I understand that there was such a resolution passed.

Mr. Riker: Of course, it was not a call under our statute. The word "call" is inappropriate.

Mr. Howell: Well, here is the resolution.

By Mr. Howell:

Q. Now, you say you were present. Where was this? A. At the office of the Clinton Hill Lumber Company.

Q. Where? A. Jelliff Avenue and Rose Street.

Q. Who were present in the office of the company on this occasion that you speak of besides yourself? A. William S. Ketcham, Jr., Edward E. Campfield and George F. Pierson.

Q. And you saw there the manner in which this forty per cent. was paid up?

Objected to.

The Court (after discussion): I do not say the question is not proper; I am afraid the answer will not be. If the witness can answer the question without breaking the rule against evidence as to the contents of a written instrument, he may answer it. If he answers it in any other way, I shall strike out both question and answer.

Q. Well, you can answer that question without giving the contents of any document, can you not? A. Only such documents as have been exhibited here in this trial.

Mr. Howell: He can answer that question, he says, if the Court please, by giving the contents of such documents as are in evidence here in this Court now, in this case.

The Court: Well, then, you are substantially asking the witness for his construction

of some documents that are already in evidence.

Mr. Howell: Let me change the form of the question altogether.

Q. On the occasion that you refer to, did you see any of these notes in question? A. I did.

Q. How many of them? A. I wouldn't like to say.

Q. Well, to what amount? A. To cover the forty per cent. assessment of William S. Ketcham, Sr.—

Mr. Riker: Well, now, he is testifying as to the contents.

Mr. Howell: The question is, "What amount of these notes did you see?"

By the Court:

Q. State it in figures, if you can, as nearly as you can remember. A. I didn't scrutinize the notes so carefully as all that; I was told that it covered the forty per cent.

Objected to.

The Court: No.

Mr. Riker: No, only what you saw.

Witness: I saw some of those notes.

By Mr. Howell:

Q. Not all of them? A. Not all of them.

Q. In whose possession were they? A. They were in the possession of the Treasurer of the Clinton Hill Lumber Company.

Q. Do you know where the rest of the notes were at that time? A. I do not.

Q. And you are unable to state about the amount of those notes? A. I am not able.

Q. Can you state approximately the amount? A. I didn't figure them up.

By the Court:

Q. Can you state now how many you saw or about how many you saw? A. I was told—

Q. No, not what you were told, but if you saw the notes, have you any recollection as to the number or about the number of notes that you saw? A. I haven't any recollection of the number or the amount that I saw.

Cross-examination waived.

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WILLIAM S. KETCHAM, JR., recalled in behalf of plaintiff, in rebuttal:

Direct-examination by Mr. Howell:

Q. Mr. Ketcham, was there any meting of the stockholders or Directors of the Clinton Hill Lumber & Manufacturing Company after February 6, 1893? A. No, sir; I think that was the last time.

Q. Do you know anything about the payment of this forty per cent. assessment? A. There never was any payment of it.

Cross-examination waived.

Plaintiff rests.

Defendant rests.

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Defendant's counsel asked the Court to direct a verdict in favor of defendant on the ground that it appears from the evidence that payment has been made for the stock in question.

The Court (after argument): Now, I want to put this case in such a shape that it will not come back. If the facts adduced by the defendant, which they say amount to payment, are substantially uncontradicted,

then there is nothing to go to the jury, and I can direct either a verdict for the plaintiff or a verdict for the defendant, according as I think the defense is made out and according to my opinion as to the binding character of the decree of the Court of Chancery. If there is any material question of fact which the jury ought to pass on, why, then, if I should direct a verdict for the plaintiff it might be set aside because I invaded the province of the jury. It does not occur to me that there is any disputed question of fact that is material. What do the counsel on the other side think?

Mr. Riker: We think there is no material fact that is disputed, and we agree with Mr. Howell that it is within the province of the Court to direct a verdict one way or the other in this case.

Mr. Howell: I think it would be very much more satisfactory to have a verdict directed one way or the other, so that the question can be passed upon by the Court of Errors and Appeals.

After further discussion the Court said:

ADAMS, J.:

Gentlemen of the Jury: In the opinion of the Court, payment has been established. There seems to be no question to go to you. The Court will, therefore, direct a verdict for the defendant, which will carry the case up under conditions that will enable the Court above to pass conclusively upon the controversy and terminate it forever.

A verdict was accordingly rendered for the defendant.

Mr. Howell: Now, if the Court please, I pray

an exception to the ruling of the Court on the motion to instruct the jury to find for the defendant. I think that covers the ground.

