New Jersey Court of Errors and Appeals

Between JOHN S. IRVING, *Complainant-Appellant,* *and* MUTUAL TRUST COMPANY, *et al.*, *Defendants-Respondents*	ON APPEAL FROM DECREE DISMISSING BILL OF COMPLAINT.

Brief for Defendant-Respondent, Mutual Trust Company.

The complainant, John S. Irving, father-in-law of John W. Crooks, in 1906, became the accommodation maker of a note of $2,000.00 for said Crooks, which note was endorsed by Crooks and purchased by the defendant, Mutual Trust Company. The note continued to be executed with Irving as maker and Crooks as endorser for several periods of two or three months each, whereupon subsequently the note was changed, so that Crooks became the maker and Irving the endorser. The note was for the accommodation of Crooks, and Irving demanded or held no collateral whatever for his protection. For the accommodation of Crook's, Irving's name also appeared on a $1,500.00 note, which was purchased by the Westfield Trust Company, but which does not figure in this controversy, excepting incidentally.

In 1905, Crooks borrowed from the Mutual Trust Company, the sum of $4,900.00 on the usual form of collateral note, pledging for its security 100 shares of the capital stock of the Westfield Land & Improvement Company, of which Irving was the President. This collateral note, in the usual form, contained a provision that the collateral pledged should be security not only for the $4,900.00 indebtedness, but "for payment of this or any other liability or liabilities of the

undersigned (Crooks), direct or contingent, individual or firm, to said Trust Company, now existing or which hereafter may be contracted," and authorized the Trust Company on non-payment, to apply the proceeds of the collateral "to pay any or all of said liabilities to said Trust Company, or its assigns, as its President or Treasurer, or assigns, shall deem proper, returning the overplus to the undersigned."

The Westfield Land & Improvement Company liquidated its assets and paid to the Mutual Trust Company, as holder of the stock, the share of such assets to which Crooks' stock was entitled. The amount received by the Trust Company from the proceeds of the stock was not sufficient to fully pay the notes which it held, upon which Crooks was obligated, without taking into account the $1,700.00 note, endorsed by Irving. The $1,700.00 note was protested, and later paid by Irving, in January, 1911, C. p. 37). At the time of such payment, Irving served notice on the Trust Company that he demanded to be subrogated to the right of the Trust Company in the shares of stock which it held as collateral, under the $4,900.00 note. The Trust Company began to receive payments on the Westfield stock on June 7, 1909, and final payment on the stock was made on August 1, 1911, (C. p. 93). The Trust Company applied these payments on other notes of Crooks, which it held, but which were unpaid, and after such application, there was no money left to apply to the reimbursement of Irving, for the $1,700.00 note which Irving had paid in January, 1911, after suit against him had been begun by the Trust Company. At no time did Irving tender to the Trust Company the amount of the Crooks indebtedness, which it held against the collateral, nor did he at any time make any specific offer to pay the amount of the Crooks' indebtedness and take over the collateral.

The complaint which Irving makes is that the Trust Company had no right to purchase the note of Crooks

of $5,247.50, on November 18, 1908, (for the payment of which, Crooks subsequently repledged the Westfield Land & Improvement Company stock, then held by the Trust Company), because on November 12, 1908, Irving claims to have informed the Trust Company that he was only an accommodation endorser for Crooks on the $1,700.00 note, which was to come due on November 28, 1908, and asked an officer of the Trust Company to pay this note out of the proceeds of the Westfield Land Company stock. He claims that what transpired between him and Phillips, (an officer of the Trust Company) when Phillips called at his office to have the collateral stock transferred to the name of the Trust Company, obligated the Trust Company to make such application before applying same to the payment of the other obligation of Crooks, acquired six days after such visit, which acquisition was made also ten days before the $1,700.00 note became due, upon which Irving was then endorser; and although when the $1,700.00 note did mature, on November 28, 1908, instead of insisting upon its payment out of the collateral, that $1,700.00 note was retired and paid by a new note in the same amount, made by Crooks and endorsed by Irving, dated November 30, 1908, and maturing January 30, 1909. As to this last note, no claim is made by the complainant that the Trust Company or any of its officers made any promises or representations of any sort as to the collateral; but the claim is urged by the complainant that if the Trust Company assumed any obligation regarding the application of the collateral to the payment of the predecessor note of $1,700.00 on November 12, 1908, when it had not yet matured, that such obligation, alleged to have been assumed, inured for the benefit of the $1,700.00 note of November 30, 1908, (payable in two months), although such last mentioned note had not then either come into being or been arranged for. In the determination of this controversy, it will become essential

to determine whether the position of the parties was changed in any way whatsoever, as the result of the visit of the Trust Company's officer to Westfield, on November 12, 1908, and the occurrences there at that time. The complainant's claim is that two things happened at Westfield on November 12, 1908, which he alleges, gave him a claim on the stock, namely:

1. A promise on the part of the Trust Company's officer to pay the then existing note of $1,700.00 out of the proceeds of the Westfield Land Company stock.

