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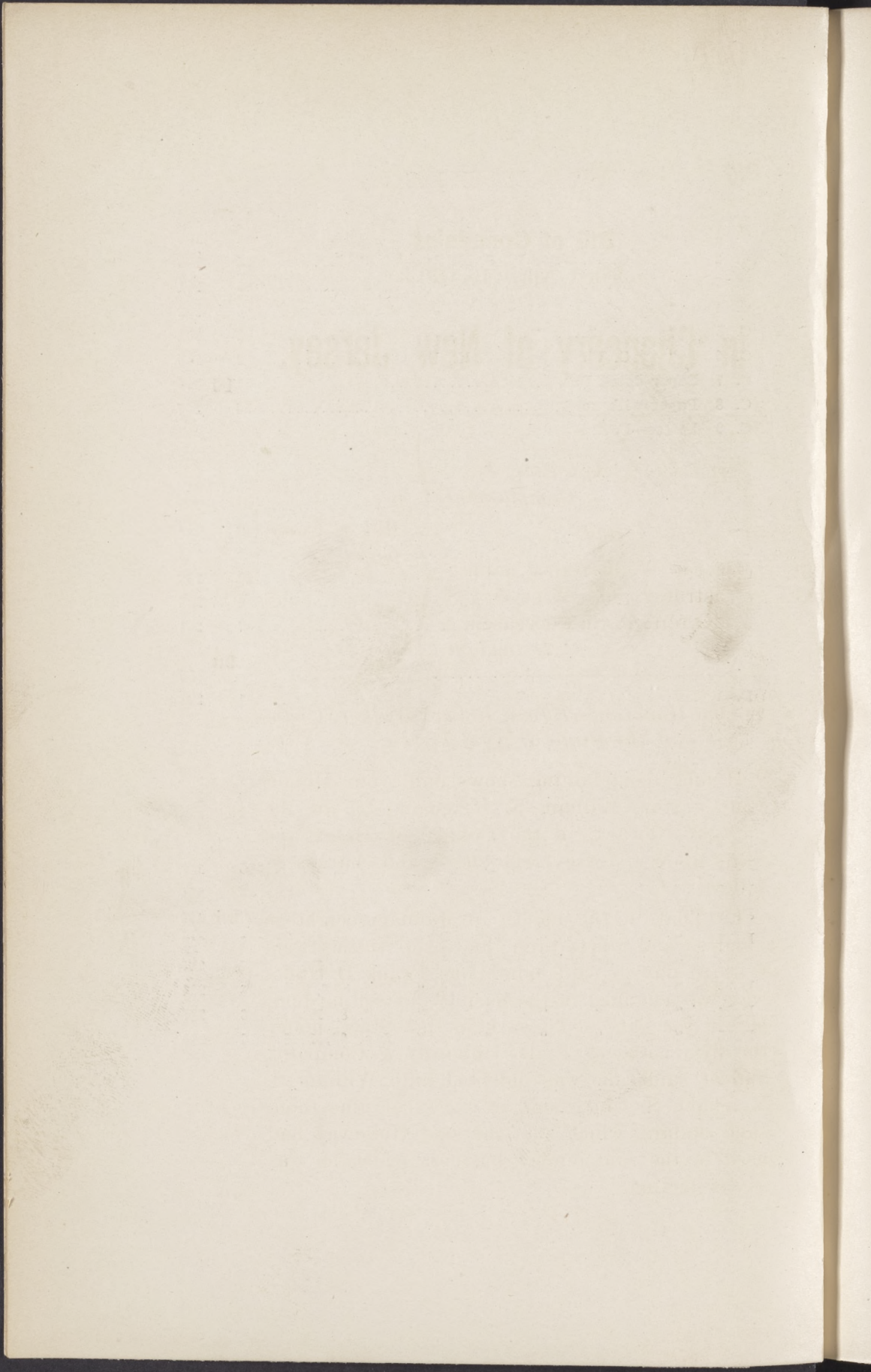
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Filed April 10, 1913.

In Chancery of New Jersey.

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Between

WILLIAM S. KETCHAM, JR.,
Complainant,

and

GEORGE W. KETCHAM, admin-
istrator of WILLIAM S.
KETCHAM, SR., deceased,
Defendant.

*Bill of Com-
plaint.*

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*To the Honorable Edwin Robert Walker, Chan-
cellor of the State of New Jersey.*

Humbly complaining shows unto your Honor, your orator, William S. Ketcham, Jr., of the City of Newark, in the County of Essex and State of New Jersey, who shows and charges as follows:

1. That in the month of January, eighteen hundred and ninety-three, and prior to the twenty-third day of said month, one Frank D. Holloway was engaged in the business of selling lumber in the City of Newark in this State, under the firm name of F. D. Holloway & Company, and at said time was indebted unto William S. Ketcham, Sr., in a sum in excess of nine thousand dollars, which sum the said Holloway had used in the said lumber business which he was so conducting.

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2. That in order to secure said indebtedness unto the said William S. Ketcham, Sr., an agreement was made between the said Holloway and William S. Ketcham, Sr., whereby a company was to be incorporated to take over Holloway's said business, and capital stock in said company was to be issued to the said William S. Ketcham, Sr., in payment of Holloway's said indebtedness to him, and the said Holloway was to procure other capital and invest the same in the capital stock of the said company.

3. That thereafter and in pursuance of said agreement, and on or about the twenty-first day or twenty-third day of January, eighteen hundred and ninety-three, the said Frank D. Holloway and William S. Ketcham, Sr., together with George W. Ketcham, Edward R. Campfield and your orator, caused to be recorded in the Essex County Clerk's office, a certificate of incorporation properly signed and acknowledged by them, purporting to incorporate The Clinton Hill Lumber & Manufacturing Company as a corporation under the general laws of the State of New Jersey. That the capital stock with which said corporation was to commence business, as stated in said certificate, was the sum of forty-five thousand dollars, divided into four hundred and five shares, of the par value of one hundred dollars each. That the number of shares subscribed for by each of said parties who signed said certificate was as follows:

Frank D. Holloway,	100 shares
Edward E. Campfield,	100 shares
William S. Ketcham, Sr.,	100 shares
William S. Ketcham, Jr.,	100 shares
George W. Ketcham,	5 shares

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4. That immediately after the recording of the certificate of incorporation in the Essex County Clerk's office, as set forth in the next above paragraph, and on the twenty-third day of January, eighteen hundred and ninety-three, the incorporators, other than George W. Ketcham, held a first meeting of the stockholders and elected the persons named as incorporators in said certificate of incorporation, directors of said company, and said persons, other than the said George W. Ketcham, then met as directors, and elected officers of said company, and accepted a bill of sale, made by the said Holloway to the said company, which is more fully referred to in the next succeeding paragraph of this bill. 10

5. That the bill of sale from said Holloway to said company referred to in paragraph four of this bill, which bore date on the day and year last aforesaid, recited that the said Holloway, in consideration of one dollar to him in hand paid, sold and transferred to the said company, all of the stock of lumber then in the yard of F. D. Holloway & Company, or in course of shipment, also a lease of the premises on the corner of Rose street and Jelliff avenue, in the City of Newark, N. J., and the improvements and buildings thereon, together with the good will of said business, the accounts receivable, fixtures and everything pertaining to the business of the said Holloway, to have and to hold unto the said corporation, its successors and assigns forever. 20 30

6. That after the recording of the certificate of incorporation, and the holding of the meetings and the delivery of the bill of sale, as above set forth, it was discovered that the said Hollo- 40

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way was more heavily involved financially than he had reported to his associates and that certain of his creditors were pressing him for payment of their accounts, and that he, Holloway, was unable to raise any additional capital to put in said business, and thereupon a disagreement arose between said persons, and the said Holloway thereupon resigned as an officer of said company and the entire scheme was abandoned, and the property which the said Holloway had transferred to the said company was turned over to your orator to be disposed of, and the original certificate of incorporation was never filed in the office of the Secretary of State, but was destroyed by the said persons, and the said company never engaged actively in the business for which it was incorporated.

20 7. That thereafter, and on March sixteenth, eighteen hundred and ninety-three, Jonathan F. Strieby, William E. Sprague, George Bubb, Nathaniel B. Bubb and Henry C. Bubb, partners in trade under the firm name of Strieby, Sprague & Company, and the Cumberland Lumber Company, creditors of the said Frank D. Holloway, recovered judgments against him in the Essex County Circuit Court and caused executions to
30 be issued thereon to the sheriff of the County of Essex, which executions were returned by said sheriff unsatisfied. That said creditors then commenced a suit in the Court of Chancery of this state, charging that the bill of sale referred to in paragraphs four and five of this bill, made by said Holloway to said Clinton Hill Lumber & Manufacturing Company, was intended to hinder, delay, defeat and defraud the creditors of the said Frank D. Holloway in the collection of
40 their just claims against him, and that the same

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was void and of no effect whatever and praying that the same should be set aside by said court.

8. That thereafter and on the fourteenth day of November, eighteen hundred and ninety-three, this court, in the suit referred to in the last above paragraph, by its decree ordered, adjudged and decreed that said bill of sale and transfer of the property thereunder, should be set aside, annulled and made void as against the said judgments and executions of said judgment creditors, and it further appointed Thomas N. McCarter, Jr., of the City of Newark, receiver in aid of said executions with full power and authority to demand, sue for, collect, receive and take into his possession, all the goods and chattels, rights and credits, moneys and effects, and property of every description which was so transferred to The Clinton Hill Lumber & Manufacturing Company by the said Frank D. Holloway by the bill of sale so set aside. That an appeal was taken from this decree to the Court of Errors and Appeals, which last named court affirmed said decree.

9. That in accordance with the decree of the Court of Chancery, the said Thomas N. McCarter duly qualified as such receiver and entered upon the duties of said office, but being unable to find any property belonging to said Clinton Hill Lumber & Manufacturing Company, with which to satisfy the claims of said creditors, the said judgment creditors filed a further petition in said cause, reciting said facts, and praying that a decree in the nature of a decree *in personam* be entered against said company, and said receiver directed to commence suit against the company and William S. Ketcham, Sr., to recover the money and property turned over to him by said

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company, or the proceeds of the sale thereof, and on April first, eighteen hundred and ninety-five, a decree was so made.

10 That thereafter the said judgment creditors filed their bill of complaint in the Court of Chancery setting forth the recovery of their judgment and the proceedings above referred to, and that the said Clinton Hill Lumber & Manufacturing Company was insolvent, and on May thirteenth, eighteen hundred and ninety-five, the said Thomas N. McCarter, Jr., was appointed receiver of said insolvent corporation. That being unable to find any assets belonging to said company out of which to satisfy the claims of creditors which had been filed with him as such receiver, and allowed by him, the said Thomas N. 20 McCarter, receiver as aforesaid, filed a petition in said proceedings, praying leave to levy an assessment upon the stockholders of said Clinton Hill Lumber & Manufacturing Company upon their subscription to the capital stock of said company, as set forth in the certificate of incorporation referred to in paragraph four of this bill, and on November seventh, eighteen hundred and ninety-five, a decree was made by the Chancellor, directing such an assessment, and which 30 decree was reversed, upon appeal, by the Court of Errors and Appeals, and thereafter and on October twenty-sixth, eighteen hundred and ninety-nine, the said receiver was granted permission upon his application in the Court of Chancery to withdraw his original petition and discontinue said proceedings without prejudice to his right to file a new petition.

40 11. That thereafter and on November ninth, eighteen hundred and ninety-nine, the said Thomas N. McCarter filed a new petition in the

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Court of Chancery in the proceedings in which he had been appointed receiver, praying leave of said court to levy an assessment upon the stockholders of the said The Clinton Hill Lumber & Manufacturing Company, upon their subscription to the capital stock of said company, as set forth in the certificate of incorporation, referred to in paragraph four of this bill, and on the ninth day of June, nineteen hundred and three, the Court of Chancery, by its decree bearing date on that day, directed the said Thomas N. McCarter, receiver as aforesaid, to assess, call and collect the sum of six thousand three hundred and forty-four dollars and ninety-seven cents, with interest, from George W. Ketcham, George W. Ketcham, administrator of the estate of William S. Ketcham, Sr., and your orator, out of their respective subscriptions as incorporators and stockholders of The Clinton Hill Lumber & Manufacturing Company and to enforce payment of such assessment and call by suit if necessary against each of the above named delinquent subscribers and stockholders of said corporation. That the amount levied against your orator under said order was the sum of three thousand and ninety-five dollars.

12. That your orator and his brother, George W. Ketcham, both individually and as administrator of the estate of William S. Ketcham, Sr., upon advice of counsel, refused to pay said assessments so levied against them by said receiver, and in September, nineteen hundred and three, the said receiver began separate suits against your orator and George W. Ketcham, individually and as administrator of the estate of William S. Ketcham, Sr., the said William S. Ketcham, Sr., having departed this life on or

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about the twenty-fifth day of September, eighteen hundred and ninety-six, for the collection of said assessments. That in the suit against your orator, the said receiver, on November eleventh, nineteen hundred and four, recovered a judgment for the sum of three thousand, three hundred and
 10 twenty-one dollars and forty cents. That your orator thereupon took a writ of error to the Court of Errors and Appeals, and on November twentieth, nineteen hundred and five, the said judgment was affirmed by that court.

13. That after the affirmance by the Court of Errors and Appeals of the judgment recovered by said receiver against your orator, referred to in the last above paragraph, and on December twenty-sixth, nineteen hundred and five, your orator
 20 and his brother, George W. Ketcham, both individually and as administrator of the estate of William S. Ketcham, Sr., took an appeal to the Court of Errors and Appeals from the order of the Court of Chancery, bearing date June ninth, eighteen hundred and ninety-three, authorizing the said receiver to levy an assessment upon the subscribers to the capital stock of The Clinton Hill Lumber & Manufacturing Company, which
 30 appeal was dismissed by the Court of Errors and Appeals on March nineteenth, nineteen hundred and six.

14. That pending the hearing of the appeal in the Court of Errors and Appeals, referred to in the last above paragraph, an application was made in behalf of your orator, to stay the collection of the judgment procured against him in the Essex County Circuit Court, which application was granted upon condition that your orator pay
 40 into the Court of Chancery the amount of said judgment, with interest to the date of payment,

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and one year's interest in advance, which condition your orator complied with, and on January seventeenth, nineteen hundred and six, paid to the Clerk of the Court of Chancery, the sum of three thousand eight hundred and eighty-five dollars, being the amount of said judgment, with the interest called for by said order, and after the appeal above referred to had been dismissed by the Court of Errors and Appeals, the sum of three thousand six hundred and fifty-eight dollars and ninety-nine cents, by an order of the Court of Chancery was paid to Thomas N. McCarter, Jr., receiver as aforesaid, in satisfaction of his judgment against your orator. 10

15. That when the parties who had filed the certificate of incorporation of The Clinton Hill Lumber & Manufacturing Company disagreed among themselves, and agreed to abandon the said company as set forth in paragraph of this bill, William S. Ketcham, Sr., took possession of the lumber which had been transferred by Frank D. Holloway to The Clinton Hill Lumber & Manufacturing Company, in part payment of the indebtedness due him from the said Holloway, which he believed he had a right to do, and placed your orator in charge of the same, with instructions to sell it as fast as he could and apply the proceeds thereof to the payment of the notes which he signed for the said Holloway and which were then falling due. That your orator did as requested by his said father, and from time to time sold and disposed of said lumber, and received in payment thereof the sum of about seven thousand dollars, and at the request of his said father and with the full knowledge of his brother, George W. Ketcham, used the proceeds of said sales to take up the notes 20
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of which their father, the said William S. Ketcham, Sr., was the maker and had given to the said Holloway for use in his said lumber business prior to January twenty-third, eighteen hundred and ninety-three, and which the said Holloway had had discounted, and invested the

10 proceeds thereof in said lumber business. That on August sixth, eighteen hundred and ninety-five, your orator had loaned to his said father, William S. Ketcham, Sr., and at his request, for said purpose, the sum of six thousand, six hundred and sixty-six dollars and eighty-four cents, and because of the litigation above referred to, your orator's said father made and delivered unto your orator, a certain promissory note, of which the following is a copy:

20 "\$6666.84 Newark, N. J., August 6, 1895.

On demand after date I promise to pay to the order of William S. Ketcham, Jr., sixty-six hundred sixty six and 84/100 Dollars at—with interest.

Value Received.

William S. Ketcham."

30 representing the cash which your orator had so advanced to him, and in order to secure your orator for said advances.

16. That your orator's father, William S. Ketcham, Sr., died intestate on September twenty-fifth, eighteen hundred and ninety-six, and on October twentieth, eighteen hundred and ninety-six, George W. Ketcham was duly appointed administrator of his said estate by the Surrogate of the County of Essex and immediately took upon himself the burden of said administration and on said last mentioned date, to wit, October

40 twentieth, eighteen hundred and ninety-six, said

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administrator took out a rule to limit creditors and an order barring creditors of said estate was entered on July twenty-first, eighteen hundred and ninety-seven.

17. That on July twentieth, eighteen hundred and ninety-seven, your orator presented to George W. Ketcham, administrator of the estate of William S. Ketcham, Sr., and left with him, a written verified proof of claim against said estate, based upon the note set forth in paragraph fifteen of this bill. 10

18. That your orator when he presented said claim, duly verified as aforesaid, to the said George W. Ketcham, administrator as aforesaid, informed said George W. Ketcham that the note represented the moneys which he, your orator, had received from the sale of the lumber transferred to The Clinton Hill Lumber & Manufacturing Company by Frank D. Holloway and loaned by him to their said father to take up the note—which he, their said father, had loaned said Holloway, and that if they were successful in the litigation which was then pending against their father's estate and against him, your orator, and if he, the said George W. Ketcham, would pay all of the expenses connected with these suits, together with any judgment that might be rendered against your orator by reason of his having sold said property or by reason of his being a stockholder of The Clinton Hill Lumber & Manufacturing Company, or in any other way connected with said company, that he would consider such payments in lieu of the payment of said note, but that if at any time he should be called upon to pay out any moneys by reason of his connection with The Clinton Hill Lumber 20 30 40

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& Manufacturing Company, his claim against said estate upon said note should then become due and payable. That thereupon the said George W. Ketcham, administrator as aforesaid, stated to your orator that such an arrangement was satisfactory to him and that he would carry on the
 10 said litigation with Holloway's creditors and that if they were unsuccessful, he would pay any claim which your orator might be called upon to pay, or upon his failure so to do, he would pay the claim of your orator filed with him as such administrator.

19. That on July twenty-first, eighteen hundred and ninety-seven, the day after your orator had filed his claim with said administrator, he received from him a letter, of which the following is a true copy:
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“July 21st, 1897.

My dear Brother:

I did not read your paper until this morning and, after consideration, I feel I have no right to receive it in its present form; with your explanation of last evening, viz: that it is a claim only in the contingency of *your being mulcted* in the Holloway suit, it might stand but you recite no facts and your affidavit says the amount of
 30 \$6666.84 'is truly owing you.' Now this as you and we all know is not the case. Nothing is owing you unless at some future time you should be called upon to pay the Holloway claim. As your action in that matter was not in any personal interest, it would appear that no such contingency could arise.

As administrator I must do my duty faithfully: I am under bonds to do so and you are one of the bondsmen. I cannot receive, without
 40 explanation, a paper which states positively that

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you hold a claim of \$6666.84 for the legal time (9 months) has passed and besides at the present time there is no such claim.

Why did you not say plainly that the claim would be pressed in case you were forced to pay an illegal demand in the Holloway case *or any portion of same?*

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I know your interest to protect yourself, and as I said, I believe you are entirely safe by a careful presentation of the facts in the present suit against the estate, but if you are anxious to put yourself on record, let it be in another form.

Suppose you made another paper about as follows:

To the Administrator,

Estate Wm. S. Ketcham.

I claim from above estate, in a certain contingency, the sum of \$6666.84, being a promissory note of my father of date, Aug. 6th, 1895. The said note was given to protect me against any demand that might be made against me personally by the creditors of one Holloway. Should no claim be pressed against me, then said note and claim to be null and void.

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The above form is only a suggestion. I do not wish to be held responsible for its validity, as I am not a lawyer, but it is consonant with facts and the paper given me last evening is not according to the facts.

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Very truly, your brother,

Geo. W. Ketcham."

20. That in compliance with the request contained in said letter, your orator communicated in writing with said administrator and further stated the conditions under which his said claim should be payable.

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21. That your orator expressly charges, however, that the said George W. Ketcham retained in his possession your orator's verified proof of claim, and the same was never disputed by said administrator, in the manner provided for by law, or in any other way until about the latter part of December, nineteen hundred and five, or the early part of January, nineteen hundred and six, when the judgment recovered against your orator in the Essex County Circuit Court was affirmed by the Court of Errors and Appeals.

22. That after making the agreement with the said George W. Ketcham, administrator as aforesaid, as set forth in paragraph eighteen of this bill, the said administrator paid all of the legal expenses connected with the litigation between the creditors of said Holloway and Thomas N. McCarter, Jr., receiver of The Clinton Hill Lumber & Manufacturing Company and for the purpose of contesting said litigation, retained Frank E. Bradner, Esquire, and Chandler W. Riker, Esquire, as attorneys for your orator and paid for their said services from the funds belonging to the Estate of William S. Ketcham, Sr. That the suit of Thomas N. McCarter, Jr., receiver, against your orator in the Essex County Circuit Court to recover the amount of the assessment levied by said receiver against your orator upon his subscription to the capital stock of The Clinton Hill Lumber & Manufacturing Company, was first tried as a test case, and the suits against the estate of William S. Ketcham, Sr., and George W. Ketcham, individually, in the meantime, were kept in suspense.

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23. That on May twenty-fifth, nineteen hundred and eleven, George W. Ketcham, filed with the Surrogate of the County of Essex, his account as administrator of the estate of William S. Ketcham, Sr., covering his transactions as such administrator, from the date of his appointment in eighteen hundred and ninety-six, down to the time of the filing thereof. Said account was thereupon noticed for settlement and allowance by the Essex County Orphans' Court, and on December twenty-sixth, nineteen hundred and twelve, the same was allowed. That in said account, said administrator prayed allowance for many items, aggregating a large sum of money which he had expended in and about the various litigations against your orator, above referred to, and all were duly allowed by said last named court. That among the items so allowed were those for the legal services, rendered by Frank E. Bradner, Esquire, and Chandler W. Riker, Esquire, in the litigation against your orator and also against the said George W. Ketcham, individually, above referred to, including taxed bills of costs, printing the state of case, and briefs in said litigation, and many of the vouchers which said administrator produced before said court upon the allowance of said account, showed upon their face that the payments had been made for services rendered or disbursements made in the litigation against your orator.

24. That in and about the month of December, nineteen hundred, the said George W. Ketcham, administrator as aforesaid, made a partial distribution of the funds in his hands as such administrator, but before making said distribution, the said George W. Ketcham, did re-

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quest your orator to again state in writing the terms under which his note against their father's estate was payable and for that purpose, the said George W. Ketcham, himself, drew up a memorandum, setting forth the facts under which the said note was payable and sent
10 it to your orator and requested him to sign the same. That in compliance with said request, your orator filed with said administrator, a further writing in which he again set forth the conditions under which his claim against said estate was to be payable, and your orator further charges that said administrator since that time has retained said paper writing in his possession, and which your orator prays he may be required to produce in this court. That upon
20 receiving said paper writing, the said George W. Ketcham, administrator as aforesaid, made said partial distribution, but retained a sufficient sum to meet your orator's said claim against said estate, in case it should be decided in said litigation above referred to, that your orator was liable.

25. That thereafter your orator, acting upon the promises and representations so made to him by the said George W. Ketcham, administrator as aforesaid, believed that he intended to
30 carry out his said agreement and to pay any judgment which might be procured against your orator by reason of his connection with The Clinton Hill Lumber & Manufacturing Company and that by reason of said promises, representations and actions of the said George W. Ketcham, administrator as aforesaid, your orator delayed bringing suit upon said note within the period of six years, provided by *statute*, and
40 your orator charges that the said George W.

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Ketcham, administrator as aforesaid, made said promises and representations to your orator with the intention that they should be acted upon by him and that the said George W. Ketcham, administrator as aforesaid, knew that your orator was acting upon them.

26. That in December, nineteen hundred and five, after the Court of Errors and Appeals had affirmed the judgment recovered by Thomas N. McCarter, Jr., receiver of The Clinton Hill Lumber & Manufacturing Company, against your orator and was demanding payment thereof from him, your orator requested the said George W. Ketcham, administrator as aforesaid, to pay said judgment in accordance with his agreement, and then for the first time the said George W. Ketcham, administrator as aforesaid, refused to recognize his said agreement with your orator, whereupon your orator was compelled to pay said judgment out of his own funds, as above set forth. That immediately thereafter he demanded of the said George W. Ketcham, payment of his claim against said estate, and upon his refusal to pay the same, he placed his said claim against said estate in the hands of Alfred F. Skinner, Esquire, a member of the law firm of Messrs. Pitney, Hardin & Skinner, for such action as might be necessary to collect the same; that the said Alfred F. Skinner, Esquire, at once took up the matter with the said George W. Ketcham, administrator as aforesaid, and his counsel, and in December, nineteen hundred and eight, after all attempts to bring about a settlement of said matter had failed, your orator, by his attorneys, Messrs, Pitney, Hardin & Skinner, commenced suit in the Essex County Circuit Court against the said George W.

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Ketcham, administrator as aforesaid, for the collection of his said note, and in said suit the said George W. Ketcham, amongst other defenses, set up the statute of limitation, to which defense your orator in his replication alleges that on July twentieth, eighteen hundred and

 10 ninety-seven, a new promise was made by the administrator in writing and signed by him, to pay the note in suit, and a trial was had in said action in the month of March, nineteen hundred and ten, before Honorable Wilbur A. Heisley, and a jury, and a verdict was returned in favor of your orator for the sum of twelve thousand, five hundred and ten dollars and thirty-three cents, representing the full amount of said note, with interest thereon. That thereafter the

 20 said George W. Ketcham, administrator as aforesaid, through his attorney, Frank E. Bradner, Esquire, obtained a rule to show cause why a new trial should not be granted, which rule was later argued before the Honorable Frederic Adams, and by him made absolute, a copy of whose opinion is annexed hereto and marked Exhibit A and made a part of this bill; that thereafter the said case was again noticed for trial and is now listed for trial at the present

 30 April Term of Court. That your orator is advised by his counsel that the said defense of the statute of limitations may be a good defense in said action by reason of the strict rules of the common law.

All which actings, doings and pretenses of the said defendant are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of your orator in the premises.

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IN TENDER CONSIDERATION WHEREOF, and for as much as your orator is without adequate remedy at and by the strict rules of the common law and can only obtain the relief prayed for in this Honorable Court where matters of this nature are properly cognizable and reviewable,

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TO THE END THEREFORE, that the said George W. Ketcham, administrator of the Estate of William S. Ketcham, Sr., may, without oath, your orator hereby waiving, pursuant to the statute, the necessity of the answer of such defendant being put in under the oath of the said defendant, true, full, direct and perfect answer make to all and singular, the matters and things hereinbefore stated, as fully and particularly as if the same were here repeated and he particularly interrogated thereunto, and that the said George W. Ketcham, administrator of the Estate of William S. Ketcham, Sr., may be enjoined and restrained from setting up the statute of limitations as a defense to the action at law brought by the said William S. Ketcham, Jr., against the said George W. Ketcham, administrator of the Estate of William S. Ketcham, Sr., deceased, and now pending in the Essex County Circuit Court and that all proceedings therein be stayed until the further order of this court and that your orator may have such other and further relief in the premises as the nature of the case may require and as shall be agreeable to equity and good conscience.

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May it please your Honor, the premises considered to grant unto your orator not only the state's writ of injunction issuing out of and under the seal of this honorable court, directed to the said George W. Ketcham, administrator of

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Affidavit of William S. Ketcham, Jr.

the Estate of William S. Ketcham, Sr., restraining him from setting up the statute of limitations as a defense to the action at law commenced by William S. Ketcham, Jr., against him as such administrator, and now pending in the Essex County Circuit Court, but also the state's writ of subpoena, likewise issuing out of and under the seal of this honorable court to be directed to the said George W. Ketcham, administrator of the Estate of William S. Ketcham, Sr., therein and thereby demanding him, by a certain day and under a certain penalty therein to be expressed, to be and appear before your Honor in this honorable court and then and there to answer all and singular the said premises and to stand to, abide by and perform such order and decree therein as to your Honor shall seem meet and shall be agreeable to equity and good conscience.

AND your orator, as in duty bound, will ever pray, etc.

JEROME T. CONGLETON,
Solicitor for and of Counsel
with Complainant.

Decision of Frederic Adams, Judge, annexed to Bill.

STATE OF NEW JERSEY, }
 COUNTY OF ESSEX. }*ss.*

WILLIAM S. KETCHAM, JR., of full age, being sworn according to law, upon his oath deposes and says:

I have read the above bill of complaint and know the contents thereof, and the same is true of my own knowledge, except as to the matters

Affidavit of William S. Ketcham, Jr.

that are therein stated to be on my information or belief, and as to those matters I believe it to be true.

In January, eighteen hundred and ninety-three, Frank D. Holloway was indebted to my father, William S. Ketcham, Sr., in a sum in excess of nine thousand dollars, and in order to secure said indebtedness, an attempt was made to incorporate The Clinton Hill Lumber & Manufacturing Company and have the said Holloway turn over his property to the said company, and the said company issue its capital stock to my father in payment of his said indebtedness. In order to assist my father in said matter, I, together with my brother, George W. Ketcham, became subscribers to the capital stock of said company, and a certificate of incorporation of The Clinton Hill Lumber & Manufacturing Company was duly recorded in the Essex County Clerk's Office on or about the twenty-first or twenty-third day of January, eighteen hundred and ninety-three. Immediately upon the filing of said certificate of incorporation, the incorporators met and elected directors and the directors in turn, officers of said company, after which and on the twenty-third day of January, eighteen hundred and ninety-three, the said Holloway transferred all the assets of the said lumber business carried on by him to said corporation by a bill of sale, which is more fully set forth in paragraph five of the above bill of complaint. Shortly thereafter a disagreement arose between the parties in interest, and the said Holloway resigned as an officer of said company, and the scheme of carrying on said corporation was abandoned, and the certificate of incorporation was never

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Affidavit of William S. Ketcham, Jr.

filed with the Secretary of State, but was destroyed.