Exception allowed; let it be sealed, and it is sealed accordingly.

(Signed) FREDERIC ADAMS, [SEAL.]
Circuit Court Judge.

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## Assignment of Errors.

NEW JERSEY COURT OF ERRORS AND APPEALS.

THOMAS N. MCCARTER, JR.,
Receiver,

vs.

GEORGE W. KETCHAM,
Administrator.

And now at this November Term, Nineteen Hundred and Six, of this court, comes the plaintiff-in-error and assigns the following causes for the reversal of the judgment brought to this court by the writ of error herein:

1. Because the trial court directed a verdict for the defendant on the ground that there was no evidence to go to the Jury, whereas, there were disputed facts which the jury should have considered.

2. Because the defendant adduced no evidence by way of defence which could countervail the evidence adduced on the part of the plaintiff.

3. Because the trial court should have either directed a verdict for the plaintiff or have sent the whole case to the jury for its consideration.

Wherefore, because of these errors the plaintiff-in-error submits that the said judgment should be in all things set aside and for nothing holden, with costs.

COULT, HOWELL & SMITH,
Attorneys for Plaintiff-in-Error.

Common joinder filed.

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## PLAINTIFF'S EXHIBITS.

**P1.** (Page 18.)

Certificate of incorporation of The Clinton Hill Lumber & Mfg. Co., dated Jan. 21, 1893.

**P2.** (Page 19.)

20 Newark, N. J., January 23, 1893.

The first meeting of the stockholders of the Clinton Hill Lumber & Manufacturing Co. was held in the office of Mr. S. J. McDonald (Prudential Bldg.) at 2.30 P. M.

Present, Wm. S. Ketcham, Edward E. Campfield, Frank D. Holloway and William S. Ketcham, Jr.

Meeting called to order and Mr. Campfield elected temporary chairman.

30 Wm. S. Ketcham, Jr., temporary Secy.

Moved and carried that certificate of organization and waiver of notice of meeting be filed.

A list of by laws was read and on motion adopted and approved.

Moved and carried that the Sec'y cast a ballot for the original incorporators for directors.

Ballot cast and named the following:

William S. Ketcham
40 E. E. Campfield
F. D. Holloway
G. W. Ketcham
W. S. Ketcham, Jr.

who were declared and elected as directors.

Same place as above. January 23-93.

Directors Meeting.
A meeting of the directors was called at which
Mr. Wm. S. Ketcham, was elected Pres.
Mr. E. E. Campfield was elected V. Pres.
Mr. F. D. Holloway was elected Secy.
Mr. W. S. Ketcham, Jr., was elected Treas.
The oath of office as Secy. was taken by F. D. Holloway.
The Treasurer was instructed to give bonds in $5,000.00.
Treasurer authorized to procure necessary stationery, etc.
The fixing of principal office of the Co. was laid on table for the present.
A bill of sale was made by Mr. F. D. Holloway to the company—said bill of sale representing what Mr. Holloway owed Mr. Wm. S. Ketcham, and to be issued in stock by the Company to Mr. Wm. S. Ketcham.

**P3.** (Page 20.)

Newark, N. J., Feb. 6th, 1893.

Special meeting of the stockholders of the Clinton Hill Lumber & Manufacturing Co. called to be held at 9 o'clock in the forenoon on Monday Feb. 6th, 1893, was called to order by the President at 9.05 A. M.
On motion of Wm. S. Ketcham, Jr., the meeting was adjourned until 2 o'clock Tuesday Feb. 7th, 1893.

F. D. Holloway,
Secretary.

Newark, N. J., Feb. 6th, 1893.

Special meeting of the directors of the Clinton Hill Lumber & Manufacturing Co. called to be held

at the office of the Company, was promptly called to order by the President. All of the directors being present except Geo. W. Ketcham. On motion of Wm. S. Ketcham, Jr., the Board of Directors were authorized to call upon the stockholders for 40 per cent. of the amount subscribed to the stock of the company, to be paid into the treasury on or before Tuesday, Feb. 7th and certificates be issued therefor.

The resignation of F. D. Holloway as Secretary and director of the company was read and accepted to take effect as soon as his successor was elected and qualified in his place.

On motion W. S. Ketcham, Jr., and Ed. E. Campfield were subpœnaed to take a temporary charge of the affairs of the company until the next meeting of the board of directors.

On motion Ed. E. Campfield, W. S. Ketcham, Jr., was elected Secretary of the Board in place of F. D. Holloway resigned.