2. An offer to buy the stock for $10,000.00 alleged to have been made by Irving to the Trust Company's officer.

What actually took place and the effect of the same will have to be determined herein.

I.

What took place at Westfield on November 12, 1908, did not impose on the Trust Company any obligation regarding the collateral which it then held; and did not change or diminish the obligation of the complainant to the Trust Company.

To determine whether any obligation was assumed by the Trust Company, it becomes essential to determine what actually took place. Phillips, the Trust Company's officer, went to Westfield to have the collateral stock, then standing in the name of Crooks, transferred to the Trust Company. Then, for the first time, Irving ascertained that the Trust Company held these shares of stock as collateral security for obligations of Crooks, (C. p. 90, l. 10), the amount of which was not definitely known even on that day, but which was discussed as being "somewhere about $10,000.00," (same page, l. 20; p. 90, l. 22-30). Irving's version of what Phillips said about the $1,700.00 note is, "He said the $1,700.00 note was included in the notes that were to be paid out of the proceeds of the stock; there was no question about that note." (C., bottom of page 81 and top of 82). Phillips denies

having made any such statement. (C., p. 105, ll. 13-28). William S. Welsh, another officer of the Westfield Land & Improvement Company, and a friend of Irving, was also present; and his version of what Phillips said is the following: "Mr. Phillips said the note would be paid * * * and if it was among the other notes to be paid and all the notes were paid, that note would be paid." (C., p. 103, ll. 18-22). In the same conversation, Irving also made an effort to get Phillips to manipulate any surplus there might be from the Westfield stock, so that a note of $1,500.00, also endorsed by Irving, for the accommodation of Crooks, and held by the Westfield bank, could also be paid. This request appears in the testimony of Irving, as follows:

"I talked with him (Philips) about that stock, if there was a surplus, if I couldn't arrange it some way to have that (the Westfield $1,500.00 note) paid out of the surplus, after all the obligations were paid to the Mutual Trust Company; he said he could not speak for the directors about that but he said he would use his influence; if there was a surplus, he would do what he could to have that $1,500.00 note that I had discontinued in the Westfield Trust Company, paid out of it.' (C., p. 81, ll. 9-17). The testimony of Irving that Phillips "could not speak for the directors" concerning Irving's request on the $1,500.00 note, gives weight and corroboration to Phillips' testimony, where he denies promising anything regarding the $1,700.00 note, and insists that he had no authority to make any such statement or promise. (C., p. 112, ll. 21-26.)

"Q. Then if you did say to Mr. Irving that this note of $1,700.00 would be paid out of the proceeds of the sale of that stock, you don't remember it now?"

"A. I remember I didn't say that. I had no authority to."

None of the three persons present at the conversation of November 12th, attempt to give it verbatim.

They all give their recollection of the substance of it, and the farthest Phillips went in making any statement of what he thought the Trust Company could do for Irving, regarding his note, is probably contained in the testimony of Welsh, (Irving's friend), as to what Phillips said, which was, (C., p. 103, l. 20): "If it (the $1,700.00 note) was among the other notes, to be paid, and all the notes were paid, that note would be paid." This statement, coupled with the statement of Irving that Phillips could not bind the Board of Directors, but would consult them, about the $1,500.00 note, and Irving's testimony that Phillips would submit his bid of $10,000.00 for the stock to the Board of Directors, (C., p. 86, ll. 20-30) is convincing that Irving knew that Phillips had no authority to do anything but have the shares of stock transferred.

