

New Jersey Court of Errors and Appeals.

EDWARD E. DORMAN, *et al.*,

Pltffs. in Error,

vs.

JAMES Y. WILSON,

Deft. in Error.

Defendant's Brief.

FACTS.

Annie E. Dorman is the owner of a house and lot in Plainfield.

James Y. Wilson filed a mechanics lien against her as owner, and her husband Edward E. Dorman as buider, for work done on that house.

The lien was filed in the clerk's office of Union county, and in due time this suit was brought thereon.

The declaration contains the common counts with the statutory averments.

The bill of particulars shows a claim of \$3,891.50, with credits of \$2,891.50 leaving a balance unpaid of \$1,000.

The pleas are, first the general issue, and second, by Annie E. Dorman, the statutory owners plea.

The verdict was for the plaintiff against both defendants for the whole claim with interest.

The whole controversy in the case is about the effect of a certain note of the Metropolitan Paper Collar Company of New York, for \$1,000, given by Edward E. Dorman to the plaintiff, on account of the claim now in suit, and which was not paid at maturity.

The defendants claim that this note was delivered to the plaintiff as a payment *pro tanto* of the claim in question, and operated as an accord and satisfaction thereof.

If this position be allowed, the plaintiff's whole claim is paid, and the action falls.

The plaintiff, on the other hand, claims that this note was only received conditionally, and upon dishonor ceased to operate as any bar to his suit on the lien claim for the amount thereof, as a balance unpaid on the contract for work and materials.

By referring to the printed case, it will appear that after the work was pretty well along, plaintiff wrote Edward E. Dorman, who was at that time in New York city, where he lived in winter, that he would like to have some money.

Instead of money, Dorman sent him a note for \$950, drawn by this Collar Co., but not endorsed by himself—this was in April 1875. See Wilson's testimony, pp. 9 and 10, and Exhibit E, p. 29.

This note was afterward paid, and is credited as cash. See p. 6, l. 7; p. 14, l. 30, &c.

About a month later, he, Edward E. Dorman, sent the note in dispute to the plaintiff by letter. It was drawn by the same Co., and was for \$1000. That letter is lost, but its contents are given by plaintiff to be, [*that he sent the note of the Collar Company the same as before, and the expression was used in this way, 'It's all O. K.'*"] On receiving this note, with no other agreement than that contained in the letter, plaintiff sent back the receipt, Exhibit A, the body of which is, [*Received of Mr. E. E. Dorman, a note for one thousand dollars on account of work done on his property on Central avenue, Plainfield, N. J.*"] See p. 14, l. 7, &c. : p. 16, l. 40, &c.

About two weeks after the giving of the \$1000 note Dorman and Wilson "settled in full." See p. 10, l. 21, 22.

At that settlement, Wilson made out and gave to Dorman a statement of account, Exhibit C, which charged him \$3,814, and credited \$3,650 cash and notes, leaving a balance of \$164. From this was deducted \$12, and to it added \$9, leaving \$161 unsettled. This amount Dorman paid (p. 10, l. 20, &c.), and thereupon Wilson gave him the receipt, Ex-

hibit D, [*“Received of Mr. E. E. Dorman, \$161, in full of all demands, for work done and materials furnished on his house on Central avenue, Plainfield, N. J., to date.”*] The plaintiff offered evidence to show that after the acceptance of the \$1000 note, and the giving of the receipt therefor, and after this settlement there were conversations between Wilson and Dorman, in which Wilson pressed Dorman to take care of this \$1000 note, and that Dorman refused, not on the ground of a want of liability, but of inability.

To this evidence defendants objected, on the ground that the foregoing facts established an accord and satisfaction of all claim on Wilson's part, and that subsequent transactions were inadmissible to vary or alter that agreement.

The judge nevertheless admitted the testimony.

The defendant, at the close of the plaintiff's case, moved for a non-suit, on the ground of the accord and satisfaction.

This the judge refused, on the same ground on which he admitted the objectionable testimony, namely, that these subsequent conversations were evidence of the intention of the parties at the time of the transaction, and that the question of intention must go to the jury.

The defendants in their testimony claim that the note was given, and by them intended as a full payment, and that there was never any bargain regarding the note other than that shown on the face of the exhibits. See E. E. Dorman's testimony, p. 18-20.

They deny that there was ever any guaranty on their part that the note would be paid, or any promise to that effect, and affirm that when pressed afterwards to take care of the note, Edward E. Dorman uniformly denied any liability to do so, and that his omission to endorse the note was in accordance with his uniform practice.

There was some question raised regarding E. E. Dorman's representing the note to be good. On that point he says he supposed the company to be good at that time, and there is no proof in the case that it was not.

The defendants submit that there was error in the following points:

Point I.

The Court erred in overruling the objection on page 11. There was no question of intention to be supported by the evidence admitted.

The only ground upon which the objection was overruled, was that the evidence objected to was "competent to show, what was the intention of the parties in giving and receiving the note" (p. 11, line 8).

The giving of the note standing alone and unexplained, it being the note of a third party, was *prima facie* an accord and satisfaction of the claim.

Line *v.* Nelson, 9 Vroom, 361.

Clearly then if the evidence had stopped at that point, viz., the giving and receiving the note, subsequent conversations or transactions would not be competent to qualify or alter an acceptance which, at the time it was made was unconditional.

Wilson accepted the note unconditionally, and said nothing. Dorman had a right to rely upon his silence as an unconditional acceptance. There was therefore no question of intention *at the time the transaction was consummated* to be explained, qualified or supported by the evidence objected to.

If Wilson had testified that *at the time of the receipt of the note*, he had communicated to Dorman anything from which an intention to make a conditional acceptance could be inferred, then there would have been some ground to have let in subsequent transactions to explain the acceptance, but there is no such evidence.

As if to exclude all possible idea of a conditional acceptance, Wilson testifies (p. 10, l. 21), "I think about two or three weeks *after I took the second note*, we settled in full. "He paid me the balance of money due, and I gave him a receipt for it."

We submit there is nothing here to be explained or qualified by evidence of subsequent transactions ; it is a clear, unconditional acceptance of the note ; and it is evident too (p. 11 line 35), that Wilson was not at all ignorant of how to make a conditional acceptance.

There is then no evidence of an intent on the part of Wilson to accept the note conditionally at the time it was given, and, we insist, that subsequent transactions cannot be brought in evidence to prove an intention not claimed to have existed at the time the transaction was consummated.

Norton *v.* Woodruff, 2 N. Y., 153.

Nor will it do for Wilson to say that *he* intended it as a conditional acceptance. His intention should have been made known to Dorman. A condition formed in his own mind but never expressed, cannot be set up against the other party.

There was, therefore, no proof of an intention existing at the time to support evidence of subsequent transactions between the parties.

Nor is there any other ground upon which the evidence was admissible.

It was not admissible to prove a subsequent contract between the parties, for there being an accord and satisfaction, *prima facie*, there was no consideration to support this new promise.

That there was no valuable consideration is practically conceded.

Nor was this a moral consideration.

The claim having been satisfied, could not be used for any purpose.

Stafford *v.* Bacon, 1 Hill, 532.

The Court should, therefore, have excluded the evidence objected to.

Point II.

The Court erred in refusing a non-suit.

The Court refused a non-suit on the sole ground that there was "a question of the intention of the parties at the "time of the transaction which must be submitted to the "jury" (p. 18, line 14).

We submit that there can be no question of intention, unless Wilson's evidence is inconsistent with an unconditional acceptance of the note.

But his evidence is not only not inconsistent with such acceptance, but is not consistent with anything else.

Wilson's evidence is directly opposed to a conditional acceptance.

The note was sent to Wilson by letter (p. 13, line 13).

This letter contained a bare statement, that the note was "O. K.," whatever that may mean, for its meaning is not explained.

Whatever it means it does not express a condition.

Wilson gave Dorman, for this note, his receipt (Ex. A p. 28).

There was no personal communication between the parties (p. 13, l. 26).

Therefore the letter and receipt contain *the whole of the transaction as to this note*, and the receipt is the only thing that can speak for Wilson. But the receipt is *unconditional*.

Surely if it had been intended by Wilson to receive the note conditionally, nothing would have been easier than to have expressed the condition in the receipt itself.

Again, Wilson no where in his whole testimony claims that the acceptance of the note was conditional.

The most that he claims, is that Dorman represented the note to be good when he took it; and there is no evidence to show that it was not.

Again, on page 10 (line 33), Wilson gives his reason for attempting to hold Dorman for payment. He does not say "I looked to him because the note was to be payment only in case "it was good."

On the contrary, he gives as his only reason for attempting to hold Dorman, because "*he represented the company as solvent and good.*" He did not, therefore, by his own showing, rely upon the conditional character of his acceptance, but upon *Dorman's guaranty of the solvency of the company.*

Again, the negotiations after the note became due, are wholly inconsistent with a conditional acceptance. All these transactions were in relation to payment *by the company.*

Wilson tries to put a different complexion upon it (p. 11, line 20, &c.), but his cross-examination shows that it was not the true one. He says that Dorman agreed to pay half in cash; but *the Company*, not Dorman, *made the payment* (p. 14, line 31, &c.). He says that Dorman agreed to give him notes for the balance, but he got notes *of the Company*, not Dorman (p. 16, line 20, &c.). Besides he went to the Company and its Receiver in regard to the payment of the amount (p. 16).