On motion of W. S. Ketcham, Jr., the Board adjourned until Tuesday Feb. 7th, 1893.

F. D. Holloway,
Secretary.

**P4.** (Page 21.)

Shares $100.00 each

Newark, N. J., Feby. 6, 1893.

This is to certify that Wm. S. Ketcham, Sr., is entitled to forty shares of stock in the Clinton Hill Lumber & Mfg. Co. Capital $75,000.

By order of Directors
Wm. S. Ketcham, Jr.
Treas.

Wm. S. Ketcham, Pres.

A like certificate was made to
W. S. Ketcham Jr for 40 shares
To Geo W Ketcham for 5 shares

**(P not marked.)** (Page 24.)

Chancery Files in the case of Cumberland Lumber Company vs. the Clinton Hill Lumber & Manufacturing Co.

1 Bill of Complaint, filed April 9, 1895, alleging insolvency and praying for the appointment of a receiver.

2 Order to show cause why a receiver should not be appointed.

3 Order appointing receiver, dated May 13, 1895.

4 The Receiver's oath and bond.

5 A petition of appeal to the Court of Chancery, appealing from the determination of the receiver in allowing the claim of Strieby, Sprague & Co., and another claim in favor of Cumberland Lumber Co., the petition being filed by William S. Ketcham, William S. Ketcham, Jr. and George W. Ketcham on July 14, 1895.

6 A similar petition, an appeal by Edward E. Campfield.

7 A order made by the Court of Chancery, sustaining the decision of the receiver and directing that his determination be affirmed and that these two claims should stand as valid claims; order dated October 30, 1895.

8 An order to limit creditors, dated April 11, 1899.

9 An order barring creditors, dated May 23, 1899.

10 Receiver's petition, asking leave to make an assessment against the stockholders, filed November 9, 1899, of which the following is a copy.

IN CHANCERY OF NEW JERSEY.

Between
THE CUMBERLAND LUMBER CO., *et als.*,
Complainants,

and

THE CLINTON HILL LUMBER & M'F'G CO.,
Defendant.

To the Honorable Alexander T. McGill, Chancellor of the State of New Jersey:

The petition of Thomas N. McCarter, Junior, the Receiver in the above entitled cause, respectfully represents:

1. That he has accepted the appointment of Receiver herein of The Clinton Hill Lumber and Manufacturing Company, and has qualified therefor by giving bond and taking the oath of office prescribed by the order of his appointment and by the statute, and that he has taken upon himself the burden of the execution of the trusts committed to him.

2. That immediately after his appointment the following claims were presented to him against the said Company: One in favor of Strieby, Sprague & Company, a partnership composed of Jonathan F. Strieby, William E. Sprague, George Bubb, Nathaniel B. Bubb and Henry C. Bubb, for the sum of Two thousand six hundred and forty-three dollars and twenty-two cents ($2,643.22) of principal besides interest, and one by the Cumberland Lumber Company, a corporation, for the sum of Seven hundred and fifteen dollars and seventy-nine cents

($715.79) besides interest, and your petitioner prays leave to refer thereto whenever it shall be necessary so to do; that your petitioner has accepted the said claims and placed the same on file and that he has admitted them as claims against the said corporation.

3. That William S. Ketcham, William S. Ketcham, Junior, Edward E. Campfield and George W. Ketcham, claiming to be stockholders of the defendant corporation, appealed from the determination of your petitioner allowing the said claims, to your Honor, and that such proceedings were had thereon that on the thirtieth day of October, eighteen hundred and ninety-five by a decree entered in this cause it was ordered, adjudged and decreed that the determination of your petitioner allowing the said claims should be, and the same thereby was, affirmed, and that the claims of the said Strieby, Sprague & Company and the Cumberland Lumber Company should stand as valid claims against the defendant The Clinton Hill Lumber and Manufacturing Company for the full amount for which the same were proved before the said Receiver; and your petitioner shows that the adjudication of the Court in this behalf stands unappealed from and unreversed.