It is very clear from the foregoing, that Phillips' visit to Westfield and the conversation related above, in no way affected the status of either Irving or the Trust Company towards the collateral. The Trust Company's rights under the collateral were not abridged by that visit, nor was any new duty cast upon it by reason of the same. Irving acquired no new rights because of the visit; he acquired only information as to where the Westfield Land Company stock was pledged, and that Crooks at that date was indebted to the Trust Company to the extent of "somewhere about $10,000.00." Phillips did not go to Westfield to make any arrangement with Irving as to the payment of the $1,700.00 note. He went for the purpose of having the stock transferred to the Trust Company. He was clothed with no other authority, and he definitely testifies to the effect that he had no authority to make any arrangement with Irving for the specific pledge of the stock for the payment of the $1,700.00 note. The stock belonged to Crooks, and was still within the control of Crooks, who specifically pledged the said stock for the payment of

any note or notes which the Trust Company might subsequently acquire, upon which Crooks might be liable, should the Trust Company deem it safe, after considering the endorsements and collateral upon which it might rely, to take care of the Crooks indebtedness, past, present or future; even if Phillips intended at the time to make an absolute agreement with Irving that he would see that the $1,700.00 note was paid out of the proceeds of the stock, it could be only his personal agreement, made without any authority from the Trust Company or its Board of Directors, and not binding upon the Trust Company in any way. The By-Laws of the Trust Company, defining the duties of Secretary and Treasurer, (which position Phillips held at the time), appear in C., p. 76. The only portions of the same which could even distantly be applicable, are the following lines, 28 etc.:

"He shall have the custody, under the control and supervision of the President, of all securities pledged as collateral for loans made by the Company; * * * He shall have power to make temporary loans upon collateral or otherwise, under such rules and restrictions as the Executive Committee may adopt."

It can hardly be said that the "custody of the collaterals, under the control of the President," or "power to make temporary loans upon collaterals or otherwise" would give him the power or authority to bind the Trust Company in the manner claimed by the complainant.

In the absence of express authority from the board of directors, neither the president, secretary, treasurer, or any other officer, has power to dispose of the property held by the Trust Company. Cogan & Conover Co., 3 Robb. 358 and cases cited at top of p. 363.

It is, therefore, urged that the visit of November 12, 1908, did not change the relations of the parties and that the Trust Company did not assume any new duty on that occasion, nor was the complainant ever relieved from any obligation which then rested upon him.

II.

The complainant, Irving, did not on November 12, 1908, or at any other time, make any valid offer or tender or offer to pay the indebtedness, which the Mutual Trust Company held against the Westfield stock, and take over the stock then held as collateral.

The complainant's contention on this phase of the case is expressed in his brief, page 4, lines 14, etc., as follows:

"But it is admitted that Mr. Irving offered to pay to the Mutual Trust Company $10,000.00 upon condition that the Trust Company turn over the collateral security to him." and states Cases, pages 80, 96, 105, 115, 117, 120 and 122, in support of that statement. This statement we emphatically deny, both as to any such statement being admitted, and as to the fact that Mr. Irving on November 12, 1908, "offered to pay $10,000.00" and take over the collateral. Examination of the testimony referred as appearing on the Case pages last above named, will show that the statement in the brief is not supported by such testimony.

C. p. 80.—Irving testifies, line 20, that Phillips thought the amount that Crooks owed the Trust Company was "somewhere about $10,000.00." And on line 32, Irving testifies that Phillips "asked me to make a bid on the stock, they wanted to sell it and he wanted to clear up these" —

There is no other reference on this page to any offer on the stock.

C. p. 96.—The reference to the $10,000.00 figure is embodied in the testimony of William S. Welsh, as follows:

"Q. You recall this, that when you said, or Mr. Irving said, you would give $10,000.00 for the stock, that Mr. Phillips said that he didn't know if $10,000.00 would cover all the Mutual Trust Company had, didn't he?

A. He said he was under the impression that it would cover it.

Q. Didn't you say in answer to counsel here, that when you made the offer, or Mr. Irving made the offer, that it was stated then that he didn't know if it would cover—the $10,000.00 would cover what the Mutual Trust held?

A. I do not think so; I said he was under the impression it would cover, and he would advise their accepting the amount and cleaning up the obligation.

Q. He would advise that it be taken, if it would cover their obligations, didn't he say that?

A. Yes.

Q. Are you sure of that?

A. I am sure he said he was under the impression that it would cover the amount and he would advise the board to accept our proposition if it did.