All these acts are inconsistent with a conditional acceptance of the note, and coupled with the receipt (Exhibit A), leave no question of intent to be decided by the jury. But the receipt itself is conclusive upon Wilson, and cannot be contradicted by parol.

It is conceded that a bare receipt can be contradicted by parol.

But this is more. It contains an agreement to apply the note in payment of the work done by Wilson, on Dorman's property on Central avenue, Plainfield.

This is plain. Suppose that Wilson had been building two houses for Dorman, could he, in the face of that receipt, have applied the note upon the other house? Plainly not, because he had *agreed* to apply it on this.

There is then an *agreement*. But this agreement is to apply *the note itself*, not its proceeds when paid, upon this contract. If the receipt had stopped with the word "dollars," Wilson could have shown that he never received the note, or any other pertinent fact he chose in relation to it. But the balance of the document is an agreement in writing, which cannot be explained or avoided by parol.

There is no authority attacking this position. Cases innumerable, almost, can be cited (*Cole vs Taylor*, 2 Zab. 59, *Schanck vs Arrowsmith*, 1 Stock, 314, and many others of a like character) where it is held that where a creditor receives a debtor's *own obligation* for an overdue account, and receipts for it as cash, the receipt can be explained. And this is strictly within the principle laid down above. The debt being due, the debtor is under a legal obligation to pay it, the creditor has the obligation given him by law. The debtor's obligation (note or acceptance) is only putting his legal obligation into another form, and extending the time of payment; the creditor gets nothing essentially different from what he had before. This being the case, the *receipt* can be explained and the *contract* is void, because it is not supported by a consideration.

Here the case is very different. The creditor gets what he did not have before, the *obligation of ANOTHER person*. This is a consideration for the contract.

Again, the receipt alone was *prima facie* evidence of a discharge, *unless given by mistake*.

Elwell v. Lesley, 2 Halstead, 349.

A mistake, to be available, must be a mutual one.

Lyman v. U. Ins. Co., 17 Johns., 376.

Phoenix F. Ins. Co. v. Guorree, 1 Paige, 279.

Nevins v. Dunlap, 33 N. Y., 680.

There is no evidence that there was any mistake at all about the receipt, certainly not on the part of Dorman.

Nor does Wilson anywhere testify that he did not receive the note as a discharge *pro tanto* of Dorman's debt.

Thus much for Wilson's own showing in respect to the facts immediately affecting the acceptance of this note. But he furnishes us with still further evidence of the character of this acceptance.

Eight days after the receipt of the note, he had a final settlement with Dorman (p. 10, l. 23, &c.; p. 14, l. 35. &c.; Ex's C and D, pp. 28 and 29).

Upon this settlement, after some dispute about items, the account is settled, showing a balance due Wilson of \$161 (Ex. C, p. 28). Here Dorman receives an *unconditional*

credit for this note. Wilson himself says (p. 10, line 23), "He paid me the *balance of money due*," and he gave Dorman the receipt, Exhibit D. In all this there is not a sign of a condition, not a word of an intention other than the intention to be inferred from the receipt of a third parties note. To further set at rest all possible doubts as to Wilson's intention, and the nature of his acceptance of the note, the receipt reads, "*In full of all demands* for work done and materials furnished," &c.

But this receipt, too, contains a contract, to wit, that the amount received should be *in full of all demands*. It must be remembered that there was a dispute between the parties as to the items of the account (p. 15, line 2, &c.) and they "settled it up satisfactorily then, as regards the amount," the item "cleaning, \$12," was evidently deducted by consent (Ex. C), and the amount thus arrived at paid (p. 17, l. 4). Can it be possible that after that settlement Wilson could sue for and recover the item "cleaning, \$12?" If not, how can he recover any other item of the account? They are all of the same character, and stand upon the same footing. The account was settled between them, the amount due, determined. Wilson agreed that that amount should be received in full of all demands. That agreement was reduced to writing (Exhibit D), signed by him, and delivered to Dorman, and the balance due paid by Dorman to Wilson. Now, without any evidence or claim even that that agreement was procured through fraud or mistake, without Wilson's pretending to say that it did not represent and contain the agreement of the parties at the time, the Court says that there was a question of intent to be submitted to the jury.

How could there be any such question, when Wilson don't attempt to contradict the agreement and would not be permitted to do so if he tried?

Vedder *v.* Vedder, 1 Denio, 257.

Kellogg *v.* Richards, 14 Wend., 116.

It was, therefore, shown that there had been an unconditional acceptance of the note; that Wilson had agreed to apply *it* on his demand; that he had settled in full with D., and receipted in full for *all* demands.

There was no evidence of fraud or mistake, nor of an intention in both parties different from the one to be inferred from the acceptance of the note and the execution and delivery of the agreements. There was, therefore, no question of intention to go to the jury; as that was the only ground of the refusal to non-suit, the Court erred in so refusing, and should have granted the motion.

Point III.

The Court erred in refusing to charge as requested, "that a note of a third party received for a payment unconditionally, is a payment, and subsequent transactions between the parties cannot alter the character of such acceptance."

This is unquestionably the law as has been already shown. Being the law, the defendant had the right to have the jury so instructed. The judge's charge tended to mislead the jury. If the jury found that the acceptance of the note was unconditional, no subsequent arrangement between the parties could affect it. The judge's charge could easily be construed that the subsequent conversations did affect or characterize the acceptance even if unconditional. In this there was error.

Point IV.

The Court erred in refusing to charge as requested:— "That the fact of the credit of the note upon the account and the balance struck, is evidence of an accord and satisfaction of the demand."

That the note was so credited and balance struck is undisputed (Ex. C. p. 28). This was evidence of an accord and satisfaction of the demand, and has been so held.

Frisbie v. Larned, 21 Wendell, 410.

The defendant was entitled to have the jury so instructed as it was the law, and law applicable to this case. The judge in refusing to so charge, erred.

Point V.

The Court erred in refusing to charge as requested:—
 “That subsequent transactions between the parties, cannot
 “affect an agreement made between the parties.”

This is law, and pertinent to the matter in issue. As such, the defendant was entitled to have the jury so instructed. The question is not whether the conversations, &c., were evidence of the contract as made, but whether the jury having found a contract executed, any subsequent transactions can be considered as affecting that contract. That they cannot here is plain, from the conceded fact that there was no consideration to support such subsequent arrangement.

Point VI.

The Court erred in refusing to charge as requested:—
 “That receipts given at the time, are evidence not to be
 “overcome by uncorroborated testimony of the party
 “making them.”

This is fully covered by Point II above. The error of the Court is, in supposing that this was a question of credibility of a witness. There is no such question raised by the the request. The question, and the only one, is whether written receipts having been given expressing the intent of the parties and including contracts, they can be varied by the receptor's own parol testimony. Even conceding that the receipts might be *contradicted*; surely the defendant was entitled to the Court's instruction to the jury that, in the absence of fraud or mistake, and neither were shown, the written receipts could not be *altered* by parol.

Point VII.

The court erred in refusing to charge, as requested:—
 “That there was no evidence that the defendant knew the
 “Company to be insolvent.” While the weight of evidence
 is exclusively for the jury, yet, we insist, that where a
 certain fact is an *essential* element in the case, it is the duty
 of the Court to instruct the jury that there is a total lack
 of evidence as to that fact.

The question of insolvency of the company, and
 knowledge of such insolvency in the defendant below, is an
 important element. If that existed, the agreement between
 the parties was void for fraud.

Fraud must be proved by either direct or circumstantial
 evidence. The Court says that the defendant below was
 brother of one of the chief officers of the Company, was
 dealing in their goods, had his office in the office of the
 Company (p. 26 and 27), and knew somewhat of their affairs
 (p. 21, line 24, &c.), which knowledge, the same witness says,
 was a knowledge of nothing unfavorable to its financial
 condition (p. 22).

Conceding all this to be the fact, and it is all uncontra-
 dicted, the question arises, was that any evidence of
 knowledge in Dorman of the insolvency of the Company
 at the time the note was given.

Certainly it is not direct evidence.

Nor is it circumstantial, for to support circumstantial
 evidence *the fact must be proved to have existed which the
 circumstances are invoked to prove.* One could not introduce
 circumstantial evidence to convict another of a crime until
 it was proved that the crime had been committed. Nor
 can circumstantial evidence be used to prove knowledge of
 a fact until the fact is proved to exist. But there is not a
 particle of evidence to prove that the Company was insol-
 vent at the time this note was given. How then can the
 facts testified to be circumstances to prove knowledge in
 Dorman of such unproved fact? But as there was neither
 direct or circumstantial evidence of any knowledge in Dor-
 man of the insolvency of the Company, it was the duty of
 the Court to so have instructed the jury.