4. That on the eleventh day of April, eighteen hundred and ninety-nine, an order was made in this cause that the creditors of the said Clinton Hill Lumber and Manufacturing Company should present to your petitioner and prove before him under oath or affirmation or otherwise, as your petitioner might direct, and to the satisfaction of your petitioner, their several claims and demands against the said defendant corporation within thirty days from the date of that order or that they be excluded from the benefit of such dividends as might thereafter be made and declared by this Court upon the

proceeds of the effects of the said corporation, and providing for publication of notice of the said order; and your petitioner shows that notice of the said order was published as in said order was directed; and that on the twenty-third day of May, eighteen hundred and ninety-nine, by another order made in this cause, it was recited that notice of the order to limit creditors had been published as was in said order directed and that but two creditors, viz: the two creditors hereinabove named, had filed their claims with your petitioner, and it was thereupon ordered that any and all creditors of the Clinton Hill Lumber and Manufacturing Company who had not filed and proved their respective claims against said company within the said thirty days should be barred from making proof thereof, and that such creditors should likewise be barred from sharing in or receiving any of the assets of the said corporation or any of the proceeds thereof which might come to the hands of the said Receiver or be divided under the order of the Court. Your petitioner prays leave to refer to the said decree or orders and to all the files and records of this Court in this cause whenever it shall be necessary for him to do so.

5. That no property of the said defendant corporation has ever come to the hands, custody or possession of your petitioner as Receiver, and that although he has demanded the same, no books of account or other books or minute book or stock book of the said corporation have been delivered to him, and that the only assets of the corporation known to your petitioner are the stock subscriptions hereinafter mentioned.

6. That your petitioner has caused to be procured from the records of the County of Essex a copy of the Certificate of Incorporation of the said

The Clinton Hill Lumber and Manufacturing Company, and he annexes hereto a copy of such certificate and prays that the same may be taken as a part of this petition; and your petitioner shows that the defendant corporation The Clinton Hill Lumber and Manufacturing Company, was organized as a corporation on the twenty-first day of January, Eighteen hundred and ninety-three under the General Corporation Laws of this State by the execution by the said Edward E. Campfield, William S. Ketcham, William S. Ketcham, Jr., Frank D. Holloway and George W. Ketcham, of a Certificate of Incorporation of which the annexed is a true copy; that thereby the said Edward E. Campfield, William S. Ketcham, William S. Ketcham, Jr., and Frank D. Holloway, subscribed each for one hundred shares of the capital stock of the said corporation of the par value of one hundred dollars each, making the stock subscription of each of the said four subscribers the sum of ten thousand dollars, and that the said George W. Ketcham subscribed for five shares of the stock of the said corporation of the like par value and that his subscription thereto amounts to the sum of five hundred dollars.

7. That the said Frank D. Holloway and Edward E. Campfield, have not paid for or had issued to them any of the stock of the said corporation but that there have been issued to the said William S. Ketcham forty (40) shares of the said capital stock; to William S. Ketcham, Jr., forty (40) shares thereof, and to George W. Ketcham, two (2) shares thereof, and your petitioner shows that the said eighty-two shares so issued to the said three persons are part and parcel of the shares subscribed for by them respectively in and by the said Certificate of Incorporation.

8. Your petitioner further shows that the Board

of Directors of the said corporation have never, since its incorporation, made any calls upon the said incorporators or upon the stockholders of the said company requiring them to pay into the treasury of the said Company any sums of money on account of their said stock subscriptions, and that the said incorporators and stockholders have never paid any money to the said corporation or any officer thereof for its benefit and that the said eighty-two shares of stock which were issued as hereinabove stated are claimed by the holders thereof to have been issued for property purchased but in some way unknown to your petitioner.

9. That in addition to the claims hereinabove mentioned, your petitioner, as Receiver of the said corporation, has become bound for the costs and expenses of the administration of the affairs of the said insolvent corporation including the costs of the suit, counsel fees and costs in the various proceedings instituted by your petitioner for recovering the assets of the said corporation, amounting in the aggregate as nearly as your petitioner can estimate, to upwards of twenty-five hundred dollars.

10. That subsequently to the organization of the said defendant corporation and the issuing of the stock hereinabove mentioned, the said William S. Ketcham departed this life intestate, and that the said George W. Ketcham was appointed administrator of his estate by the Surrogate of the County of Essex, and your petitioner shows that the said George W. Ketcham as such administrator, is a shareholder of the said corporation and is liable for the subscription made to the stock of the said corporation by the said William S. Ketcham, deceased.

11. That your peitioner is informed and believes

it to be true, and therefore charges the truth to be, that the said Frank D. Holloway and Edward E. Campfield are insolvent, and that no portion of any assessment which may be levied against them could ever be collected.

12. That your petitioner finds that it will be necessary to make an assessment against the said shareholders to pay the debts of the said corporation and the expenses of the administration of its affairs by your petitioner as its Receiver.