Q. That is, if it did cover their indebtedness?

A. Yes."

C. p. 105.—The reference to the $10,000.00 figure is contained in the testimony of Phillips, the Bank officer, as follows:

"Q. Do you remember something about an offer of $10,000.00 being made at that time by Mr. Irving for the shares of stock?

A. Yes, sir.

Q. And you heard what he said about that, that you would refer the matter to the executive committee.

A. Yes.

Q. Is that what you said?

A. I said I would take it to the Bank and refer it to the committee."

C. p. 115.—All of the testimony on this page is that of Phillips and is practically a repetition of what appears on page 105:

"Q. As a matter of fact, you were offered on

that day, the 12th day of November, by Mr. Irving $10,000 for this stock?

A. He made an offer, I think, of $10,000.

Q. Do you know whether he did, or only guess?

A. He did make that offer, yes.

Q. Are you sure of that?

A. Yes.

Q. What did you say to him?

A. I told him I would take it back to the bank and submit it to the committee.

Q. Did you tell him that was sufficient to cover the amount of money that was owing by Crooks to the bank on his various notes?

A. I don't remember having said that.

Q. At that time you were the secretary and treasurer of the Mutual Trust Company, were you not?

A. Yes.

Q. You knew their business thoroughly?

A. Yes.

Q. You knew Crooks, didn't you?

A. Yes.

Q. Do you mean to say that a man who was a director in your bank, you didn't know how much he owed the bank?

A. I knew it.

Q. Then you knew when you were out in Westfield that that $10,000 would cover the liabilities?

A. I suppose I did at that time; I don't know as I said it, though.

Q. Didn't you say to Mr. Irving that you would recommend that that offer be accepted?

A. No, I said I would submit it to the committee."

C. p. 117.—This extract is also from the testimony of Phillips:

Q. Didn't you report to your committee when you returned from Westfield after having the

shares of stock assigned, that those shares of stock were worth so much money, according to what you learned out there?

A. I told them there was an offer of $10,000 made."

C. p. 120—The testimony of Welsh further discloses the following:

"Q. Mr. Phillips says that at the time of his conversation with you and Mr. Irving on the 12th of November, 1908, there wasn't anything figured up in his presence to show the value of these fifty shares of stock; what have you to say?

A. We figured it out and approximated the value at about two and a half a share, making it about $12,500 as the value of the stock at that time, and we made the offer of $10,000, because we didn't know whether the contract would carry through or not.

Q. What did Mr. Phillips say about that $2,500 over the $10,000 you offered?

A. He said, if our company accepts your $10,000 offer, that the profits on that would protect Mr. Irving on his $1,500 in the Westfield Bank. That came out in conversation."

C. p. 122.—This testimony is that of the complainant, Irving, and is as follows:

"Q. Mr. Irving, on November 12, 1908, when you, Welsh and Phillips were together, did you and Mr. Welch figure out what you thought would be the approximate value of the fifty shares of stock, so that you might make an offer to purchase it?

A. Yes, sir.

Q. Did you inform Phillips what in your opinion it was worth?

A. He was there and knew as much about the figuring as we did.

Q. Did you tell him what you figured?

A. I suppose we told him; he could see the

figures himself, he stood there at the desk alongside of me.

Q. He was right there and saw the figures?

A. Yes.

Q. Did he make any remark about the $2,500 in excess of the $10,000 you were offering?

A. No, I don't remember that he did any more than about the surplus would pay the $1,500 that I had in the bank, in the Westfield Trust Company.

Q. Who said that?

A. I think Mr. Phillips spoke of it, as he knew that was what we were buying the stock for, to cover that note, trying to make something out of it over and above paying Crooks' obligations to the Mutual Trust Company."

The sum total of all of the above testimony is that Phillips asked Irving to make a bid on the stock; Irving and Welsh figured the matter out and determined that the stock was worth at least $12,500.00, and made a bid of $10,000.00 for the stock admittedly worth $2,500.00 more, in the hope that if the indebtedness due the Trust Company was paid and the $1,500.00 Westfield note was paid, there would still be a good chance for him to "make something out of it;" that Phillips said he would submit the bid to the Board of Directors or Executive Committee; that he did report the bid to the Bank authorities and they did nothing towards accepting the same, thereby rejecting it; that Irving did nothing to follow up his bid; never made a formal offer or tender, or even made an effort to find out how much the Bank held against the collateral, with the idea of tendering that amount and taking over the collateral; that the rejection of his bid of $10,000.00 for collateral, which the complainant admitted was worth $12,500.00, and which actually produced $13,697.38, (C., p. 66, l. 31), was not only justified but was the proper thing to have done at the time. There never has been made by or on behalf of the complainant any valid "offer to pay" or tender