Point VIII.

The judgment against Annie E. Dorman and the land is clearly erroneous.

Suppose we admit, for the sake of argument, that Dorman at the interview after the giving of the \$1000 note and receipt, Exhibit A, did promise that he would see that the note was paid, or any words to that effect, the result of such an admission would be an obligation personal to himself, certainly nothing more.

There is no promise even alleged that the note shall operate as payment if met, and not as payment if dishonored.

At the best it is but a personal guarantee.

Shipman vs. Cook, 1 C. E. Green, 253 & 254.

Frisbie vs. Larned, 21 Wendell 450.

But there are two defendants in this cause. There is no pretence that Annie E. Dorman guaranteed this note or promised to pay it, nor that she authorized her husband to do so. The receipts and account stated are in writing, and absolute on their faces.

As to Annie E. Dorman they are final. The transactions and conversations invoked to mitigate their severity are subsequent. Mrs. Dorman is in no way connected with them, nor so far as appears, was she even aware of them.

But if she were. Annie E. Dorman is a married woman, and cannot be made liable for any debt of her husbands' contracting, nor as guarantor of his agreements.

True, she will be liable as owner for work and materials furnished to her house with her assent, but that specific debt being paid no matter how, she cannot be afterward made liable by any guaranty of her husband as to the value of any chose in action given in such payment. But this verdict and judgment include her, and as a consequence must be erroneous.

Again, this is a lien suit ; the judgment is general against the builder and special against the land.

Such a judgment can only be for labor and materials.

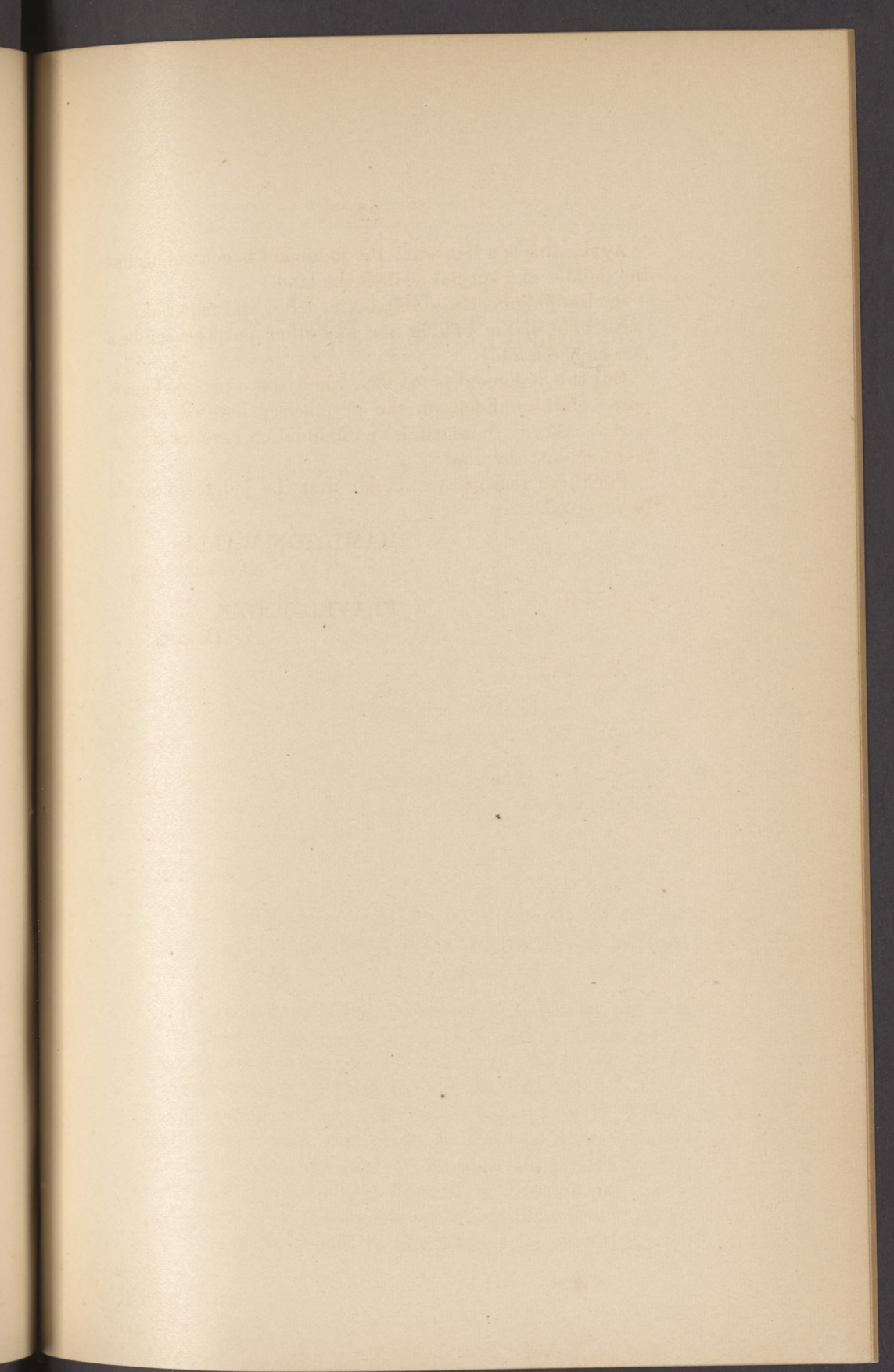
No debt of the builder for any other purpose can be a lien on the land.

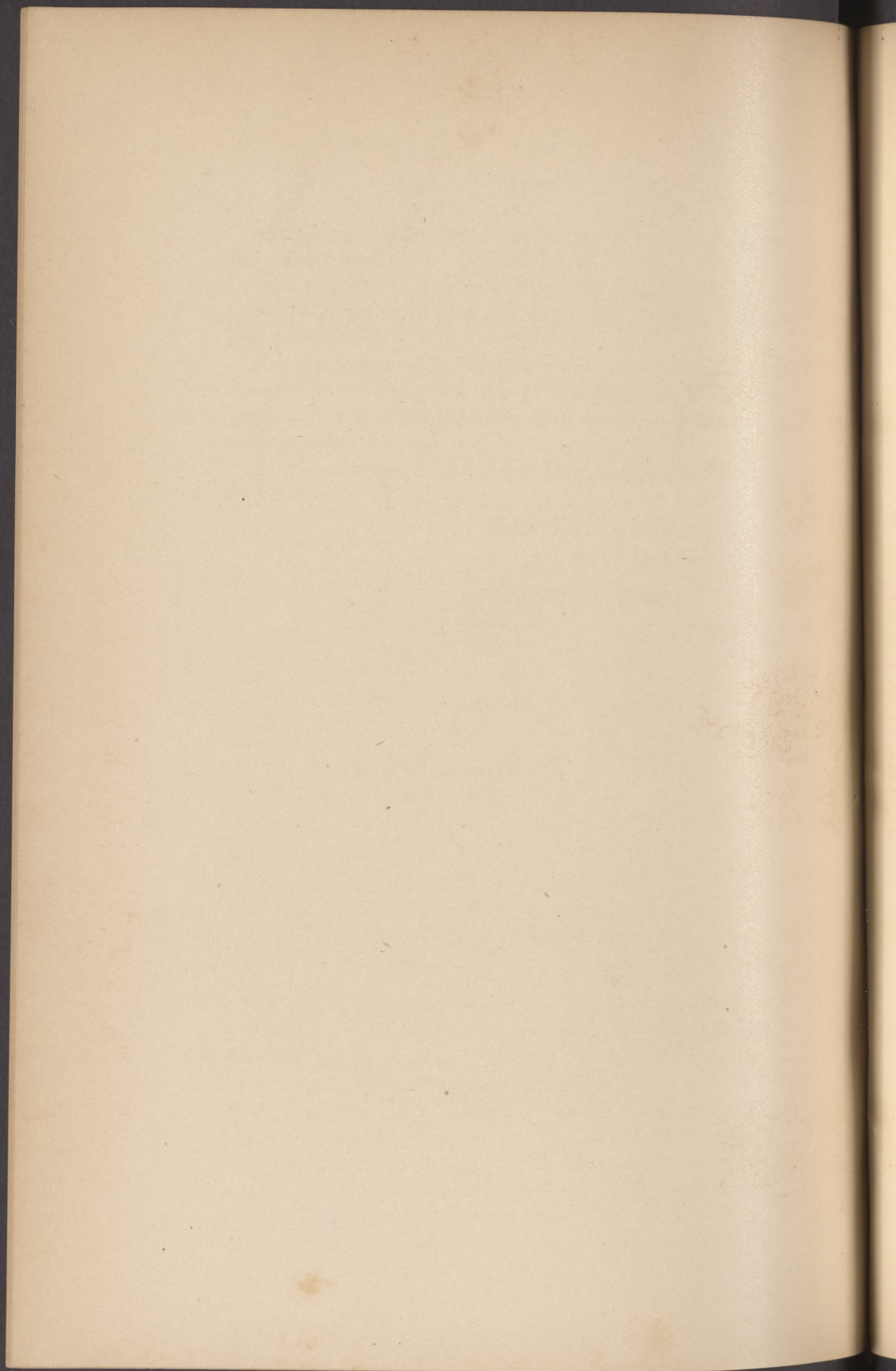
But this judgment is founded wholly on a personal guarantee of the builder, on the promissory note of a third party. Surely there can be no foundation here for a judgment against the land.