Wherefore your petitioner prays that he may have the aid and direction of the Court in the premises, and that the said William S. Ketcham, Jr., George W. Ketcham, Frank D. Holloway, Edward E. Campfield and George W. Ketcham, Administrator of the estate of William S. Ketcham, may answer this petition but without oath; that this Court will either levy an assessment upon the said stockholders of the said corporation or direct your petitioner to do so, requiring them severally to pay to your petitioner such amount of their several and respective unpaid subscriptions to the capital stock of the said Company as may be necessary to pay the debts of the said corporation with interest, and the expenses incident to the winding up of the said corporation's affairs by your petitioner as its Receiver, together with the costs of this petition and the orders made thereon, and that your petitioner may have leave, when such assessment shall have been made or directed, to bring actions at common law or in equity, as your petitioner is advised may be necessary, to recover the money so assessed against the said stockholders, to the end that the same may be applied under the direction of this Court to the payment of the debts of the said corporation, with interest and the said expenses, and that your petitioner may have such

other relief as the nature of his case requires and as shall be agreeable to equity.

THOMAS N. McCARTER, Jr.,
Receiver of The Clinton Hill Lumber
and Manufacturing Company.

11. An order requiring George W. Ketcham, Administrator, &c., *et als.*, stockholders, to show cause why the prayer of the petition should not be granted.

12. An order continuing this order to show cause.

13. An order requiring George W. Ketcham, Administrator, &c., to answer the petition within thirty days.

14. An answer to the stockholders' petition, of which the following is a copy:

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IN CHANCERY OF NEW JERSEY.

| | |
|---|---|
| Between<br>THE CUMBERLAND LUMBER CO., *et als.*,<br>Complainants,<br>and<br>THE CLINTON HILL LUMBER & MFG. CO.,<br>Defendant. | On Petition. |

The answer of George W. Ketcham, Administrator of the goods and chattels of William S. Ketcham, Sr., deceased, and individually; and William S. Ketcham, to the petition of Thomas N. McCarter, Jr., Receiver.

1. These respondents have no knowledge of any of the alleged facts contained in Paragraph One of said petition and can neither admit or deny the same and leave said petitioner to make such proof thereof as he may be advised to be necessary.

2. These respondents have no knowledge of any of the alleged facts contained in Paragraph Two of said petition and can neither admit or deny the same, and leave said petitioner to make such proof thereof as he may be advised to be necessary.

3. These respondents admit that the records in the case show that an appeal was taken from the determination of said Receiver allowing the claims mentioned in Paragraph Two of said petition in the names of William S. Ketcham, Sr., William S. Ketcham, Jr., Edward E. Campfield and George W. Ketcham, and that an order was made affirming said determination; but these respondents deny that said William S. Ketcham, Sr., or William S. Ketcham, Jr., claimed or asserted that they were at that time stockholders of said alleged corporation, The Clinton Hill Lumber and Manufacturing Co.; and these respondents further say that said appeal was taken at the suggestion of this Honorable Court by reason of one of the defences made by said William S. Ketcham, Sr., and others to the petition of said Receiver to assess the stockholders of said defendant; that defence being that the claims of the Cumberland Lumber Co. and Strieby, Sprague & Co., were not debts of the said defendant; and the Court refused to hear that defence until an appeal had been taken from the determination of said Receiver allowing said claims.

The hearing of the appeal and of the Receiver's petition came on together and two separate orders were made, one affirming the determination of the Receiver as aforesaid, and the other granting the

prayer of the petition and ordering assessment to be made.

The latter order was afterwards reversed by decree of the Court of Errors and Appeals in the last resort of all causes, made on the ninth day of March, eighteen hundred and ninety-nine, to which these respondents beg leave to refer.

And these respondents further say that when said appeal was taken from the determination of said Receiver the petition of appeal set forth the facts as aforesaid, that an answer had been filed to the petition of said Receiver for leave to levy an assessment, and that the hearing on said petition and answer had been postponed to give the respondents thereto an opportunity to appeal from the determination of said Receiver, as by reference to the said petition of appeal will more fully appear.

And these respondents further say that in said petition of appeal from the determination of said Receiver the appellants expressly reserved all defences either legal or equitable to any pretended right of action by said Receiver, or said complainants, to wit: Cumberland Lumber Co. and Strieby, Sprague & Co. against them for unpaid subscriptions to the capital stock of the said Clinton Hill Lumber and Manufacturing Co., as by reference to said petition of appeal will more fully appear.

4. These respondents have no knowledge of any of the matters alleged in Paragraph Four of said petition and can neither admit or deny the same, and leave said petitioner to make such proof thereof as he may be advised to be necessary.