In March, eighteen hundred and ninety-three, judgment creditors of the said Holloway filed a bill in Chancery to set aside the bill of sale, made by the said Holloway to the said The
 10 Clinton Hill Lumber & Manufacturing Company, as in fraud of creditors, and in said litigation were successful. On May thirteenth, eighteen hundred and ninety-five, Thomas N. McCarter, Jr., was appointed receiver of The Clinton Hill Lumber & Manufacturing Company, as an insolvent corporation, and by proper proceedings, obtained permission from the Court of Chancery, by its order or decree, to levy an assessment upon the stockholders of The Clinton Hill
 20 Lumber & Manufacturing Company upon their subscriptions to the capital stock. In September, nineteen hundred and three, the said receiver began separate suits against my brother, George W. Ketcham, individually and as administrator of the Estate of William S. Ketcham, Sr., and against me in the Essex County Circuit Court, and ultimately recovered judgments against us all. On January seven-
 30 tenth, nineteen hundred and six, I was compelled to pay to the Clerk of the Court of Chancery, the sum of three thousand, eight hundred and eighty-five dollars, being the amount of the judgment recovered against me, together with interest for one year in advance, and on July thirtieth, nineteen hundred and six, three thousand, six hundred and fifty-eight dollars and ninety-nine cents of said amount was paid by the Clerk of the Court of Chancery to Thomas N. McCarter, Jr., in satisfaction of said judgment, the difference being returned to me. When
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Affidavit of William S. Ketcham, Jr.

the scheme for the incorporation of The Clinton Hill Lumber & Manufacturing Company was abandoned my father took possession of the lumber which had been transferred by the said Holloway to said company, in part payment of the indebtedness due him from the said Holloway, and placed me in charge of the same, with instructions to sell it as fast as I could and apply the proceeds derived from such sales to the payment of the notes of which he was the maker and had loaned to the said Holloway, and which were then falling due. In accordance with such instructions, I sold the lumber and received in payment thereof, the sum of about seven thousand dollars, which sum I used at the request of my father, and with the full knowledge of my brother, George W. Ketcham, in taking up said notes. These notes had been discounted by Holloway and I personally attended to their payment. By August sixth, eighteen hundred and ninety-five, I had paid out for my father in this way, the sum of six thousand, six hundred and sixty-six dollars and eighty-four cents, and because of the litigation above referred to, and for fear that I might be called upon to account for said money or held liable personally by reason of my connection with The Clinton Hill Lumber & Manufacturing Company, my father made and delivered unto me, his certain promissory note dated August sixth, eighteen hundred and ninety-five for the sum of six thousand, six hundred and sixty-six dollars and eighty-four cents, a true copy of which is set forth in paragraph fifteen of the above bill of complaint.

My father, William S. Ketcham, Sr., died intestate on September twenty-fifth, eighteen hun-

Affidavit of William S. Ketcham, Jr.

dred and ninety-six, and on October twentieth, eighteen hundred and ninety-six, my brother, George W. Ketcham, was duly appointed administrator of his estate by the Surrogate of the County of Essex, and immediately took upon himself the burden of administering said estate.

10 On October twentieth, eighteen hundred and ninety-six, as such administrator, my brother took out a rule to limit creditors and on July twenty-first, eighteen hundred and ninety-seven, an order barring creditors was duly entered.

On July twentieth, eighteen hundred and ninety-seven, I presented to George W. Ketcham, as such administrator, and left with him a written verified proof of my claim against my father's estate upon the note above referred to. From March, eighteen hundred and ninety-three, until the death of my father, on September twenty-fifth, eighteen hundred and ninety-six, all of the expenses in connection with the litigation against The Clinton Hill Lumber & Manufacturing Company and against my brother and myself were paid by my father. When I presented my claim to my brother as administrator, I informed him that the note represented the moneys which I had received from the sale of the lumber which father had taken possession of when the scheme to incorporate The Clinton Hill Lumber & Manufacturing Company had been abandoned by us and loaned to father to take up the notes of which he was maker, and had loaned to said Holloway, and that if we were successful in the litigations against us, and if he would pay all of the expenses connected with these suits, and any judgment that might be rendered against me, by reason of my having sold said lumber, or by rea-

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Affidavit of William S. Ketcham, Jr.

son of my being a stockholder of The Clinton Hill Lumber & Manufacturing Company, or in any other way connected with said company, I would consider such payments in lieu of the payment of said note, but that if at any time I should be called upon to pay out any money by reason of my connection with The Clinton Hill Lumber & Manufacturing Company, my claim against the estate upon said note should then become due and payable. My brother stated to me that such an arrangement was satisfactory to him and that he would carry on the litigation with Holloway's creditors and pay all of the expenses and if unsuccessful in the litigation, he would pay any claim which I might be called upon to pay, or upon his failure so to do, he would pay my claim against the estate. The agreement between my brother and myself took place in his house on the evening of July twentieth, eighteen hundred and ninety-seven. The next day I received a letter from my brother, a true copy of which is set forth in paragraph nineteen of the above bill of complaint. In compliance with the request contained in that letter, I wrote my brother a further letter setting forth more in detail, the conditions under which my claim against the estate was to be payable, in accordance with our agreement at the time when I filed said claim with him. My brother has never returned to me, my proof of claim so filed with him, and has never served me with any notice disputing the claim, and requiring me to bring suit thereon within three months. He never disputed the claim at all, until the latter part of December, nineteen hundred and five, or the early part of January, nineteen hundred and six, after the judgment recovered by

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Affidavit of William S. Ketcham, Jr.

Thomas N. McCarter, Jr., receiver of The Clinton Hill Lumber & Manufacturing Company had been affirmed by the Court of Errors and Appeals. From the time my brother and I made our agreement on July twentieth, eighteen hundred and ninety-seven, above referred to, and
10 until the latter part of December, nineteen hundred and five, we had many interviews in reference to the litigation against us, and on many occasions, both verbally and in writing, my brother referred to the fact that my claim was pending, and often referred to it as preventing the settlement of the estate, until it was known whether or not the estate would have to pay said note, and during all of this period, my brother paid from the funds in his hands as administrator of our father's estate, all of the expenses,
20 legal and otherwise, in connection with said litigation, and I never was called upon by the attorneys who were conducting said litigation, even in the suit against me personally, to pay any of their bills. I was in attendance before Charles F. Kocher, Esquire, when my brother's accounts as administrator, were before him under an order of reference of the Essex County Orphans' Court, and saw the vouchers which he
30 produced covering charges for which he prayed allowance as such administrator, and many of these vouchers covered the services of Frank E. Bradner, Esquire, and Chandler W. Riker, Esquire, as attorneys in the suits against me personally, and these amounts were duly allowed by the Essex County Orphans' Court as proper allowances to be made to said administrator.

In December, nineteen hundred, I applied to
40 my brother, George W. Ketcham, to make a

Affidavit of William S. Ketcham, Jr.

partial distribution of my father's estate then in his hands as such administrator, but before he would make such distribution, he requested me to again state in writing the terms under which my note against my father's estate was payable, and he, himself, drew up a paper which he desired to have signed, setting up the terms under which said note was payable and sent it to me and requested me to sign the same. In compliance with said request, I filed with said administrator, a further writing, in which I again set forth the conditions under which my claim against my father's estate was payable. My brother received said writing, and never made any objection thereto, and shortly thereafter made a partial distribution of my father's estate, but retained in his hands a sufficient sum to meet any claim in case it should at a later date become payable.

By reason of the promises and representations so made to me by my brother, and also by reason of the fact that he at once commenced the carrying out of said agreement so made with me, I believed that he intended to pay any judgment that might be recovered against me, by reason of my connection with The Clinton Hill Lumber & Manufacturing Company, and because my brother did not dispute my claim, and did not serve me with any notice, requiring me to bring suit therefore, and because he continued to carry on the said litigation and pay all of the expenses thereof, I delayed bringing suit upon my said note within the period of six years from the date thereof, and it was not until I was required to pay the judgment recovered against me by Thomas N. McCarter, Jr., receiver of The Clinton Hill Lumber & Manu-

Affidavit of William S. Ketcham, Jr.

facturing Company, that I became aware that there was any dispute as to my claim. I paid said judgment on January seventeenth, nineteen hundred and six, amounting to three thousand, six hundred and fifty-eight dollars and ninety-five cents. When my brother refused to
10 pay said judgment, I immediately placed my claim against the estate in the hands of Alfred F. Skinner, Esq., a member of the law firm of Messrs. Pitney, Hardin & Skinner, with instructions to take such action as was necessary to collect the same, and in December, nineteen hundred and eight, a suit in my behalf against my brother as administrator of my father's estate was commenced in the Essex County Circuit Court and is still pending. In said suit, my brother, among
20 other defenses, has set up the statute of limitations, and I am advised by my counsel that said defense is a good defense in actions at law. My only reason for not commencing suit within six years from the date of the note, was because of the promises, representations and actions of my brother, George W. Ketcham, administrator of my father's estate, above referred to.

WILLIAM S. KETCHAM, JR.

30 Subscribed and sworn to before me this ninth day of April, A. D., 1913.

*Rule to Show Cause.***Order to Show Cause.**

Filed April 10, 1913.

Upon reading and filing the bill of complaint in this cause and the affidavit thereto, annexed, and on motion of Jerome T. Congleton, of counsel with the complainant, and due cause appearing therefrom, it is on this tenth day of April, nineteen hundred and thirteen, 10

ORDERED, that George W. Ketcham, administrator of the estate of William S. Ketcham, Sr., show cause before the Chancellor at the Chancery Chambers, in the City of Newark, on Tuesday, the twenty-second day of April, nineteen hundred and thirteen, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard why an injunction should not issue according to the prayer of said bill, and for such further relief as may be just. And it is further 20

ORDERED, that in the meantime and until the further order of this court in the premises, the suit of William S. Ketcham, Jr., against George W. Ketcham, administrator of the estate of William S. Ketcham, Sr., now pending in the Essex County Circuit Court, be stayed. And it is further 30

ORDERED, that a copy of the said bill and affidavit and of this order (which copies may be uncertified) be served upon the said George W. Ketcham within two days from the date of this order.

Respectfully advised,

J. E. HOWELL,
V. C.

Answer.

Answer.

Filed May 2, 1913.

10 The answer of defendant, George W. Ketcham, administrator of William S. Ketcham, Sr., deceased, to the bill of complaint filed in this cause.

20 This defendant answering says he believes the statements contained in paragraphs one, two three, four, five, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen and sixteen, of complainant's bill of complaint, filed in this cause, to be true, except that he is not informed as to whether the indebtedness due from F. D. Holloway & Company unto William S. Ketcham, Sr., was a sum in excess of nine thousand dollars, as contained in paragraph one of said bill, and except as to the exact amount of the capital stock of the Clinton Hill Lumber & Manufacturing Company, which this defendant believes to be 30 forty thousand, five hundred dollars, instead of forty-five thousand dollars, as stated in paragraph three of said bill, and except as to whether the bill of sale contained in paragraph five stated anything about accounts receivable, and as to these matters, he leaves the said complainant to make such proof thereof as to this honorable court shall seem meet.

40 This defendant further answering says, as to paragraph six of said bill that he is not sufficiently informed thereof to either affirm or deny the same, and specially as to whether the property therein mentioned, which Frank D. Holloway had transferred to said company, was turned over to the said complainant to be disposed of; neither is he sufficiently informed to either affirm

Answer.

or deny the statements contained in paragraph fifteen of complainant's bill, and specially as to whether the said William S. Ketcham, Sr., took possession of the lumber which the said complainant alleges had been transferred by Frank D. Holloway to the Clinton Hill Lumber & Manufacturing Company in part payment of the indebtedness due him from the said Holloway, and place the said complainant in charge of the same, with instructions to sell it as fast as he could and apply the proceeds thereof to the payment of the notes, which the said complainant alleges the said William S. Ketcham, Sr., had signed for the said Holloway and which were then falling due, and whether the said complainant, at the request of the said William S. Ketcham, Sr., from time to time sold and disposed of said lumber and received in payment thereof the sum of about seven thousand dollars and that the said complainant, at the request of his said father, the said William S. Ketcham, Sr., used the proceeds of said sales to take up the notes of which the said William S. Ketcham, Sr., was the maker and given to the said Holloway for the use of said lumber business, prior to January 23rd, 1893, and which the said Holloway had had discounted, and invested the proceeds thereof in said lumber business, except that this defendant expressly denies that the said complainant used the proceeds of said sale with the full knowledge of this defendant for the purposes mentioned in said paragraph, and except that he expressly denies, that on August 6th, 1895, the said complainant loaned to his said father, William S. Ketcham, Sr., and at his request for the said purpose, the sum of six thousand, six hundred and sixty-six dollars

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Answer.

and eighty-four cents (\$6,666.84) and because of the litigation therein referred to, said complainant's father made and delivered unto the said complainant a certain promissory note of the purport and effect set forth in said paragraph of said complainant's bill, and which the said complainant alleges represented the cash which he had advanced to his said father in order to secure him for such advances, and this defendant, therefore, leaves the said complainant to make proper proof thereof.

AND this defendant further answering admits that the said complainant presented to this defendant, as administrator of the estate of William S. Ketcham, Sr., deceased, a written verified proof of a note which the said complainant alleges was given to him by his father, the said William S. Ketcham, Sr., mention of which is made in paragraph seventeen of said bill, a copy of which said note and proof of claim is as follows:

(Copy of Note.)

“\$6666.84. Newark, N. J. August 6, 1895.

On demand after date I promise to pay to the order of William S. Ketcham, Jr., Sixty-Six Hundred Sixty Six and 84/100 Dollars at..... with interest.

Value Received.

William S. Ketcham.”

Answer.

(Copy of Proof of Claim.)

“To Mr. George W. Ketcham,
Administrator of Estate of Wm. S.
Ketcham (\$6666.84)

I claim from the estate of said Wm.
S. Ketcham the sum of Sixty Six hundred 10
and sixty six dollars and eighty four cents,
being a promissory note signed by Wm. S.
Ketcham, dated Aug. 6-1895 being on de-
mand with interest from date of note.

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

Wm. S. Ketcham, Jr., being duly sworn
according to law says that the above claim
is truly owing him from the above estate.

Wm. S. Ketcham, Jr. 20

Sworn and subscribed before me
on the 20th day of July, 1897.

Julius Rupprecht,
MCC of N. J.”

AND this defendant further answering admits
that when the said complainant presented said
verified note as aforesaid on said July 20th,
1897, to this defendant, the said complainant 30
did state something about the note represent-
ing moneys which the said complainant had re-
ceived from the sale of lumber, mentioned in
paragraph eighteen of said bill, but expressly
denies that the said complainant stated if they
(evidently meaning the Estate of William S.
Ketcham, Sr.) were successful in the litigation
which was then pending against their said
father's estate and against the said complain-
ant, and if he (meaning this defendant) would 40

Answer.

pay all of the costs connected with these suits, together with any judgment that might be rendered against said complainant by reason of his having sold said property, or by reason of his being a stockholder of said Clinton Hill Lumber & Manufacturing Company, or in any way

10 connected with said company, that he, said complainant would consider such payments, in lieu of the payment of said note, and expressly denies that the said complainant stated if at any time he should be called upon to pay out any moneys by reason of his connection with the Clinton Hill Lumber & Manufacturing Company, his claim against said estate upon said note should then become due and payable; and expressly denies that this defendant as such

20 administrator stated to the said complainant that such an arrangement was satisfactory to him, and that he would carry on said litigation with Holloway's creditors, and if they were unsuccessful, this defendant would pay any claim the said complainant might be called upon to make, or upon his failure so to do, this defendant would pay the claim of said complainant filed with him as such administrator, as set forth in paragraph eighteen of said bill, but, on the

30 contrary, this defendant expressly denies any such agreement or any agreement of any nature or kind for the payment of said claim with said complainant at the time aforesaid, or at any other time, and says that at the time said complainant presented said note, which was about twelve o'clock at night, this defendant had very little conversation with said complainant, except that he distinctly remembers, in addition to what this defendant states that said complainant

40 said as hereinabove set forth, the said com-

Answer.

plainant said: "Now George (meaning this defendant) don't think this is a debt." "Father (meaning William S. Ketcham, Sr.) does not owe me this money." And that this defendant then stated to said complainant that the claim presented was not in proper shape, and if the said complainant had any claim against his said father's estate, it should be presented in proper form. 10

AND this defendant further answering admits that on July 21st, 1897, this defendant sent a letter to the said complainant as set forth in paragraph nineteen of said bill, a copy of which is therein set out, and that said complainant wrote a letter to this defendant, as mentioned in paragraph twenty of said bill, and enclosed therein a paper, copies of which are as follows: 20

(Copy of Letter.)

"July 22nd, '97.

Dear Bro:—

Your letters received and duly considered.

As are you aware the Holloway matter has been so perplexing that it has all along been difficult to decide what to do. If I should be compelled to pay for *unpaid subscription*, and had given no notice to the estate of note, etc., then it would be too late. 30

But by giving notice now I cover all possibilities.

I have only wanted to do what was right in the matter.

If it would be in any better shape for the estate, I would be willing to withdraw the 40

Answer.

note if the estate would in some way guarantee me from loss. So many contingencies often arise especially where all the heirs are not fully informed on matters that I feel it best to do what I have.

10 If the enclosed paper will do to put with the note, all right, or if you suggest anything else drop me a line.

Yours truly,

(Signed) Will.

(Copy of Paper Enclosed.)

Newark, N. J., July 22nd, 1897.

To Mr. Geo. W. Ketcham,

Admin. Estate of Wm. S. Ketcham, Dec'd.

WHEREAS,

20 A promissory note made by Wm. S. Ketcham deceased, and dated Aug. 6th, 1895, for (\$6666.84) Sixty-six Hundred and Sixty-six Dollars and eighty-four cents and payable on demand to Wm. S. Ketcham, Jr., having been presented to the Admin. of said estate for payment, it is presented on the following conditions.

30 1st: No payment is demanded except in the contingency of any loss or payment being demanded of me by reason of my relations to the 'Clinton Hill Lumber & Mfg. Co.' 2nd: No payment of said note to be demanded in case said estate shall otherwise guarantee me against any loss or payment by reason of connection with said company.

(Signed) Wm. S. Ketcham, Jr."

Answer.

AND this defendant further answering admits that he retained in his possession said complainant's verified proof of claim served upon him as hereinabove set forth, but expressly denies that he never disputed the same, and says that he always disputed the payment of said note as such administrator.

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AND this defendant further answering admits that he did, as administrator, pay certain legal expenses after the litigation between the creditors of said Holloway and Thomas N. McCarter as set forth in paragraph twenty-two of complainant's said bill, but expressly denies that the same were paid by reason of the alleged agreement set out by said complainant in paragraph eighteen of said bill, or in any other paragraph of said bill, but expressly says that this defendant had paid a portion of said legal expenses before said complainant presented said note and states that an agreement was made by this defendant to pay the same, and that the same were made with the knowledge and consent of not only the said complainant, but all other persons interested in the Estate of William S. Ketcham, Sr.

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AND this defendant further answering admits that he filed with the Surrogate of the County of Essex his account as administrator of the Estate of William S. Ketcham, Sr., as set forth in paragraph twenty-three of said bill, and that the same was objected to by the said complainant, but was afterwards allowed by said Essex County Orphans' Court, and that in said account, this defendant prayed allowance for various sums expended in litigations connected with the Clinton Hill Lumber & Manufacturing Co. suits, and the same were paid with the knowl-

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Answer.

edge and consent of the said complainant, but not by virtue of any agreement made with the said complainant as alleged by him in said bill.

AND this defendant further answering admits that in or about the month of December, nineteen hundred, this defendant as administrator
 10 of the Estate of William S. Ketcham, Sr., made a partial distribution of the funds in his hands as such, and that before the distribution was made, the said complainant did give to this defendant a certain writing or paper concerning the alleged claim of said complainant against said estate, as set forth in paragraph twenty-four of said bill, a copy of which is as follows:

“Whereas Wm. S. Ketcham, Jr., holds a promissory note, dated Aug. 6th, 1895, for
 20 the sum of sixty-six hundred and sixty-six dollars and eighty-four cents, signed by his father, Wm. S. Ketcham, deceased, and payable to him with interest; and whereas said note is barring a settlement of the estate of Wm. S. Ketcham, it is hereby agreed by Wm. S. Ketcham, Jr., that if the *heirs* of Wm. S. Ketcham will release Wm. S. Ketcham, Jr., from all claim whatsoever that *may* be adjudged against *him* by reason
 30 of suit now pending in Chancery or that may be brought *against him* by reason of *his* connection with The Clinton Hill Lumber Mfg. Co., that he will destroy said note so that no payment shall be demanded on same. (The said note having been given *me* as security against any loss in above suits.) Dated, Newark, N. J., Dec. 22nd, 1900.

Wm. S. Ketcham, Jr.

Witness present:

40 Julius Rupprecht.”

Answer.

But this defendant expressly denies that the amount retained by him as such administrator was for the purpose of paying any alleged claim of the said complainant against said estate as further set forth in paragraph twenty-four of said bill.

AND this defendant further answering denies 10
that the said complainant delayed bringing suit upon said note within the period of six years, provided by statute, by reason of any promises, representations, and actions of this defendant as such administrator, as this defendant made no such promises or representations to the said complainant as alleged by him, and, therefore, the said complainant could not act upon the same or allege them as a reason or excuse for not bringing his suit within the time required by law, and that the statements contained in paragraph twenty-five of said bill are absolutely and wholly untrue. 20

AND this defendant further answering says he has no knowledge as to whether in December, nineteen hundred and five, Thomas N. McCarter, receiver, demanded payment from said complainant for the sum claimed to be due to him, as contained in paragraph twenty-six of said bill, but this defendant denies that the said complainant requested this defendant to pay said judgment, in accordance with any previous agreement made between them, and this defendant further expressly denies that for the first time he refused to recognize said agreement with said complainant, but expressly says that he never made any agreement with said complainant as administrator of the Estate of William S. Ketcham, Sr., or otherwise, as therein set forth. 30
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Answer.

AND this defendant further answering says he believes that the said complainant did pay said judgment so recovered by said receiver against him, but has no personal knowledge thereof, and, therefore, leaves the said complainant to make proper proof of the same.

10 AND this defendant further answering admits that the said complainant did make demand upon him to pay said claim as such administrator, but he absolutely refused as he had always done, to pay the same.

AND this defendant further answering says that he has no knowledge as to just when the said complainant placed his claim against said estate in the hands of Alfred F. Skinner, as mentioned in paragraph twenty-six of said bill,
20 nor of the exact time when said suit was brought by said complainant against him as such administrator, but says that the same was brought more than six years after the time required by law.

AND this defendant further answering admits that, among other defenses set up by this defendant, to said action, was the statute of limitations, as set forth in said paragraph, and that a trial in said action was had, and a verdict rendered in favor of said complainant, and a new trial was granted by Honorable Frederic Adams, and that said action is still pending, and undetermined as set forth in said bill.
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AND this defendant further answering says that the said complainant acquiesced in the filing of the plea of the statute of limitations by this defendant in said Circuit Court action, brought by said complainant to recover the amount due on said note, as hereinbefore set
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Answer.

forth, by joining issue thereon, and proceeding to trial, and, therefore, is not entitled to the relief prayed for by him in his bill of complaint; and this defendant respectfully requests that he may have the same benefit of this defense by way of answer, as though he had demurred to said bill.

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AND this defendant further answering says that the said complainant did not apply to this court within a reasonable time after he became apprised of the circumstances on which his application for an injunction is founded, and is therefore, in laches, and is not entitled to the relief prayed for by him in said bill, and this defendant respectfully requests that he may have the same benefit of this defense by way of answer as though he had demurred to said bill:

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AND this defendant further answering denies that there was any valid consideration whatsoever for said note mentioned in the complainant's said bill of complaint, and further says that the said bill does not set forth any valid consideration for said note, and, therefore, the said complainant is not entitled to the relief prayed for therein, and this defendant respectfully requests that he may have the same benefit of this defense by way of answer, as though he had demurred to said bill.

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AND this defendant further answering says that the said complainant does not come into equity with clean hands, and, therefore, is not entitled to the relief prayed for.

AND this defendant further answering says that the said bill does not on its face show that the complainant is entitled to any equitable relief, and this defendant, therefore, requests that

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Replication.

he may have the same benefit of this defense by way of answer as though he had demurred to said bill.

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

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SCOTT GERMAN,
Solicitor of Defendant.

Replication.

Filed May , 1913.

The complainant joins issue on the answer of the defendant.

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JEROME T. CONGLETON,
Solicitor of Complainant.

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William S. Ketcham, direct.

IN CHANCERY OF NEW JERSEY.

Between

WILLIAM S. KETCHAM, JR.,
Complainant,

and

GEORGE W. KETCHAM, admin-
istrator of WILLIAM S.
KETCHAM, SR., deceased,
Defendant.

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Transcript of testimony taken in the above
entitled cause before Hon. John R. Emery, Vice-
Chancellor, at the Chancery Chambers, Newark,
New Jersey, on Wednesday, October 1, 1913, at
10:30 A. M.

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Appearances:

Mr. Jerome T. Congleton for complainant.

Mr. Frank E. Bradner and Mr. Scott German
for defendant.

WILLIAM S. KETCHAM, complainant, sworn.

Direct examination by Mr. Congleton.

Q You are the complainant in this suit? A
Yes, sir.

30

Q And you are one of the heirs at law of
William S. Ketcham, Sr., deceased? A Yes,
sir.

Q And a brother of George W. Ketcham, the
defendant in this case? A Yes.

Mr. Congleton. I understand the other
side will admit that George W. Ketcham
was appointed administrator of this estate

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William S. Ketcham, direct.

on October 20, 1896, and that a rule to limit creditors of that estate was taken out on October 20, 1896.

Mr. German. Yes, sir, that is admitted.

Court. Was there any decree on it?

10 *Mr. Congleton.* An order barring creditors was entered on July 21, 1897.

Q Did you present any claim to your brother George W. Ketcham as administrator of the Estate of William S. Ketcham, Sr.? A I did.

Q When did you present that claim? A On July 20, 1897.

Mr. Congleton. Have you that claim?

Mr. German. Yes, sir. (Producing same.)

20 Q I show you a paper dated Newark, N. J., July 20, 1897, and ask you if that is the claim which you filed with your brother on that date? A That is the paper.

Mr. Congleton. I offer the paper in evidence. (Marked Exhibit C. 1.)

30 Q Was that paper ever returned to you by your brother? A No, sir, this is the first I have seen it since the day I filed it with my brother.

Q Did you ever receive any notice in writing from your brother that the claim which you filed with him as administrator was disputed?

Mr. Bradner. I object to the form of the question.

Court. Ask whether he received any communication from his brother in writing after giving the notice, relating to the notice.

40

William S. Ketcham, direct.

Q After you filed this claim with your brother, did you receive any communications from him in writing? A I did, the following day, July 21, in the form of a letter.

Q I show you a letter dated New York, July 21, 1897, addressed "My dear brother" and signed "Very truly your brother George W. Ketcham," and ask you whether that is the letter that you refer to? A That is the letter. 10

Mr. Congleton. I offer that letter in evidence. (Marked Exhibit C. 2.)

Q After you received that letter from your brother, did you write him anything further? A I did, I immediately wrote him a letter.

Q You say immediately? A July 22nd, I think the date is, the following day. 20

(Letter called for and produced by the defendant.)

Q I show you a paper dated July 22, 1897, headed "Dear brother" and signed "Yours truly Will," and ask you if that is the letter you have reference to and if you wrote that? A That is the letter.

Q Did you enclose any other paper in that letter? A I did.

Q The paper referred to in the letter? A Yes. 30

Q I show you another paper also produced by the defendant, headed "Newark, N. J., July 22, 1897," addressed to "Mr. George W. Ketcham, administrator Estate of William S. Ketcham, deceased," and signed "William S. Ketcham," and ask you to look at that paper and say whether or not that is the paper which you enclosed with the letter just referred to?

A That is the paper. 40

William S. Ketcham, direct.

Mr. Congleton. I offer the letter and paper in evidence.

(Letter dated July 22, 1897, marked Exhibit C. 3; paper dated the same day marked Exhibit C. 4.)

10 Q After you sent that letter with the enclosure to your brother did you receive any further communication from him in reference to your claim? A No, sir.

Q (*By the Court.*) You received no further written communication from him? A Not at that time.

Q When did you, if you did, at any other time? A Two or three years later there was further correspondence in 1910.

20 Q At the time of the partial distribution?
A Yes.

Mr. Congleton. I won't come to that quite yet.

Q When you filed this first paper with your brother did you have any conversation with him at that time about it? A I did.

30 Q Will you state what that conversation was? A I presented the paper to my brother; he took it and read it over and then he asked me some further statements of details in regard to it. I said, "George, that claim represents the sale of the lumber in the Holloway matter," and I said, "This Holloway litigation is going on, we don't know just when it will end or what the result will be," and I said, "if you will carry on the litigation and pay any expense attending thereto, so that I am not called upon in any way to pay out any expense or money or pay the judgment—any judgment that may be
40 rendered by reason of my being a stockholder

William S. Ketcham, direct.

or in any way connected with this company, I will not demand payment of the note, I will consider those payments in lieu of payments of the note," and the conversation was along that line, and my brother expressed himself as satisfied with that explanation. I think we talked a little further in regard to the general Holloway matter and the matter was left there for that evening. 10

Q At that time, Mr. Ketcham, was there litigation pending against you in reference to your connection with the Clinton Hill Lumber & Manufacturing Company matter? A I don't recall just the exact form it was in, but there was litigation against the Clinton Hill Lumber Company in which I was a stockholder and director. Later on, it was against me individually. 20

Mr. German. I object to that; he didn't ask you the latter part of the answer.

Court. He asked whether there was any against him at that time; he recollects later it was against him. If there is any question about it, you may have to produce the record. Do you want the matter of the pending litigation proved by the suit? 30

Mr. German. No.