to the Trust Company of the amount of the Crooks obligations, about which the complainant raises no question whatsoever. Nowhere in the case does any such "offer to pay" or tender appear. The complainant's case rests upon the assumption that there was an obligation imposed upon him to pay, offer to pay or tender to the Mutual Trust, the amount rightfully due it. If the complainant and the Trust Company disagreed on what that amount was, then it was his duty to tender the amount which he claimed to be due. He did none of these things, and it is respectfully urged that the testimony referred to in the complainant's brief absolutely disproves the statement which he makes the basis of his prayer for relief.

III.

The defendant Trust Company was entirely within its rights in purchasing the Crooks note of $5,247.50, on November 18, 1908, and having purchased the note, accompanied as it was, by the repledge of the Westfield Land Company stock, as collateral security for its payment, it was the duty of the Trust Company to apply the proceeds of the stock to its payment before applying the same to the payment of the $1,700.00 note.

Giving the complainant credit for the full force of this argument, it can amount only to this, that on November 12, 1908, ten days before the note, upon which he was obligated, came due, he offered to pay the indebtedness due to the Trust Company and take over the collateral. While this contention is emphatically denied, still if absolutely true, it would not be sufficient to warrant granting the prayer of the complainant's bill. If the complainant should be considered in the light of a surety, his right to pay the debt and take over the collateral would not come into existence until the note became due and owing, and was unpaid by the principal debtor. Brick v. Freehold Banking Company, 8 Vr. 308. Therefore, on November 12, even if willing to pay, and actual payment was made, before the note came due, the Bank would not have

any authority to turn over the collateral pledged for the payment of the note, which had yet some time to run. The case at bar is identical with Brick v. Freehold Banking Company, because in that, the offer to pay, if made at all, was made before the obligation to pay had arrived. The Court, at page 309, holds such an offer to pay amounted to nothing. It says, "It is hardly necessary to add that the defendant's offer to pay the note, prior to its maturity, on condition that the collaterals should be at once assigned to him, was of no effect, especially in view of the fact that the complainants were under written stipulation, executed and delivered simultaneously with that given to the defendant, to convey the collaterals to the wife of one of the makers of the note, on payment of the note by him." In the case at bar, it was the duty of the Trust Company to turn back the collaterals to the maker of the notes, in case the obligations for which they were held were paid by him. Until the note came due, it was not known whether the maker would or would not pay.

The purchase of the $5,247.50 note, made on November 8, 1908, in the usual course of business, was in line of the practice of the Bank in the purchase of commercial paper. The repledge of the Westfield stock by the maker of the last mentioned note, who was the owner of the stock, and the acceptance of the repledge by the Trust Company did not violate any of the laws governing the banking business or any of the usual banking customs. All the notes which the Bank held against the stock and upon which notes John W. Crooks' name appeared, were the debts of Crooks, as principal debtor. On some he was endorser or guarantor; and the Bank held other security, (to wit, the names of other makers and endorsers), besides the Crooks stock as security for the money advanced on the various notes. There was no restriction placed upon the Trust Company that it could not purchase any notes of Crooks subsequent to November 12, 1908,

—the date of the conversation of Phillips with Irving. For all that appears in this case, there was no reason to believe that the notes were not perfectly good in every respect. Within the legal limit, it could have purchased notes of Crooks, both before and after November 12, 1908. Certainly the complainant made no effort to ascertain definitely to what extent the Bank held the notes of Crooks, or when its purchase of the notes began or ended. Even had the complainant forbidden the Bank to make any additional purchase of Crooks' notes, after he became aware that the Bank held the collateral, such order or notice would have been of no avail.

The case of Brick v. Freehold Banking Company is cited approvingly in Phila. & Reading R. R. Company v. Little, 14 Stew., at 529; Monroe v. De Forest, 8 Dick., 267.

The right of subrogation cannot be enforced until the whole debt is paid; and until the creditor is wholly satisfied, there ought and can be no interference with his rights or his securities, which might even by bare possibility prejudice or embarrass him in any way in the collection of the residue of his claim.

Receiver of Midland Railway C. v. Wortendyke, 12 C. E. Green, at 661.