5. These respondents admit that the alleged defendant corporation has no property or books of accounts, or other books, or minute book, or stock book and that no property has come to the hands of said petitioner, and that no books have been de-

livered to him; but these respondents deny that the alleged defendant corporation ever had any assets of any kind or description, or ever had any existence either in law or in fact to be able to own any assets, and that there ever were any actual subscriptions for the stock of said alleged corporation.

6. These respondents admit that the petitioner has annexed to his petition a copy of the alleged certificate of incorporation of The Clinton Hill Lumber and Manufacturing Co., taken from the records of Essex County; but these respondents deny that said alleged corporation was organized on the twenty-first day of January, eighteen hundred and ninety-three, or at any other time, and they deny that the persons who signed said alleged certificate became a body corporate, or subscribed thereby for any shares of the stock of said alleged corporation.

7. These respondents admit that Frank D. Holloway and Edward E. Campfield have not paid for or had issued to them any of the stock of said alleged corporation; but they deny that any shares of stock of said alleged corporation ever issued to either said William S. Ketcham, William S. Ketcham, Jr., or George W. Ketcham.

8. These respondents admit that no calls upon the alleged incorporators or upon the alleged stockholders of said alleged company requiring them to pay into the treasury thereof any sums of money on account of subscriptions for stock, have ever been made by any Board of Directors of said alleged corporation, and that no money has ever been paid for any such purpose; but these respondents deny that any shares of stock were actually issued for property purchased, or that either the said William S. Ketcham, George W. Ketcham or William S. Ketcham, Jr., claim to be the holders of any such shares of stock or are the holders of any shares of

stock claimed by them to have been issued for property purchased.

9. These respondents have no knowledge of the matters alleged in Paragraph Nine of said petition, and can neither admit or deny the same, and leave the petitioner to make such proof as he may be advised to be necessary.

10. These respondents admit that subsequently to the time of the alleged organization of said corporation and alleged issuing of stock, the said William S. Ketcham departed this life, intestate; and that said George W. Ketcham was appointed Administrator of his estate; but they deny that said George W. Ketcham as such Administrator is a shareholder of the said alleged corporation, or is liable for any subscription for stock of said corporation made by said William S. Ketcham.

11. These respondents have no knowledge of the matters alleged in Paragraph Eleven of said petition and can neither admit or deny the same; but leave the petitioner to make such proof thereof as he may be advised to be necessary.

12. These respondents deny that it is necessary to make any assessment against the alleged shareholders of said alleged corporation; and deny that said petitioner has or ever had lawful authority to incur any expense in administering the affairs of said alleged corporation.

These respondents allege and insist:

1. That The Clinton Hill Lumber and Manufacturing Co. never was a corporation either in law or in fact.

2. That The Clinton Hill Lumber and Manufacturing Co. never transacted any business as a corporation.

3. That no actual subscriptions for shares of stock in the alleged corporation, The Clinton Hill Lumber and Manufacturing Co., were ever made by any person or persons.

4. That an attempt was made by several persons named in the certificate of incorporation annexed to the petition herein, to form a corporation, but the said persons could not agree and the entire scheme was abandoned; and the original certificate of incorporation was never filed in the office of the Secretary of State, and was destroyed by the said several persons, and no business was transacted in pursuance of said certificate, and no debts were contracted.

5. That the claims presented to said petitioner are not debts contracted by said alleged corporation; but are debts originally contracted by Frank D. Holloway individually and were made claims against The Clinton Hill Lumber and Manufacturing Co. by an order of this Honorable Court in a cause wherein Jonathan F. Strieby, *et al.*, are complainants and The Clinton Hill Lumber and Manufacturing Co. is defendant, and which order is founded on statements made by William S. Ketcham, Jr., under a misapprehension of the facts; and which order was made without authority in law to make the same, and without notice to these respondents.

6. That said Clinton Hill Lumber and Manufacturing Co. never had possession of any property belonging to said Frank D. Holloway, and never owned any property of any kind or description, and that any statement heretofore made by either of these respondents in any proceeding, to the contrary, was erroneous and was made in ignorance of the facts.

7. That no claim has ever been presented by said

petitioner or by said alleged defendant corporation, or by said claimants as creditors of said corporation to the said George W. Ketcham as Administrator of the estate of said William S. Ketcham, deceased, and that a decree barring creditors of this estate was duly made by the Orphans' Court of the County of Essex, prior to the filing of the petition aforesaid, and said Administrator claims the benefit of said decree.