For these reasons, we submit that the judgment should be reversed.

HAMILTON WALLIS,
Deft's Attorney.

FLAVEL MCGEE,
of Counsel.





New Jersey Court of Errors and Appeals.

EDWARD E. DORMAN & ANNIE E.
DORMAN,

Pl'tffs in Error.

vs.

JAMES Y. WILSON,

Def't in Error.

In case on Lien.

HAMILTON WALLIS,

Att'y of Pl'tffs in Error.

GASTON & BERGEN,

Att'y of Def't in Error.

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NEW JERSEY, ss :

The State of New Jersey, to the Judge of the
[L. s.] Circuit Court, of the county of Union, greet-
ing :

For inasmuch as in the record and proceedings, and also in the giving of judgment in a certain plaintiff, which was in our said Circuit Court for the county of Union, before you, between Edward E. Dorman, builder, and Annie E. Dorman, his wife, owner, defendants, and James Y. Wilson, 20 plaintiff, in a plea of trespass on the case upon promises upon lien claim, manifest error, hath intervened to the great damage of the said Edward E. Dorman and Annie E. Dorman, as it is said, and we being willing that the error if any there be, should in due manner be corrected, and

full and speedy justice done to the parties aforesaid, in this behalf do command you that if judgment is thereupon given and confirmed, then you distinctly and openly send under your seal the record and proceedings aforesaid, with all things touching the same, to our judges of our Court of Errors and Appeals, in the last resort in all causes, at Trenton, within twenty days from the date of this writ, together with this writ, that the record and proceedings aforesaid, 10 being inspected, we may cause to be done thereupon, for correcting that error, what of right, and according to the law and custom of the State of New Jersey, ought to be done.

Witness our chancellor and president judge of our said Court of Errors and Appeals, at Trenton aforesaid, on the seventh day of December, in the year of our Lord, one thousand eight hundred and seventy-six.

HENRY C. KELSEY, *Clerk.*

20 HAMILTON WALLIS, *Def'ts Att'y*

The answer of Bennet Van Syckel, Judge, within named :

The record and proceedings of the plea, whereof mention, is within named, with all things concerning the same, to the Court of Errors and Appeals, in the last resort in all causes within specified, at the day and place within contained, I certify in a certain schedule to this writ annexed, as I am within commanded.

B. VAN SYCKEL, *Jus. Sup. Ct.*

30 The execution of this writ appears by the schedule annexed.

HENRY R. CANNON, *Clerk.*

Pleas before the Judge of our Circuit Court holden at Elizabeth, in and for the County of Union, of the term of May, in the year of our Lord one thousand eight hundred and seventy-six.

HENRY R. CANNON, *Clerk.*

Union County Circuit Court of the twentieth day of April, in the year of our Lord one thousand eight hundred and seventy-six.

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UNION COUNTY, *ss.*

Edward E. Dorman, builder, and Annie E. Dorman, his wife, owner, the defendants in this suit, were duly summoned by the sheriff of the county of Union, by serving copies of the summons issued in this cause on the said Edward E. Dorman and Annie E. Dorman, personally to answer unto James Y. Wilson, the plaintiff in this suit in a plea of trespass on the case, upon promises whereupon the said plaintiff, by Gaston & Bergen, his attorneys, 20 complains for that whereas the said Edward E. Dorman, heretofore, to wit, on the thirty-first day of May, in the year of our Lord one thousand eight hundred and seventy-five, at Elizabeth, in the county of Union, within the jurisdiction of this court, were indebted to the said plaintiff in the sum of two thousand dollars for the work and labor, care and diligence of the said plaintiff, by the said plaintiff, before that time done and performed and bestowed for the said defendant, and at their special instance and request; and also for divers materials and other necessary things by 30 the said plaintiff before that time found and provided, and used and applied in and about that work and labor for the said defendant, and at his like instance and request; and in the further sum of two thousand dollars for goods, wares and merchandise sold and delivered by the said plaintiff to the said Edward E. Dorman at his like request; and in the further sum of two thousand dollars 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 further sum of two thousand dollars for money 40

found to be due from the said defendant to the plaintiff in an account stated between them, and being so indebted to the said Edward E. Dorman, the defendant, in consideration thereof, afterwards to wit, on the day and year, at the place, and within the jurisdiction aforesaid, promised the plaintiff to pay to him the said several moneys on request, yet the said defendant, though often requested, has not paid the several sums of money or any or either of them, or any part thereof, wherefor, the said plaintiff says he is
 10 injured, and has sustained damages to the amount of two thousand dollars, and therefore he brings suit, &c. And the said plaintiff avers, and in fact says, that the said debt is by virtue of the provisions of an act of the legislature, entitled "An Act to secure to mechanics and others payment for their labor and materials in erecting any building," approved March 27th, 1874, and the supplements thereto, a lien on a certain building curtilage thereto, described as follows :

The said building is a two-story French roof frame
 20 dwelling house, thirty-four feet front and thirty-two feet deep, with wing in rear, one story French roof twenty-two feet in depth and twenty-three feet four inches in width, on a lot or curtilage situate in the city of Plainfield, county of Union, and State of New Jersey, fronting on Central avenue, and is one hundred feet in width in front and rear, and about four hundred feet in depth, and is bounded northerly by lands in possession of James M. Taylor, easterly by Madison avenue, southerly by lands of Saltzman, and westerly by Central avenue ; the northerly line of said
 30 lot begins in the centre of Central avenue two hundred feet southerly from the point where the southerly line of Ninth street intersects the easterly line of Central avenue.

The following is a bill of particulars of the labor performed and materials furnished by the said plaintiff for the said defendant, upon which the foregoing declaration is founded :

DUNELLEN, N. J., MARCH 22d, 1876.

MR. E. E. DORMAN,

TO JAMES Y. WILSON.

1875.

March 10.	To work on summer house, dwelling house, barn, chicken house, &c., &c., as per contract.....	\$2600 00	
	To difference of galvanized iron pumps	8 80	
	2 stone chimney casks.....	20 00	10
	To one large hearth for kitchen, and setting same	19 00	
	Taking out same and resetting	7 50	
	Extra on sink.....	4 50	
	Netting frames, as agreed	27 00	
	Bells from Mrs. Dorman's room to kitchen, and from back door to kitchen	16 00	
	8 mortised bolts on doors	12 00	
	Extra cellar window and frame.....	9 00	20
	Swinging door between kitchen and dining room	10 00	
	Outside netting doors to kitchen	8 00	
	Brick wall in cellar	45 00	
	Extra on washbowls in childrens rooms.....	9 00	
	Door to north room in cellar.....	8 50	
		<hr/>	
		\$2803 50	
May 31.	Building conservatory and side porch as per contract....	\$650 00	30
	Furnace as per contract	275 00	
	Inside blinds, as agreed	150 00	
	Building bird house.....	13 00	
		<hr/>	
		1088 00	
		<hr/>	
		\$3891 50	

		Cr.		
	Dec. 24, 1874.	By cash	\$100 00	
	“ “	By check	100 00	
	Feb. 22, 1875.	By check	500 00	
	Mar. 22, “	By cash	500 00	
	“ “	By note	500 00	
	Oct. 10, “	By cash	950 00	
		“	161 13	
10		By remittance on extra work.....	80 37	
			2891 50	
			\$2891 50	
			\$1000 00	

Judgment will be claimed for the above amount of one thousand dollars, with lawful interest thereon, until entry of judgment final, besides costs of suit.

And the said defendants by Hamilton Wallis, their attorney, come and defend the wrong and injury, when, &c., and say that they did not undertake and promise in manner and form as the said plaintiff hath above thereof complained against them, and of this they the said defendants put themselves upon the country, &c.

And for a further plea in this behalf, the said defendant, Annie E. Dorman, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that the said plaintiff ought not to have or maintain his aforesaid action thereof against her, and against said house and lands, because she says that said house and lands in the said declaration mentioned and described are not liable to the said supposed debt in manner and form as the said plaintiff hath above thereof complained against her, and of this she puts herself upon the country, &c., &c.

And the said plaintiff as to the plea of the said defendants, by them first above pleaded, and whereof they have put themselves upon the country, doth alike.

And the plaintiff as to the said plea of the said defendant Annie E. Dorman, by her secondly above pleaded saith,

that said plaintiff by reason of any thing by the said defendant in that plea alleged ought not to be barred from having and maintaining his aforesaid action thereof against the said defendant, because he says that the said house and lands in the said declaration mentioned and described are liable to the said debt in manner and form, as he, the said plaintiff hath above thereof complained against her.