Mr. Congleton. We agreed that we would use the printed books to show the different matters set forth instead of bringing the clerk from the court.

Q You say at this time you cannot remember whether there was litigation against you personally or not? A No.

William S. Ketcham, direct.

Q In the litigation against you personally were you called upon to meet the expenses of that litigation? A No, sir.

Q During the litigation against you personally were you called upon to meet any of the expenses of carrying on the litigation? A
10 Not a penny.

Q Did you ultimately have to pay a judgment against yourself personally in this matter? A I did.

Q In reference to the Clinton Hill Company? A Yes.

Court. That was a judgment by the receiver?

Witness. Yes.

Q Do you remember when that was? A
20 In January, 1906.

Q What suit was that? A The receiver Thomas N. McCarter against me as a stockholder in the Clinton Hill Lumber & Manufacturing Company; that is, I paid it in January, 1906.

Q (*By the Court.*) When you say you paid it, do you recall what the form of the payment was? A I sent it down to the Clerk of the
30 Court of Chancery.

Q That judgment had been recovered against you by Thomas N. McCarter, receiver of the Clinton Hill Lumber and Manufacturing Company in the Essex County Circuit Court? A Yes.

Q And from that judgment a writ of error was taken ultimately to the Court of Errors and Appeals? A I believe so; I know there was an appeal taken. Mr. Bradner took it; I
40 suppose that was what it was.

William S. Ketcham, direct.

Q And after that judgment had been affirmed, were you called upon by Mr. McCarter to make payment of that amount? A I had paid into the Court of Chancery.

Q Why did you pay it into the Court of Chancery; was anyone making demand upon you for the money? A The receiver— 10

Court. The witness paid into the court a certain amount.

Q (*By the Court.*) Did you after the appeal had been decided in the Court of Appeals, as you understand, make any further payment? A No, sir, that money was transferred—Mr. Bradner had it taken from the Court of Chancery and paid to the receiver and he returned to me a certain rebate of interest, over \$100. 20

Mr. Bradner. The receiver applied here and your Honor directed the clerk to pay the amount of his claim, when the judgment was affirmed.

Court. The money deposited in court only bears three per cent. interest. Did the receiver get the full amount of interest on the entire claim? I want to find out when he made his last payment to the receiver of the entire amount then due to the receiver. By paying into court he would not pay the full amount of interest accruing on the judgment pending its deposit in court, for the interest on deposit in court is only three per cent. and the receiver would be entitled to six. When did he pay the entire amount that was due to the receiver? 30

Mr. German. July 30, 1906.

Court. Was any further payment ever made? 40

William S. Ketcham, direct.

Witness. No.

10 *Mr. Congleton.* On January 17, 1906, Mr. William S. Ketcham, Jr., paid to the clerk in Chancery the amount of the judgment with a year's interest amounting to \$3,885; then when that final appeal was disposed of, the receiver at that time was entitled to receive from William S. Ketcham, Jr., the sum of \$3,658.99 and the receiver's account in the Cumberland Lumber Company, *et al*, against Clinton Hill Lumber & Manufacturing Company, found in book entitled in that cause, known as Book No. 4, the receiver charges himself, "July 30, 1906, judgment and interest paid by William S. Ketcham, Jr., for assessment on stock \$3,658.99"; the
20 difference between those two amounts, Mr. William S. Ketcham, Jr., received back from the Clerk in Chancery.

Court. Then on the question as to when the final payment was made by him, it would be July 30, 1906.

30 *Mr. Congleton.* I desire to have on the record the notice of assessment made by this receiver under an order of this court dated July 17, 1903, which assessment against this complainant was for the sum of \$3,095, found in Book No. 4, page 119.

Q Coming now to the time when you say you had some further writing with your brother in reference to your claim in 1900, will you state what that was? A I think it was in December, 1900, having an opportunity to enter into a business firm, I wrote to my brother asking for a partial division of the estate, there
40 having been none up to that time except a di-

William S. Ketcham, direct.

vision of a portion of the income of the estate, and I received a reply from my brother in which he stated that all the debts of the estate—

Mr. Bradner. Have you the letter?

Witness. I received a reply from my brother in which he made a demand upon me, that as a prerequisite to any division of the estate, I should file with him a further paper explaining the conditions on which I demanded payment of my note. 10

Mr. German. We think the letter should be produced.

Q (*By the Court.*) Was that request for the division verbal or in writing? A By writing.

Court. Do you happen to have the letter?

Mr. German. We have no letter from Mr. Ketcham on that date or at any time in reference to that. 20

Mr. Congleton. You have the paper which we did file.

Mr. German. We want the letter in which Senator Ketcham replied to the request.

Q Did you get such a letter; was it in writing?

A Yes, I think there are two letters there. 30

Q I show you a letter dated "New York, December 10, 1900," addressed to "My dear brother" and signed "Sincerely yours, Brother George" and ask you if that is the letter you have reference to as having received from your brother after you had made a request for a partial distribution of the estate? A That is the letter I received.

Mr. Congleton. This letter would indicate that you have received this request in writing.

Mr. German. We haven't got it. 40

William S. Ketcham, direct.

Mr. Congleton. I offer in evidence letter dated December 10, 1900.

(Marked Exhibit C. 5.)

10 Q I show you another letter dated "Newark, N. J., December 21, 1900," and addressed "Dear Brother," and signed "Brother George"; did you receive that from your brother? A I did.

Mr. Congleton. I offer that letter in evidence.

(Marked Exhibit C. 6.)

Q After receiving those two letters did you file a further paper with your brother? A I did.

Mr. Congleton. Have you that paper dated December 22, 1900?

Mr. Bradner. Yes, sir. (Producing same.)

20 Q I show you paper dated "Newark, N. J., December 22, 1900," signed "William S. Ketcham, Jr.," "witness present Julius Rupperecht," and ask you if that is the paper which you filed with your brother on or about that time? A Yes, sir, that is the paper as far as I recollect.

Mr. Congleton. I offer the paper dated December 22, 1900, in evidence.

(Marked Exhibit C. 7.)

30 Q Did you receive from anyone suggestions as to the form that this paper marked C. 7 should take?

Mr. German. Objected to.

Q Did you receive from the defendant George W. Ketcham any suggestion as to the form which this paper marked C. 7 should take?

Mr. German. Objected to as immaterial.

40 *Court.* I will take the evidence and hear you on the relevancy.

William S. Ketcham, direct.

A I did.

Q And was the suggestion in writing or by word of mouth? A In writing.

Q I show you a paper upon the letterhead of the Central Stamping Company, written in pencil, and ask you if you know whose handwriting that is? A That is my brother's writing. 10

Q Where did you get this paper from? A From him.

Mr. Congleton. I offer that paper without date in evidence.

(Marked Exhibit C. 8.)

Mr. Bradner. There is some writing on this which is not in Mr. Ketcham's handwriting.

Q At the top of this paper there are two lines and a half in writing; whose handwriting is that? A That is mine; that is a memorandum I put on. 20

Q But the body of the paper is in the handwriting of your brother? A Yes.

Q Read the part in your handwriting. A "This was suggested by G. W. K., but as it did not truly explain all the facts, I gave him a different paper. 12/00."

Mr. Congleton. Is that your writing, Senator Ketcham? 30

Mr. German. That is his writing, but there is no date on it.

Q When did you receive this paper with reference to the giving of the paper marked Exhibit C. 7? A I do not recall now whether my brother gave me this at his house or whether it was enclosed in one of the letters.

Q With respect to Exhibit C. 7, when did you receive the paper that you now have in your hand 40

William S. Ketcham, direct.

from your brother? A About the same time, within a day or two.

Q Within a day or two of what? A The first letter that I got from my brother was dated December 10; the second, December 21. It was either enclosed in one of those letters or else
10 given to me when I was up to his house, pending that time.

Q Then before you actually signed and delivered to him the paper called Exhibit C. 7? A Yes, C. 7 is dated December 22, 1900; it was before that.

Q After the signing of that paper was there any distribution made of your father's estate? A There was, within a few days.

Q Was the entire estate distributed? A No.

20 Q How much was left remaining on hand? A I don't recall now.

Q Approximately, as you knew it at that time? A I think \$20,000 or \$25,000.

Q Mr. Ketcham, when you were called upon or when you did make payment of the judgment recovered against you by Thomas N. McCarter, did you have any conversation with your brother at that time? A I did.

30 Q In reference to this note, I mean? A I did.

Q What was that conversation? A I got a letter from my brother, I think it was enclosing Mr. Bradner's letter to my brother, in which I think Mr. Bradner spoke of the judgment, and my brother, I think, at the foot of that same letter added these words—

Q Have you the letter? A Yes. (Producing letter.)

40 Q You hand me a letter dated January 2, 1906, addressed "George W. Ketcham, Esq.,"

William S. Ketcham, direct.

and signed "Frank E. Bradner," and then in the lower left-hand corner is, in your brother's writing, a note to you; is that the letter that you have referred to? A Yes. This is the letter I received from my brother, but I think a month before that, in December, 1905, I heard either through Mr. Bradner or my brother, the fact that judgment had been entered against me. I do not know if that was by letter or by hearing from Mr. Bradner, and I went up to my brother's and had a conversation with him in regard to the judgment rendered against me, and as to his paying that, and the matter was left in abeyance, and I think in the meantime the judgment was put in the sheriff's hands, and as the outcome of that, Mr. Bradner wrote this letter to my brother, and then he re-mailed it to me.

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20

Mr. Congleton. I offer in evidence letter dated January 2, 1906.

(Marked Exhibit C. 9.)

Q After you got that letter from your brother, did you have any further conversation with him in regard to the payment by him of this judgment against you? A Previous to getting that letter.

Q You told us about that and the matter was in abeyance; after you got this letter did you have any further conversation with your brother about the payment of this judgment? A I do not recall exactly. I thought that that note down at the bottom meant business, and so I got a certified check and paid the claim.

30

Q Had you previous to that made any demand upon him for the payment of the judgment? A The month previous, in December, 1905, yes, sir.

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William S. Ketcham, direct.

Q What was your conversation with him and what did he say to you about it? A When I learned that the judgment had been rendered against me, I went up and saw my brother and said I expected him to pay the judgment according to our agreement. He said he thought it would all come out right in the end, and he told me—suggested that I go and see Mr. Holzhauer. I said, “George, I am dealing with you as administrator, not with anyone else,” but I did go and have a conversation with Mr. Holzhauer, and then I saw my brother again and he suggested that a paper be drawn up and submitted and taken to the rest of the heirs in regard to the payment of this claim. I said, “George, I am not begging anything of the family or anything of the kind; I am standing on my legal claim here,” but a paper was drawn up, signed by my brother and myself, and taken to two of the sisters, but nothing came of that and that fell through.

Mr. German. Where is the paper, have you got it?

Witness. I haven't the paper. That paper was in evidence in the Circuit trial.

Q After that did you ever make demand upon your brother to reimburse you for the amount which you had paid in satisfaction of this judgment? A I did; after that paper had been taken to two of the sisters, I went back to my brother and told him the circumstances and said I expected him to pay it, and according to our agreement, but there was nothing done, and then I got this letter of January, in which he said “This means business, you had better attend to it,” and so I paid it.

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William S. Ketcham, direct.

Q After you had paid that money and after the appeal had finally been disposed of and it was determined that this money was not coming back to you, did you make any further demand upon your brother to reimburse you for the amount which you had paid? A Not until I began suit against him. 10

Q Then you did make some further demand?
A I did.

Q When was that, if you recollect? A I placed the matter in the hands of ex-Judge Skinner of Pitney, Hardin & Skinner, I think in January, 1906, right after I paid the amount.

Mr. Congleton. It is admitted that the suit was commenced in this county on December 28, 1908. 20

Q Why did you postpone bringing suit on this note until December, 1908? A Do you mean from the time that I paid the amount into court?

Q The whole time?

Court. From 1906, when it was decided that the money wouldn't come back to you, because Mr. Bradner's letter advised you that the money wouldn't be paid out until after the appeal was determined; why did you postpone bringing suit after July, 1906, when it was finally determined that the money paid into court would go to the receiver and wouldn't come back to you? 30

Witness. I placed the case in the hands of ex-Judge Skinner, with instructions to go ahead and sue on the note. Ex-Judge Skinner told me—

Mr. German. Objected to. 40

William S. Ketcham, direct.

Q From that time on, until suit was brought, was it in Judge Skinner's hands? A Yes; there was correspondence in regard to it.

Q You saw that correspondence? A I did.

Q Do you recall who the correspondence was with? A Between my brother and ex-Judge Skinner.

10 Q But Judge Skinner actually brought this suit in the Circuit Court and tried the case there? A He did.

Q Why did you postpone enforcing your claim on this note from the time that you filed it until the time that you did? A At the time I filed my claim, as I have explained, on July 20, 1897, I made the verbal explanation to my brother that evening of my purpose in the matter, that if he would pay all the expenses of the Holloway litigation then going on, so that I wasn't called upon in any way to pay any expense or any judgment in regard to the whole matter, that I would consider that in lieu of payment of the note. As has been shown, on July 21, the following day, I got the letter from my brother in which he objected somewhat to the form of the notice of the claim and asked that it be modified; I complied with that on July 22, 1897, and gave him a further explanation or a couple of conditions that I said on which the payment was demanded. I wasn't a lawyer and I didn't pretend to write them in legal form. And then for three years from that time, to 1900, the time of the partial division, my brother paid all the expense of the Holloway litigation against the Clinton Hill Lumber Company and against me personally, paid all the bills of Mr. Bradner as counsel and his expenses, and then in 1900 I asked for a partial division and got the letter from my brother asking again for

William S. Ketcham, direct.

a paper stating the conditions that I had made in regard to the payment of that note, and then following that for several years my brother kept on paying all the expenses of the suits and all and I certainly thought it was carrying out our agreement; he never in any way, shape or manner, either by letter or by word, disputed the claim or said it was unjust, and on the contrary, on more than one occasion in his own house, he said to me that if the claim went against me he would pay the judgment. The matter went on until, as you have shown, the judgment was rendered against me and he failed to pay that judgment and then I began suit. All during that time I had no intimation—that is, during the period of the statutory period, I had no intimation in any way whatever, that he disputed the claim or disagreed with the agreement that I had made with him, confirmed by these different papers that I gave him. 10

Q You never received any formal written notice from him that your claim filed was disputed and informing you that you must commence suit against the estate on your claim within a certain period of time, did you? A None whatever. The only paper that bore on that at all was the letter of July 21, in which he states that he objects to the form of the notice; there was nothing said about the objection to the claim in any way at all, and I complied with that the following day, with the letter of July 22, 1897. 20 30

Q You have received no other letter except those you have produced? A I might say after the statutory period had passed and probably a couple of years before I began suit, there was certain correspondence passed between us in which there was some discussion of my note 40

William S. Ketcham, direct.

claim, but even that, I never took as any disputing of the claim itself.

Mr. German. Have you that correspondence?

Witness. Yes.

10 *Mr. German.* Suppose you produce that and let us see what it is.

Q You may produce those letters.

Witness. Might I ask—there are several letters and correspondence.

Court. You spoke of correspondence in which the matter of the note was referred to.

20 *Witness.* There is one letter dated May 1, 1903, from George W. Ketcham in reference to this claim. There is the other correspondence after the suit was—I would have to read them over and pick them out.

Court. Let Mr. Ketcham during the recess go over his letters and see which of them refer at all to the note. Everything in reference to the note should go in.

Mr. Congleton. We will leave that until later then.

30 Q Did Mr. Bradner represent you in all of the litigation that was brought against you in the various suits at all and in the Court of Chancery growing out of the Clinton Hill Lumber & Manufacturing Company? A He did.

Q You had no other counsel which you were paying personally? A No, sir.

40 *Mr. Congleton.* Then subject to further questions based on the letters, I will turn the witness over for cross examination at this time.

William S. Ketcham, cross.

Witness. Might I suggest a question to my counsel?

Mr. Congleton. If you think it is material, you may do so.

Witness. I don't know whether it is relevant or not to ask who paid all these expenses. 10

Mr. Congleton. I will prove that in a different way; your knowledge would only be hearsay.

Cross examination by Mr. German.

Q Your recollection regarding all this evidence concerning this subject matter is good?

A Yes, sir.

Q You are a son of William S. Ketcham, are you? A Yes. 20

Q How many children were there? A Five.

Q Your father died without a will? A Yes.

Q And you were interested to the extent of one-fifth in his estate, as one of the heirs and next of kin? A Yes, sir.

Q What was the condition of your father's health previous to the time he died and about the time of the giving of the note?

Mr. Congleton. Objected to; it seems to me that that is going into the— 30

Court. This is not cross examination.

Mr. German. I am going into the note.

Court. This is not cross examination; you may call him as your witness on that.

Q What time in the evening was it when you called at your brother's house to present this note? A Between six and seven o'clock.

Q Who let you in the house? A I don't recall that. 40

William S. Ketcham, cross.

Q Do you know this lady (woman stands up in court room)? A I cannot say.

Q Annie I believe they called her at that time? A I cannot say anything about that. I cannot identify her as the one who let me in.

10 Q How long did you stay there in the house before your brother came? A My best recollection is that he either had not quite finished his supper or was through, I don't recall that, but I do not think it was very long.

Q Then your brother was at supper when you arrived? A I am not sure whether he was at supper or had just about finished.

Q He came out how soon after you arrived? A Very soon, as far as I recall.

20 Q That would be in the neighborhood of half-past six in the evening? A I think it was nearer seven o'clock, if I recollect.

Q And you at once presented the note to your brother? A I did.

Q I mean the claim. A The affidavit of the claim.

Mr. Bradner. He is asking you as to the note, the note as well as the claim, not the claim on the note.

30 Q What about that? A I don't recall whether I had the note with me at that time or not. I thought you referred to the affidavit.

Q Then you did not present the original note at that time? A I don't recall whether I showed it to him then or not; I did subsequent to that, but the paper was the affidavit witnessed by Mr. Rupprecht.

Q Where is the note now? A The note is in the possession of Judge Skinner.

40 Q Why don't you produce it here?

William S. Ketcham, cross.

Mr. Congleton. I object to that; he hasn't been asked to produce it.

Court. Do you call for it?

Mr. German. I would like to call for the note.

Witness. I haven't it here. 10

Court. Have you got the note?

Mr. Congleton. I want to state at this time that I am working on our arrangement that we were to call for each other's papers, but if the note were here, I would object that it is not material to this issue, and further than that, I want to state that Judge Skinner who tried this case in the court of law has had the papers and upon applying to him for it, it has in some way or other become mislaid, and he has not yet been able to put his hand on it; that is the reason that we cannot produce it at this particular time, and if necessary to prove those facts, I would like an opportunity to have Judge Skinner come here. 20

Court. That is your answer to the call for the note.

Q You handed the written claim to your brother? A Yes. 30

Q Did he take it? A He did.

Q Did he read it? A He did.

Q What did he say, if anything? A He asked me for some further details in regard to it.

Q Give his conversation. A I think that is what he said, and then I explained.

Q What he said? A That is all he said that I remember, at that time. 40

William S. Ketcham, cross.

Q What did he say? A Asked me for some further details in regard to it.

Q He said, "I want further details regarding it?" A Yes.

Q Then what did you say? A I said, "George, that note represents the sale of the lumber in the Holloway matter," and I said, "this Holloway litigation is going on, we don't know when it will end or how it will result, and if you will carry on the litigation and pay any expense connected with it or any judgment that may be rendered against me at any time as the outcome of any proceedings in the Clinton Hill matter, I will not demand payment of the note, but will consider that in lieu of payment," and my brother said that that explanation was satisfactory.

20 Q What did he say, if anything? A I do not recall the words, that was the gist of it.

Q You don't recall any words, but he said it? A Not especially.

Q Did you tell him at that time why your father had given you the note? A I said the note represented the sales of the lumber in the Holloway matter, which I had got as custodian, selling the lumber.

30 Q Did you tell him at that time why your father had given you the note? A I don't think I said anything further than that.

Q Why not? A I considered that explained the whole matter; I knew he was aware of the fact that the lumber had been sold.

Q Was your father in the habit of giving demand notes?

Mr. Congleton. Objected to.

Objection sustained.

William S. Ketcham, cross.

Q How did you know that your brother was aware of that? A In regard to the sale of the lumber?

Q What you just stated. A Two years before, in 1893, when the attempt was made to form this Clinton Hill Lumber Company, I was up to my brother's house several times and we conferred in regard to the formation of that company, and then when it didn't go through I went up and saw him and told him the circumstances why it wasn't best to go on, and my brother advised me—I said, "Now, father wants these notes of his coming due, he wants them first paid," and my brother advised that I sell the lumber and apply it on my father's notes; so that I knew he was aware of the sale of the lumber and gave him all the information that I thought was necessary. 10 20

Q Did you sell the lumber, acting on your brother's advice?

Mr. Congleton. I object.

Court. I will take the evidence.

A Partly so.

Q How? A We had talked together about our father's affairs and I told him father wanted these notes paid, they were coming due; he said, "I would sell the lumber as fast as you can and apply it on the notes." 30

Q What was the other part; it was partly on your brother's advice.

Mr. Congleton. I object to this testimony; they are going back to the time in 1893, which it seems to me has no bearing.

Court. It may not as to time, but it may as to the witness's statement in reference to the circumstances of giving the note. I can- 40

William S. Ketcham, cross.

not say that it is not material; I will take it subject to your objection, Mr. Congleton; if it has no bearing, I will strike it out, but it may have.

Q What was your own reason? A It was good sense on my own judgment.

10 Q Why did your judgment tell you to sell the lumber? A The lumber, while it wasn't exactly perishable material, it needed to be sold.

Q Whose lumber was it?

Mr. Congleton. Objected to.

Court. It does not strike me that that has any bearing, but I will take the evidence.

20 *Mr. Bradner.* Mr. German is trying to get at—he told the administrator that note represents the sale of the lumber in the Holloway matter; we all know the facts.

Court. I will have to change that ruling, because the witness has himself said here that was the lumber which he held as custodian of the company.

30 A I didn't know at the time; I had been appointed custodian by the parties in interest that attempted to form this company; when they found out that the affair wasn't going on there were conflicting interests there; by a bill of sale this Holloway had turned over this property to the Clinton Hill Lumber Company which was to be further organized. Later on, when we didn't go on, there were suits brought by the creditors of Holloway. Holloway himself personally served me with a paper claiming the lumber, and my father claimed an interest in it. There were three or four conflicting interests and I didn't pretend to settle the matter. I
40 thought it was good to sell the lumber, and I

William S. Ketcham, cross.

saw no harm in loaning it to my father and taking his note, so that whatever—

Q I haven't asked anything yet as to that note; I asked you whose lumber it was. A I ask the right to do that.

Court. You only answer the question.

Q The directors of the Lumber Company named you as treasurer and custodian, did they not? A I was elected treasurer by the directors of the company.

Q And were you appointed custodian of this property by the company? A At the time, on February 6, when we had determined not to go ahead with the company, the parties in interest then appointed me as custodian of the property.

Q Did the directors name you as custodian of this lumber? A I do not pretend to give the legal explanation of that.

Q I asked you whether the directors of this company named you as custodian of the lumber? A I cannot put a legal interpretation upon that.

Mr. Congleton. What do you understand; answer that question.

Witness. It was the same parties present.

Q I asked you whether the directors of the Lumber Company named you as custodian of this lumber.

Court. You mean the directors officially as a board?

Mr. German. Yes.

Court. Or the persons who were directors.

Q By resolution? A There was a resolution appointing Mr. Canfield and myself as custodian of the property of the company.

William S. Ketcham, cross.

Q When was that? A February 6, 1893.

Q Then you took possession of the lumber as custodian under this resolution? A I did.

Q Did you make an inventory of this lumber?

Mr. Congleton. I object.

10 *Court.* Why do you want to go into that detail; he said he sold it.

Q Did you sell that lumber as such custodian? A I did.

Q Were you authorized by the company to sell the lumber?

Mr. Congleton. I object.

20 *Court.* Let him state just what was said in reference to it. What directions, if any, do you recollect, or authority did you receive from the company itself in reference to the sale?

Witness. None at all; I don't pretend to—none other than resolution appointing me as custodian.

Court. Did that say anything about the sale?

Mr. Congleton. No, sir.

30 Q Didn't the Clinton Hill Lumber & Manufacturing Company hold a meeting and authorize William S. Ketcham, Sr., your father, to take possession of that lumber under his mortgage and sell it.

Mr. Congleton. I object.

Court. I will take it subject to your objection.

A No, sir.

40 Q I show you what purports to be an affidavit in the case in the Court of Chancery, be-

William S. Ketcham, cross.

tween the Cumberland Lumber Company and others, complainants, and the Clinton Hill Lumber Company, defendant, and ask you whether that is your signature; affidavit dated June 22, 1895? A It looks like my signature.

Q Is it your signature? A So far as I can say, it is; it is my writing.

10

Q And in that affidavit do you remember stating as follows: "These respondents further say (others included) that at the same time it was agreed to surrender the property that had belonged to said Holloway to said William S. Ketcham, Sr., who claimed to have a mortgage thereon, and an agreement was made that the property should be sold and the proceeds should be paid to said Ketcham, which has been done." Do you remember that?

20

Mr. Congleton. It is not necessary to go into all this old litigation, as I see this case, back in 1893 and 1895. It seems to me that the point for this court to determine is whether or not we presented a claim within the statutory period, and whether or not by reason of the representations made by the administrator at that and subsequent times, we should not have to contend with the statute of limitations in the law court when it comes to whether or not the claim on this note is a valid legal claim. That is a matter that must be determined in the law court, and all I am asking is, that because we filed our claim within time, that the administrator did not dispute our claim, as provided by the Orphans' Court practice, and entered into an agreement and carried out that part of the agreement up to a certain point, that during that time the statute

30

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William S. Ketcham, cross.

of limitations cannot run against us. Now, whether or not this is a good note, it seems to me, is a subsequent proceeding, and therefore I say it is not incumbent upon us to go into that question at this time, or proper for them upon cross examination.

10

Mr. Bradner. We have a right to show that we were misled by the statement of the claimant when he presented the claim; we took the claim and read it and said, "What does this mean? Tell us about it." He says, "This represents the sale of the Holloway lumber." We propose to show that there was no possible liability of William S. Ketcham, Jr., by reason of the sale of that Holloway lumber. He misled us into making some promise that we would otherwise not have made, if he had told us the exact truth about it.

20

Court. You deny the making of it?

Mr. Bradner. We deny the making of it also.

30

Court. I will not overrule it; I will admit it. There are statements by the two witnesses as to what were the circumstances under which the note was originally given, and this may throw some light on it. They had in hand correspondence, but in the last communication between them, Mr. George Ketcham said to his brother, "You haven't stated this right," and I will have to admit all the evidence in order that I may get the bearing of all the correspondence. I will reserve your right to raise the point as to what questions are to be decided here and what are to be left to the court of law.

40

William S. Ketcham, cross.

This evidence will be taken subject to your objection. You may now offer that part of the paper signed by his affidavit, which you consider has some bearing on the case.

Q I now call to your attention in the answer sworn to by you, with others, and whose signature you have admitted. A I do not recall the paper; the signature is all right. 10

Q (*By the Court.*) In reference to that statement to which counsel calls your attention, what have you to say about that? A I have no recollection of that.

Mr. Bradner. It is the answer to the original petition to assess the stockholders.

Mr. German. It is docket 18/732, filed June 28, 1895.

Court. Read the paragraph. 20

Mr. Bradner. Paragraph 7 of the answer filed June 28, 1895, to the petition of the receiver of the Clinton Hill Lumber & Manufacturing Company.

“And these respondents respectfully allege and set forth that early in the year 1893, Frank D. Holloway was indebted to William S. Ketcham, Sr., in a large sum of money, nearly \$10,000, and that said Holloway had given to said Ketcham a mortgage on the property and plant of said Holloway and used by him in conducting a lumber business, and that said Holloway pretended to be desirous of satisfying the claims and demands of said Ketcham, but was anxious to continue in business, and suggested to said Ketcham that a company should be organized and his property should be transferred to the company and stock should be issued to 30 40

William S. Ketcham, cross.

10 Ketcham to the extent of the amount due to
Ketcham, if the property should prove on ap-
praisalment to be worth that much, otherwise
stock should be issued to the amount of the
value of the property, and if there should be
a surplus of property over and above the
amount due to Ketcham, stock should be is-
sued to Holloway to represent such surplus,
and said Holloway also represented that he
could obtain several thousand dollars which
he would put in said company, and there-
upon an agreement was made by and be-
tween the said Ketcham and the said Hollo-
way for the formation and organization of a
company as aforesaid, and for a transfer to
said company of the property and business
20 plant of said Holloway as aforesaid, and
thereupon a certificate of incorporation was
executed by the several persons named
therein, a copy of which said certificate is
annexed to said petition, and said certificate
was filed in the Clerk's Office of Essex
County, but no certificate has ever been
filed in the office of the Secretary of State,
and no fee has ever been paid to the Sec-
retary of State by said incorporators for
30 any purpose; and a meeting was held and
officers elected and a bill of sale of said
property was executed by said Holloway
and delivered to said defendant, and said
defendant attempted to take possession of
the property and to put a valuation there-
on for the purpose of ascertaining the
amount of stock to be issued, and the direct-
ors of said company ordered that forty per
centum of the stock subscribed should be
40 paid in, and eighty-two shares of stock were

William S. Ketcham, cross.

made out to said William S. Ketcham, Sr., or on his account to represent that much of the money due to him, and that said stock was afterwards surrendered to said company; and that on February 6th, 1893, the said Holloway withdrew from said company, and by mutual agreement of all the incorporators and stockholders, his subscription for capital stock was waived and cancelled, and that thereupon the said incorporators realized that they could not proceed as a corporation and could not obtain possession of the plant of said Holloway, and had only gotten control of a small portion of his property and they the said incorporators being all the persons who had subscribed to said certificate or who held any stock in said company, or were entitled to any stock, mutually agreed among themselves to cancel their subscriptions for stock and to waive their rights as stockholders and to surrender for cancellation any stock that had been issued, and to release the several persons who had subscribed for stock in said company from any and all liability to pay for said stock, and such agreement of said incorporators and stockholders was duly performed and carried into effect in the month of February, 1893, before any proceedings were taken by said complainants to recover a judgment against said Holloway and before these respondents had any notice that said complainants made any claim of any kind against said company; and these respondents further say that at the same time it was agreed to surrender the property that had belonged to said Holloway to said William S. Ketcham,

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William S. Ketcham, cross.