8. That if any cause of action ever existed against the persons who executed said certificate of incorporation of The Clinton Hill Lumber and Manufacturing Co. by reason of their signing the same, or by reason of any subscription for shares of stock in said alleged corporation, it arose more than six years before any proceeding was taken by said petitioner to make any assessment upon said persons for unpaid subscriptions, and is barred by the Statute of Limitations; and these respondents claim the benefit of the said statute as fully as though they had pleaded the same.

9. That there are now pending in the Circuit Court of the County of Essex in this State, three actions at law against these respondents, respectively, to recover from them, respectively, the amount of money alleged to be due from them, respectively, for unpaid subscriptions for shares of stock of said alleged defendant corporation founded on their execution of said certificate of incorporation; and that said petitioner is the plaintiff in each of said actions; and these respondents claim that the pendency of said actions at law estops the petitioner from pursuing any remedy in this Honorable Court.

These respondents respectively submit that they have answered all the matters alleged in said petition, and they pray that they may hence be dismissed with their reasonable costs and charges in

this behalf most wrongfully sustained; and they also pray that they may have the same benefit and advantage as though they had demurred to said petition; and had pleaded the several matters hereinbefore set forth by them in bar of the demand of said petitioner.

FRANK E. BRADNER,
Solicitor for and of
Counsel with Respondents.

A true copy:
L. A. Thompson,
Clerk.

15. A replication to that answer.

16. A stipulation concerning E. E. Campfield.

17. A final decree directing an assessment to be made, dated June 9, 1903, of which the following is a copy.

IN CHANCERY OF NEW JERSEY.

Between

THE CUMBERLAND LUMBER COMPANY, *et als.*,

Complainants,

and

THE CLINTON HILL LUMBER AND MANUFACTURING CO., *et al.*,

Defendants.

On Bill &c. Order.

Thomas N. McCarter, Jr., the Receiver herein, having presented to the Court his petition by which it appears that two claims against The Clinton Hill Lumber and Manufacturing Company have been proved before him, one in favor of Jonathan F. Strieby, William E. Sprague, George Bubb, Nathaniel B. Bubb and Henry C. Bubb, partners in trade under the firm name of Strieby, Sprague & Co., for the sum of Two thousand six hundred and forty-three dollars and twenty-two cents of principal, besides interest, and one in favor of The Cumberland Lumber Company for the sum of Seven hundred and fifteen dollars and seventy-nine cents principal, besides interest, and that he had accepted the said claims and admitted them as claims against the said corporation:

And it further appearing that William S. Ketcham, Sr., William S. Ketcham, Jr., George W. Ketcham and Edward E. Campfield appealed from the determination of the said Receiver allowing the said claims as debts of The Clinton Hill Lumber and Manufacturing Company, and that on the

Thirtieth day of October, Eighteen hundred and ninety-five, it was ordered, adjudged and decreed that the determination of the said Receiver allowing the said claims be confirmed, and that the said claims should stand as valid claims against The Clinton Hill Lumber and Manufacturing Company for the full amount for which the same was proved before the said Receiver.

And it further appearing that no property of the said corporation has come to the hands, custody or possession of the said Receiver, and that by the certificate of incorporation of the said Clinton Hill Lumber and Manufacturing Company, Edward E. Campfield subscribed for One hundred shares of the capital stock thereof, William S. Ketcham, Sr., for One hundred shares thereof, William S. Ketcham, Jr., for One hundred shares thereof, Frank D. Holloway for One hundred shares thereof and George W. Ketcham for Five shares thereof, each of the par value of One hundred dollars, and it appearing that sixty per cent. of their said several subscriptions remain unpaid, and that in order to pay the debts of the said corporation it would be necessary to call upon the said subscribers for such sum as might be necessary for that purpose, and for the purpose of paying the costs and expenses of the administration of the estate of the said corporation. And the said Receiver having prayed that he might be allowed to levy an assessment upon the said incorporators and stockholders of the said corporation and to bring actions at common law or in equity to recover the amounts so assessed against them to the end that the same may be applied under the direction of this Court to the payment of the debts of the said corporation and the expenses of administration as by the said petition will more fully appear.

And it further appearing that William S. Ketcham, Sr., one of the subscribers to the stock of the

said corporation has departed this life, and that the respondent, George W. Ketcham, has been appointed Administrator of the estate of the said William S. Ketcham, Sr., and has taken upon himself the burden of such administration, and is the holder of whatever interest the said William S. Ketcham, Sr., had in said corporation in his lifetime.