Therefor let a jury thereupon come before the judge aforesaid, at Elizabeth aforesaid, on the first Tuesday of October next each of whom, &c., by whom, &c., whom 10 either, &c., to recognize, &c., because as well, &c., and the same day is given to the parties, here, &c.

At which day before the judge aforesaid, came the parties aforesaid by their attorneys aforesaid, and the jurors of the jury whereof mention is within made, being summoned also came, who to speak the truth of the matter herein contained, being chosen, tried and sworn on their oaths, say that the defendants did undertake and promise in manner and form as the plaintiff hath above thereof alleged against them, and they assess the plaintiffs dama- 20 ges at one thousand and sixty-seven dollars and forty cents.

Judgment signed, October 17, 1876.

BENNET VAN SYCKLE, *Judge.*

Whereupon it is considered that the said plaintiff do recover against the said defendants his damages aforesaid found, and also the sum of fifty-two dollars and eighty cents for his costs and charges by him about his suit in this behalf expended by the clerk of the court, now here adjudged to 30 him of increase with his assent, which damages, costs and charges in the whole amount to eleven hundred and twenty dollars and twenty cents.

And the said defendants in mercy, &c.

STATE OF NEW JERSEY, }
UNION COUNTY, } ss.

I, Henry R. Cannon, clerk of the Circuit Court in and for the county of Union, do certify that the foregoing is a true copy of the record of a certain judgment entered up in said court in the case of James Y. Wilson against Edward E. Dorman, builder, and Annie E. Dorman, owner, as the same is recorded in Book 18 of judgments of said court, pages 20, 21, &c.

In testimony whereof, I have hereunto set my hand
[L. S.] and seal, this eighteenth day of December, A. D.
eighteen hundred and seventy-six.

HENRY R. CANNON,
Clerk.

(Filed with Clerk of Union Circuit, December 13, 1876.)

UNION CIRCUIT COURT.

JAMES Y. WILSON,
 vs.
 EDWARD E. DORMAN, Builder
 and
 ANNIE E. DORMAN, Owner.

In Case.
On Lien Claim
Bill of Exceptions.

Be it remembered, that at the Circuit Court in and for 10 the county of Union, held at Elizabeth, in and for said county, on the sixteenth day of October, eighteen hundred and seventy-six, before Bennet Van Syckle, judge of said court, the several issues in the above stated cause joined between the said parties, according to the form of the statute in such case made and provided, came on to be tried *pro ut* the said issues, at which day, before the said judge, came as well as the said James Y. Wilson, as the said Edward E. Dorman and Annie E. Dorman, by their respective attorneys, and the jurors of the jury aforesaid, 20 whereof mention is within made, being called likewise came, and were sworn to try the said several issues in manner aforesaid respectively joined, and thereupon the said James Y. Wilson to maintain the said issues on his part, called as a witness, *James Y. Wilson*, who being duly sworn, testified as follows :

Q. Mr. Wilson, please tell under what circumstances these notes were taken ; first the \$950 note, and then the \$1000 note ?

A. I had been doing some work for Mr. Dorman, com- 30 mencing in the early part of the winter I think of 1874, and had got the work pretty well along; he had paid me

considerable in cash, and in March—the latter part of March or early part of April—we were having pretty bad weather, and he wasn't out for some time, and I wrote to him that I would like to have some money, and instead of giving me the money he sent me out a note.

Q. Just describe the note?

A. The note was for \$950 ; I think the first one was made by the Metropolitan Collar Company to the order of themselves, and endorsed by the president and secretary for the
 10 company ; I wrote to Mr. Dorman that he should have endorsed that note ; he didn't come out until sometime afterward, and I spoke to him about it ; he says, " Its all right, I use a great many of their notes ; it don't make any difference at all, the notes are good, and it will be paid when it comes due ; its all right, and you will get your money." In about a month he sent out a second note in the same way, and represented that the company was perfectly good ; he was connected with the company, selling their goods, &c. ; his brother was president, and gave me to understand it
 20 was all right, and as good paper as there was in the market I supposed. I think about two or three weeks after I took the second note we settled in full. He moved out about the 31st of May, I think. He paid me the balance of money due, and I gave him a receipt for it. About a week after that, I think about the 5th, 6th or 7th of June, I saw a statement in the New York Tribune that the Metropolitan Collar Company had failed—suspended. I went to see Mr. Dorman about it a very short time after that, and he said yes, the company had got into trouble, etc. The first
 30 note had not become due at that time, and I asked him whether it would be paid when it became due, and he said it was a little uncertain, he didn't know what they would do, but they expected to go on. Of course I looked to him for payment, as he represented the company as solvent and good, and I went after him quite frequently, I think until the latter part of September, and pressed him pretty hard for a settlement, and he plead off, said he hadn't the money, that he was short of funds, and I waited as long as I
 40 could.

Mr. Wallis here interrupted the witness, and objected to all testimony of transactions after this settlement; claims that this settlement and the giving of this note, was an accord and satisfaction of the claim and that any subsequent agreement was without consideration and therefore void.

The court stated, that the subsequent conversation between the parties will be competent to show what was the intention of the parties in giving and receiving the note. And the said judge having 10 given his opinion that the evidence so objected to was competent and legal evidence in the cause, admitted the same, to which the defendants by their counsel, excepted, and prayed that this their bill of exceptions be sealed, and it is sealed accordingly.

B. VAN SYCKEL,

[L. s.]

Jus. Sup. Ct.

And thereupon the witness further testified :

He said to me in the latter part of August or September, 20 that he could not pay all the money; wanted to know what I would do. He said he didn't want to be pressed for it in any way, and said he could pay me part of the money but couldn't the rest of it. I told him I wanted all of it; I had bills due that should be paid. He said to me the company was going on again, they had compromised for twenty-five cents on the dollar with their creditors, and said he, "I will pay you about half of the money, and give you some notes that you can use for the balance of it." Well, I said to him, that I didn't want any notes if I was going to be 30 troubled with them as I had with these former ones, but I would like to get the money, and if he would pay me one-half the money I would wait for the balance of it as long as I could. Then he wanted to give me notes running from one to five months. Said I, "If these notes will be paid when due; if I can have a certainty of using them, I will take them to help you and myself at the same time." So he paid me \$950 I believe it was, and brought me out

four notes of \$250 each for the balance, and said that these were all right, that they would be paid when they became due; that there was no question about it at all, the company had compromised and were going on and it was all right. I said to him at the time "If I am not going to get the money for these I don't want them." Said he, "I will see you through; those notes are all right and I know it. If I didn't, I wouldn't bring them out to you; you will get your money all straight." Before the first notes became due the
 10 company failed again, and the notes were all protested. So a day or so after the note was protested, I went to see Mr. Dorman to see if I could do anything about it, and he promised during the winter, and when I pressed him pretty sharp that he would settle the matter up, that I could get my money if I would wait. Well, I waited as long as I could, and finally had to resort to the law to get my money.

Q. How long after the note of \$1,000 was given, before the company failed?

20 *A.* The first time?

Q. I mean the one thousand dollar note; yes.

A. The thousand dollar note came due in August. I think it did not come due until after the company failed.

Q. I say how long after the note was given did the company fail?

A. The note was sent to me from the middle to the 20th of May, and the company failed the 5th, 6th or 7th of June. I think I got the note about the 20th or 21st of May; it
 30 was sent to me by mail the same as the previous note had been.

BY THE COURT:

Q. That was the \$1,000 note?

A. Yes, sir; the company failed, I think, in the first week in June.

BY MR. BERGEN:

Q. This amount has never been paid—these notes?

A. Never has been paid; no, sir.

40 *Q.* These are the notes, are they not?

(Showing witness notes.)

A. Those are the notes.

BY THE COURT :

Q. These are the renewal notes ?

A. Yes, sir.

MR. BERGEN : (We now offer those notes to the defendants counsel.)

Q. After the company failed the second time, did you ever go to see the company about those notes ?

A. I went to see their receiver.

10

And being *cross-examined*, he says :

Q. At the time this second note was given, Mr. Wilson, this note for one thousand dollars, where was Mr. Dorman ?

A. I presume he was in the city of New York.

Q. The note was sent to you by mail ?

A. I believe it was sent to me by mail.

Q. Was it accompanied by a letter ?

A. Yes, sir ; they were both accompanied by letters.

Q. Then Mr. Dorman didn't make any of these representations of which you have spoken, at the time the second note was given ?

A. Didn't make any representations ?

Q. You say at the time the second note was given, he told you the same as he had at first ?

A. He came out a short time afterwards.

Q. I say at the time the note was given and received, there was no representations made to you at all ?

A. There was representations made in the letter.

Q. Where is the letter ?

30

A. The letter is burned.

Q. Who burned it ?

A. The fire that destroyed my dwelling about two months after that time ; it occurred in the night, and burned up all my effects and furniture.

Q. Did that letter contain any representations ?

A. It did.

Q. What?

A. It contained this representation; that he sent the note of the Collar Company the same as before, and the expression was used in this way: "It is all O. K."