10 Sr., who claimed to have a mortgage thereon, and an agreement was made that the property should be sold and the proceeds should be paid to said Ketcham, which has been done and every dollar of the proceeds of the sale of said property has been paid to said Ketcham, Sr., except what has been used to pay expenses; that said defendant went out of existence in the month of February, 1893; that said Holloway was aware of what had been done, and knew that said defendant had ceased to exist, and did not intend to carry on business."

This answer is verified by William S. Ketcham, Jr.

20 Q I call your attention to paragraph six of the bill of complaint filed in this cause, verified by you, to that part which reads as follows: "And the property which the said Holloway had transferred to the said company was turned over to your orator to be disposed of." That is correct, is it not?

Mr. Congleton. The bill of complaint speaks for itself.

30 Q Do you wish to change that statement? A We certainly stand by our bill of complaint.

40 Q I call your attention to paragraph fifteen of your bill, in which you state as follows: "That when the parties who had filed the certificate of incorporation of The Clinton Hill Lumber & Manufacturing Company disagreed among themselves, and agreed to abandon the said company, as set forth in paragraph six of this bill, William S. Ketcham, Sr., took possession of the lumber which had been transferred by Frank D. Holloway to The Clinton Hill Lumber & Manufacturing

William S. Ketcham, cross.

Company, in part payment of the indebtedness due him from the said Holloway, which he believed he had a right to do, and placed your orator in charge of the same, with instructions to sell it as fast as he could and apply the proceeds thereof to the payment of the notes which he signed for the said Holloway and which were then falling due." Do you still stand by that statement? A With any testimony I can give bearing on it. 10

Q Do you still stand by that statement?

Court. He has a right to state that he does.

A With my legal right to explain what I meant by that.

Court. He stands by that in connection with the evidence he has given. 20

Q I call your attention to the top of page 3 of your affidavit annexed to the bill, in which you state as follows:

"When the scheme for the incorporation of The Clinton Hill Lumber & Manufacturing Company was abandoned, my father took possession of the lumber which had been transferred by the said Holloway to said company, in part payment of the indebtedness due him from the said Holloway, and placed me in charge of the same, with instructions to sell it as fast as I could and apply the proceeds derived from such sales to the payment of the notes of which he was the maker and had loaned to the said Holloway, and which were then falling due." 30

William S. Ketcham, cross.

Do you want to stand by that statement?

A I stand by the whole bill of complaint. I think there are other clauses that may more fully explain that, or that go in conjunction with that.

10 Q Do you stand by that statement which I have just read to you?

Mr. Congleton. There is no application here to amend the bill of complaint, and of course the bill of complaint stands until it is changed.

Court. It is for you to argue whether his claims are inconsistent.

Q Did you ever make an accounting to the Lumber Company for the sale of this lumber?

20 *Mr. Congleton.* I object.

Court. I will take the evidence subject to the objection.

A Not to the company as a company. There was no need for it. I want my legal explanation to go in, in regard to that.

Q Were you ever asked to make an accounting by the company? A No, sir.

30 Q Or by the receiver? A No, sir, except as the receiver demanded by his suit; if you call that—

Q At the time that you presented the claim on the note on December 20, what did you tell him the note was given for? A I didn't say what the note was given for; I said the note represented the money that I had received from the sale of the lumber of the Holloway company.

40 Q You did not tell him what the note was given for?

William S. Ketcham, cross.

Court. He answered the question.

Q Did you tell him why your father gave you the note? A No, because I had paid the money due on his account, that is the reason I got the note.

Q You did not tell him why your father gave you the note? A Nothing further than that. 10

Q (*By the Court.*) Nothing further than what? A I gave my brother either at that time or shortly subsequent to that, a list of the payments that I had paid on my father's account, on notes that he had outstanding and personal payments; a list of that—

Q I haven't asked you that. Didn't you tell your brother that the note was given to you, to protect you for any accounting that you might have to make for the sale of this lumber? A Not in that way; I told my brother that it was my purpose to use the note in that connection, and that if he— 20

Q In what connection? A So that if I was called upon at any time to pay out any moneys in any way, as expense or judgment, I could use it to pay that, but I would waive that if he would pay those expenses and judgment; that was the option I gave my brother of paying it in that way; that is what I meant by that. 30

Q Did you tell him that your father had authorized you to use the note that way? A No, I said nothing of the kind, because it was my option in the matter, I could do as I chose with the note; I could have demanded payment right away, but I wanted to show my brother in all this that I was perfectly fair, I wanted to show him that I was acting in the right manner, not trying to take something from the estate that 40

William S. Ketcham, cross.

didn't belong to me, and I said, "George, if you will pay these expenses or any judgment, I will not demand payment of the note."

Q You hadn't been called upon at that time to make any payments, had you? A No, sir; my brother paid every cent of it.

10 Q You hadn't been called upon at that time by the receiver to account for this money, had you? A Suits were pending; I don't just recall the shape they were in at the time.

Q You knew you were being pressed for the assessments on your stock? A As I say, I don't recall just the shape the suits were in at that time. Mr. Bradner can tell you more about that than I can, he had the whole litigation.

Q We want to know what you knew about it. At the time you presented the note— A I looked ahead and I realized that this was a complicated matter, I didn't pretend as a layman to solve the legal problems involved. I went to Mr. Bradner as counsel and put the matter in his hands, and we followed his advice, and we went along that way, and any affidavits I made were of course— I read them over and supposed they covered the case as far as I could as a layman.

30 Q At the time you presented this claim to your brother on the note, you had not at that time been called upon to pay any money by reason of your selling this lumber as custodian of the company and turning the money over to your father, for which you say he gave you the note? A Not directly, except suits were pending— whatever the outcome of those might be.

Q Did your father give you the note to represent the proceeds from the sale and which you turned over to him in place of the lumber?

40

William S. Ketcham, cross.

A My father gave me the note representing the payments that I had made on his account, according to my agreement with my father beforehand, and that list of payments is, I think, in the bill of complaint, a list which I gave to my brother, showed to him at the time, and gave him some of the checks which he produced in the Circuit Court at the trial there. 10

Q Suppose you answer yes or no, if you can. "Did your father give you the note to represent the proceeds from the sale and which you turned over to him in place of the lumber?" A He gave me the note to represent the payments which I had made to my father and on his account.

Q Did your father give the note to you to represent the proceeds from the sale of the lumber which you turned over to him? A Not in that way, as I understand it. 20

By the Court.

Q You turned over the lumber to your father and the amount of this note was six thousand and some dollars?

Mr. Congleton. This man sold the lumber and took the money to pay his father's notes. 30

Q You sold the lumber to other parties?
A Yes, sir.

Q While the lumber was in your custody you sold it to different parties? A It never went out of my custody.

Q Until you sold it to the parties to whom you delivered it? A Yes.

Q And you kept an account of the amount you received on these sales to other parties?

A Yes. 40

William S. Ketcham, cross.

Q None of those sales were made to your father directly; he didn't himself take the lumber? A No, sir.

10 Q You sold the lumber, keeping an account of the amounts of the sales? A Yes. I might state that I think that there seems to be— I don't want to intrude on what is legal—there seems to be a little ambiguity between—(interrupted).

By Mr. German.

Q Did you take the note from your father to represent the money that you turned over to him for the sale of this lumber?

Mr. Congleton. I object.

20 *Court.* Strike that out; that is not proper, because he has not yet said he turned that money over to him.

Q What did you do with the money which you received from the sale of the lumber? A I sold the lumber and put the money in the bank.

Q To what credit? A Two different banks at different times and from time to time—

30 Q In whose name? A Partly in my own personal name and partly in an account which I opened in the Second National Bank and I called it the Clinton Hill Lumber Company, so as to separate it from my personal account.

Mr. Congleton. What was the official title of the account?

Witness. I don't recall now.

40 Q How much of this money was in your own personal account and how much in the account of the Clinton Hill Lumber Company? A I cannot give that unless I took all the payments and traced up the checks.

William S. Ketcham, cross.

Q (*By the Court.*) What did you do with the money received from the sale of the lumber?

A From time to time, as my father had notes outstanding which he loaned Holloway and some other indebtedness, and from time to time I helped pay these notes, and then I paid him some money by check, to him personally; the bulk of it was paid on notes that he had outstanding. 10

Q You took some of the lumber yourself, didn't you? A Not personally—well, I took it to our shop and worked it into other material, more salable shape, and then sold it.

Q Didn't you take \$1,900 worth of the lumber yourself? A I did that, as it states in the—

Q Didn't you take \$1,900 worth of the lumber yourself for your own personal use? A No, sir. 20

Q Didn't you use it? A The entire lumber was in my possession as custodian and I sold the lumber, turned it into money in the best way that I could. I think there is forty odd hundred dollars was sold up at the Lumber Company at Jelliff avenue and Rose street, where the lumber was; then the list which Mr. Holloway had written out and I transferred, I think it says \$1,900 worth; I made an appraisal of it at our carpenter shop in Mercer street, and during the next year I used that up, turned it into window frames and door frames and material which made it more salable. 30

Q (*By the Court.*) You accounted for it as changed? A I made out a statement.

Q (*By Mr. Bradner.*) Were you in partnership with your father then? A No. 40

William S. Ketcham, cross.

Q See if you stand by this "Lumber to the extent of \$1,900 was moved to No. 26 Mercer street and used by me in my business there carried on, and which I paid for?" That is \$1,900?

A That is the substance of it.

10 Q So you did use \$1,900 worth of lumber yourself? A With my explanation, if that is what you mean.

Q You paid for it? A Yes.

Q To whom did you pay? A It is part of the payments made to my father on these notes, the list of which shows there.

Q How did you make those payments? A Mostly by check.

Q Have you the checks?

20 *Court.* I am not going into an account now. He says he submitted a list of the payments.

Q Did your father give you the note to represent these moneys which you say you paid out for him from the sale of this lumber? A He did.

Q That is the only reason he gave you the note? A For those payments that I had made, yes.

30 Q What was said by either you or your father when he gave you this note?

Mr. Congleton. I object. Are we going into conversations between this witness and a dead person? I think it is only fair that we have that matter thrashed out so, if I do not object, when I come to ask some questions, that cannot be used against me.

40 *Court.* You haven't any right to ask him that question if you do not want them to ask the question. He cannot ask it on your

William S. Ketcham, cross.

cross examination if you object. He may call him as his own witness.

Mr. Congleton. I have no objection to the examination being gone into at this time because it is not cross examination; I do not object for that reason, but if they do examine this witness at this time, that when they get through with him I can go into that same subject matter of conversations with their father, who is now deceased, and not be confronted then with an objection on their part. 10

Court. Whatever the effect will be, I will decide when the question comes up. The only point now is, do you desire to object to the witness's conversation with the father? 20

Mr. Congleton. Only along the same line that I have objected to this other testimony, that it is not relevant to this issue. 20

Court. You do not object because it is not admissible, you object only on account of relevancy. I will overrule it on that point.

A Previous to taking that note, after the company had determined not to go on and I had been up and seen my brother, and he had suggested that I sell the lumber as quick as I can and pay on my father's notes, I began thinking the matter over and it seemed to me like a very complicated affair. Here was my father wishing to have his notes paid— 30

Mr. Bradner. We asked you for the conversation.

Court. After you had thought over the matter—was this down to the time when you first spoke to your father about the note? 40

William S. Ketcham, cross.

10 *Witness.* I said to my father, "Now, this matter is complicated, these suits are going on, I do not know how they will turn out, I want to have it so that at any time I can demand this money back. I will pay on your notes"—first I think I said, "You can take the lumber and give me a note for its value," but I knew my father couldn't sell that, so I said, "I will sell the lumber for you and take your note for just what I get for it, and then I can have that note so that I can use it in my own discretion," and I think it took, according to the payments made, a year and a half before I consummated the entire sale, and then I got the note as agreed.

20 Q (*By the Court.*) You didn't get it until after the sale had been completed and on rendering an account? A Yes, not until then.

Q Was this conversation with your father before you sold the lumber? A Yes.

Q And about a year before you took the note? A I should say a year and a half; if I had a list of the payments, I could tell a little better.

30 Q Why didn't you have some agreement with your father at this time, if this matter was so complicated?

Mr. Congleton. Objected to.

Q A written agreement? A I didn't need to; I had a father that I had confidence in.

Q Did you submit the statement of the amounts paid to your father before he gave you the note? A I did.

40 Q Was it at the time he gave you the note? A I think it was just previous to that. Some of those notes as they came due, I didn't have enough to pay them in full and I paid what I could,

William S. Ketcham, cross.

and then new notes were renewed, which my father signed; in fact, I think some of the notes were carried along for a year maybe, and payments were made on them, and every time my father would make a new note. There were, I think, four or five notes that I paid on, and I think later on as I paid some of them, others were consolidated into one or two notes. I have got a list of all that just as it was. 10

Court. I understand you that this figure for which the note was given—this sum for which the note was given, seems to be a specific amount.

Q You say your father wasn't able to sell the lumber; why not?

Court. That may be relevant on your case; you cannot prove your case by their witness. 20

Q Have you a copy of the statement of the amount of the notes that you made out to your brother? A I think my counsel has.

Mr. Congleton. I submit that if they have the original, they ought to submit the original rather than to ask us for the copy. The defendant here is the administrator.

Q You had all these payments in a book? A I do not think it was in any book. It was on a list or paper, because there were no books kept. 30

Q Where are the papers? A Mr. Congleton has them.

Mr. Congleton. I will have Mr. Ketcham get them out during the noon recess.

Mr. German. We want the statement you say you rendered to William S. Ketcham, Sr.

Mr. Congleton. We will do that.

RECESS.

40

William S. Ketcham, cross.

Q Have you the statement called for before recess? A I can give you the papers. I haven't the paper I gave to my father.

Q What became of it? A It might have been in his desk at the time—my brother—

Q You gave it to him? A Yes, left it on his desk.

Q You left it with your father? A Yes.

Q When? A When I gave him the statement.

Q When was that with reference to the giving of the note? A At the time I got the note.

Q Was your father in bed at the time? A No, sir.

Q Did you keep a copy of that statement? A I have all the figures.

Q (Last question repeated.) A No.

Q What statement did you present to the administrator? A A list of the payments that I had made to my father for which the note was given.

Q How did you make that statement up? A I had a memorandum of that home that I had kept since the sale.

Q Have you that memorandum here? A I have a copy of it; I have it in a book home, the list.

Q And were the items in that book made up at the time that you presented this statement to your father or shortly before? A I think they were, as far as I recall.

Q What statement have you of this amount of the note which you say you presented to your father and to the administrator?

Court. If he presented a statement to the administrator, wouldn't that show? What is it you are asking him for?

William S. Ketcham, cross.

Mr. German. It is in the answer to the interrogatories.

Mr. Congleton. You are reading from answers to interrogatories served in this cause; that is not a statement.

Court. In the case at law?

Mr. Congleton. In this present suit, the case being heard now. I would like to renew my application of this morning, that before they examine this witness upon a statement which he says he gave to the administrator, that they produce the original which they have in their possession.

10

Mr. German. We will produce everything we have.

Court. He said that he gave a statement to the administrator, and counsel for complainant now asks that you produce that statement. You gave him this in December, 1900; is that right?

20

Witness. Yes.

Q Is that the paper you refer to; I show you paper dated "Newark, N. J., December 20, 1900," and ask you whether that is the statement you refer to showing this amount of \$6666.84 which you submitted to the administrator? A That is it.

30

Q From what did you make up this statement?

A From the papers and statements that I had home in regard to this.

Q When did you make up the items in this statement of December 20, 1900? A I think shortly after the sales were made, as I recall; this wasn't made until 1900, this paper.

Q The first item was for a note held by Mrs. Canfield, \$150; you paid that? A Yes, sir.

40

William S. Ketcham, cross.

Mr. Congleton. Is this offered in evidence?

Mr. German. Not yet.

Q The next was Eastern Lumber Company, \$3,060? A Yes.

Q Did you pay that? A Yes, sir, I did.

10 Q Didn't your father pay that himself? A No, sir.

Q Have you the note? A I have not the note.

Q It was given to pay a note? A Yes.

Q Where is the note? A Two notes.

Q Where are the notes? A I haven't got them; I haven't them myself.

Q The next item is \$150 for Mrs. Canfield; you paid that yourself? A Yes.

20 Q Then your father didn't pay that? A No.

Q Next is \$550, W. S. K., who was that? A My father.

Q You paid that to your father directly? A Yes.

Q \$100 you paid to your father? A Yes.

Q Next item was for taxes, \$200? A Yes, that was paid to my father, though.

30 Q The next item of \$25 was for what? A I think he wanted to go up in the country to his farm and I gave him \$25.

Q Next was S. J. Macdonald \$25? A That was some service he rendered my father. I think he collected a bill for him.

Q "Mrs. C. \$526.07," you paid that? A Yes.

Q Next item, deputy collector taxes \$103.07? A That was tax on the lumber up there.

Q You paid that? A Yes.

40 Q Mrs. Canfield \$300, you paid that? A Yes.

William S. Ketcham, cross.

Q W. J. Knight \$23.70? A That was some stenographer fees.

Q For what case? A I think in the lumber case. I am not sure what it was.

Q The next is Mrs. Canfield \$1,000, you paid that yourself? A Yes.

Q Mrs. Canfield, again, \$452.70? A Yes. 10

Q All that you have totaled \$6,665.54? A Yes.

Q And then at the bottom there seems to be \$1.30 for filing papers? A Yes.

Q What was that for? A I think it was some canceled mortgage my father had; I think the property was turned over.

Q When was that? A I am not sure just what that was; it was some paper I took to the court house for him. 20

Q When was that paid? A In 1895.

Q Before or after the note was given? A Before the note was given; all that was before.

Q You said you showed your father this statement, or one corresponding to it? A Yes.

Q Showing the total amount to be \$6,666.84? A Yes.

Q All this money was received from the sale of the lumber of which you were the custodian? 30

A There was, I think, three hundred and odd dollars of my own money that were mixed up in that.

Q You say that \$300 and odd was your own money and something like \$6,300 was received from the sale of the lumber? A No, I can give you a statement of the receipts; there were some expenses paid, and that is the balance of it.

Q You said you told your brother that this note was given for the lumber transaction; was 40

William S. Ketcham, cross.

that correct? A For the money that I had received from the lumber, yes.

10 Q Now, what do you want to say? A The same thing, except there was in the payment of these notes, I think, two or three times it lacked a little balance and I made that difference up of my own money; I think it amounted to about \$350 and odd, comprising probably three or four payments.

Q So with the exception of three hundred and fifty odd dollars this amount of \$6,666.84, the amount of the note, represented the receipts from this lumber transaction of which you were the custodian? A That is right.

Q And which you have mentioned heretofore in your testimony? A Yes, sir, that is correct.

20 Q And when you showed this amount to your father, did you have the note prepared at that time? A No, I think that was some days before, if I remember rightly; I don't just recall the exact time.

Q You had presented this paper to him a few days before he gave you the note? A Not that paper, but the statement contained in that.

30 Q Did your father tell you to make out the note for that amount? A Not at that time.

Q When did he tell you to make out the note? A When I did make it out, he didn't tell me to make it out; that had been our previous agreement, and I made it out and presented it to him with the explanation of what it was, and he signed it.

40 Q What did you say to him when you presented the statement about the note? A I told him that was the moneys that had been paid out on his account.

William S. Ketcham, cross.

Court. Tell what took place between you. You told him that you had paid—

Witness. That I had paid those moneys out on his account.

Q Did you tell him that you had advanced \$350 of your own money? A I don't know whether I did specifically then or not; I gave him a list of what I had paid. 10

Q Did he go over the list with you? A I think he did; he read it over.

Q Did he ask you how much the lumber had been sold for? A The statement showed.

Q Did he ask you? A I don't recall just what he asked; he read it over.

Q Did he ask you that? A I don't recall.

Q Did you tell him? A I did.

Q What did you tell him? A I told him that that was the amount that I had received from the lumber or paid out on his account on these notes; most of them were held by Mrs. Canfield. 20

Q But you didn't tell him anything about having advanced \$350 of your own money? A I don't recall that I did; I am not sure as to that.

Q So when he gave you this note, I understood you to say that he gave it to you to secure you for the moneys that you had received from the sale of this lumber, in accordance with this statement which you say you handed to him? A He gave me the note for the payments that I had made on his account. 30

Q Which was \$6,666.84? A That is right, and that was money that I got principally, with the \$350 exception, from the sale of the lumber.

Q In other words, he gave you this note in order to secure you in case you were called upon to return any part of this amount of \$6,666.84 or any part of it? 40

William S. Ketcham, cross.

Mr. Congleton. Objected to; he has already stated his understanding of the note. He told what the transaction was and gives the conversation.

Court. I think the objection is well taken.

10 Q Have you any writing or writings from your father other than the note that he gave to you concerning this transaction? A In what respect do you mean, or pertaining to what?

Q Did your father give you any other paper, other than this note, regarding this transaction? A No, sir.

Q Have you any power of attorney from your father for any purpose, in writing? A No, sir.

20 Q Did you have at the time this note was given? A Never had, except that I may have signed some receipt for money for him, just on my own hook, but no power of attorney.

Q Did your father tell you at the time that he gave you this note, or did you tell your father that you would only use this note in case you were called upon to return the \$6,666.84 or any part of it?

Mr. Congleton. I object.

30 A No, sir.

Q Did you have any agreement with him, verbal or otherwise, regarding the use of the note? A No, sir, I knew what my purpose was in regard to it, which I explained to my brother later; that is all there was; there was no condition on the note.

40 Q Did you explain that to your father? A No. Before the note was given and before we made that arrangement, after the company fell through, I told my father of the uncertainties of

William S. Ketcham, cross.

the litigation and that I didn't know what the result would be, and I wanted this note so I could hold it, to use in any way that I saw fit.

Q At that time there had been no suit against you personally, had there? A I don't recall the position—the legal phase of the matter at that time.

10

Q What do you mean when you say that the note was given on a contingency? A There was no condition to the note; the contingent agreement or the option was between me and my brother when I gave him the affidavit, or notice.

Q Then the contingency upon which the note was given was made by someone else other than between you and your father? A There was no contingency on the note itself; the contingent agreement, the option, was between me and my brother, in 1897, when I gave the notice.

20

Q Then you got the note in August, 1895, payable on demand, with interest? A Yes.

Q Did you demand the note of your father while he was living? A I did not.

Q Why not? A There was no need of it.

Q Why not? A Because I didn't intend to use it only—I wanted to wait the outcome of the litigation.

Q Why did you want to wait to use it until the outcome of the litigation? A That was my reason; as I told you this morning—

30

Q Tell me now. A I will. I was appointed custodian—

Q Why did you want to wait to use it until the outcome of the litigation before presenting the note to your father, when it was payable on demand with interest? A After the company had failed to go on the matter seemed to me very complicated; I wasn't a lawyer, but I could see

40

William S. Ketcham, cross.

that there were complications. There were three or four parties that seemed to be in interest. In the first place, a bill of sale of the property had been made to the company. I think the court called it a *de facto* company instead of *de jure* company, and then Holloway when he saw the
10 company wasn't going on, served me with a paper saying he demanded the property back; and then there were the creditors of Holloway suing, and I knew the company, if there was a company, had certain rights in it, so I didn't know where I was at, so I thought I would just go on and await the legal outcome of this whole matter, and then settle the matter according as the court said.

Q Did you explain all that to your father when he gave you the note? A No, I don't
20 think I did, not in just that way.

Q What way did you? A I told him before I sold any of the property, I said, "This thing is complicated; these suits are going on and we do not know what the result will be; I have charge of this property; I will sell it and give you the benefit of it, but I must have this note so that I can use it to return the money or in any way that I see fit."

30 Q Why didn't you put all that agreement in writing? A Hindsight is always better than our foresight.

Q Why didn't you? A Because I did it the other way.

Q That didn't state the agreement? A I don't pretend to be a lawyer; I was dealing with a man who was my father, that I had the utmost confidence in and he in me; we might have done it in some other way, but that seemed to me a
40 fair and reasonable way to do.

William S. Ketcham, cross.

Q The note didn't state what the understanding was? A I don't know that the note does.

Q Why didn't the note explain the whole situation then? A You must pass that up to the court; I don't pretend to solve legal questions.

Q The note does not explain the whole situation? A When I gave the first notice of the note— 10

Mr. Congleton. Objected to.

Court. He may state that.

Q Then the note does explain the whole situation, does it? A It does so far as that is concerned; it don't explain my agreement with my brother.

Q I am leaving your brother out; I am only talking about the understanding with your father when the note was given. A The note does; it was a note for so much money received. 20

Q I ask again why you didn't present the note to your father? A Because he was living and this litigation was going on; there was no need; I didn't intend to use the money until this litigation was settled. I never dreamed it was going to last in Chancery fifteen years.

Q Who did you consider owned the note at that time? A I didn't pretend to settle the matter legally. I wanted to be fair to all parties, and that is the reason of our contesting the matter. Mr. Bradner took it and carried it fifteen years through Chancery; he knows more about it than I did. 30

Q You knew the money had been received from the sale of property that was not yours? A I never pretended personally to have a personal right in the matter other than as I was conserving it for others. 40

William S. Ketcham, cross.

Q Why wasn't the note given to the company then? A Well, we were contending it was no legal company, that it hadn't been fully formed. Mr. Bradner fought it on that issue.

Q You sold it as custodian for the company?
 10 A No, I didn't say I did. I said I sold it as custodian, that is all; I didn't pretend to say whether I was appointed custodian by the directors; I said by those in interest; I didn't pretend to put any legal construction.

Q I refer now to the testimony which you gave in the Court of Chancery between the Cumberland Lumber Company and the Clinton Hill Lumber & Manufacturing Company on March 28, 1912, on the petition to assess Campfield, on pages 7 and 8, wherein you state: "This note
 20 was given for money paid on my father's indebtedness on notes which he had outstanding. This money was received from the sale of the lumber and other property of the Clinton Hill Lumber & Manufacturing Company, of which I was the treasurer and custodian at the time. The litigation was then in process and the question as to the rightful owner of this property was in dispute and in fact there were three or four parties claiming rightful owner of it. Mr. Holloway
 30 claimed it; my father claimed certain right on it; the receiver of the Clinton Hill Lumber Co. was claiming it to pay the debts, so there were three or four parties that were claiming it, and I as treasurer and custodian loaned it to my father and took his note pending the result of this litigation." A That is just as I have stated, although the term "treasurer" is used—I didn't pretend to say that the company was a perfectly formed company; it is used in a general way.

40

William S. Ketcham, cross.

Q Did the receiver tell you to loan this money to your father? A No, sir.

Q Did Mr. Holloway tell you to do it? A No, sir.

Q Did the Clinton Hill Lumber Company through its directors or officers tell you to do it?

A No, sir.

10

Q Nobody did? A Only my brother—

Mr. German. I didn't ask you that.

Q I call your attention to the evidence you gave in the Clinton Hill Lumber & Manufacturing Company against Jonathan F. Strieby in the Court of Chancery, wherein you testified that by the resolution of February, 1896, you were appointed custodian of this lumber. A I have already stated—

20

Q — and ask you what you have now to say regarding that? A Nothing whatever.

Mr. Congleton. I object; he hasn't said anything different.

Court. He can explain about that.

Q When did your father die? A September 25, 1896—I think that is the date.

Q After your father died and your brother was appointed administrator you and he went over the affairs of your father, did you not? A He came down—

30

Q You did? A He came down to the house where my father lived and where I lived.

Q Did you go over the affairs? A We went over the papers in my father's desk.

Q Did you go over them and endeavor to ascertain what debts your father owed when he died, with the administrator? A No, I didn't then, we all know we didn't do that.

40

William S. Ketcham, cross.

Q You discussed the affairs of your father?

A Not specially; my brother came down and—

Q Did you do that with any member of your family—I mean your brothers or sisters—your father's affairs generally? A No, sir.

Q You didn't do that? A No, sir.

10 Q Did you present this account to the administrator at any time before this evening you spoke of, or make this agreement as set out in your bill? A Did I present the note to him—I didn't present it to him until I took the affidavit up to him.

Q Why did you wait so long to present it to him? A I am glad to explain that. My brother was appointed administrator, I think, October 20, 1896; that was a month after my father died. The
 20 family met together shortly before that and something was said about the Holloway suit, and I think it was Mr. Holzhauer said, "I think Howell will jump on you," Howell being the attorney on the other side, and I remember making the statement, "Well, I am protected in the matter," some general statement like that; this note I drew up myself; it was a demand note, on demand after date I promise to pay to the order of so and so. I had intended it to be a note only on actual
 30 demand, and after I got the note, I laid it aside and didn't give any special consideration to it right away, but later on, some months afterwards, through some other remarks I don't recall now, through some information I learned that a note worded that way really became due immediately, much to my surprise. I supposed if it had been worded "after demand," some little word different I didn't know, and so I went up to the
 40 court house to ascertain the time in which the nine months in which claims could be filed ex-

William S. Ketcham, cross.

pired, and I found that—this was on July 20—that was the very last day, so I hurried home and drew up this paper and went around Springfield avenue, near my house, to Mr. Rupprecht's, who then lived in Springfield avenue, and made affidavit to it, got my supper early and went up to my brother's to get there before he should leave the house, and gave him the note. That is the only reason why I delayed until the last day; it was merely the misconception I had of the character of the note. 10

Q You knew your brother had advertised for creditors, did you not? A Yes.

Q Why didn't you present the note? A Just as I have explained, I didn't think it was a claim until I had actually made the demand, and I was waiting for this litigation to be settled. 20

Q You knew this money was due to you on demand? A Yes, I understood the note to read—

Q And before you presented the note to the administrator, there was litigation going on? A Yes, but it wasn't settled; there was no conclusion.