This decision reversed that of Coe v. Railway Co., 12 C. E. Green, 110, which intimated that subrogation might take place even though the whole debt was not paid. The decision in 12 C. E. Green, 661, is now the law of this State, as appears by such cases as Irich v. Black, 2 C. E. Green, 189; Polhemus v. Prudential Realty Co., 45 Vr., 570, and the cases cited at page 578.

In the case of Trusdell v. Price, 2 Stew. 620, reversing 1 Stew, 200, one Barber transferred to Trusdell all moneys payable on a City paving contract to secure indebtedness to Trusdell, represented by money advanced on notes from time to time. On several of the notes, Price was endorser for Barber, and Trusdell paid out of the paving contract moneys, notes of Bar-

ber, negotiated subsequently to the Price endorsements, and negotiated after Trusdell knew that Price was only an endorser on the Barber notes, and although Price claimed that Trusdell had promised that the notes on which he (Price) was endorser, would be paid out of the paving contract moneys. This case seems to be exactly in point with the case at bar. Barber later made an agreement with Trusdell, whereby Price was cut out of all right to the paving contract moneys as protection on his endorsements. This Court held that the trust was personal and that Barber had the right to release Trusdell from it at any time, and that thereafter, neither Barber nor anyone else in his place could urge any equity against Trusdell. This Court stated, at page 624:)"Nor am I able to perceive that any new equity arose by which, (upon the assumption that the Trust existed), Price, a stranger to the agreement, could ask for its enforcement. No change in the condition of the respondent (Price) is shown to have occurred by reason of the existence of such a trust, or by any act of Trusdell relating thereto."

This case is peculiarly similar to the case at bar, where, even if Philips had been authorized to agree that the $1,700.00 note would be paid out of the collateral, such agreement would not deprive Crooks of the right to pledge the Land Company stock, as collateral for the subsequent note of $5,247.50.

To the same effect is Crowell v. Hospital, etc., 12 C. E. Green, 650, cited in a long list of cases at the foot of page 650.

Unless the Westfield visit of November 12, 1908, had the effect of preventing Crooks from borrowing any more money, there was no reason why we should not have negotiated the note of November 18, for $5,247.50, for which he repledged the collateral. If the Westfield visit had not taken place, this suit, so far as can be seen from the pleadings and testimony, would not have been instituted. Unless the Westfield visit gave the complainant the right to control, Crooks'

subsequent notes and the application of the collateral to the payment of Crooks' indebtedness, this case must fail. There was no idea on the part of the complainant or Crooks or the Trust Company that Crooks must stop issuing notes. In fact, the complainant himself was a party to the issue of a new note on November 30th, to take up the note which he was then on as endorser, and he again endorsed the note which Crooks sent to him. He was also on the Westfield note of $1,500.00, which was unpaid at that time, and he suspected that Crooks must have been indebted to the Federal Trust Company, in an amount unknown to him. (C p. 80, l. 30.) Crooks' original note of $4,900.00, of August 30, 1905, was pledged not only for the then existing indebtedness, but for indebtedness "which hereafter may be contracted." It expressly stated the possibility of future notes being taken up by the Trust Company. When on November 18, 1908, he sold the $5,247.50 note to the Trust Company, and directed that it should be specifically paid out of the Westfield Land Company stock, such action was directly in line with the original pledge of the stock, which was subsisting since 1905. The complainant cannot successfully contend that anything which the Trust Company or any of its officers may have done, induced him to alter his position in any way. In fact, he never did alter his position, but continued to endorse for his son-in-law after that date, as he had done before.

The Massachusetts case of Fall River National Bank v. Slade, harmonizes with the New Jersey doctrine as to the application of collaterals.

The case of Fall River National Bank v. Slade, 153 Mass. 415, referred to in the brief of counsel for the Federal Trust Company, is a case outside of New Jersey, exactly in point and follows the reasoning of the New Jersey Courts, as to the application of such collateral. The decision in the Massachusetts case is as follows:

"If shares of stock are pledged to a Bank by the Maker of a promissory note, given in renewal of earlier notes 'as collateral security for the payment of this note, or any of my liabilities to said bank, due or to become due, now, or hereafter contracted or incurred' with authority 'to sell the stock, the proceeds above all sums due to the Bank, including its expenses, to be credited to such maker, no special pledge of the stock exists for the payment of the note above any other indebtedness of the maker to the Bank at the time of a lawful sale thereof; and extrinsic evidence of prior transactions between the parties, and of previous forms of the note and of the provisions therein respecting the collateral security, even if admissible, is immaterial."