Q. That was in the latter part of May?

A. About the 20th of May or thereabouts.

Q. You took the note and gave Mr. Dorman that receipt for it, didn't you? (Showing witness paper.)

A. Yes, sir.

10 (Receipt read in evidence and marked Defendant's Exhibit A.)

Q. You have taken paper from the company before have you not?

A. Never took any from the company; no, sir.

Q. Didn't you in February, 1874, take a check of that company?

A. Took it from Mr. Dorman.

20 *Q.* Didn't you take a check from the company in February for \$500?

A. I believe I never took any check from the company.

Q. Is that receipt in your writing? (Showing paper.)

A. Yes, sir, that receipt is in my writing.

Q. Does that state the fact?

A. Yes, sir, that was their check but I took it from Mr. Dorman.

(Receipt read in evidence and marked Defendant's Exhibit B.)

Q. Now this note for \$950; that was paid?

30 *A.* Yes, sir; Mr. Dorman paid it.

Q. How was it paid?

A. He brought me checks of the company for it.

Q. Brought you checks of the company for it?

A. Yes, sir; that is my recollection of it.

Q. On the 29th of May, did you render Mr. Dorman this account? (Showing paper.)

A. I believe I did.

Q. That is your handwriting, isn't it?

A. Yes, sir.

Q. What mean those lead pencil marks down below there?

A. There were certain changes there that was made, I believe, at the time of our settlement; I forget exactly what they were or how they were. Some things that probably he objected to; it is in his writing; I don't remember exactly how they were.

Q. And you between arranged upon the amount that was then due? 10

A. Yes, sir, we settled up satisfactorily then; as regards the amount that is; I believe there was no dispute. I don't remember just what the items were.

(Paper read in evidence, and marked Defendant's Exhibit C.)

Q. And at the same time you gave Mr. Dorman that receipt, did you not, Mr. Wilson?

A. I presume it was at the same time; I gave him that receipt.

(Receipt read in evidence, and marked Defendant's 20 Exhibit D.)

Q. Did you ever do any work on that house after the 31st of May?

A. I done some after that.

Q. Is that included in this debt?

A. No, sir.

Q. You say that Mr. Dorman gave you to understand that the note was good. What did Mr. Dorman say to you about the note?

A. He said that it was good; that his brother was presi- 30
dent of the company; he knew all about it; the paper was perfectly good; it was A, number one, and would be paid when it was due; they were in a perfectly solvent condition, and gave me to understand that it was all right; gave me every assurance of it and made as strong representations as a man could in regard to it; if he hadn't represented it as good, of course I wouldn't have taken it.

Q. Didn't you ask him to endorse the note?

A. I didn't ask him to endorse it; I said to him in this way, that he should have endorsed that note.

Q. What did he say to you then?

A. He said he was in the habit of taking their notes and took them in that way and he said, "That note is all right, and will be paid. I am not in the habit of endorsing notes"; didn't want to make a precedent of it. He said "take it and be perfectly easy in regard to it; it is all right." That is the way he talked to me about it.

10 *Q.* Now, in regard to these small notes for \$250; who first spoke about those notes?

A. Mr. Dorman, I believe.

Q. Didn't you?

A. No, sir.

Q. Didn't you ask him to get you a settlement with the company?

A. I didn't ask him to get a settlement at all; he kept talking about seeing the company.

Q. Didn't you go down to see the company?

20 *A.* At his request I went down to see his brother, the president; his brother was not there, and we went to his brother's residence.

Q. And saw his brother?

A. Yes, sir.

Q. And then you took the four \$250 notes?

A. No, sir, I did not; after that I did; I took them from Mr. Dorman, not from his brother.

Q. After the company failed the second time, you went to see the receiver about these \$250 notes.

30 *A.* Mr. Dorman spoke to me about calling to see Mr. Baldwin, the receiver, to see what he had to say; said he couldn't get any satisfaction out of him, and he said if I was going down to New York to "go and see him and see what he says to you," and I went.

Q. This \$1000 was, you say, paid in the same way as the note for \$950, that is, received by you in the same way as the \$950 note?

A. I believe they were; I believe they were both received in the same way—that is my recollection of it.

40 *Q.* (Showing receipt.) That receipt you gave for the \$950 note?

A. That is the receipt I gave for the \$950 note.

(Receipt read in evidence marked Def'ts Ex. E.)

And being *examined in the re-direct*, witness said :

Q. At the time of your settlement when he paid you \$161 had either of these notes become due ?

A. No, sir.

Q. Neither of them ?

A. Neither of them. The settlement was about the last day of May, and the first one came due the 16th of June, I think. 10

Q. Do you remember the date of this \$1,000 note ?

A. I think it was dated April 1st.

Q. What became of the \$1,000 note ; what did you do with it ?

A. Put it in the bank for collection.

Q. The receipt you gave, I see is dated May 21, 1875. How soon was it after that that the company became insolvent and failed ?

A. I think a trifle over two weeks ; about the 6th or 7th of June I saw it ; the 7th of June in the Tribune. 20

Q. And the receipt you gave for the note is May 21, '75 ?

A. Yes, sir.

And being *re-cross-examined*, the witness said :

Q. Did you get that note discounted ?

A. I got the \$950 note discounted.

Q. Didn't get the \$1,000 note discounted ?

A. No, sir.

Plaintiff rests.

And being *further examined* by the counsel for the plaintiff the witness said :

Q. Are you acquainted with Mr. Dorman's wife ?

A. I am.

Q. What is her name ?

A. It is Annie ; I don't know whether it is Annie or Annie E.

Q. You have seen her and talked with her during the progress of this building?

A. Yes, sir; she was there frequently about the time it was done, and at frequent intervals during the progress of the work, and had a good deal to say about it.

Q. Who conveyed this property to Annie E. Dorman.

A. I take it, I did.

No cross-examination.

Plaintiff rests.

10 Mr. Wallis then moved for a non-suit on the ground that the claim for this debt has been paid, as appears from the plaintiff's own testimony; that an accord and satisfaction has been made in the tender and reception of this note.

The court held that it was a question of intention of the parties at the time of the transaction which must be submitted to the jury. Motion for non-suit denied.

To which refusal the defendants by their counsel, excepted and prayed that this, their bill of exceptions, might be sealed, and it is sealed accordingly.

20

[L. S.]

B. VAN SYCKEL,

Jus. Sup. Ct.

Q. Mr. Dorman, you are one of the defendants in this action?

A. Yes, sir.

Q. State the circumstances under which the \$950 note that Mr. Wilson has spoken of, was given to him?

A. If I remember correctly, I carried it to him from the company.

Q. What was said about it at the time?

30 A. He asked me to endorse it, and I said no; I said I did not endorse anybody's note—that I had taken their notes for several years, and they had always been paid, which seemed satisfactory as far as I knew.

Q. What else was said between you?

A. I don't remember anything in particular.

Q. Now state the circumstances under which the \$1000 note was given?

A. He wanted money, and I was home sick; I had not been in Plainfield I think for something near a month, when he wrote me for money. I asked him if he could use a note; told him I could send him one—the same as he had before—the Metropolitan Collar Company's; he said he could use it the next week, and I said very well, and therefore I sent it to him; nothing further was said, and he sent me a receipt.

Q. Have you stated everything that was said at the time of giving the \$950 note? 10

A. As near as I can remember—I have stated the facts of the case—it might have been stated in a little different words.

Q. When did you next see Mr. Wilson with regard to this matter?

A. I should say between the 20th and 26th of May.

Q. Well, what took place then?

A. I was visiting at my uncle's in Plainfield, and I asked him to come in and we would settle our account—he called and we settled it. 20

Q. Was this paper, (Ex. C.) produced there?

A. It was.

Q. And how about these items, was there any dispute then between you, and if so, what was it?

A. We had some little talk about some extra over charges which we settled between us amicably at the time.

Q. And you paid him that amount?

A. I paid him that amount in greenbacks.

Q. And got his receipt? 30

A. There is no consideration about it whatever.

Q. What was said about these notes?

A. Nothing whatever, to my remembrance—not a word.

Q. Now, when next did you see Mr. Wilson?

A. Well, I should say I saw him at different times; I was out at my house after I was better, nearly every day.

Q. When next did you see him in regard to this note?

A. I think nothing was ever said about that note until he came to my house after the failure for me to do something about these notes, and I says, "It is nothing that concerns me; if my name is on them that is one thing, 40

if it is I shall be obliged to pay for them ; if it is not, I don't see how there is any relation between the notes and me."

Q. Well, what else took place then ?

A. And the conversation went on some little time in that way—he feeling that I was to make some consideration for the note, and I saw not the slightest reason—

Q. What did you say—state the conversation as near as you can recollect it ?

10 *A.* I said that I would see the company, and give him any information that I could in relation to the notes, but I had no personal engagements.