Q You knew you might be called on to pay money for that? A I didn't know what the outcome might be, but as soon as I learned of the character of the note I lost no time in getting right up and giving my notice, and I considered the last day as good as the first, as far as the law is concerned. 30

Q You never told the administrator nor any of your brothers or sisters or Mr. Holzhauser that you had this note up to the time that you presented it? A Except that remark I made about when we were together and Mr. Holzhauser made the remark in regard to the Holloway suit; he 40

William S. Ketcham, cross.

said, "I think Howell will jump on you," I mean making me a test case, I suppose. I said, "I am protected in that matter;" I don't know I said I had a note, I don't recall that, but I remember making the general statement.

Q Why didn't you tell him you had the note?

10 A I have no other explanation to make.

Q Wasn't there a suit pending against you by the receiver before your father died? A I don't know of the condition, the records will show that.

Q Wasn't there an action brought against you by the receiver in the Essex County Circuit Court for your unpaid subscription when your father died? A I cannot give you the dates at all. There was one, but I don't know the date of beginning.

20 Q You wouldn't say there wasn't? A Certainly not.

Q When you told the family or Mr. Holz-
hauer at this meeting that you had papers to
protect yourself, did anybody inquire what pa-
pers you had? A I didn't say "papers;" my
recollection is I said I was secured or had se-
curity; I don't recall, but I remember making
that statement, because it was called out by the
30 fact that he said Howell might jump on me,
and I wanted him to understand that I was se-
cured in that.

Q Did Mr. Holzhauser at that time ask you
what security you had? A Not that I have any
recollection of, no, sir.

Q Will you say he didn't? A I don't think
he did, and I have no recollection of anything in
that line.

40 Q Didn't Mr. Holzhauser at this conversation
with you ask you what security you had and

William S. Ketcham, cross.

that you told him that you would tell him at the proper time? A Never, not a word like that, never.

Q I show you letter of December 8, 1907, to your brother, the administrator, signed by you, and call your attention to this part of the letter: "I was elected Treas. of the C. H. L. Co. and later when it was about determined not to proceed with the company, I was elected custodian (Campfield resigning) of the property of the Co." A If that is there, I wrote it. 10

Mr. Congleton. Is that going in evidence?

Court. It will have to go in evidence, it is part of the question.

(Letter shown witness, dated December 8, 1907, marked Exhibit D. 1 for identification.) 20

Q I understood you to say that you didn't find out the note was due until July 20; you are correct in that date, are you? A No, I say the last day of the nine months in which claims could be filed with the administrator was July 20, 1897; that was the date that I went to the court house in the surrogate's office and read the record; of course I was very anxious when I found the note didn't imply just what I had understood it did. 30

Q That is the date that you found out that the note should be presented at once? A I concluded that I had better serve—

Court. He said a note payable on demand was payable from the day of its date without demand, and he didn't understand it was payable without the actual demand, and he afterwards learned that a note payable on demand is payable at the time when it is dated. 40

William S. Ketcham, cross.

Q I show you letter dated July 19, 1897, and ask you whose signature that is? A That is mine.

Q That is a letter to your brother George, the administrator? A Yes, sir.

10 (Letter dated July 19, 1897, from William S. Ketcham to George W. Ketcham, marked Exhibit D. 2.)

Q You didn't say anything in this letter about presenting the note to him, did you? (No answer.)

Mr. German. I offer in evidence statement dated December 20, 1900.

(Marked Exhibit D. 3.)

20 Q I show you letter dated April 30, 1903, Newark, N. J., signed by you and addressed to your brother; did you write that? A Yes.

Mr. German. I offer in evidence letter dated April 30, 1903, from W. S. Ketcham to G. W. Ketcham.

(Marked Exhibit D. 4.)

30 Q In that letter you don't refer to any agreement with your brother regarding the payment of your note, do you? A No, but I am very proud of that letter.

Q You had consulted counsel, had you not, at that time, Judge Skinner? A What is the date of the letter?

Q April 30, 1903, did you consult counsel? A I didn't consult Judge Skinner until 1906. As I recall now, I think it was Mr. Rupprecht, the man who signed my affidavit.

40 Q Did you consult him about bringing suit on the note? A No.

William S. Ketcham, cross.

Q I show you letter dated April 29, 1907, signed by you? A Yes, that is a letter to my brother.

Mr. German. I offer in evidence dated April 29, 1907, from W. S. Ketcham to G. W. Ketcham.

(Marked Exhibit D. 5.)

10

Q You do not refer in that letter to any promise?

Mr. Congleton. The letter speaks for itself.

A No, but in all those letters I want to say that I was trying to act fair and to get this matter settled; I am proud of those letters.

Q I show you letter dated 5/13/09 and ask you whether that is signed by you, a letter to your brother George? A Yes.

20

Mr. German. I offer in evidence letter dated 5/13/09, from W. S. Ketcham to G. W. Ketcham.

(Marked Exhibit D. 6.)

Q I want to call your attention to pages 90 and 91 of your testimony in your suit against George W. Ketcham, administrator, in the Essex Circuit Court:

30

“*Cross examination* by Mr. Bradner:

Q Then the note does not represent indemnity, does it, it was given for money loaned? A Well, I call it security, the same as any note is a security.”

Mr. Congleton. Read the balance of the answer.

Q “(A Continuing.) If I borrow money at the bank and I give my note, they have got that as security.”

40

William S. Ketcham, cross.

A Whatever is there is correct; I don't go back on any court record.

Q I show you letter dated May 7, 1907, and ask you whether that letter was written by you to your brother and signed by you? A Yes, sir.

10 *Mr. German.* I offer in evidence letter dated May 7, 1907, from W. S. Ketcham to G. W. Ketcham.

(Marked Exhibit D. 7.)

Q Have you any other letters or writings from your brother other than you have testified to here regarding this conversation which you say you had with him on the night that you presented the claim? A I gave Mr. Congleton, I think two or three that I picked out since noon.

20 (Letters produced by Mr. Congleton.)

Q I show you letter dated May 1, 1903, a letter which is apparently signed by your brother George; that is a letter written by him to you? A Yes, sir.

Q Another letter dated May 5, 1903, which is from your brother George to you? A Yes, sir.

30 Q And another letter dated June 24, 1903, from your brother George to you? A Yes.

Q I now ask you whether you have any other letters than these three which I have now read and those which are introduced in evidence, or any other writings from your brother George to you since the conversation which you say took place at the time you presented the claim? A There are other letters; I haven't had time to read them all over. There are other matters about firm interests; I think these are the essential ones; there might be one or two.

40

William S. Ketcham, cross.

Mr. German. I offer these three letters in evidence, from G. W. Ketcham to W. S. Ketcham.

Mr. Congleton. I think there are other letters.

(Letter dated May 1, 1903, marked Exhibit D. 8.) 10

(Letter dated May 5, 1903, marked Exhibit D. 9.)

(Letter dated June 24, marked Exhibit D. 10.)

Court. The last letter relates to the settlement of the other suit.

Mr. Bradner. I would like to ask a few questions.

Cross examination by Mr. Bradner. 20

Q When the plea in your suit against the administrator was filed setting up the statute of limitations you were informed about it, were you not, by your counsel? A I presume I read the papers, I don't know.

Q Were you not told by Judge Skinner that your brother claimed that the note was outlawed? A I think some months after suit was started I saw a paper in which he demanded of you—I don't know what you call it, but you set up eight defenses, something like that. 30

Q A specification of defenses, you saw that? A Yes.

Q Didn't you know that a special plea had been filed setting up the statute of limitations against your claim? A I don't recall when I was aware of that.

Mr. Congleton. Did you know that such a defense was set up in this suit? 40

William S. Ketcham, cross.

Witness. I presume I must have before we began suit, I don't recall when or how. I talked it over with Judge Skinner.

Q Why did you not at that time bring this suit in the Court of Chancery for an injunction?

10 A Well, again, I will say I am not a lawyer, I depended upon my lawyer, but I want to say this, that although you as the attorney set up the defense of the statute of limitations, we met that defense by producing letters which we claimed showed a new promise to pay, and we not only relied upon that, but we relied upon the fact that for ten years my brother had paid you as attorney and Mr. Riker all the expenses of the suit, carrying out my agreement which I said I had given to my brother July 20, 1897. Now,
20 then, in order to prove that, I had letters of my brother, and this very letter has been read here, wherein it says: "all the expenses of the estate had been paid for nine years," and when we came into court, and upon subpoena of my counsel, Judge Skinner, upon my brother to produce those papers, he denied under oath that he had ever paid a dollar of that expense.

Q That was the reason you didn't bring this suit in the Court of Chancery? A I presume so.

30 Q Do you know that a replication was filed in your suit, setting up in substance this answer to the plea of the statute of limitations, that you ought not to be barred by that plea, "because on the 20th day of July, 1897, the defendant was indebted to the plaintiff in a large sum of money upon a promissory note, and in the manner in the plaintiff's declaration mentioned, and the said defendant in consideration of the premises on the day and year last aforesaid, by certain memo-
40 randum in writing then signed by him, undertook

William S. Ketcham, cross.

and promised the plaintiff to pay the said moneys in the said plaintiff's declaration mentioned to him, the said plaintiff, when the plaintiff should be compelled to pay any sum of money by reason of a certain subscription to the capital stock of a certain company known as the Clinton Hill Lumber & Manufacturing Company, which the said plaintiff had entered into at the request of said William S. Ketcham, Sr., in his lifetime, and for and on behalf of said William S. Ketcham, Sr., as his agent." Did you know that reply was set up to the statute of limitations? 10

Mr. Congleton. Do you mean that that is the replication upon which you went to trial, because as you read it, it did not contain the amendment.

Q Did you know that it was filed at the time? 20

A I don't know, I left the matter to my counsel, Judge Skinner. I don't know all the little proceedings, papers of trial; that is a legal matter and I didn't suppose it was necessary for me to know all that.

Q You said here today that you had no power of attorney from your father for anything? A No, sir, that is to say, his name, if that is what you mean. 30

Q In this replication, as I read it, you set up you acted as his agent in making your subscription; do you state that as a fact? A No, I think Judge Skinner made an error there and that was corrected by amendment at the trial and allowed.

By Mr. German.

Q Have you any letter or any writing from your brother George referring to this conversa- 40

William S. Ketcham, re-direct.

tion of July 20, 1897? A This letter of July 21, 1897.

Q Other than those you have produced here?

A Except the various letters that you have read here in which my brother refers to the fact that I filed the affidavit, in which he says that he sent it back, and which has since been proved to be false; he kept the paper and you produced it in court today.

Q Other than has been presented here?

Mr. Congleton. He said there is other correspondence and the idea was that he was to go over it and pick it out.

The testimony about the consideration, &c., and how this money was derived from the sale of the lumber, is all taken, as I understand, under my objection. I do not want to go into all that, if I am right in my objection. I wondered if I could have a ruling on it at this time.

Court. I will not rule it out; your re-direct examination on that does not make it legal evidence, unless you withdraw your objection at the hearing. This does not overrule your objection. You may re-direct on the cross examination. If the evidence is ruled out as not admissible, your evidence which is re-direct on that point, also goes out.

Re-direct by Mr. Congleton.

Q Some question has been raised on your cross examination as to whether your brother, the administrator, knew that you were selling this lumber down there at the yard. I ask you was your brother there at the lumber yard while

William S. Ketcham, re-direct.

you were selling that property? A He was. He drove up there once or twice while I was present there selling the lumber, and he so testified in court.

Q You said you sold all of the lumber; is that strictly so; did you get cash for all of the lumber? A No, sir, there was a certain quantity of lumber that was timber that was somewhat unsalable and after my father died, the heirs erected a barn upon the farm and one or two carloads of that lumber were sent up there. I never made any charge to the estate for that, no credit or debit. I credited in my inventory of lumber and debited it as going to the farm, but I never received any money for it. 10

Q Does the value of the lumber that went to the farm represent any part of this note? Does \$6,666 represent cash that you received, or was it cash plus the value of the lumber that went to the farm? 20

Court. He testified how the note was made up.

A The two carloads of lumber was outside of the note.

Q After the meeting of the stockholders and directors of the so-called Clinton Hill Lumber & Manufacturing Company which was held in February, when the resolution was passed appointing you custodian, was there ever any other meetings of that board held? A No, sir, that was the end of it. 30

Q Have you your papers there from which you made up the figures showing how you had expended this money? A I have.

Court. I do not think it is necessary at this point to go into the details of those 40

William S. Ketcham, re-cross.

10 items. That may be the subject of special examination or reference, if necessary. The witness has given his statement as to the object of the note and the manner in which it was made up. It does not strike me that it is material at this time to go any further into detail.

Mr. Bradner. I am satisfied to let it rest the way it is.

Court. You want to go into the details of these statements?

Mr. Congleton. I didn't think it was necessary, in my view of this case.

20 *Court.* I don't think it is. If it becomes material hereafter, it can be inquired into, but at this point I am not settling that account. It will appear now to have been a stated account between the father and son, in which that amount was agreed on as the result of that statement. If hereafter it becomes necessary to inquire into any particular item, I will see whether that will be done. Further direct examination upon the question of how the statement was made up in detail is at this point stopped by the
30 court, giving the counsel for the complainant leave hereafter to apply to further examine, if he sees fit, and no objection is made to this course.

Mr. Congleton. With the exception of letters I may desire to put in, that is all.

Re-cross by Mr. Bradner.

40 Q I call your attention to the minute of February 6, 1893, of the special meeting of the directors of the Clinton Hill Lumber & Manufactur-

William S. Ketcham, re-cross.

ing Company, as published on page 191 of Book 4, the last appeal to the Court of Errors from the Court of Chancery; it states "the resignation of F. D. Holloway as secretary and director of the company was read and accepted, to take effect as soon as his successor was elected and qualified in his place. On motion W. S. Ketcham, Jr., and Ed. E. Campfield were appointed to take temporary charge of the affairs of the company until the next meeting of the board of directors." You recall that being the fact? A Yes. 10

Q I call your attention to your testimony in the matter of the petition of the receiver to assess the stockholders; testimony taken before Vice-Chancellor Emery on March 30, 1900, page 99 of the same book:

"Q After Holloway resigned did you have any other meeting of the stockholders? 20

A Yes, sir, those of us that were left we were talking matters over for a few days. I went up to my brother.

Q You did see your brother, did you? A Yes, sir.

Q Did you have any understanding with him as to what should be done in his behalf at that meeting? A I did. 30

Q Well, when that meeting took place, who was there? A Mr. Campfield was there and I was there and my father was there. I am not positive whether Mr. Holloway came in that day or not.

Q What took place then? A Well, Mr. Campfield decided that—

Q You didn't keep any minutes of that meeting, did you? A No, sir, I don't think there was any minutes kept after February 6. 40

William S. Ketcham, re-cross.

10 Q What took place then? A Well, the situation seemed to be so peculiar that I made up my mind the best thing to do was just to abandon the whole thing and not go on any further with the organization, and so informed the lawyer, and told him not to send the certificate down to Trenton; he said there was a \$25 fee to be paid there, and I thought we would save that.

20 Q What further, if anything, did you do at that meeting? A Well, my father said that Holloway had given him a mortgage on the property and that he wanted the property sold on his account and to be reimbursed, so that after that he authorized me to take possession of it and sell it for him, which I did during the next few months."

Q Do you recall that testimony? A If it is there, I said it.

30 Q Do you recall now that there was a meeting after February 6th? A Of course I considered that on February 6th was the end of the company; Mr. Holloway withdrew entirely, Mr. Campfield I think stayed there a day or two and my father was there maybe and I was there and we were talking over matters generally. This seemed to be a complex problem. It was in the Court of Chancery fifteen years and it was to us as laymen—it was a hard problem to tell what to do, the thing seemed to be so mixed up; we wanted to do the right thing.

Q You had a meeting? A That was just a meeting of us interested in it. It speaks about the "company;" the word "company" was used without any special significance.

40

William S. Ketcham, re-cross.

Q I read a little further, on page 100:

“Q Was there anything done at that meeting in reference to the payments on stock or about the stock? A Well, we said we will cancel everything and destroy the certificate and release one another so that—and we didn’t make any debts or anything, so we just said ‘we will give the thing up.’”

10

A I think that refers to February 6th when Mr. Holloway was there, because that was the time when he practically broke up, although for two or three days we were rehashing the matter and talking it all over.

Q You never told the receiver that you held this note, did you? A No, sir, but I testified before Vice-Chancellor Van Fleet that the property had been sold, and you, Mr. Bradner, wrote a letter to Mr. Howell saying that the property had been sold and that you were the attorney in the case and would receive any papers.

20

Mr. Bradner. I move to strike out the latter part of the answer.

Court. Yes, that wasn’t an answer.

Q Why didn’t you tell the receiver that you had the note? A I didn’t have any note then; I didn’t have the note until 1895.

30

Q You had the note when this testimony was taken in March, 1900? A That might have been, too, there have been several of these suits.

Q Why didn’t you disclose to the receiver or to the court at that time that you held this note? A The matter didn’t come up in any way, not relevant in any way that I saw; there was no attempt to conceal, if that is the thing you mean to imply, not a bit of it.

40

William S. Ketcham, re-cross.

Q You thought and understood at that time that the note was intended to cover that lumber—take the place of the lumber? A I sold the lumber and got the money for it and instead of keeping the money in the bank, I made my father the bank and loaned it to him at six per cent. interest, so that any time I could call for that I chose to. Now, then, I had a double object in view in doing that; I knew my—

10

Q Never mind about that. You considered that you held that note instead of the money that you had received for the sale of the lumber? A Yes.

Q So you could turn it over either to the company or to the receiver if you were called upon to do so? A In any way that the court might finally say who owned the lumber and what should be done.

20

Q When the decree was made making an assessment against you, why didn't you hand over the note? A Because we wanted to contest the matter. You carried it on for years in various phases, the rights of the receiver, and we as honorable men wanted to contest it, and when we were finally defeated the receiver got his money.

Q You didn't have any agreement with your brother to conceal the note? A No, by any means, and didn't intend to, neither of us, we ain't that kind of people.

30

Q Did not your father in his lifetime pay all the legal expenses of the litigation of the Clinton Hill Lumber Company? A He did up to the time of his death.

Q When the suit was brought against the Clinton Hill Lumber Company originally by Strieby, Sprague & Co., and Mr. Macdonald was retained, your father paid the expenses. And

40

William S. Ketcham, re-direct.

after I came into the case, he paid all the legal expenses, up to the time of his death? A He did; you rendered a bill of \$50 to my brother and he paid it; except the bill my brother paid to you of \$50 which you made affidavit to and delivered to him.

Q You mean a claim against your father's estate? A Yes, bearing on that litigation. That was shown in the surrogate's office. 10

Re-direct by Mr. Congleton.

Q Referring to Book No. 1 in the original suit, I ask you if you did not testify before Vice-Chancellor Van Fleet, on the 9th day of November, 1893, at page 64, as follows:

“Q What finally became of the property that was taken from the company by Holloway? A Well, what do you mean? 20

Q I mean the lumber and the fence and building and the other assets? A The lumber that we received—the property that we received, some of the lumber has been sold, the biggest part of it has been sold; I have the office desk in possession and the register; the planking and fence were torn down and removed. 30

Q How much of the lumber remains unsold? A Well, I don't know, most of it is sold.

Q What became of the shed? A The shed still remains there, it is on leased property and I became in possession of the lease.”

Did you testify that way in that case? A I did.

William S. Ketcham, further cross.

Court. That closes the examination of this witness, except as to the letters which you may look over and put in, in the morning.

Adjourned to October 2nd, 1913, at 10 o'clock.

10

IN CHANCERY OF NEW JERSEY.

Between

WILLIAM S. KETCHAM, JR.,
Complainant,

and

GEORGE W. KETCHAM, admr.,
&c.,

Defendant.

20

Continuation of testimony in the above entitled cause, pursuant to adjournment, before Hon. John R. Emery, Vice-Chancellor, at the Chancery Chambers, Newark, New Jersey, on Thursday, October 2nd, 1913, at ten o'clock in the forenoon.

30

Present: Counsel as before stated.

Mr. Congleton. I have been over a lot of correspondence and I have here a great many letters; to my mind, they have very little bearing on this matter; they do refer in some instances not directly on the matter of this claim; it was my purpose not to offer these letters, but to allow them to be at the disposal of the other side, and if they care to put them in, they can do so.

40

William S. Ketcham, further cross.

Court. You produce them as all you have and state that in your judgment they have no bearing.

Mr. German. Have you a letter of May 6, 1907?

Mr. Congleton. May 6, 1907, addressed "Dear Will" and signed "George." 10

Court. Before the case closes you must call attention to what use you intend to make of them that the witness on the other side can explain them.

Mr. German. I offer in evidence the letter of May 6, 1907.

(Marked Exhibit D. 11.)

Mr. German. It is admitted that the letter, Exhibit D. 11, dated May 6, 1907, was written by the administrator to the complainant? 20

Witness. Certainly.

Court. When you offer it and read it, it can be explained in rebuttal.

Mr. Bradner. The letter of May 6th refers to yours of the second.

WILLIAM S. KETCHAM, JR., recalled for further 30

Cross examination by Mr. German.

Q The letter of May 2, 1907, was written by you to your brother George? A Yes.

(Letter dated May 2, 1907, offered in evidence and marked Exhibit D. 12.)

Mr. German. I call for the letter of March 6, 1908, from Senator Ketcham to complainant. 40

William S. Ketcham, further cross.

Mr. Congleton. Letter produced. All these letters were after the matter was in the hands of Judge Skinner.

(Letter of March 6, 1908, offered in evidence and marked Exhibit D. 13.)

10 *Mr. German.* I call for letter October 8, 1908.

Mr. Congleton. Letter produced.

(Letter dated October 8, 1908, offered in evidence and marked Exhibit D. 14, being letter from Senator Ketcham to complainant.)

Mr. German. I ask for letter of January 20, 1908.

20 *Mr. Congleton.* I don't seem to have that letter.

Mr. German. I offer copy of letter dated January 20, 1908, from Senator Ketcham to complainant.

(Marked Exhibit D. 15.)

Mr. German. That is all.

30 *Mr. Congleton.* They charge us with laches, I do not know whether they mean by that, after we paid this judgment that we were slow in bringing suit, or what, but I would like to simply put in evidence the letters written by the defendant in this case to Judge Skinner, showing that for a period of time Judge Skinner was in correspondence and negotiations with the defendant in this case.

40 *Court.* You have asked the general question as to the reason for the delay of the suit, and they gave the answer that the matter was in the hands of Judge Skinner for

William S. Ketcham, further cross.

some months, or longer. Those are letters from the defendant to Judge Skinner?

Mr. Congleton. Yes.

Court. Those will be relevant if there is anything in them that bears on it; you need not delay to read them now. You state you offer them for the purpose of explaining the delay. 10

Mr. Congleton. I offer the letter of October 8, 1907, from the defendant to Judge Alfred F. Skinner.

(Marked Exhibit C. 10.)

Next, letter of November 26, 1907, addressed "My dear Judge" and signed "George W. Ketcham."

(Marked Exhibit C. 11.)

Next, letter of January 6, 1908, addressed "My dear Judge" and signed "George W. Ketcham." 20

(Marked Exhibit C. 12.)

Mr. German. All these letters specifically say that Senator Ketcham does not admit any legal claim.

Court. They are offered for the purpose of explaining the delay while the matter was in Judge Skinner's hands. That is the only object. 30

Mr. Congleton. Next, February 15, 1908, addressed "My dear Judge" and signed "George W. Ketcham."

(Marked Exhibit C. 13.)

Next, letter of February 10, 1908, from the defendant to Judge Skinner.

(Marked Exhibit C. 14.)

William S. Ketcham, further cross.

Next, letter of March 24, 1908, addressed "Judge Alfred F. Skinner," signed "George W. Ketcham."

(Marked Exhibit C. 15)

By Mr German.

10 Q I understood you to say yesterday that among the payments which you said you made for your father was an item of the Eastern Lumber Company, May 4, 1893, for \$3,060? A Yes.

Q I show you note dated February 1, 1903, for \$3,060.73, and ask you whether that is the note which you referred to in your statement, as the note which you say you paid? A I paid that; that represents the amount.

20 Q Is that the note that is represented in your statement and the amount which you claim you paid? A I took it up; there were two payments.

Court. What is the connection between the claim of that credit and that note, is it the same amount?

30 *Witness.* The same amount and the same account, the Eastern Lumber Company, and I paid it.

Q And the note that I now show you is the note that you say you paid representing this amount? A It was, the amount is there, it was paid in either two checks or—I have got the account in another paper that I can refer to, but that represents the same transaction.

40 Q Was it paid in one or two checks or more? A It was paid in two separate amounts, if I recall. I have the account here.

William S. Ketcham, further cross.

Q What were the two separate amounts? A I put it in the Eastern Lumber Co.

Court. In the statement credit is claimed of what amount?

Mr. German. \$3,060 on May 4, 1893.

Q (*By the Court.*) When was the first demand made? A After I had placed the matter in the hands of Judge Skinner previous to suit he had me go to the banks where I had kept my accounts and deposited the funds which were received from the proceeds of the sale of the lumber. This was some years after it took place and I didn't have the bank books or the checks, or the stub checks, they had been destroyed, and I got a transcript of my account and here under the account that I got from the Merchants National Bank, under May 4, their tally shows two checks \$3,060. I put the initials E. L. Co., the Eastern Lumber Company; it was paid in two—I don't recall just exactly the divisions of this amount; my father gave the note, but I took it up and paid it.

Q You are absolutely sure that this note was paid by two of your checks on the Merchants National Bank? A I think, according to my memorandum here—

Q Are you absolutely sure and are you willing to swear to that?

Court. All his evidence is given under oath.

A This is the bank's statement.

Q I want your own statement as to whether you paid it in one or two payments or more? A My recollection is two, because I think this is correct; I got the transcript from the bank.

William S. Ketcham, further cross.

Q Did you make the two payments at the same time? A No, I think there was a renewal, if I remember rightly; there was a new note made to renew part of it; that is my recollection.

Q I ask you now how this note of February first, 1893, was paid by you?

10 *Mr. Congleton.* He has answered that.

A I will have to go into detail.

Court. He is entitled to make it.

Q (*By the Court.*) How was that note paid?

A My father gave a number of notes which I eventually paid, and this is one of them. When the attempt to form the company was made, Holloway had ordered some lumber, consisting of several carloads from this company, and on the bill of it—the lumber was in transition and these parties wrote—they wanted to know—they were a little shaky about Holloway, and wanted to know if it would be all right. I knew we were in the process of forming the company and I wrote back to them that the account will be all right, and they sent it on, and in the process my father made out a note for the full amount. There was \$10 or so discount from the bill, and then I eventually paid this note, the same as I paid—

20

30 Q (*By the Court.*) The question is how you paid it, as to the particular method in which you paid it; you haven't answered the question. A I cannot recall that, except that I have traced the payments that I made on all my father's indebtedness through the bank accounts where I kept the account, and I also can prove through Mrs. Campfield, who is in court, the payments I made to her.

40 Q (*By the Court.*) You are asked now for your own recollection of the manner of payment.

Mrs. Annie O'Neill, direct.

Give a complete answer to that so far as you can remember. A I cannot remember the details of that. I can remember certain circumstances connected with it.

Q I asked you whether this note of February 1, 1893, for \$3,060.73 represents the item of May 4, 1893? 10

Court. He said that once; he said it was. You need not repeat it.

Mr. Congleton. We rest.

MRS. ANNIE O'NEILL, sworn for defendant.

Direct examination by Mr. German.

Q Mrs. O'Neill, do you know Senator Ketcham? A Yes, sir.

Q And do you know his brother William S. Ketcham? A Yes, sir. 20

Q Did you ever work for the Senator? A Yes, sir.

Q You were his maid there? A Yes.

Q For how long? A Nearly thirteen years.

Q And when did you go there? A I started to work for him about twenty-seven or twenty-eight years ago.

Q And when did you leave? A Fifteen years in November. 30

Q That would be 1898? A Yes.

Q Then you got married, did you, and left? A Yes.

Q Do you ever remember William S. Ketcham coming to the house in the month of July, 1897, in the evening? A Yes, sir.

Q Who let him in? A I let him in.

Q What time of the evening was it? A Well, Mr. Ketcham had gone to church—it was near nine, between eight and nine. 40

Mrs. Annie O'Neill, direct.

Q Go on and state what you started to say.

A The Senator had gone to church and Mr. Ketcham come and looked after his brother.

Q Who do you mean by "Mr. Ketcham?"

A Mr. Will Ketcham come and looked after his brother, and then I said he was at church and
 10 to wait awhile until he came in, and he sat down and waited and waited and waited a long while, because Mr. Ketcham was a long while out, and then he didn't come along until eleven o'clock and later on I said to Mr. Will, couldn't he go home and come back again, it was so late, and Mrs. Ketcham had gone up to bed, too, she wasn't well, and I was all alone by myself. It was my duty to shut the house up, and then Mr. Ketcham didn't come yet and I said to
 20 him, "Oh, Mr. Will, can't you go home and come again," and he said "No, I have to give something to my brother, something he has to get this evening." Whenever I met Mr. Will—

Q Never mind that. Then what? A Then I said to him, "Oh, I wish you would go away," I thought he could come back again to his brother, but he didn't. I said, "It is twelve o'clock now," but he waited and Mr. Ketcham never came home that time near one or something; he would go into the club with the gentlemen.
 30

Q What time did Senator Ketcham come home? How late? A After twelve o'clock, but he often come home so late.

Q How do you know it was after twelve o'clock? A I looked at the clock every other time; I wanted him to go home.

Mrs. Annie O'Neill, cross.

Cross examination by Mr. Congleton.

Q Mr. William Ketcham called at the Senator's house very often at or about that time, didn't he? A I didn't meet him.

Q Is that the only time you met him there? A I often met him, long ago, but not then; they let him in themselves. 10

Q And this time that you have spoken about you think is the only time that you ever let him in? A Oh, I often let him in.

Q Then he was there often? A In those twenty-five years, I mean.

Q Were you there twenty-five years? A It is twenty-five years since I went there.

Q You were with the Senator, I understood you to say, about thirteen years? A Yes, sir. 20

Q During those thirteen years, not the twenty-five, Mr. Will Ketcham called at that house many times, didn't he? A I guess so.