And the said Receiver having given notice to the said incorporators and subscribers that he would apply to the court for leave to make an assessment in accordance with the prayer of the said petition, and the Court having on the Twenty-sixth day of December, Eighteen hundred and ninety-nine, ordered that the respondents named in the said petition should file their answer thereto within thirty days from the date of service upon them or their solicitor of a true but uncertified copy of the said order, which order was served in accordance with its terms:

And it appearing that George W. Ketcham, Administrator of the estate of William S. Ketcham, deceased, George W. Ketcham, individually, and William S. Ketcham, three of the said respondents filed their joint answer thereto, and that the said Edward E. Campfield and Frank D. Holloway neglected and refused to answer the said petition, and the said cause having been brought on to a hearing in the presence of James E. Howell, of counsel with the Receiver, and Frank E. Bradner, of counsel with the answering defendants, and the Court having taken the proofs and read and considered the same with the exhibits in the cause:

And it appearing to the Court that the claim of the Cumberland Lumber Company has been withdrawn from the consideration of the Court and from the hands of the Receiver; and it further appearing that there is due to the said Jonathan F. Strieby, William E. Sprague, George Bubb, Na-

thaniel B. Bubb and Henry C. Bubb, partners in trade under the firm name of Strieby, Sprague & Co., on their claim for principal and interest on this day the sum of Four thousand three hundred and sixty-one dollars and seventeen cents; and that the said Receiver has paid and incurred bills of costs and expenses in and about the execution of his said trust as Receiver in this cause, amounting in the aggregate to Six hundred and eighty-four dollars and seventy-four cents, which with interest thereon amounts on this day to the sum of Eight hundred and two dollars and forty-seven cents.

And it further appearing that the said Receiver will be obliged to incur further costs and expenses in this suit in the execution of his said trust, including the enrolling of the proceedings therein, the final decree herein and the settlement of the Receiver's accounts, which costs and expenses are hereby allowed at Fifty dollars, and that he will incur further costs and expenses in and about collecting the assessment hereinafter provided for in the common law courts, which costs and expenses are allowed at One hundred dollars.

And it further appearing that the said Receiver should be allowed the sum of One hundred and fifty dollars for his compensation as Receiver herein; and that there should be allowed to James E. Howell, his counsel, a counsel fee of One thousand dollars for his services to the Receiver in this cause, all of which costs, fees and expenses aggregate the sum of Two thousand one hundred and two dollars and forty-seven cents, which added to the amount of the claim of the said firm of Strieby, Sprague & Co., aggregates the sum of Six thousand three hundred and forty-four dollars and ninety-seven cents, to be paid out of such assets of said corporation as may come to the hands of the said Receiver. And that the said Receiver has now no funds with which to pay the same and that an as-

sessment should be made against the persons who subscribed for and now hold the stock of the said corporation.

And it further appearing that the said Frank D. Holloway and Edward E. Campfield are insolvent and that no portion of their said subscription can be recovered from them;

It is thereupon, on this Ninth day of June, Nineteen hundred and three, ordered, adjudged and decreed that Thomas N. McCarter, Jr. the Receiver in this cause be and he hereby is directed and authorized to assess, call and collect the said sum of Six thousand three hundred and forty-four dollars and ninety-seven cents, with interest, from the said George W. Ketcham, George W. Ketcham, Administrator of the estate of William S. Ketcham, and William S. Ketcham, Jr., out of their respective subscriptions as incorporators and stockholders of The Clinton Hill Lumber and Manufacturing Company, which have not been fully paid up, (but not to exceed sixty per cent. thereof), and to enforce payment of such assessment and call by suit if necessary against each of the above named delinquent subscribers and stockholders of the said corporation. This order is made, however, without prejudice to the rights of any person named in said petition or in this order to any defence which they may have to any action, legal or equitable, which may be brought against them on such alleged stock subscriptions.

Respectfully advised,

JOHN R. EMERY,
Vice Chancellor.

18. A paper withdrawing the claim of the Cumberland Lumber Co.

**P5.** (Page 28.)

Bill of sale from Frank D. Holloway to The

Clinton Hill Lumber & Manufacturing Company, dated January 23, 1893.

**P6.** (Page 34.)

The formal Proof of Claim of Strieby, Sprague & Co.

**P7.** (Page 35.)

The Notice of Assessment made by the Receiver in pursuance of the decree of June 9, 1903.

## DEFENDANT'S EXHIBITS.

**D1.** (Page 37.)

12 notes of William S. Ketcham, endorsed by Frank D. Holloway.