Q. When next did you see him in regard to these notes ?

A. I couldn't say that ; from time to time I suppose. I was living in Plainfield and might see him once or twice a week.

Q. Well, under what circumstances were these little notes given by the company ?

20 *A.* I told him I would assist him in getting his money from the company ; every dollar of it if I could ; whatever I could ; anything I could do for him I would do with pleasure. I said to him that he could see my brother and talk with him—the president of the company—I would do all I could to bring about a meeting ; he came over to see him and we went there, but he was not in that afternoon, and he went to his house with me to see him, and I talked to my brother.

Q. Never mind what you said to your brother—what else took place between you and Wilson ?

30 *A.* Nothing at all, any further than I would assist him all I could in getting the money and these notes—not another idea that I ever have had.

Q. Mr. Wilson says that you said to him that you would see the notes paid—

A. I never said anything of the kind.

Q. At any time ?

A. At no time.

Q. Either when you gave the notes or afterwards ?

A. Never at all, under any circumstances.

40 *Q.* You say you were sick—how long were you sick ?

A. Nearly two months, I should say six to seven weeks.

Q. Between what times ?

A. Commencing about March 30th, it ran about a month and I came out one day, and came to Plainfield, took cold, and went back, and was sick two or three months longer.

Q. And during that time was you attending to business at all ?

A. I was not in the office during the time.

Q. Was you confined to the house during that time ?

A. Yes.

10

And being *cross-examined*, the witness said :

Q. Mr. Dorman, what connection had you with this company ?

A. I sold their goods on a commission.

Q. Did you have an office with them ?

A. Always.

Q. Always had an office with them ?

A. That was my head-quarters.

Q. Ever since they started ?

A. Ever since they started.

20

Q. Were you acquainted with the president and secretary of the company ?

A. Yes, sir ; certainly.

Q. You knew all about their affairs then ?

A. I knew something of their affairs.

Q. Was that your practice to pay your debts with the notes of this Collar Company ?

A. Whenever it came in the way to do so.

Q. Whenever you could do it ?

A. Certainly.

30

Q. How long after this note was given did that company become insolvent—do you remember ?

A. No, sir ; I could not tell you that sir.

And being *examined in the redirect*, witness says :

Q. At the time of giving the note to Mr. Wilson—this \$1000 note—what knowledge had you of the financial condition of the company ?

A. Nothing unfavorable—as favorable as I ever knew it.

Q. Had you taken the notes of the company before that time yourself?

A. Yes, sir; I had always used them for seven or eight years. I supposed the company was in better condition than at any time before.

And being *recross-examined*, witness said:

Q. The company was in fact insolvent, wasn't it, although you didn't know it?

10 Objected to as incompetent.
 Objection sustained.

And thereupon the defendants rested their case, and the evidence on both sides being closed, the said Judge charged the jury as follows, that is to say:

The first question, gentlemen, which you will consider in this case, is whether the plaintiff received this note of The Metropolitan Collar Company as absolute payment of his claim against the defendant in this case of one thousand dollars. If he did receive it as absolute payment, 20 and there was no fraud practiced upon him by the defendant, it extinguished the debt that he owed him—and you should find for the defendant, no matter whether the note was collectable or not, you must settle this as a question of fact under the evidence, whether he did receive it absolutely as payment, agreeing to take the risk of it himself. To support this defence, you have the receipts of the plaintiff, stating that he had received such a note in payment, and you have a bill made out by him upon which he credited these notes, but these statements are not conclusive upon that point. 30 The plaintiff testifies to the contrary himself. He says he did not agree to take the risk of those notes. He says he knew nothing about them, and asked the defendant whether they were all right, and told him he did not wish them, and would not take them unless he was sure of their being paid; and the defendant told him he did not endorse the notes,

as it was against his principles, but to take them, and he would see that it was all right. After the one thousand dollar note matured, the defendant and the plaintiff came together, and the plaintiff told him that this note was not paid, and he wished to have it arranged, and he says he called upon the defendant to arrange it, and that the defendant did not say to him that he had taken these notes absolutely and taken the risks of them. He did not say, "I am not responsible at all for this, and you must look to the Collar Company ;" but he did procure four other notes of 10 \$250 each from the Collar Company, and gave them to the plaintiff to take up his \$1,000 note which had matured. That, gentlemen, is a circumstance which you may look at in this case, to determine what the intention of the parties was at the time the thousand dollar note was passed to the plaintiff. You are to say from that and the other circumstances in the case, whether the defendant himself understood that he was to be entirely relieved from the payment of this one thousand dollars when he passed the thousand dollar note originally to the plaintiff. If you find from all 20 the evidence in the cause, that the plaintiff did not agree to accept the thousand dollar note unconditionally as absolute payment of his claim against the defendant, you should find a verdict for the plaintiff for the thousand dollars with interest. But if you find that the plaintiff did agree to accept the one thousand dollar note absolutely, then you must enquire further, whether at the time the defendant passed that thousand dollar note upon him, he knew that the company was insolvent. If he did know 30 that the company was insolvent at the time, and assured the plaintiff that the company was good, he is guilty of a fraud from which he can deserve no benefit, and you should therefore hold him for the original debt, and find your verdict against him, if you find that he was guilty of actual fraud in passing that note upon the plaintiff.

And thereupon the defendants by their counsel, request the said judge to charge as follows :

MR. WALLIS :

If your Honor please, I request the court to charge the jury that the note of a third party received for the payment of a debt unconditionally is a payment, and subsequent transactions between the parties cannot alter the character of such acceptance.

Upon which the court charged as follows :

The defendants counsel, gentlemen, asks me to charge you, that a note of a third party received for a payment
10 unconditionally is a payment, and subsequent transactions between the parties cannot alter the character of such acceptance.

I have already charged you that if the note was received unconditionally as a payment, it extinguished the debt. The subsequent conversation between the parties was evidence to indicate what the bargain between the parties was, and I have admitted it for that purpose.

I refuse to charge otherwise on that.

MR. WALLIS :

20 Will your Honor allow us an exception to your Honor's refusal to charge otherwise ?

We also submit these requests in writing. To which refusal of the said judge to charge as requested, and otherwise than aforesaid, the defendants, by their counsel, excepted, and prayed that this their bill of exceptions, might be sealed, and it is sealed accordingly.

B. VAN SYCKEL,

[L. s.]

Jus. Sup. Ct.

30 And thereupon the defendants, by their counsel, asked the said judge also to charge, that the fact of the credit of the note upon the account and the balance struck is evidence of an accord and satisfaction of the demand. To which the said judge replied as follows :

There are circumstances, gentlemen, as I have already stated to you, from which, with the other evidence in the case, you must determine whether it was absolute payment or not by note.

To which refusal of the said judge to charge as requested the defendants, by their counsel, excepted, and prayed that this their bill of exceptions might be sealed, and it is sealed accordingly, subject to what was said by the court.

B. VAN SYCKEL,
[L. s.] *Jus. Sup. Ct.*

And thereupon the said defendants, by their counsel, also asked the said judge to charge that subsequent transactions between the parties cannot effect an agreement made between the parties at the time. 10

To which the said judge replied :

As I have already stated, gentlemen, the subsequent transactions between the parties may be considered by you to determine whether the note was received as an absolute payment or not.

To which refusal of the said judge to charge as requested, the defendants, by their counsel, excepted, and prayed that this their bill of exceptions might be sealed, and it is sealed accordingly, subject to what was said by this court.

B. VAN SYCKEL, 20
[L. s.] *Jus. Sup. Ct.*

And thereupon the said defendants, by their counsel, requested the said judge to charge, that receipts given at the time are evidence of the intention of the parties not to be overcome by uncorroborated testimony of the party making them.

To which the said judge replied as follows :

The credit which is to be given to the testimony of the plaintiff, is a question for you and not for the court to settle.

To which refusal of the said judge to charge as requested, 30
the defendants, by their counsel, excepted, and prayed that this their bill of exceptions might be sealed, and it is sealed accordingly.

B. VAN SYCKEL,
[L. s.] *Jus. Sup. Ct.*

And thereupon the defendants, by their counsel, also asks the said judge to charge you, that the defendant said, that he did say, that he was not to be responsible for the note.

To which the said judge replied :

That, gentlemen, is a question as to what was sworn to by the defendant, and you must settle that. If there is any doubt about it the stenographer may read it from his notes.

10 And thereupon the defendants, by their counsel, asked the said judge also to charge, that there is no evidence that the defendant knew the company to be insolvent.

To which the said judge replied as follows :

There is no direct evidence, gentlemen, upon this point. There are circumstances in the case which you may consider upon that question. The defendant was in the employ of the company, his brother was one of the chief officers, he was dealing considerably in their goods, and says that he was somewhat acquainted with their affairs. You are to say whether then is evidence enough to satisfy you that he did know when he passed these notes that the
20 company was insolvent. It is not a question for the court.

To which refusal of the said judge to charge as requested, the defendants, by their counsel, excepted, and prayed that this their bill of exceptions might be sealed, and it is sealed accordingly, subject to what was said by the court, and also subject to what was stated by the court to the jury when they were brought into court after they had retired, as appears subsequently herein.

B. VAN SYCKEL,

[L. S.]

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MR. WALLIS :

I ask one exception to so much of the charge of your Honor, as says that the defendant was in the employ of the company.