Q You know that, because you saw him there? A Yes, I heard him in the sitting room; we could hear him talking.

Q How do you fix this one time that you have described when Mr. William Ketcham stayed there so late in the evening, as a certain date? A Well, I remember that he had some paper he wanted his brother to get; I wanted him to come again and it annoyed me to think he would remain there; he wanted to see his brother and I wanted to go to bed. 30

Q What I am asking you is, how do you now, today, fix the date when that occurred? A I haven't fixed it today; I knew it all the while since.

Q I ask how do you now fix the month of July when Mr. William Ketcham called at the 40

Mrs. Annie O'Neill, cross.

Senator's house and stayed there late in the evening? A I know it was July.

Q How do you know? A Because it was warm; it was very hot and close and I knew Mr. Ketcham was out late those times, that month, very late, and I know it was then; I don't know
10 the very day, but know it was in July.

Q Senator Ketcham was out late very often nights, wasn't he? A At the time of the—

Q When he was in politics? A Yes.

Q He was out nights very often? A He used to be.

Q And the only way that you fix it as the month of July is because it was hot weather?

A No, no.

Q What else have you in mind? A I remember—
20

Q Have you anything in your mind that helps you to fix this month? A Nothing whatever, only I remember it was this time, and Mr. Will, he wanted to stay so much and I didn't know anything about the paper; I wondered why he couldn't go and see his brother again.

Q You say that you told Mr. William Ketcham when he called, that his brother was at church?

30 A Yes.

Q And the church was just about two blocks from the house? A He left the house to go to church.

Q The church is about two blocks from Senator Ketcham's house? A Yes.

Q When did you leave Senator Ketcham's employ? A 1898.

Q When were you first spoken to about this incident that you have testified to, since then?

40 A Sometime ago.

Mrs. Annie O'Neill, cross.

Q How long ago? A I cannot tell you that.

Q About when? A I cannot tell you that.

Q One year or two years? A Sometime ago. Mr. Ketcham asked me if I remembered.

Q (*By the Court.*) Is there anything by which you can fix that time. Where were you living then? A I was living in my own house. 10

Q (*By the Court.*) At the same place where you are living now? A Yes.

Q (*By the Court.*) Where did you see him, at your house or somewhere else? A At his house.

Q At Senator Ketcham's house? A Yes.

Q Did he send for you to come? A No, sir, I often called on them.

Q (*By the Court.*) You were at his house and he then mentioned this incident to you. Is there any way in which you can fix about what time that was, last year or year before, or anything you were doing? A No, sir, I first called on him and just mentioned, if I remembered any night when Mr. Will come, and I said that. 20

Q Did he say anything about a suit being on hand? A No, sir, I never knew anything about papers or suit.

Q Give your best recollection as to about how long ago that was. Two or three years or when? No answer. 30

Q (*By the Court.*) Do you know what season of the year it was; was it warm or cold weather? A It was in July, because I was alone; Mrs. Ketcham had to go up to bed, she was sick.

Q (*By the Court.*) We are not talking now about that time when Mr. William Ketcham was there with the paper; I am talking about the time when you were at Senator Ketcham's house and 40

Mrs. Annie O'Neill, cross.

he asked you if you recollected about William's coming there with the paper, or a reference to the paper. When was that visit; when did Senator Ketcham speak to you about recalling this thing? You said that was some little time ago; can you recollect when that was, when he spoke to you?

10 A I cannot recollect whether it was a year or two or what.

Q Give your memory about it. A I cannot recollect, I cannot do it.

Q You are only to say what you think is true. A I don't remember now.

Q You cannot remember whether it was one year ago or two years ago? A No, not exactly.

20 Q (*By the Court.*) Do you think now, on thinking over the time you were there, it was as much as a year ago, or longer than a year? A I remember his asking me the question, and that is all. I wouldn't even remember this, only for Mr. Will was so long in the house and he had a paper to give his brother; that impressed it on my mind.

Q There is nothing that impresses on your mind now the time when Senator Ketcham spoke to you? A No.

30 Q Can you say whether or not you think it was as long ago as five years that you called at Senator Ketcham's house, when he talked with you about it? A No, sir.

Q You cannot say it was five years? A I cannot say that. I cannot recall to mind the very date.

Q It may be five years ago? A I am out of that altogether.

40 Q Can you tell us what month of the year it was? A Oh, my, indeed I cannot.

Mrs. Annie O'Neill, cross.

Q Can you tell us whether it was hot or cold weather? A Oh, well, no.

Q You cannot tell us that? A No.

Q You called at this time, whenever it may have been, at Senator Ketcham's house? A I called often.

Q But this one time that you called and had this conversation with the Senator about this long visit of Mr. Will's, was there anyone else present beside the Senator? A I had no conversation with him whatever; he only merely asked me the question if I remembered any evening I waited awhile—

10

Q Was anyone else present at that time when he made that remark to you? A No, no one else was there.

Q What did the Senator say to you? A He merely asked me, "Annie, do you remember any night when Mr. Will come in and stayed so late;" I waited awhile, I said, "yes, sir, I did, the night that he had something to give you, that he waited so long to give you the paper; he said, 'No, Annie, I cannot go, I have a paper to give my brother tonight.'"

20

Q You told that to the Senator; who first suggested it, you or the Senator? A I didn't tell that to the Senator.

30

Q Listen to this question. When you were having this talk with Senator Ketcham regarding the fact that Mr. Will Ketcham had been there and stayed there so late one night, who first suggested or stated that it was in the month of July, you or Senator Ketcham? A We hadn't any conversation whatever; Mr. Ketcham didn't converse with me or anything, he merely asked me the question and I said "July."

40

Mrs. Annie O'Neill, cross.

Q When you said July, what did the Senator say to you about that? A Nothing whatever.

Q That conversation you say you don't know when it took place, the first conversation; have you talked with anyone else since that time about it? A Nobody, no person.

10 Q Haven't you talked with Mr. German? A Yes, he asked me the question; I didn't think about him.

Q Did he ask you the question just as he asked it of you on the witness stand here this morning, whether or not you recollected William Ketcham called at the Senator's house in July, 1897? A He asked me merely what I told him.

20 Q I ask you if he asked you if you recollected that Will Ketcham called there in July, 1897, and stayed very late at night to give the Senator a paper? A I don't remember anything about it, he did not; I don't remember anything that he said here now.

Q You don't remember what Mr. German talked to you about? A After he talked to me I didn't remember it any more.

30 Q You cannot tell us today what your conversation with Mr. German was? A That is all, merely that Mr. Will Ketcham come in and asked for his brother, and it was near nine o'clock; he asked me what time, if I knew Mr. Ketcham was gone to church, and after that he went to the club; I told that to Mr. Will, too.

Q When did that conversation take place with Mr. German? A Some time ago.

Q About how long ago? A Two or three weeks, four weeks.

40 Q You say you talked with Mr. German about two or three weeks ago; have you talked with anyone else? A No.

Charles Holzhauser, direct.

Q Did you have more than one conversation with Senator Ketcham about the matter? A No, sir; only the one.

Q You say then that Senator Ketcham talked to you once about this matter? A Yes.

Q And you cannot fix the time, and about three weeks ago you talked to Mr. German? 10
A Yes.

CHARLES HOLZHAUER, sworn for defendant.

Direct examination by Mr. German.

Q You have been engaged in business for how long? A Fifty years last month.

Q Were you acquainted with William S. Ketcham, Sr., in his lifetime? A Yes, sir. 20

Q And you married one of his daughters, did you? A Yes, sir.

Q You know William S. Ketcham, the complainant in this suit? A Yes.

Q Do you remember after Mr. Ketcham, Sr., died, a conversation between his children? A Yes, sir.

Q Where was that conversation? A In the old homestead, 26 Mercer street.

Q Who were present? A All the heirs in interest. 30

Q Name them. A The Senator and his wife, Dr. Baldwin and his wife, Mr. Smalley and his wife, William S. in the room and his wife sitting in the hall and myself and wife.

Q At that conversation what was said, if anything, by William S. Ketcham, the complainant, as to a claim against the estate?

Mr. Congleton. I renew my objection that this is a matter that is a defense in 40

Charles Holzhauser, direct.

10 law; whether that note itself is a valid claim, is a matter that is not in controversy here in this court, whether or not by reason of the actions of this defendant he should be allowed to set up the one defense of the statute of limitations, reserving to himself all other defenses in the law action.

Court. I will note your objection; I will admit it subject to argument and ruling on the relevancy.

A There was nothing in just that shape.

Q What form did the question take, if any?

A I endeavored to get the status of things in general and somebody remarked as to how much the possible loss might be of the litigation then pending, in case it should go against the estate, and I said that wouldn't be as much as that in any case, because there would only be the subscription to stock that was made by William S. Ketcham, Sr. Then William S., Jr., said, "Well, if you are going to talk that way, I will tell you right now that I am protected in that matter." I said, "How are you protected?" "I have papers to protect me." "What are your papers?" "At the proper time I will produce them."

20

30

Q From that time on to the beginning of this suit, have you had conversations with William S. Ketcham, Jr., regarding the estate? A Some, yes, sir.

Q From that interview down to the time July 20, 1897, did you have any conversation with William S. Ketcham in regard to the— A You fix that at a special date, I do not know that I can fix the date.

40

Charles Holzhauser, direct.

Q Regarding the litigation pending? A I have had several conversations, but I cannot fix the date.

Q What, if anything, did he say about his claim against the estate, prior to 1897?

Court. July 20, 1897, is the date, or about the date when a formal claim was presented to the administrator, you may or may not have heard within a short time that a claim had been presented. 10

A I can fix two conversations with him by other matters than his dates.

Q Let us have those. A One conversation I had with him was when I was in consultation at the time that he wanted a partial distribution of the estate, and the other time was when he came to see me at my house after the judgment had been rendered against him in the suit for subscription to stock; what the dates were, I cannot tell. 20

Q When was the first time that you heard that he held a note for \$6,666.84 against the estate? A The morning after he had been to the Senator's house the Senator called me up on the telephone and told me.

Q What did he say, if anything, about his claim at this first interview that you have just mentioned, when he wanted a distribution of the estate? A The Senator refused to make a distribution— 30

Mr. Congleton. I object to his stating what the Senator said.

Court. Strike that out. He is asking what William said. Don't state anything unless William was present when the Senator spoke to you. 40

Charles Holzhauer, direct.

10 *Witness.* He was present. The Senator refused to make a distribution until he had a settlement of the status of the note that he had, and I objected to any distribution until that whole matter should have been cleared up; and there was quite a discussion about it, and the Senator took the position that here was a note, a plain bald note, and if William S. Ketcham, Jr., should die and that note fell into the hands of his family, they would simply present that note and want payment of the note, and he said he wasn't willing to jeopardize either himself, or his wife after him, in case she should outlive him, with any such thing as that, when he had said that the note was not
20 owing for its face value.

 Q Who had said that? A George W. Ketcham.

 Q What did William S. Ketcham say to that?
A I don't know that I can give you just his answer.

 Q What was the purport of it? A Hammering away to get a distribution, that was the main thought and the main conversation.

30 Q Did he deny at that interview, or on any other occasion, that the note had been given on a contingency?

Mr. Congleton. I object.

Court. Tell what took place.

A I never heard anything else.

Mr. Congleton. I object.

 Q Did he on that occasion say anything about
40 Senator Ketcham having made a promise to pay him the amount of any judgment that might be

Charles Holzhauser, direct.

recovered against him for personal subscription or otherwise, in the Holloway matter?

Mr. Congleton. I object.

Court. I do not recall that William Ketcham said that that did take place.

Mr. Congleton. He said at the time of the filing of the claim in 1897, and the witness is speaking of a conversation in 1900. 10

Mr. German. Question withdrawn.

Q What if anything did William S. Ketcham, Jr., say at this interview or any other interview that you had with him, regarding a promise that he claims the Senator made to pay him any judgment against him in the Holloway matter? A I never heard anything of the kind.

Q When did you first hear that he made such a claim? 20

Mr. Congleton. I object.

Court. That would be hearsay; he said he never heard it from the defendant.

Q At this interview after William S. Ketcham, Jr., had paid the judgment, which you say you had with him, what was the subject of that conversation? A He came to see me—

Mr. Congleton. I object to the form of that question. He didn't say he had any conversation with him after the judgment was paid. 30

Court. After the judgment had been obtained.

Witness. Our interview was before he paid the judgment.

Q What was that conversation? A He wanted to convince me that the administrator 40

Charles Holzhauser, direct.

ought to pay his note, and I told him I didn't see how the administrator possibly could pay his note; from all I had learned, he couldn't do it if he so desired; and I said I certainly would object, in the interest of my wife, to his paying a note that had no more status to it than that had; that there was nothing definite about it; there was no value received shown, and the whole atmosphere of the note was dubious, and I said, "I shall certainly object, for my wife's interest in the estate, to making any payment of that kind." That was the substance of the conversation. Then he asked me what I would do if I were in his place. I said, undoubtedly an execution would issue shortly and I would do something toward satisfying it. He spoke of an appeal, and I said that I thought the case was one that would be worthy of appeal, so far as I could tell about it, and he spoke of having to have a bond in case he appealed. I told him if he had any difficulty in the matter of a bond, that I would be willing to go on his bond—on the appeal bond, and I thought that his brother also would be willing to do the same; so he left with that idea, that he was to appeal the case and I was to go on his bond, and I did so.

Q What did he say, if anything, on that occasion about an agreement with his brother to reimburse him? A I never heard of any agreement between him and his brother.

Q (*By Mr. Bradner.*) You didn't fix the time when you had the first meeting of the family after Mr. Ketcham's death. A That was immediately after, the first meeting that they had, and I was endeavoring to get the status of things. Nobody had ever known anything

Charles Holzauer, cross.

about his affairs and I asked several questions, and that was among them.

Cross examination by Mr. Congleton.

Q Going back to that original meeting of all the heirs at the homestead of William S. Ketcham, Sr., did William S. Ketcham say that he had a claim there against his father's estate? 10
A He said, "I have papers to protect me."

Q Is that all he said? Did he say he had a claim against his father's estate? A I don't think I heard the word "claim" mentioned; he simply said in answer to my statement, that the estate could only be held for its subscription to stock, or the father's subscription to stock, and he said "if that is the way you are going to talk, I will tell you now that I have got papers to protect me." 20

Q If that is the way you are going to talk, that the estate could only be held for a certain sum? A Yes.

Q Then did he say that the estate was responsible for the moneys which he had obtained— A He said he expected the estate to pay.

Q And that he had papers to protect him? A Yes, sir. 30

Q The next thing you say you heard about this so-called claim of his was the day after he filed a claim with the Senator? A Yes, sir.

Q The Senator called you up and told you that his brother Will had filed a claim with him? A The Senator called me up and told me that Will had been there the night before and had presented a note to him.

Q Did he say whether or not he had filed an affidavit with him under oath? A He said he 40

Charles Holzhauser, cross.

had left an affidavit with him and that he told him that he couldn't receive it.

Q That he had left it with him? A I don't know as to that; that he presented it; whether he left it or not, I don't know.

10 Q Did the Senator discuss with you what reply he should make him? A No, sir.

Q Did he say to you whether or not he had written to him? A He said he had or was going to write to him that day.

Q Can you fix that date? A No.

Q Coming down now to the time when there was a partial distribution that you have spoken of, do you recall about when that was? A Not as to date; no, sir.

20 Q You cannot remember the year? A No, sir.

Q At that time there was some discussion about this claim that Will had filed? A That was the one objection to the distribution.

30 Q Did you know that the Senator was asking Mr. Will Ketcham to give him another writing in reference to his note? A He said that he wanted some document to fix the status of that note before he would consent to pay out any money.

Q Did you know before distribution was made, that Mr. Will Ketcham did give to the Senator a further writing? A If I did, I have forgotten it.

Q You do not think the Senator showed you that? A What?

40 Q A paper that he received from Mr. Will at that time, fixing the status of the note, as you put it? A Not that I recollect.

Charles Holzhauser, cross.

Q A distribution was made in about the year 1900? A Not of my own knowledge, I wasn't there.

Q You know that your wife did receive a portion of her father's estate about that time?

A Through her I know it.

Q And prior to her receiving that money you do know that there was some conversation and discussion between the parties in interest about Mr. Will Ketcham giving to the Senator a further paper fixing the status of his claim against the estate? A Not a general discussion. I do not think we met again. 10

Q A discussion between you, Senator Ketcham and Mr. Will Ketcham, then? A No, aside from the meeting that we had together.

Q That is what I am talking about; at that meeting you discussed the question of the distribution? 20

Q (*By the Court.*) At the time you spoke of this partial distribution, was there a general meeting of the heirs together at one place? A I wasn't there when they got the money.

Q (*By the Court.*) When was the time you refer to, then, as having a conversation about the partial distribution with William? A That was before the distribution was made, shortly before. 30

Q (*By the Court.*) Shortly before the family met for the distribution you met with whom to have the talk? A Senator Ketcham and Will.

Q (*By the Court.*) You three? A Yes.

Q That is the talk; that talk was just prior to your wife's receiving part of her father's estate? A Yes. 40

Charles Holzhauser, cross.

Q At that talk one of the matters discussed was the status of Will Ketcham's claim against the estate? A It was the principal discussion.

Q It was the desire of you and Senator Ketcham to have the status of that claim settled before that distribution was made? A Yes, sir.

Q You do not recall whether the Senator told you that he had a further paper before he made distribution? A My memory isn't clear on that, but if my memory serves me correctly, the Senator drew up a paper and Will refused to sign it, and then I heard afterwards that he drew up one on his own account, one which suited him.

Q And filed it with the Senator before distribution? A That I don't know.

Q You then had another conversation with Mr. Will Ketcham after the judgment had been recovered against him? A Yes, sir.

Q And he at that time was insisting that the judgment should be paid by the estate? A I would hardly say "insisting," he was endeavoring to have the Senator pay it.

Q His stand was that the estate should pay that judgment? A I don't know that I put it that way quite, they should pay; he thought they ought to pay it; he wanted them to pay it, is better, perhaps, and I told him then that I should oppose anything of the kind.

Q You have said that. Can you fix about the date when that last conversation was? A No.

Q 1905 would you say?

Court. He says as a result of it an appeal was taken and he went on the bond.

Charles Holzhauer, re-direct—re-cross.

Witness. I fix it in that way, but I couldn't get within five years of it, I don't believe.

Court. You can agree as to the time when the judgment was recovered and the time when the appeal was taken.

Mr. Bradner. He means the writ of error. 10

Re-direct by Mr. Bradner.

Q In the interview which you had with Will Ketcham and the Senator just before the distribution was made, did Will Ketcham state to you just what his claim was? A No, sir; I never could get anything definite out of him as to what the status of the note was.

Q (Last question repeated.) A No, he stated the note; I never could get any further than that, as to anything definite; that was the reason I objected to the distribution. 20

Q Did he say at that time what the note was given to him for?

Mr. Congleton. I object as not re-direct.

Court. It is not re-direct, it is on the same subject matter. He gave the whole conversation. 30

Q I want to know whether at that time there was anything before you to show just what this claim was, in dollars and cents? A No, never; that is what I said to him.

Re-cross by Mr. Congleton.

Q But he did say it was on a note? A Oh, yes.

Q Did he? A Oh, yes. 40

Mrs. Ella B. K. Smalley, direct.

Q And that the note had been filed with the administrator? A No, I don't remember that.

Q Had proved his claim with the administrator? A I don't know that I care to change anything that I said; I was asked what I knew about it and I answered that.

10 Q Which conversation are you talking about; at what time, when the partial distribution was made or when the judgment was recovered? A In what connection?

Q The last testimony you just gave to Mr. Bradner, I want to know whether that was at the time of the partial distribution or whether it was at the time the judgment was recovered? A Mr. Bradner's question was of that nature that it would apply to both.

20 Q I asked you when the conversation took place. A It applied to both.

Q You mean to say that you had that same conversation both times with Mr. Will Ketcham? A The same subject matter.

Q Same conversation? A I took the same position in both conversations.

Q When do you say that Mr. Will Ketcham told you that the note was not due for the face value?

30 *Court.* He hasn't said that. His first answer was, at that interview the Senator said "I cannot allow that claim when you said it wasn't due for its face value."

MRS. ELLA B. K. SMALLEY, sworn for defendant.

Direct examination by Mr. German.

40 Q You are one of the children of William S. Ketcham, Sr? A Yes.

Mrs. Elizabeth K. Baldwin, direct.

Q And a sister of the parties? A Yes.

Q When was the first time that you ever heard that your brother Will claimed that your brother George had agreed to pay this note in controversy, or any judgment that should be recovered against him?

Mr. Congleton. I object.

10

A I never heard it.

Court. The question wasn't proper.

Q I mean from your brother Will? A No, I never heard it from my brother William.

Mr. Congleton. No cross examination.

MRS. ELIZABETH K. BALDWIN, sworn for defendant.

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Direct examination by Mr. German.

Q You are one of the daughters of William S. Ketcham, Sr.? A Yes.

Q And a sister of William S. Ketcham? A I am.

Q Did you ever hear your brother Will say that your brother George had agreed to pay any judgment which might be recovered against him in the Holloway matter?

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Mr. Congleton. I object.

A I never did.

Mr. Congleton. There is no contention on the part of this complainant that he ever told this party any such thing.

Court. I will hear you on the bearing of the testimony.

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George W. Ketcham, direct.

GEORGE W. KETCHAM, defendant, sworn.

Direct examination by Mr. German.

Q You are the defendant in this suit? A I am.

Q How old was your father when he died?

10 A Eighty-two.

Q What was the condition of his health previous to his death? A He was an invalid practically for the last several years of his life, he was in bed most of the time.

Q Were you present after your father's death, at this meeting of the family, as has been testified here? A I was.

Q What did Will Ketcham say, if anything, about any claim against the estate? A I did not hear his remark at that meeting.

20 Q Did you go over with your brother Will the debts of your father or your father's affairs? A I went all over my father's affairs after I was appointed administrator and inquired as to what debts he had and consulted with my brother, who was able to give me a good deal of information on the subject; went through my father's desk and searched out all the papers with him and found all the claims and paid them, or arranged

30 to pay them.

Mr. Congleton. This is still subject to my objection as not relevant; I don't want to keep objecting all the time.

Court. Yes, you need not repeat your objection.

Q What part did your brother take in these matters? A He helped me find these papers and claims; some were sent to him and he sent them to me. I have one or two letters of his in

40 which he enclosed claims for me to pay.

George W. Ketcham, direct.

Q Did he say anything previous to the time that he presented this note to you for payment, about any note against the estate or any claim against the estate? A Of his own?

Q Yes. A No, never.

Q When was the first you heard that he had a claim against the estate, from him? A From him, on the night of the 20th of July, 1897, or it was so close to midnight, I might say the morning of July 21st. 10

Q State what took place on that occasion. A Well, I may state in a little detail—

Q Your brother Will says it was about half-past six or seven or half-past seven? A I was home until eight o'clock; I didn't go away until perhaps five minutes of eight.

Q And he hadn't come at that time? A No. 20

Q Go ahead. Where had you been on that occasion? A That was our church night; I went to church, and that would take an hour or hour and a half, and I was in politics at that time and I was going about frequently, and I went to several meetings and I came home about midnight. I cannot say whether it was five minutes before twelve or ten minutes after, but about midnight, and as I approached the house, I found that there was a light in the hallway, as there would be, I being out, and I found that the library was lighted up, and I was surprised, because the upstairs was dark, and stepping in the room, I found my brother there, and the family had all retired, and of course I greeted him and we had some conversation. 30

Q What was the first thing he said after greeting you? A I think he stood up, we stood up for a few minutes, and he showed me a note of my father to him for a large amount, sixty- 40

George W. Ketcham, direct.

six hundred and something; I glanced at the note and noticed some things about it; first, I was startled at the large amount, and startled at any amount, in fact, and I noticed that the body of the note was written in my brother's handwriting. Furthermore, I noticed that the signature

10 was somewhat scattered; my father wrote in a straight angular way; his lines were up and down as though he had drawn a rule under them and followed this rule; this was straggling. I had my thoughts about it; my thoughts were running about it; I wouldn't say what my thoughts were, but that is what he presented to me, and immediately he presented a proof of claim, which was furnished here yesterday, which I glanced at; it was very late, I was very tired, and I simply

20 glanced at it, but I didn't read it carefully until after he had gone; in fact, until the next morning, and the first thing my brother said to me after showing me these papers, and evidently noticing my surprise, he said, "George, don't think this is a debt; father does not owe me this money," and I paid particular attention to that "George, don't think this is a debt, father doesn't owe me this money." Of course, my surprise was started right away. Here is a note for so much money

30 and I am told virtually it is not a note, father doesn't owe anything.

Objected to. Objection sustained.

Q What further was said by your brother? A He said, "This note was given to me to cover me in the Holloway matter. He used a general expression, I think he spoke two or three times over and used such an expression as this: "the Holloway matter," or the "lumber suit," nothing more than that.

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George W. Ketcham, direct.

Q What did you say to that? A I said—I discussed it with him in a few words—I said, “If that is the case, why don’t you prove that; why do you bring a note to me for \$6,600 and say it is owing and then tell me it is not owing, and it is to cover you in something that may happen at a future time or may never happen,” 10
and I said, “if that is your claim about something that is to happen or may happen, prove that.” I wanted an exact statement.

Q Did you tell him that? A I told him that.

Q What else did you tell him? A That is about what I told him; that is the substance of it.

Q Did he say anything further about it on that occasion? A He stated this, that if I was not satisfied with that, he would change it, and I got the impression that he was going to change 20
it and give me another paper.

Q Was anything further said? A That was reiterated; that is practically what was said and about all that was said.

Q Did your brother Will on that occasion when he presented the claim to you, inform you that the note represented moneys which he, William S. Ketcham, had received from the sale of lumber transferred to the Clinton Hill Lumber & Manufacturing Company by Frank D. Holloway 30
and loaned by your brother Will to your father to take up the note which your father had loaned to Holloway, and that if they—I suppose meaning you—were successful in the litigation which was then pending against your father’s estate and against your brother Will, and that if you would pay all of the expenses connected with these suits together with any judgment that might be rendered against you by reason of your having sold 40
said property, or by reason of your brother

George W. Ketcham, direct.

Will's being a stockholder in the Clinton Hill Lumber & Manufacturing Company, or in any way connected with that company, that your brother Will would consider such payments in lieu of the payment of said note, and that if at any time your brother Will should be called upon
 10 to pay out any moneys by reason of his connection with the Clinton Hill Lumber & Manufacturing Company, that his claim against the estate upon said note should then become due and payable?

Mr. Congleton. I object to the form of the question.

Court. Where do you get that from?

Mr. German. From the bill of complaint.

Court. Has it been proved in this case?
 20

Mr. German. Yes, sir.

Court. You need not contradict what Mr. William Ketcham has sworn to, because you have already denied it in your answer.

Mr. German. I will withdraw the question.

Q Did you agree on that occasion to pay your brother the expenses of the litigation that was then going on, or that you would pay any judgment that might be recovered against your
 30 brother? A Never, nothing of the kind, it wasn't mentioned.

Q Have you agreed at any future time since that occasion? A I never from that day to this have said any such thing; that I would pay his debts; I have said the contrary, and he has affirmed it in letters again and again. Here they are, right in the letters.

Q Your brother Will says that pursuant to an alleged agreement with you on that occasion,
 40

George W. Ketcham, direct.

that you did actually pay the expenses of his litigation; what do you say about that? A I will explain that a little in detail.

Q He says further after that agreement, that you did? A I never agreed to pay any expenses of anybody except those of the estate, and I never agreed to that, because I fell heir to that. I was notified after my father died, that the suit was renewed against me as administrator. I knew but little about it. The original suit before Vice-Chancellor Van Fleet had been finished; I knew nothing of it, and I was inquiring the status of things; I had been present at no trial before that date and I was inquiring of my brother as to what the status of things were, and I have a letter of his in which he explained it to me, and I found some papers, which were notes of my father to Mr. Bradner, paying him for his expenses, and those notes were prepared in the handwriting of my brother; so if there was any plan or agreement, it was first by my father and assisted by my brother, and I fell heir to that. I agreed to nothing; I never was asked to agree to anything. I paid what came to me through Mr. Bradner, and every bill was against the estate of William S. Ketcham, Sr., or to George W. Ketcham, administrator of the Estate of William S. Ketcham, Sr. I paid these bills without question, and I paid only those bills, and I want to say here, as I said before, that I have never paid any bill and never been asked to pay for any bill, except the bills of the estate, and had no right to pay any other. I want to say this, that I had already paid a bill before that date, before the night he called on me with that paper.

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George W. Ketcham, direct.

Q What bill are you referring to, the bill of the estate for what? A One of Mr. Bradner's bills against the estate; I don't know but what there were two; I know I paid one; I would have to look at the list to see if I paid two.

10 Q Your brother Will stated that you had taken part or were cognizant of his sale of this lumber and the turning over of the proceeds to your father; what have you to say about that? A I had taken no part in it; I knew in a general way that the lumber was there and he was present and disposing of it; I knew that, but as to any moneys he had received or what he had done with it, I, of course, knew nothing; I never saw any statement of any kind.

20 Q Your brother says that in December, 1905, he made a demand upon you to pay a judgment that had been recovered against him, and that you suggested that he see Mr. Holzhauser. A He didn't make a demand; he came to me and asked me if the estate would pay his judgment, and I said then, as I have said all along, all the way down the course of this long litigation, that I couldn't pay it, and I said, "You had better see Mr. Holzhauser." I want to say here that
30 while we have never admitted a legal claim of any kind, we have always felt kindly disposed—I personally have always felt kindly disposed, and I used mild words very frequently in my letters, when I might have used harsher words, but I wanted to be kind to my brother, and when he came to me and asked if I would pay the judgment, I said, "You had better see the rest of them;" I guess I said "see Mr. Holzhauser." I further said if he could induce the family to pay, I would say right then and there that I would
40 pay my one-fifth, and help him out, but it was

George W. Ketcham, cross.

a matter of good will only, and I told him he must go himself to inquire of the sisters whether they would consent to pay their one-fifth.

Q Did they consent?

Mr. Congleton. I object.