The doctrine urged against the above and against the trend of judicial decisions in New Jersey, on the subject of collateral, is the case of National Exchange Bank v. Silliman, 65 N. Y., 475. In that case, the Bank purchased the past due note of the debtor. Collaterals had been deposited, which belonged to the wife of the debtor, and the deposit of collaterals was made at the time the account was opened. There was no written agreement as to the terms of the pledge and there was no evidence in the case on the intent of the parties as to the use to be made of the collaterals. The Court held that in the absence of such evidence, the presumption was that the securities were given to cover only such loans as were beneficial to the debtors rather than covering all claims which the bank might in any way acquire; and the decision of the Court favored the application of the collaterals to the payment of a note endorsed by the defendant, and whose liability had been fixed thereon, before the purchase of the past due and dishonored note; the remaining portion of the decision in the New York case, to the effect that the surety acquired an equitable lien upon the collateral, and which right accrued as soon as his

liability attached, and could not be affected by the creditor, while apparently dicta in the New York case, may not be so much out of harmony with the New Jersey rule as it at first may appear. Whatever equity the endorser might have in the collateral would be subject to the lien thereon of the Bank at the time the collateral was realized upon.

The case at bar differs from the New York case in the material point that the evidence here is very plain regarding the terms of the pledge of the collateral, those terms being substantially the same as the terms of the pledge in the Massachusetts case; in the New York case there is no evidence as to the terms of the pledge and the Court was forced to presume, from the lack of evidence, what the intention was. It is very likely that had the same case arisen in New Jersey, upon the same facts as the New York case, that the decision would probably have been the same, omitting the dicta.

The case of Forbes v. Jackson, 21 E. R. C., 615, supports the New Jersey doctrine, in holding, "If a creditor holding a claim, for which he has both collateral security from the principal debtor, and also the engagement of a surety, acquires an additional claim against the same principal, *to which the agreement, upon which the security was taken does not extend,* the the surety will be entitled to the benefit of such security on payment of the first indebtedness alone, and can require the proceeds of such security, when realized by the creditor, to be applied upon the first indebtedness, etc."

It is quite plain that the crux of the case of Forbes v. Jackson is the point that the collateral was to be specially applied to a particular debt, in the agreement pledging it.

A very exhaustive collection of notes and cases on the subject of almost every phase of collaterals, will

be found in the foot note to Nelson v. Webster, (a Nebraska case), 68 L. R. A., 513.

The rule established in Fall River National Bank v. Slade, which is in harmony with all of the New Jersey decisions, is respectfully urged as the rule which should appeal to this Court as the proper doctrine to be applied in this case. The application of any other doctrine, in view of the authority given to the Bank by the terms of the collateral note, and the well known practices of banks in taking such notes and acting thereunder, would revolutionize the banking practices in the State of New Jersey. If the complainant's position is correct, banks would have to limit the amount of credit to be given to a person, even one who presented endorsements, by the amount of collateral which he was able to pledge. It would have to consider the equities of endorsers in the collateral, in the order in which they originally became endorsers, and it would open the door for endless litigation and trouble. It would force the banks to be a sort of guardian for endorsers like Mr. Irving, who assumed his obligation for the accommodation of his son-in-law, without either the hope, or apparently the desire, that he should be protected in any way. The establishment in this State of a doctrine, that regardless of the endorser's desire, expectation, or course of conduct, that banks holding collateral under a collateral note in the general form, must in the application of such collateral, first ascertain the equities of all names appearing on the debtor's paper, decide what those equities are, the order in which they should be considered, and then apply the proceeds of the collateral in such a way as to extinguish the liability of the endorsers in the order of their particular equities, would be placing upon the banks an obligation which neither the makers nor endorsers of notes ever anticipated or expected to have placed upon them. It would jeopardize the wel-

fare of all banks and would prevent fair credit being given to individuals, even upon apparently adequate collateral.

It is respectfully urged that there is not the slightest evidence of any fraud in this case, and the Court of Chancery has so found; and that the decree of the Court of Chancery, dismissing the bill of complaint, should be affirmed.

HOWE & DAVIS,

Solicitors for and of Counsel with the Defendant-Respondent, Mutual Trust Company.