THE COURT :

Very well, if I made a mistake about the fact, I will recall the jury.

The stenographer will read that portion of the evidence.

(Evidence read, and jury recalled.)

THE COURT said :

Gentlemen, after you retired, the counsel for defendants called my attention to the fact that I had misstated the testimony in one respect ; I stated to you, that the defendant was in the employ of the Metropolitan Collar Company. The evidence was, that he was engaged in selling their goods, and that he had his office in the office of the company. That is the fact.

(The jury then retired.)

EXHIBIT A.

\$1000 $\frac{00}{100}$

Rec'd of Mr. E. E. Dorman, a note for one thousand dollars on a/c of work done on his property on Central ave., Plainfield, N. J.

JAMES Y. WILSON.

Dunellen, N. J., May 21st, 1875.

EXHIBIT B.

DUNELLEN, N. J., Feby. 22d, 1875.

Rec'd of Metropolitan Collar Co. a check for five hundred dollars, the same to be credited to the account of E. E. Dorman, Esq.

\$500 $\frac{00}{100}$

JAMES Y. WILSON.

EXHIBIT C.

DUNELLEN, N. J., May 29th, 1875.

MR. E. E. DORMAN,		
To JAMES Y. WILSON,		DR.
To work, as per contract	\$3500 00	
Putting in heater	275 00	
Bird house	13 00	
Door in attic	5 50	
Screen door	9 00	
* Cleaning	12 00	
		<u>\$3814 00</u>
CR.		
By cash and notes	\$3650 00	
		<u>164 00</u>
Deduct cleaning	12 00	
		<u>\$152 00</u>
$\frac{1}{2}$ Bobl.	9 00	
		<u>\$161 00</u>
Paid	\$161 00	
		JAMES Y. WILSON.

* This line is erased in original.

EXHIBIT D.

\$161 $\frac{00}{100}$

Received of Mr. E. E. Dorman, one hundred and sixty-one dollars in full of all demands for work done and materials furnished on his house on Central ave., Plainfield, N. J., to date.

JAMES Y. WILSON.

Plainfield, May 31st, 1875.

EXHIBIT E.

DUNELLEN, N. J., April 23d, 1875.

Rec'd of Mr. E. E. Dorman a note for nine hundred and fifty dollars, dated Feb'y 13th, 1875, payable four months from date, the same being paid on a'e of improvements now being made on house on Central ave., Plainfield, N. J.

\$950 $\frac{00}{100}$

JAMES Y. WILSON.

(Filed, December 30, 1876.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

10	EDWARD E. DORMAN, Builder, <i>and</i> ANNIE E. DORMAN, Owner, <i>Plaintiffs in Error,</i> <i>versus</i> JAMES Y. WILSON, <i>Defendant in Error.</i>	}	<i>Assignment of Errors.</i>
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20 Afterwards, that is to say, on the 27th day of December, 1876, in the Court of Errors and Appeals in the last resort in all cases in New Jersey, comes the said Edward E. Dorman and Annie E. Dorman by Hamilton Wallis, their attorney, and say that in the record and proceedings, and also in the matters contained and recited in the said bill of exceptions, and in the verdict and judgment aforesaid, there is manifest error in this, to wit: That the declaration aforesaid and the matters therein contained, are not sufficient in the law for the said James Y. Wilson to have his said action thereof against the said Edward E. Dorman and Annie E. Dorman.

30 There is also manifest error in this, to wit: That at the trial of said cause in the Union Circuit Court held in and for the county of Union, the said judge who tried the case admitted in evidence testimony offered by the plaintiff, James Y. Wilson, and objected to by the defendants below, which testimony was illegal, and was injurious to the said defendants.

There is also manifest error in this, to wit: That after the said plaintiff had closed the testimony offered by him to maintain and prove the said issue on his part, and had

rested his case on said testimony, the said defendants, by their counsel, moved that the plaintiffs be non-suited on the ground that the claim for the debt in suit had been paid, as appeared from the plaintiff's own testimony, that an accord and satisfaction had been made in the tender and reception of a certain note mentioned in the testimony, and shown in the said bill of exceptions, but the said judge denied the said motion, and refused to order a judgment of non-suit, as is mentioned in the said bill of exceptions in that behalf, whereas by the law of the land the judge should have granted the said motion, as will appear by the evidence in the said bill of exceptions. 10

There is also manifest error in this, to wit : That the testimony having been concluded, and the parties having rested their cause, the said defendants, by their counsel, requested the said judge to charge the jury before whom the said issue was then and there being tried, that the note of a third party received for the payment of a debt unconditionally is the payment, and subsequent transactions between the parties, cannot alter the character of such acceptance, 20 whereupon the said judge declined to charge said request as made, but added to and qualified the proposition contained in such request, and charged the jury in that behalf, as is shown in and by the said charge, whereas by the law of the land, the said judge should have charged the said request as made, and without the additions and qualifications in that behalf contained in said charge.

There is also manifest error in this, to wit : That at the time last aforesaid, the said defendants, by their counsel, further requested the said judge to charge the said jury 30 that the fact of the credit of the note upon the account and the balance struck, is evidence of an accord and satisfaction of the demand ; whereupon the said judge declined to charge the said request as made and added to and qualified the proposition contained in said request, and charged the jury in that behalf, as is shown in and by the said charge, whereas, by the law of the land the said judge should have charged the request as made, without the additions and qualifications in that behalf contained in said 40 charge.

There is also manifest error in this, to wit : That at the time last aforesaid, the said defendants, by their counsel, requested said judge to charge said jury, that subsequent transactions between the parties cannot affect an agreement made between the parties at the time ; whereupon the said judge declined to charge as requested, but on the contrary, did charge the jury as follows : " As I have already stated, gentlemen, the subsequent transactions between the parties, may be considered by you to determine
 10 whether the note was received as an absolute payment or not," whereas, by the law of the land, the said judge should have charged the said request as made, and should not have charged as he did.

There is also manifest error in this, to wit : That at the time aforesaid, the defendants, by their counsel, requested the said judge to charge, that receipts given at the time are evidence of the intention of the parties not to be overcome by uncorroborated testimony of the party making them, whereupon, the said judge declined to charge said request as
 20 made, but added to, and qualified the proposition contained in said request, and charged the jury in that behalf, as shown in and by the said charge, when, by the law of the land, the said judge should have charged the said request as made, and without the additions and qualifications in that behalf contained in said charge.

There is also manifest error in this, to wit : That at the time aforesaid, the defendants, by their counsel, requested the said judge to charge, that there is no evidence that the
 30 defendant knew the company to be insolvent ; whereupon, the said judge declined to charge said request as made, but added to, and qualified the proposition contained in said request, and charged the jury in that behalf, as is shown in and by the said charge, whereas, by the law of the land, the said judge should have charged the said request as made, and without the additions and qualifications in that behalf contained in said charge.

There is also manifest error in this, to wit : That by the record aforesaid, it appears that the verdict of the jury before whom the said cause was tried, was in favor of the
 40 said James Y. Wilson and against the said Annie E.

Dorman and Edward E. Dorman, whereas, by the law of the land, the said verdict ought to have been for the said Annie E. Dorman and Edward E. Dorman, and against the said James Y. Wilson, and that said verdict is contrary to the weight of evidence.

There is also manifest error in this, to wit: That by the record aforesaid, it appears that judgment in the plea aforesaid was given for the said James Y. Wilson and against the said Annie E. Dorman, when, by the law of the land, judgment in the said plea ought to have been for the said Annie E. Dorman and against the said James Y. Wilson. 10

There is also manifest error in this, to wit: That by the record aforesaid, it appears that judgment in the plea aforesaid, was given for the said James Y. Wilson and against the said Annie E. Dorman and Edward E. Dorman whereas, by the law of the land, judgment in the said plea ought to have been given for the said Annie E. Dorman and Edward E. Dorman against the said James Y. Wilson.

Therefore the said Edward E. Dorman and Annie E. 20 Dorman, pray that the judgment aforesaid by reason of the aforesaid errors, and of the errors appearing in the record and proceedings aforesaid, may be reversed, annulled and for nothing holden, and that the said Edward E. Dorman and Annie E. Dorman may be restored in all things they have lost on the occasion of the said judgment.

HAMILTON WALLIS,
Attorney of Plaintiffs in Error.

N. J. COURT OF ERRORS AND APPEALS.

JAMES Y. WILSON, <i>Def't in Error.</i> <i>ads.</i>	}	<i>In Error.</i>
EDWARD E. DORMAN & ANNIE E. DORMAN, <i>Pl'tffs in Error.</i>		

And thereupon the defendant in error, by Gaston & Bergen, his attorneys, comes into the said court, and says that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid.

And he prays that the said Court of Errors and Appeals may proceed to examine as well the record and proceedings aforesaid, as the matter above assigned for error, and that the judgment aforesaid; in form aforesaid given, may be in all things affirmed, &c.

GASTON & BERGEN,
Att'ys for and of Counsel with
Def'ts in Error.