Cross examination by Mr. Congleton.

10

Q You say that you have never paid any of the legal expenses in connection with the litigation against William S. Ketcham, Jr.? A I say this, Mr. Congleton, as I have said before, that I paid bills, only such bills as came to me as administrator. The litigation in its earliest stages was against the company.

Court. He said that all bills that he paid were either those rendered to the estate of William S. Ketcham, or to George W. Ketcham, administrator. You want to know whether in those bills was included other expenses?

20

Q In the bills which were rendered to you by Mr. Bradner and by Mr. Riker, either to you as administrator or to the estate of William S. Ketcham, Sr., did not those bills specify on their face that they were for services and disbursements in the litigation against William S. Ketcham, Jr.? A The bills speak for themselves.

30

Q Will you produce them? A I have them here. I think there are one or two of them that include my brother's name; I hadn't seen them for ten years when I testified, and I could only answer the question in a general way, that I had paid only such bills as came to me as administrator. The bills are here.

40

George W. Ketcham, cross.

Q Will you produce the bill rendered by Mr. Bradner, June 7, 1898? A Yes, sir. (Producing same.)

10 Q This is a bill on the letterhead of Mr. Frank Bradner, under date of June 7, 1898, addressed to the Estate of William S. Ketcham, and I call your attention to "costs to date McCarter v. Ketcham, Jr., \$25"; did you pay that bill? A I paid this bill, yes, sir.

Q I further call your attention that it includes "costs to date McCarter v. G. W. Ketcham," did you pay that out of the estate funds? A Yes.

Q Both your brother's and your own personal suit? A Yes, I paid what came to me. Let Mr. Bradner explain it.

20 Q The next is bill of Clarence Sackett of June 22, 1898? A I don't think that bill is there. You called for Mr. Bradner's bills; I don't know whether Sackett's bill came through Bradner or came direct; it may or may not be there.

Mr. German. It don't seem to be here.

Q September 27, 1898, Frank E. Bradner, voucher 126? A (Producing same.)

30 Q I show you bill dated September 27, 1898, to the Estate of William S. Ketcham, Dec'd, from Mr. Bradner, for \$28.86, and ask you if you paid that bill? A Here is the check, that proves it, I paid it.

40 *Mr. Congleton.* I offer this bill in evidence, made out to the Estate of William S. Ketcham, deceased; "To preparation of notice of appeal and petition of appeal, copies and services, and expenses, Cumberland Lumber Company, et al. vs. Clinton

George W. Ketcham, cross.

Hill Lumber & Manufacturing Co., from order assessing stockholders, \$12.50.”

Court. You put in the record what you want, without offering the exhibit.

Mr. Congleton. They are all right, they have been allowed by the Orphans’ Court.

Q I show you bill dated December 5, 1898, addressed to George W. Ketcham, Administrator, on the bill head of Frank E. Bradner; item under date of November 4, “Printer’s bill for case, Ketcham, Administrator, et al. *vs.* Cumberland Lumber Company, \$38.60,” and under date of November 15, “To time at Trenton opening day Court of Errors and share of expenses \$16.50”; November 23, “To time at Trenton, examining law and preparing brief in library, share of expenses \$26.50”; March 30, “Printer’s bill for brief \$8; Motion and order substituting administrator as party \$6.40”; November 30 and December 1 and 2, “To time at Trenton on argument of appeal, \$50; To expenses, two trips to Trenton, \$6,” and I ask you if you paid that bill? A Yes, I paid that, I paid all those bills.

Q From the funds belonging to the estate of William S. Ketcham, deceased? A Yes.

Q Bill to Estate of William S. Ketcham, deceased, on the bill head of Frank E. Bradner, dated 1899; under date of March 20, “To costs in Court of Errors \$72.23; March 25, To costs in Court of Errors, Chancery, \$34.78; amount recoverable from Strieby, Sprague & Co., et al., \$107.01; credit by former payment to me in Chancery costs, \$13.66; printing case changed in Court of Errors and paid to me in account rendered December 5, \$38.60, making \$52,26; balance of costs due to me \$54.75.” You paid that bill from the estate funds? A Yes, sir.

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George W. Ketcham, cross.

Q Bill dated October 2, 1899, Estate of William S. Ketcham, bill head of Frank E. Bradner, in the matter of Clinton Hill Lumber & Manufacturing Company:

	1898		
	Dec. 13	Time at Circuit Court	\$5.00
10	Dec. 14	Time at Circuit Court	5.00
	1899		
	Mar. 8	Time on opinion of Court of	
	9	Errors in preparation of decree of reversal,	10.00
	Mar. 20	Taxed costs Court of Errors less printing,	33.63
	Mar. 24	Time on decree in Chancery,	10.00
	Mar. 25	Taxed costs Chancery less previous charges,	21.12
20	Apr. 8	Time on motion to have judgment in Circuit Court, costs on rule vacating judgment,	7.26
	Apr. 25	Time on notice and motion for leave to file answer,	5.00
	June 7	Costs of having bill of costs taxed and copy, Receiver vs. William S. Ketcham, Sr.,	3.84
	June 10	Time on discontinuance of all the suits at law,	10.00
30	July 5	Time to date and argument on petition of receiver for leave to amend,	25:00
		Total,	<hr/> \$150.85

Court. That is all in the law case?

Mr. Congleton. No, some in Chancery and some in the Court of Errors.

40 *Mr. German.* We admit that Senator Ketcham paid all the bills that came in against the estate.

George W. Ketcham, cross.

Mr. Congleton. We deny that all the bills came in made out either to George W. Ketcham, Administrator or the Estate of William S. Ketcham; some of them you have included the items against William S. Ketcham.

Court. Mr. Congleton wants to show that in the payments there was special reference to the case against William S. Ketcham, individually. Can't you look over them and state it, without taking time to go over all the detailed items? 10

Mr. Congleton. If Mr. Bradner will admit on the record that all of the services which he rendered in the suits against William S. Ketcham, Jr., were included in his charges to this estate and were paid for by the estate— 20

Court. Were rendered as bills to the estate and were so paid.

Mr. Bradner. Up to a certain time. When he brought this suit in the Circuit Court, then we stopped.

Mr. Congleton. At that time was there any further litigation against William S. Ketcham, Jr.? 30

Mr. Bradner. I don't know. I separated it then and made a distinct bill against George W. Ketcham personally, and against the estate.

Court. Is that satisfactory?

Mr. Congleton. Not entirely.

Q Bill of October 26, 1899, voucher 192; first item in the bill, October 26, 1899, addressed to the Estate of William S. Ketcham, deceased, on 40

George W. Ketcham, cross.

the bill head of Frank E. Bradner, and there is nothing in it specially about William S. Ketcham, Jr.

Court. Make as a single exhibit copies of the bills rendered by Mr. Bradner up to that date.

10 *Witness.* This list I furnished here is down to the very end of time; it may include a whole lot after that. I have produced an entire list of the bills.

(Examination in reference to the details of bills suspended by the suggestion of the Court until after recess.)

Q You knew that after the attempt to organize the Clinton Hill Lumber & Manufacturing Company had been abandoned, your brother
20 Will was at the yard and selling the lumber, did you not? A I knew he was up there handling the lumber.

Q You went down there and visited him? A I drove down there and looked over it, but I had no further connection with it.

Q You knew what was being done with the money which he received from the sale? A No, sir, that has been the thing I have been trying
30 to find out for years. I haven't seen a list, and asked for a list and couldn't get it.

Q Didn't you get a list? A Never.

Q Didn't you produce here yesterday a list which your brother served upon you at your request? A He produced a list of certain things that don't begin to cover it. There are expenses of carmen and wages and all that sort of thing.

Q He presented to you a list showing how he had paid out \$6,666.84? A No, sir, he didn't
40 do anything of the kind.

George W. Ketcham, cross.

Q You advised your brother against filing the certificate of incorporation and going on with this company, didn't you? A I cannot say that I advised him, no; he told me that he hadn't—

Q Answer my question. A No, I don't think I advised him at all; I don't remember any such thing; I remember the fact and all that sort of thing. 10

Q I call your attention to Book 2, page 89, which was the trial before Judge Adams in Circuit Court on November 9, 1904, in which Thomas N. McCarter, Jr., was receiver, and William S. Ketcham, Jr., was defendant, and ask you if you were not asked this question, and whether you did not make this reply:

“Q Did you know whether this paper was or was not filed with the Secretary of State? A I knew it was not filed with the Secretary of State. 20

Q Did you know why it was not filed with the Secretary of State? A I advised my brother not to do it.”

A That might be; that is nine years ago, but this event was way back in 1893, twenty years ago; I don't remember it. 30

Q You don't remember you testified that way or not? A I said a moment ago that I didn't realize it; I didn't remember of it; it wasn't fixed in my mind at all; I may have said it and may not have said it.

Q I call your attention to further testimony in the same case, page 89:

“Q Why wasn't it filed? A It was not filed because the purpose of the incorporation was not fulfilled and the parties agreed 40

George W. Ketcham, cross.

not to go on; there was no necessity for filing it down there.

Q Are you speaking of something that you know of your own knowledge? A I know of my own knowledge, Mr. Howell. If I may answer; I was not present at the meetings, but I consulted with my brother constantly; he was at the office to see me and he came to the house nights, and I was in constant consultation with him."

A That is true.

Q What is true, the entire questions and answers that your brother came to you; I am asking you if those questions were not put to you, and if you didn't make those answers? A I made those answers, yes, and I knew in a general way, but what your question was a few moments ago to which I answered, was whether I answered about the facts, the disposition of the money and all that; that is another question.

Court. The only thing he is asking now is about advising him against going on with the incorporation.

Witness. Perhaps I did; it is a long while ago and I cannot recall it exactly; perhaps I did.

Q Referring to the payment of legal expenses in your answer, you say that an agreement was made by you to pay the same, and that the same were made with the knowledge and consent of not only the said complainant, but all other persons interested in the estate of William S. Ketcham, Sr. Now, I ask you which is the true situation, whether or not you did pay all of the legal expenses against your brother Will by

George W. Ketcham, cross.

agreement, or whether you didn't pay them with the knowledge thereof? A I said before that these bills were paid in the course of things; I made no agreement with him to pay them; I don't remember what is written in that form, but I made no contract to pay them; I made no agreement to pay them; I paid them as a matter of course. When they came to me with Mr. Bradner's endorsement, I paid them and didn't question them; I simply added up the figures and paid the bills. I don't know whether this or that or the other item was there. 10

Q I call your attention again to your answer filed in this case, page 7, and the second paragraph, which reads as follows:

“And this defendant further answering admits that he did, as Administrator, pay certain legal expenses after the litigation between the creditors of said Holloway and Thomas N. McCarter as set forth in paragraph twenty-two of complainant's said bill, but expressly denies that the same were paid by reason of the alleged agreement set out by said complainant in paragraph eighteen of said bill, or in any other paragraph of said bill, but expressly says that this defendant had paid a portion of said legal expenses before said complainant presented said notice and states that an agreement was made by this defendant to pay the same, and that the same were made with the knowledge and consent of not only the said complainant, but all other persons interested in the Estate of William S. Ketcham, Sr.” 20 30

Now, I ask you whether or not this statement in your answer is a true statement, that you paid 40

George W. Ketcham, cross.

these expenses by agreement of all of the heirs or whether or not you didn't pay them knowingly? A I have said here and I say it again, it was by no agreement with my brother; that particular clause I don't recall; of course, I signed that paper as an answer, and I may not
10 have realized all that was in that paragraph, but the fact is that I paid the bills.

Court. He didn't sign that answer.

Q You say there was no agreement made either with your brother or with your sisters about the payment of expenses? A No agreement whatever.

Q Then I ask you why did you pay all of those expenses? A Because it was proper that I should pay them.
20

Q Why? A Because I had confidence in my counsel; he had to conduct the case, and the case was in its original status against the company, and included minor details, various motions and counter motions, and naturally the five incorporators to this company would be mentioned in those earlier proceedings, and Mr. Bradner told me that he felt it was wise that the estate should conduct the litigation up to a
30 certain point, and we did.

Q As a matter of fact, didn't you pay all the legal expenses up to the point where a final judgment had been recovered against William S. Ketcham, Jr., upon the assessment levied against him as a stockholder by Thomas N. McCarter, receiver? A I paid all the bills that were sent to me, and as to that specific time, I will have to refer to counsel; I don't know the date.

Q You knew you were paying all of the expenses in connection with the various litiga-
40

George W. Ketcham, cross.

tions growing out of the attempt to incorporate the Clinton Hill Lumber & Manufacturing Company, didn't you? A There were no various litigations, so far as I know.

Q When I say "various," I mean several different suits, or different stages in the same suits. A In the same general suit, yes, sir. 10

Q But there were separate suits, were there not? A I suppose so.

Q There was one against the estate as such; there was one against you personally? A Yes.

Q As a stockholder to the capital stock? A Yes.

Q And one against your brother Will? A Yes.

Q You knew that those three suits were pending? A Yes. 20

Q You knew you were paying the expenses for the conducting of those various suits, did you not? A Yes, by the advice of counsel.

Q You knew that when you paid the bills, did you? A Yes, I knew it.

Q Then, Senator, I ask you why you testified before Judge Heisley, on March 14, 1910, in the trial of the suit of William S. Ketcham, Jr., against you as administrator, when you were asked this question: "Didn't you pay the expenses of it?" referring to the suit of your brother: 30

"A No, not that I know of. I was deceived in the bill if I did. I never paid his bill for litigation, never.

Q Didn't you pay Mr. Bradner's bill? A I paid Mr. Bradner's bill, but not for William S. Ketcham, Jr. I want that understood. 40

George W. Ketcham, cross.

10 Q Why, Mr. Ketcham, that suit went on for some years, didn't it? A It went on as against the Clinton Hill Lumber Company, and when it was split up as against the various stockholders, then each stockholder carried their own. I carried mine, and I carried my father's as his administrator. While it was going on against the Clinton Hill Lumber Company I had to pay it, because the fight was against me. I was notified by Mr. Howell the suit was continued against me as administrator. Of course, I had to defend it.

20 Q Did you not pay, as administrator, the expense of the litigation against the Clinton Hill Lumber Company? A Up to the time that it was a suit against the separate stockholders, yes.

Q And then didn't you pay the expenses of taking to the Court of Errors and Appeals the judgment that had been rendered against your brother? A Not that I know of.

30 Q Have you got those bills that you paid Mr. Bradner? A I have got a whole lot of bills; I have got thousands of them. This thing has been running for fifteen years, and I know of no bills that I paid except as administrator, and my own personal bills.

Q I ask you if you have got bills? A I have got bills, yes, but they do not specify any such thing as you ask about."

Q Did you so testify at the Circuit Court? A I so testified, according to the best of my knowledge and ability at that time, and I want to explain that.

George W. Ketcham, cross.

Court. You have a right, but not on cross examination. You answer his question.

Q You didn't produce any of those bills in the suit tried before Judge Heisley, did you? A No.

Q Although you had been subpoenaed to do so? A No, I was not subpoenaed in time; that is one of the things I want to explain. 10

Q The notice to produce had been served? A I got the notice the night before in a letter from Mr. Bradner; I hadn't time to do it.

Q And then these bills were produced when you made an accounting in the Orphans' Court, for the first time, were they not, before Mr. Kocher as Master, after exceptions were filed to your account; that was the first time you produced them? A I produced them, I think, when I filed the statement of my account; when I filed my account, I put in all these bills. 20

Q You took them away with you right away? A I took them away when they were handed back to me by the court when they were through with them, and after Judge Davis had decided that they were mine.

Q And Judge Davis made you bring them back before the Master and let this complainant examine them? A No, sir, Judge Davis said he had no right to order me to bring them back; he said he had consulted the law, and he said he had no right to refer them back. 30

Q Senator Ketcham, after your brother filed with you his proof of claim on July 20, 1897, the same has been in your possession ever since, has it not? A Yes, it has.

Q And the further paper which he filed with you on July 22, 1897, has been in your possession ever since? A Yes; I can explain that. 40

George W. Ketcham, cross.

Q It has been in your possession ? A Yes, right straight along.

Q Did you at any time serve upon your brother after he filed that claim with you a notice that you disputed his claim, and that he must commence an action at law to prove his judgment in a court of law within a certain period of time? A I didn't notify him that he must commence any action, but I repudiated his claim in a letter the next morning.

Q That is what you base your repudiation upon? A I didn't mention suit, but I said, "I cannot receive your paper, I refuse to receive it."

Q Did you after July 20, 1897, and before 1903, serve upon your brother any notice other than the letter the next day, that you have referred to, disputing his claim, and advising him that it would be necessary to prove it in a court of law? A I never served on him any paper advising him that he would have to sue in a court of law; I never served any paper of that kind. There were various letters in which I repudiated his claims; I just can't remember them.

Q And those letters have been offered in evidence? A I think so; I cannot recall all those dates.

Q After the paper your brother filed with you on July 22, 1897, in which he filed another paper with you in reference to this note, did you dispute that? A I don't know just what paper you mean.

Q Paper July 22, 1897, addressed to you and marked Exhibit C. 4:

"Whereas, a promissory note made by Wm. S. Ketcham, deceased, and dated Aug. 6, 1895, for (\$6666.84) sixty-six hundred and sixty-six dollars and eighty-four cents and

George W. Ketcham, cross.

payable on demand to Wm. S. Ketcham, Jr., having been presented to the Adm'r of said estate for payment, it is presented on the following conditions: 1st. No payment is demanded except in the contingency of any loss or payment being demanded of me by reason of my relations to the Clinton Hill Lumber & Mfg. Co. 2. No payment of said note to be demanded in case said estate shall otherwise guarantee me against any loss or payment by reason of connection with said Co. 10

Wm. S. Ketcham, Jr."

Q You received that paper? A I received that.

Q You said you kept it in your possession?
A I think so; I think I produced it here yesterday. 20

Q Did you write to your brother shortly after, about that paper? A I don't recall that.

Q You took that and didn't write him any further letter about that? A I don't remember that I did.

Q You don't recall that you did write him?
A No, I don't recall; it is so many years ago.

Q Coming down to the time of the partial division of the estate in 1900, your brother had asked you to make a partial distribution of the estate? A Yes, sir. 30

Q And you refused to do so until you had some further writing about the status of his claim against the estate? A My letter in answer to his request is here and expresses just what I said at the time.

Q Didn't you have some personal interviews with him about that time? A I may have had, I don't recall it. 40

George W. Ketcham, cross.

Q You do not recall the interview that Mr. Holzhauser has testified to? A I do not recall them; there have been so many of them, I don't recall them.

10 Q Before you made a distribution at that time you did receive from your brother a further paper? A I received a further paper.

Q And after receiving that paper you made the distribution? A After he had corrected the paper; he made a paper that I wouldn't receive; he made a paper that was not acceptable and I demanded that he express himself differently, and until he did that, I wouldn't make any distribution.

20 Q After you received the paper which is in evidence as Exhibit C. 7, you did make the distribution? A Yes.

Q At the time this paper was received, you received it by mail, or did your brother come and leave it with you? A I do not know whether I received it by mail; he certainly was there, because he made this amendment in my presence, so he must have been there.

Q What amendment do you speak of? A The last clause of the paper.

30 Q The words written at the end of the paper in lead pencil? A Yes.

Q The words in pencil are "The said note having been given me as security against any loss in above suits?" A Yes.

40 Q With the addition of those words to the paper which he brought you, you then made the distribution? A Yes; we discussed that thing and I considered that that did away with the note, and the note being out of the way, I made the distribution.

George W. Ketcham, cross.

Q You say "the note being out of the way." You understood this paper put the note out of existence? A Yes, read my letter, and take that in connection with it and you will see it.

Q Although this paper recites that he had filed a claim with you and that the note was barring a settlement of the estate? A Yes, so it was. 10

Q " * * * it is hereby agreed by Wm. S. Ketcham, Jr., that if the heirs of Wm. S. Ketcham, deceased, will release Wm. S. Ketcham, Jr., from all claims whatsoever that may be adjudged against him by reason of suits now pending in Chancery or that may be brought against him by reason of his connection with the Clinton Hill Lumber and Manf'g Co., that he will destroy the said note so that no payment shall be demanded on same." (Then the words in pencil) "The said note having been given me as security against any loss in above suits." 20

Q Did the heirs at that time agree to take care of any judgments that might be recovered against William S. Ketcham, Jr.? A Never.

Q Wasn't that the purport of this paper? A That is the purport of that paper, but that is the form of a dozen I have had. 30

Q Then you say because he gave you this paper, although the sisters and yourself had not agreed to the terms stated in here, you thought that put the note out of existence? A That final clause put it out of commission, as I understood it.

Q "The said note having been given me as security against any loss in above suits." A My idea was that if it was given to him as security, then he would have to prove security; he would have to prove that his father agreed to pay his 40

George W. Ketcham, cross.

expenses, and he would have to prove that. The note was a note for so much money with interest from a back date; it had no connection with any expenses to come, and having been given him for security, the idea of it was that it would take the note out of existence, and that thought was particularly in mind at that time; if he should die, his estate, his heirs would pick up that note and sue for it on the face of the note. They wouldn't care about any explanation. Now, if he had written—and that is the first time he had written it, for he had refrained from writing it hitherto, he had held the note as a club in one hand—"Pay me or I will sue you on the note," and if a clause should be written in any paper that it was given for a certain purpose, his heirs would have to prove that purpose, and they couldn't come in on the face of the note, and that was the idea of the paper.

Q You thought because he signed the paper, the heirs didn't agree to do anything? A A man cannot make an agreement and sign it himself and no one else sign it.

Q But you made distribution upon receiving this paper? A Because of that last clause.

Q That is the best explanation you have for saying that this paper put the note out of existence? A Because he would have to prove the note was a note for \$6,600 dating way back with interest, way back, and if he had to sue on anything, he would have to prove that his father was to pay certain expenses, and that wasn't incorporated in the note.

Q You only made partial distribution at this time, didn't you? A Yes.

Q How much did you keep on hand, approximately? A I cannot remember the exact amount;

George W. Ketcham, cross.

I think it was something like \$12,000; it was to cover the possible judgment against my father. I cannot tell you how much that would be. Then, of course, some expenses. The estate owned a farm and by consent of all the heirs we were running that farm as a business proposition. It was a sort of a one-sided thing that required a good deal of money. Sometimes we would have to buy a thousand dollars worth of cattle—(interrupted). 10

Q Didn't you keep a great deal more than that? A I think not; my best recollection is—

Q This is back in 1900? A I know it is; that is one reason I cannot remember it.

Q When you filed your account last year in the Orphans' Court, you had considerably more than that on hand, didn't you? 20

Court. Wouldn't that show?

Witness. I can explain that very readily.

Q What was the amount in your hands when you filed your account last year? A I would have to look at that; I cannot state offhand when the figures can be had.

RECESS.

30

Mr. Congleton. I would like to state on the record what I found from these various bills rendered by Mr. Bradner. One of September 15, 1903: "To services, counsel and time from May 4, 1903, to date, as per book, in full of all claims—in matter of proceedings in Chancery to assess stockholders, Clinton Hill Lumber & Mfg. Co. &c. \$50." Voucher 370. 40

George W. Ketcham, cross.

November 2, 1903, to the Estate of Wm. S. Ketcham, "To services and time to date in suit of McCarter, receiver, *v.* Ketcham—preparation of pleas &c. \$25.00; to costs and incidental expenses \$17.17." Voucher 381.

10 March 15, 1904, to the Estate of Wm. S. Ketcham: "To services counsel and time from Nov. 2, 1903 to date, McCarter, *Rec. v.* Ketcham—Essex Circ. Ct. and consultation with Mr. Riker, &c. \$25."

December 7, 1904, Estate of Wm. S. Ketcham:

20 "To services and time, in preparation for trial and on trial of case—and on rule to show cause for new trial—and on writ of the case of Thos. N. McCarter, error—and continuance of rule, in *Rec., v.* Wm. S. Ketcham, \$ 75.00
 To costs on trial & expenses, 9.18
 " " " Rule to show cause 5.86
 " " " Writ of Error 6.35
 " " " Continuance of Rule 1.43
 " copy of stenographer's notes &c. 32.20
 " " " same to serve 16.10

30

\$146.12"

February 7, 1905, to Estate of Wm. S. Ketcham:

"To services and time on motion for new trial: McCarter, *Rec. v.* Ketcham, Jr. 10.00
 To services and time on return to Writ of Error, same case, 5.00
 To services and time on Recognizance of Bail in Error, same case, 5.00

40

George W. Ketcham, cross.

To services and time on Assignment of Errors, same case,	10.00	
To time on Pleas: McCarter Rec. v. Est. of Wm. S. Ketcham,	10.00	
To time on Pleas: McCarter Rec. v. Geo. W. Ketcham,	10.00	
To costs and expenses as follows:		10
Return to Writ of Error and copy,	5.50	
Dictation of Assignment & Recog. & Copies,	3.00	
Filing Assignment of Errors &c.,	6.34	
“ Recognizance,	1.51	
Dictation of Pleas & copies,	6.30	
Costs on Pleas—2 cases (9.92),	19.84	
Notice of argument, filing,	3.45	
	<hr/>	
	\$95.94”	20

April 10, 1905, to the Estate of Wm. S. Ketcham:

“To services and time to date in the case of Thos. N. McCarter, Rec. v. Wm. S. Ketcham, Jr., on writ of error to the Court of Errors & Appeals as follows:”

there are various items here; Mr. Bradner says they all refer to that one case, \$111.25.

June 13, 1906, to the Estate of William S. Ketcham: 20

“To additional cost on affirmance of judgment in McCarter, Receiver v. Ketcham, Jr.; extra copies of opinion; costs on staying proceedings; copy of brief for printer, &c.; defendant’s costs on trial, McCarter, Receiver, v. George W. Ketcham; defendant’s cost on judgment, McCarter, Rec. v. Estate of Wm. S. Ketcham; costs on petition of appeal

40

George W. Ketcham, cross.

10 from order assessing stockholders; services and time to date on the appeal and motion to dismiss same, and on the trial of two causes in the Essex County Circuit Court, including all services, time and counsel in the different matters from March 24, 1905, \$346.27''

Two bills of the Holbrook Printing House; one under date of January 31, 1907, printing case, Ketcham, sixty pages and cover, \$54, and bill of March 7, 1907, 2 briefs, Ketcham case, \$10.80.

Bill of February 20, 1908, to George W. Ketcham—written in lead pencil "Admr."—a bill of Riker & Riker; the items are:

20 1904
 Nov. 9 To Trial of McCarter,
 Receiver, *v.* Ketcham, \$100.00
 10 " Trial of McCarter, Re-
 ceiver *v.* Ketcham, 100.00
 1905
 Feb. 10 " Examination of Argu-
 ment in Error, 10.00
 May 3 " Paid Grover Bros. for
 30 printing brief in above
 case, 10.00

40 I desire to call attention to printed book No. 2, which is in the Essex County Circuit Court, Thomas N. McCarter, Jr., Receiver, *v.* William S. Ketcham, Jr., and under date of November 9, 1904, shows the commencement of the trial in that cause, with Mr. Riker and Mr. Bradner as counsel for the defendant, which corresponds with the date in this bill, and that case went on

George W. Ketcham, cross.

from that day to the next day; it took two days to try it, and that bill is for those services in the William Ketcham, Jr., case. That was on page 15 of Book 2, that that reference may be found.

Another bill of Riker & Riker to George W. Ketcham, "Admr.," written in lead pencil, June 4, 1909: 10

1908, to balance \$110.

Q All of those bills that I have just read were paid by you from the funds of the estate, were they not? A Yes, if this is a true transcript of my books—I suppose it is—I paid those bills; I don't remember the account.

Mr. Congleton. There are several other bills here, but they do not specifically mention William S. Ketcham, Jr., suit by name; they are simply the case of Cumberland Lumber Company, *et als. v.* Clinton Hill Lumber & Manufacturing Company, on motion to dismiss appeal and tax bill of costs. The records show that we were in a lot of those proceedings, but I do not know that it is necessary to put them all in. 20

Court. The records will be in.

Mr. Congleton. I want to put the printed books in. 30

Q Senator Ketcham, in demanding from time to time these further writings from your brother, you knew at those various times that he was still insisting that he had a valid claim against your father's estate, did you not? A I had various letters at various times.

Q When you demanded these various papers that you have set up in your answer, at those times you knew that your brother was insisting 40

George W. Ketcham, cross.

that he had a valid claim against your father's estate? A What do you mean by "these papers;" just specify, please.

10 Q The letter, the further paper which you got from your brother on July 22, 1897, and the paper marked Exhibit C. 7, under date of December 22, 1900. A That earlier paper was within a day of my first knowledge of the case, so I couldn't know from that that he was insisting; there wasn't time; he only made the claim on the day before, and I couldn't know from that that he was insisting on it, because there hadn't been much space in between the letters. I knew it at the time of the paper of December 20, 1900; I knew it then, of course, and that is the reason I demanded a paper from him to get rid of that note.

20 Q The Cumberland Lumber claim did not get to a final conclusion, did it, you settled that claim? A I settled that personally.

Q Out of your own personal moneys? A Yes.

Q Not out of the estate funds? A Not out of the estate money at all.

30 Q You didn't pray allowance for that in the Orphans' Court matter? A No, sir. Do you want me to explain it?

Court. No, your counsel will ask you about that.

Q That claim was against your brother also, wasn't it? A I cannot say; that was in the early stages of the litigation.

Q That settlement was after your brother had filed this claim with you, wasn't it? A I don't understand you.

40 Q When you paid the Cumberland Lumber Company claim, your brother had filed with you

George W. Ketcham, re-direct.

this claim that we have been talking about? A Yes, I guess that is so.

Q And the Cumberland Lumber Company claim was against your brother also, was it not?

A No, I don't think it was.

Q And it grew out of this Clinton Hill Lumber & Manufacturing Company matter? A Yes, there were two cases, one of the Strieby, Sprague & Co. and one of the Cumberland Lumber Company, and I wanted to get rid of both of them. 10

Court. The claim on the face of it? These parties, the Cumberland Lumber Company and Strieby, Sprague & Co., were not formal parties to the proceedings at all.

Mr. Congleton. Originally they were.

Court. That is when Strieby, Sprague & Co. got the judgment and the Cumberland Lumber Company filed the bill. The claim was made by the receiver on behalf of creditors who had proved, two of them being the Cumberland Lumber Company and Strieby, Sprague & Co. 20

Mr. Congleton. And while that was the situation, Senator Ketcham settled.

Court. The claim was withdrawn. I recall that he appeared before me; it was said that no calculation need be made for one amount, that that claim was withdrawn, but they were formal parties in any other way, as I recall, but the receiver in order to establish the amount of his assessment, put in proof of both of their claims. 30

Re-direct by Mr. Bradner.

Q On the night of July 20, 1897, when you received this proof of claim, Exhibit C. 1, what did you do with it? 40

George W. Ketcham, re-direct.

Mr. Congleton. The witness has already testified about that.

10 A I don't know what I did with it at the time. My house was in the hands of a nurse, my wife was an invalid and my papers were upset again and again, and this paper was gone, I couldn't find it, and as my brother had suggested that he would make another form of the statement, I assumed that he had taken it away for that purpose. The letter was found in 1911, after the Heisley trial. My wife in looking through a lot of papers found this and one other paper, and I didn't know that I had it at that time, and I was lamenting that I didn't have it at the trial, but I found it then, and of course it must have been in my possession, but I supposed it had been taken away 20 by him, and therefore I wrote a letter once that he took it back, which was in error—that was an error.

Q (*By the Court.*) Your wife found it at your house? A Yes, sir, in 1911.

30 Q Then you didn't have it at the trial of your brother's suit before Judge Heisley? A I did not, and I supposed that he had it; at least, I didn't know I had it.

Mr. Congleton. You so testified in Judge Heisley's suit, didn't you?

40 Q I show you Exhibit D. 3, which you produced here today, and ask you where you got that paper, being the statement of the items, dated December 20, 1900? A It came into my possession after the Heisley trial; I never had it in my possession before that, but in gathering up the papers—the papers were scattered around the desk, and I don't know who did it, whether

George W. Ketcham, re-direct.

I did it or someone else, but when I got looking afterwards, I found that this paper was mixed up among a whole lot of my own exhibits, but that is the only time I ever had it; it was shown to me on cross examination at the Heisley trial, and I said that I hadn't seen it, and supposed that was true, but my brother or Judge Skinner spoke of certain interlineations which seemed to be in my handwriting, and my brother may have shown it to me at some time; when, I cannot remember, if he did, but it was never left with me and I never had it in my possession until after the Heisley trial. 10

Q You started on cross examination to make some explanation of your testimony relating to the payment of the expenses of the litigation?
A Yes, sir, I wanted to explain further, and the Judge said "You can explain later." 20

Q You can explain now. A Judge Skinner sent you a letter, Mr. Bradner, calling upon me to produce certain papers, and it was a general call for a whole lot of papers, I really couldn't tell much what he wanted, but it was so general, and you included a letter in his letter and sent it to me, stating that the time was so short and the call was so general that it wouldn't be possible for me to produce those papers, and that came the night before the trial. I did read the paper over and gathered up some papers and brought them over, supposing those might be the ones to be called for. They were not called for, and the question was then put to me, "Did you pay any of your brother's bills?" Well, I hadn't seen a bill for—see, 1910, and way back in 1897, 1898 and 1899, I hadn't seen the bills for a dozen years, they were filed away among my papers; I had paid 40

George W. Ketcham, re-direct.

them as you sent them to me, in the natural course, without any agreement with anybody, and of course I couldn't remember the items, and I understood Judge Skinner to mean this: "Did you pay any of your brother's bills—

10 *Mr. Congleton.* I object; this is not re-direct.

Court. It is explaining the apparent contradiction.

A (Continuing.) I understood Judge Skinner to mean "Did you pay any of your brother's bills," by which I understood, "Was any bill made out to your brother for services rendered him, which he sent you and you paid," and I said "No, I paid only the bills that came to me as the administrator of the estate, either 20 addressed to me as administrator of the estate, or to the Estate of William S. Ketcham, and these are the bills and they all bear that heading."

Q What agreement, if any, did you have with your father in his lifetime, with relation to the payment of the expenses of any of the litigation, so far as you were concerned? A I never had a word with him on the subject.

30 *Mr. Congleton.* I have no objection.

A (Continuing.) In fact, I didn't know practically anything about the litigation until after his death.

Q You were asked how much money you retained when you made the distribution and you said about \$12,000? A As near as I can remember.

40 Q Do you wish to make any explanation about that? A I couldn't tell exactly until I saw the figures. My father's stock—his hold-

George W. Ketcham, re-direct.

ings were in bank stock, and there was a certain appreciation of bank stock from the time I received the papers until within a year or two, perhaps, and my figures were based on the values of the stock at that time. There was some appreciation afterwards and I think that \$12,000 loomed up a little, to about \$14,000 were the figures as they were in my possession, and as rendered in my account, were about \$12,000. I might correct that, if I examined my books, but that is about it. 10

Q I understood you to say on your cross examination that you had paid the Cumberland Lumber Company claim yourself? A Yes.

Q Was that by agreement with anybody? A No; shall I explain that?

Q Yes, you may. A Mr. John O. H. Pitney had that case in suit and I had a talk with him, and the claim was something like \$750, perhaps; I am not a litigious person; I have tried for years to get rid of this litigation; I have never had a case in court of my own personally, and I tried to get rid of that; I tried to get rid of the other, too, and I found it would be cheaper if I could buy the thing up, so I talked with Mr. Pitney about it, and the case was then up on appeal and he was very candid with me; he said, "I think you stand— 20 30

Mr. Congleton. Objected to.

Court. You settled it with Mr. Pitney.

Q Did your brother have anything to do with that settlement? A No. I thought you wanted me to tell why I bought it personally.

Q You bought it personally? A Yes.

Q I wanted you to explain that. A I am ready to explain it. I had talked to Mr. Pitney about it. 40

George W. Ketcham, re-direct.

Mr. German. You cannot tell what he said.

A (Continuing.) I said to Mr. Pitney, "If that claim is all—

Mr. Congleton. I object.

Q After you talked to Mr. Pitney, what did
10 you do? A I bought the claim.

Q Did you have any talk with your brother Will about it? A I don't remember that I did; I cannot deny it, but I don't remember that I did.

Q Why did you retain any of the estate when you made the distribution? A Because there was a suit against the estate for probably a large sum, I couldn't tell what it might be, and then, as I said this morning, we had a farm up in
20 Orange County, New York, of considerable value, that required a good deal of money to carry it; it was a dairy farm, and frequently we had to buy large invoices of cattle, and it was necessary that we should retain some money to carry that and to pay taxes, and I retained enough to cover what I thought might be the judgment against it, if it should be rendered, and also a little margin to work on, and that is all I retained.

Q How were you doing that, as administrator, taking charge of this farm?
30

Court. They were all of age, they were doing it as heirs.

Q Did you make any agreement with your brother in relation to the amount of money that you should retain upon the distribution? A Nothing at all. I can answer that further, if you want me to.

Mrs. Louisa S. Holzhauser, direct.

Re-cross by Mr. Congleton.

Q This paper that you say you found among your papers after the trial before Judge Heisley, when did you find that statement, D. 3, among your papers? A Not until a long time afterwards.

10

Q You knew it wasn't yours when you found it? A Yes.

Q But you kept it and didn't return it? A Some of my papers were gone; I supposed they were mixed up.

Q You didn't return it to your brother? A No.

Q You knew you had the paper of July 22 in your possession all of this time, didn't you? A There were two or three papers that were mis-

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laid in a large envelope and I cannot tell you at this minute just what those papers were. I think that July 22nd was folded away with the others.

Q They were in your house somewhere? A Yes, sir.

Q Under your control? A Yes, everything in my house. I suppose the coal bin is under my control.

MRS. LOUISA S. HOLZHAUER, sworn for de- 30
fendant.

Direct examination by Mr. German.

Q You are one of the five children of William S. Ketcham, Sr., deceased? A I am.

Q And a sister of William S. Ketcham? A I am a sister.

Q Did you ever hear your brother Will state that he had an agreement with your brother George, whereby George was to pay any judg- 40

Frank E. Bradner, direct.

ment that might be recovered against Will in the Holloway Company matter? A No.

Q Or Cumberland Lumber Company suit? A No.

Q Or pay any legal expenses in connection therewith? A No.

10

NO CROSS EXAMINATION.

FRANK E. BRADNER, sworn for defendant.

Direct examination by Mr. German.

Q Mr. Bradner, before going into the question of the bills, I call your attention to the second paragraph, on page 7 of the answer of George W. Ketcham in this suit, wherein it states that certain bills were paid by the defendant in accordance with an agreement, and ask you whether you have any knowledge as to how that was inserted in the answer?

20

Mr. Congleton. I object.

Court. I will sustain that objection.

A I know something about what is alleged there as an agreement.

Q You have been connected with the various forms of litigation between the Cumberland Lumber Company and Holloway and Ketcham for a number of years? A Yes, sir.

30

Q You were connected with it from the start? A I didn't try the first case, that was tried by Mr. Macdonald, the one before Vice-Chancellor Van Fleet. After the final decree was made in the suit of Strieby, Sprague and others against Clinton Hill Lumber Company to set aside the bill of sale, I took the appeal and I was employed by Mr. William S. Ketcham, Sr.

40

Frank E. Bradner, direct.

Q Explain, if you will, your bills that have been offered in evidence against the estate of William S. Ketcham, Sr., or George W. Ketcham, administrator?

Mr. Congleton. I object to the form of the question.

10

Q So far as the charges are concerned? A The original appeal was taken in behalf of the Clinton Hill Lumber & Manufacturing Company. Mr. William S. Ketcham, Jr., whom I had known for a number of years, came to me first and then brought his father in and I was directed by Mr. Ketcham, Sr., to charge all the bills to him.

Mr. Congleton. Unless the complainant was present at these various interviews, it does not seem to me that that is good testimony.

20

Court. I think it may be used.

Witness. I think he was.

Mr. Congleton. I am not speaking of bills that were incurred prior to the death of the father; the only bills I have introduced in evidence are after the death of the father.

Court. I will take that subject to your objection.

30

Witness. I think Mr. Will Ketcham was present when the arrangement was made and he undoubtedly came in with the checks or notes afterwards to pay the bills; they were generally paid by note of William Ketcham, Sr., and the notes were brought to me by Mr. William Ketcham. After the appeal of the Clinton Hill Lumber Company was determined, a bill was filed by the same complainant, changing the title of the suit from

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Frank E. Bradner, direct.

10 Strieby, Sprague & Co. to Cumberland Lumber Company, *et als.*, against Clinton Hill Lumber Company, for the appointment of a receiver of the Clinton Hill Lumber Company, and I went right on, of my own volition, and carried on that litigation, and sent my bills to Mr. William S. Ketcham, Sr., and they were paid.

20 When the petition was filed against the stockholders, I filed a joint answer for the three stockholders who were of the family of Wm. S. Ketcham, Sr. Mr. Campfield filed an answer through Mr. Wilcox, as his solicitor, and I sent my bills to William S. Ketcham, Sr., and they were paid. All through the proceedings, joined those three parties—those three stockholders always—in all answers and in all appeals; possibly in one petition I did not, the petition to open the decree—I am not quite sure about that, but I think I did. I sent all the bills to William S. Ketcham, Sr., in his lifetime, and after his death I sent the bills to the estate. I was not directed after his death to make the bills to anybody; I simply sent them that way and they were paid.

30 Q The answer filed in this case states that they were made under an agreement, with the knowledge of the complainant and other persons interested in the estate; what have you to say about that, if anything?

Mr. Congleton. I object.

Court. It is on the question of what he knows about the agreement with the complainant.

40

Frank E. Bradner, direct.

A I don't know of any agreement made with the complainant and defendant.

Q The bills were sent to the administrator for the reason you have stated? A Yes, sir. I might say this, subject to being stricken out, when the answer was prepared, Mr. German came to me, and he may have gotten the impression that there was an original agreement with Mr. Ketcham, Sr. I don't know about that. There was no agreement, anything more than Mr. Ketcham, Sr., told me to make the charges to him. 10

Q Did you see William S. Ketcham, Jr., frequently after July 20, 1897, for the few following years? A No, I don't think I did.

Q Did you see him at all? A I saw him.

Q On one or more occasions? A He was not controlling the litigation so much as his brother, the administrator. 20

Q Did you see him at different times? A Yes.

Q Did he at any time on any of those occasions state to you that he had an agreement with his brother George, whereby George was to pay any judgment that might be recovered against him personally in the Holloway matter? A I don't recall his saying so, prior to the time that Judge Skinner got the claim; I never heard of the note until then. When Will put his claim in the hands of Judge Skinner, I heard of the note for the first time. 30

Q Did he on any of those occasions tell you that his brother George had promised to pay any judgment that might be recovered against him personally, or that his brother George had agreed to pay all the expenses connected with the litigation? 40

Frank E. Bradner, cross.

Mr. Congleton. He said he didn't know about the claim.

A I didn't know anything about it before it got into Judge Skinner's hands; we may have had a great many conversations; I have known Will for years; we went to school together.

10

Cross examination by Mr. Congleton.

Q You represented the defendant in the cases in the law court of Thomas N. McCarter, receiver, against William S. Ketcham, Jr., did you not? A Yes.

Q And for all of your services in those various cases, in the original trial and on appeal and so forth, did you ever render William S. Ketcham, Jr., any bill? A I never sent him any bill, not until after he wanted to get the money out of court that he paid in.

20

Q That wasn't for services in the trial of that case? A No.

Q That was simply for the service of obtaining back from the Clerk of Chancery after he had paid the final judgment, the rebate that was due him? A Yes.

Q And for that, under date of July 28, 1906, you charged him \$28.38? A That is the only bill I ever rendered him. At that time he had put his claim in the hands of Judge Skinner, I think, and the parties had split, I was then told.

30

Q And you never had any other charge on your books against William S. Ketcham, did you? A I never made any specific charge against anybody except William S. Ketcham, Sr., and after his death, the Estate of William S. Ketcham.

40

Frank E. Bradner, re-direct.

Q And these bills that were read here this morning were as you made them out items of the different litigations and they went to the administrator in that form? A Yes.

Q In the trial of the suit in the first case of Thomas N. McCarter, Jr., receiver, against William S. Ketcham, at law, you had conferences with the defendant in this case about the conducting of that litigation, did you not? A I do not think we had many conferences; we had had some many years before. 10

Q This was in 1904? A There had been a trial before that in the Circuit Court on the first assessment; we had all the evidence out then.

Q But you say that the administrator after the death of his father was in control of the litigation? A He took more interest in it than anybody else. 20

Q As a matter of fact, in this very case that I have referred to, he was a witness before the court and jury, the administrator?

Court. There were other witnesses.

Mr. Congleton. I want to show that the administrator knew that the trial was going on.

A That was the first suit brought by the receiver and brought to trial. 30

Q And George W. Ketcham was a witness in that case? A Yes.

Q And in that case Chandler W. Riker was associated with you as counsel? A Yes.

Q Did you retain him? A No.

Q Do you know who did? A No.

Re-direct by Mr. German.

Q I notice here is a check by the administrator, made under date of April 15, 1897, for \$50, 40

Frank E. Bradner, re-cross.

for services in connection with the Clinton Hill Lumber Company suit? A That is all my writing, but I don't remember that; that seems to be a claim that I presented to the administrator; it is a claim proved against the estate, something due me from William S. Ketcham, Sr.; it is for
 10 services from March 28, 1896, to October 1, 1896, in the suit of Thomas N. McCarter, receiver, Clinton Hill Lumber Company, to recover assessment on stock.

Q That was paid by check of the administrator dated April 15, 1897, for \$50? A Yes, sir. That was the first trial in the Circuit Court, the suit brought on the first order for assessment of stockholders; there was only one case tried then, that was the one against William S.
 20 Ketcham, Sr.

Q (*By the Court.*) The judgments in the other case were by agreement— A The other suits were discontinued, and this judgment was opened and the suit discontinued.

Re-cross by Mr. Congleton.

Q Didn't William S. Ketcham, Jr., tell you after the death of his father, that the administrator was to pay all of the expenses of this litigation, and for you to send your bills to him?
 30 A I don't recall that.

Q You wouldn't say that he didn't say that to you? A No, I wouldn't say that, for I have no recollection of it whatever. My own impression is that I simply sent the bills, because I thought that was the right thing to do, because William S. Ketcham, Sr., had started the litigation, and I assumed that it was intended that he would
 40 keep it up, or his estate, if they wanted to.

Frank E. Bradner, re-cross.

Q There were a good many suits started after Mr. William S. Ketcham, Sr.'s death? A There were just as many started before.

Q And several started after his death? A Yes, against the same parties.

Q But there were suits against William S. Ketcham, Jr., started after the father's death? 10

A There was a petition to assess the stockholders in June, 1895, and these three stockholders, William, Sr., William, Jr., and George, joined in an answer and verified by William S. Ketcham, Jr., from whom I got all my information. I never got any from William S. Ketcham, Sr.; he was rather a feeble old man and couldn't tell me a connected story. I got all my facts from William, Jr. That was a joint answer.

Q William S. Ketcham, Sr., testified before Vice-Chancellor Van Fleet in the first suit? A I wasn't there; I don't know. I think if you will read his testimony, you will find it wasn't of much value. Then there was an order made assessing stockholders in November, 1895, and then there were five suits brought on that order, one against William S. Ketcham, Sr., another against William, Jr., another against George, another against Campfield, and another against Holloway. 20 30

Q And that is the litigation that you say the administrator of the estate and the defendant in this suit took the laboring oar, or was in control of, that is the litigation you mean he was in control of? A He was interested in it, yes.

Q And you got your instructions practically from him? A Yes, and got my facts as far as necessary, as far as we wanted to get them, from Will Ketcham; he was the only one who knew 40

Frank E. Bradner, re-cross.

any of the facts. But while those suits were pending, my bills were paid by William S. Ketcham, Sr., for the three parties; they were all joined as one; there was no distinction made whatever, except that I specified in my bills each case so far as the costs were concerned, but I

10 lumped the services as a rule.

Q After you took this matter up with George W. Ketcham, did you have any conversation with him about the point that your bills included services in all of the litigation? A I don't think Mr. Ketcham ever questioned my bills; I used to send them to him and get a check by return mail always. It always seemed to me that he never took the trouble to look at them.

Q He never asked you anything about charging for services against him as administrator in the suits against William S. Ketcham, Jr., did he? A That question never came up until Will went to Judge Skinner and then we discussed it.

20

Q But up to that time he never raised any point about you rendering him bills as administrator for services rendered in the suits against William S. Ketcham, Jr.? A No, never has been a word said about it, that I recall.

Mr. Bradner. We offer in evidence the

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record in the case of Jonathan F. Strieby, *et al.*, against Clinton Hill Lumber and Manufacturing Company, in the Court of Chancery, and the entire record in the case of Cumberland Lumber Company, *et al.*, against Clinton Hill Lumber and Manufacturing Company.

Court. You will have to specify what you want to use on each side.

Mr. Bradner. What I have in mind in the

40

first case is the final decree, in the Strieby

Frank E. Bradner, re-cross.

case, and the order in that case, making the claims of the complainants judgments against the Clinton Hill Lumber Co. The petition to assess stockholders, in the second case, and the order of November, 1895, assessing the stockholders.

Court. I am not requiring you to specify from memory now. 10

Mr. Bradner. The petition and answer, order assessing stockholders in 1895, and the subsequent petition and answer and order assessing stockholders.

Court. The first order was set aside.

Mr. Bradner. After the trial in the first suit in the Circuit Court, an appeal was taken from that order, and there was a second petition filed in 1900 and an answer, and a hearing on that, but the decree was not made until June, 1903. There was a judgment in the first suit, and then an appeal was taken from the order and proceedings were stayed on that judgment; the judgment was in favor of the receiver and an appeal taken from the order, and the order assessing was set aside in the Court of Appeals. 20

Court. Then the receiver applied here and got a second order for assessment, and after that was made, was there an appeal from that order? 30

Mr. Bradner. The appeal was taken, but too late, and it was dismissed.

Court. Then five new suits were brought?

Mr. Bradner. I think they only brought three new suits.

William S. Ketcham, direct.

Court. And this one against William S. Ketcham was brought first, and the suit against George individually and one against the estate, and verdict and judgment.

Mr. Bradner. Will's case was tried first.

10 *Mr. Congleton.* I have no objection to any of the records going in evidence, but I would suggest that Mr. Bradner make up a statement of what it is he wants to go in, with dates, so we can agree upon that, and we will simply submit it one to the other and agree upon what these records show.

Mr. Bradner. That is satisfactory.

Court. The letters on both sides which have been proved, are in.

20 DEFENDANT RESTS.

WILLIAM S. KETCHAM, recalled in rebuttal.

Direct examination by Mr. Congleton.

Q Mr. Ketcham, after the death of your father did you have any conversation with Mr. Bradner as to how the expenses of any subsequent litigation were to be paid? A I did on several occasions.

30 Q What was that conversation? A I told Mr. Bradner that I had a claim of a note against the estate and I expected that in the eventuality of my being called on to pay out any moneys the estate would have to pay it, and that I had arranged with my brother that he should pay all the running expenses, and for him to send the bills to my brother, and he told me that he had done that, after that.

William S. Ketcham, cross—re-direct—re-cross.

Cross examination by Mr. German.

Q Give the first occasion on which you say you told Mr. Bradner. A That is impossible; there were—

Q You cannot give the day nor date? A No, sir.

10

Q Nor the year? A I was there a number of times.

Q Or the year? A No, sir.

Q Where was it? A In his office in Clinton street; I had charge of all the litigation; my father didn't have any charge of it.

Q You recall the first time you mentioned this to Mr. Bradner was in his office on Clinton street? A I was there a good many times.

Q Was the first time you called in reference to this matter of which you have just spoken, in Mr. Bradner's office on Clinton street, as you have stated? A As far as I can recall now.

20

Re-direct by Mr. Congleton.

Mr. Congleton. I want to ask one question I think I overlooked on direct.

Q Did you retain Chandler W. Riker as counsel in the suit against you in the Circuit Court?

A I did not.

30

Q Did you ever pay him anything for his services? A Not a penny or see any bill until it was brought into the surrogate's hearing.

Re-cross by Mr. German.

Q How long after July 20, 1897, was this first call of yours on Mr. Bradner? A I don't know; this litigation was going on for fifteen years, and I suppose I was a hundred times in Mr. Bradner's office.

40

Frank E. Bradner, direct.

Q Was it within six months after that date?

A I cannot say as to that date.

Q Was it within a year? A The records will show, even after my brother became administrator, I was there continuously.

10 Q (*By the Court.*) July 20, 1897, when the claim was presented—keep that in your mind—was it within a year? A I cannot tell as to that.

Mr. Congleton. I have one more letter of Mr. Bradner's to Judge Skinner, which I overlooked this morning, and which I want to put in evidence, dated April 6, 1908. I offer this on the question of laches.

(Marked Exhibit C. 16.)

20

COMPLAINANT RESTS.

FRANK E. BRADNER, recalled in rebuttal for defendant.

Direct examination by Mr. German.

Q You heard Mr. Ketcham's testimony just preceding you; what have you to say about his statement that he came on various occasions?

30

Court. He has already said that.

A Mr. Ketcham stated now when he was on the stand, that he called on me in my office in Clinton street, and that was the first time he told me about his alleged arrangement with his brother; I didn't move into that office until the first of May, 1900.

Q (*By Mr. Congleton.*) That was before the time of distribution? A I don't know anything about the distribution.

40

Mrs. Margaretta C. Campfield, direct.

Mr. Congleton. I have a witness in court to prove the payment of the Campfield notes.

Court. Will you insist that the notes said to have been paid to Mrs. Campfield were not paid in fact by Mr. William Ketcham?

Mr. Bradner. We are not able to offer any evidence on that or to dispute it. 10

Court. He offers to prove it, and unless it is admitted, he would have the right to prove it.

Mr. Bradner. I think they had better prove it.

MRS. MARGARETTA C. CAMPFIELD, sworn for complainant.

Direct examination by Mr. Congleton. 20

Q Did you know William S. Ketcham, Sr., in his lifetime? A I did.

Q At the time of his death did you have any paper of his? A I did.

Q Not at the time of his death, but just prior to the time of his death, you had had his paper? A Yes.

Q Have you the records with you here showing what paper of his you held? A That is the note book and these are the check books; they are marked. These books have been in the courts before the last fifteen years. 30

Mr. Congleton. The defendant in this cause served the complainant with interrogatories, and the complainant answered those interrogatories, and among other questions was how he had disposed of the money which he had received from the sale of this lumber, and in the answer to that in- 40

Mrs. Margaretta C. Campfield, direct.

terrogatory I have a statement of the amounts paid Mrs. Campfield, with the dates, and this statement is made up from the data which Mrs. Campfield gave my client. Unless there is some objection, she may use this statement.

10 *Court.* A witness has already done so, and he swore the payments were made. Were all the notes paid?

Witness. They were.

Q Who paid them to you? A William Ketcham, Jr.

Q You have a record on your books which will show the time of every payment he made? A Yes.

20 Q And the check stub books show the dates on which you received the checks and deposited them to your account? A Yes.

Q Did you hand those books to Mr. William Ketcham for the purpose of his making up a statement as to the time of payment? A Yes.

30 *Court.* I will take William Ketcham's oath that the statement he made in his answer was made up from these books. Is there any objection to Mr. Congleton offering that question put to the complainant in the interrogatories and the answer thereto as direct evidence of his in reference to the time of payment?

Mr. Bradner. Why not have them all go in?

40 *Mr. Congleton.* If I have the right, I desire to offer in evidence as part of this case the interrogatories served by the defendant upon the complainant, and my answers.

Mrs. Margaretta C. Campfield, direct.

Court. I don't know whether you have that right or not. You do not object to this particular one?

Mr. Bradner. No.

Mr. Congleton. I offer interrogatories number 14 and 19 and the answers thereto.

Court. They are offered on behalf of the complainant and not objected to by the defendant. Now, if you offer the others, I will hear you on the objection. 10

On that statement and the evidence of Mrs. Campfield to the delivery of the books to the complainant for the purpose of making up the statement, I direct that for the present no further examination of Mrs. Campfield is necessary on the question of the payment, the times and amounts of payment. 20

Mr. Bradner. We do not object to that.

Mr. Congleton. I desire to have introduced in evidence the interrogatories which the defendant in this case served upon the complainant, and the answers of the complainant made thereto under oath.

Court. You do not object to them?

Mr. Bradner. We are willing that he shall put them in evidence. 30

(Interrogatories and answers thereto marked Exhibit C. 17.)

Adjourned to October 27, 1913, at 11 o'clock A. M.

*Exhibit D. 2.***EXHIBITS.**

(The Exhibits are arranged in chronological order as requested by Vice-Chancellor Emery.)

EXHIBIT D. 2.

10

July 19, '97.

Dear Bro.

I have been out of town for a couple of days or I should have seen you before you went up to the farm.

I enclose five dollars (5.00) which I got for use of shop for 1 month.

I have not made any definite arrangements about that lumber yet but will try & do so soon as I can.

20

I am going down town to day & will stop in to see Bradner and see what is new.

You remember last fall I stated to all our family when we met together, that in case of any claim upon me by reason of the Holloway matter that I had papers to protect myself, and should look to the estate in case I was sued—as I did not profit by the transaction, but was only trying to help out father.

30

I have checks &c. which I paid out on his account, some with his endorsement and others that I paid direct to Mrs. Campfield. I also have a note of father's covering these amounts and thought I had better tell you, so you would be aware of my position.

Your position as stockholder was same as mine, only technical and we should not suffer when we did not profit by it.

I will explain further when I see you again.

Yours truly

40

Will K.

Exhibits C. 1 and C. 2.

EXHIBIT C. 1.

Newark, N. J., July 20, 1897.

To Mr. George W. Ketcham

Administrator of Estate of Wm. S. Ketcham
(\$6666 84/100)

I claim from the estate of said Wm. S. Ketcham the sum of Sixty six hundred & sixty six dollars & eighty four cents being a promissory note signed by Wm. S. Ketcham & dated Aug. 6, 1895, being on demand with interest from date of note. 10

State of New Jersey

County of Essex ss.

Wm. S. Ketcham Jr. being duly sworn according to law says that the above claim is truly owing him from the above estate.

Wm. S. Ketcham Jr. 20

Sworn & Subscribed

before me on this 20 day
of July 1897

Julius Rupprecht, M. C. C. of N. J.

EXHIBIT C. 2.

New York, July 21, 1897.

My dear Brother,

I did not read your paper until this morning and, after consideration, I feel I have no right to receive it in its present form. With your explanation of last evening, viz. that it is a claim only in the contingency of *your being mulcted* in the Holloway suit, it might stand but you recite no facts and your affidavit says the amount of 6666 84/100 "is truly owing" you. Now this as you and we all know, is not the case. Nothing is owing you unless at some fu- 30 40

Exhibit C. 2.

ture time you should be called upon to pay the Holloway claim. As your action in that matter was not in any personal interest it would appear that no such contingency could arise.

As Administrator I must do my duty faithfully. I am under bonds to do so and you are
 10 one of the bondsmen. I can not receive, without explanation, a paper which states positively that you hold a claim of 6666 84/100, for the legal time (9 mos) has passed and besides at the present time there is no such claim. Why did you not say plainly that the claim would be pressed in case you were forced to pay an illegal demand in the Holloway case *or any portion of same?*

I know your interest to protect yourself and,
 20 as I said, I believe you are entirely safe by a careful presentation of the facts in the present suit against the estate but if you are anxious to put yourself on record, let it be in another form.

Suppose you make another paper about as follows:

Wm. S. Ketcham

To the Administrator

30 Estate Wm. S. Ketcham, dec'd.

I claim from above estate, in a certain contingency, the sum of \$6666 84/100, being a promissory note of my father of date Aug. 6-1895. The said note was given to protect me against any demand that might be made against me personally by the creditors of one Holloway. Should no claim be pressed against me, then said note and claim to be null & void.

The above form is only a suggestion. I do
 40 not wish to be held responsible for its validity

Exhibit C. 3.

as I am not a lawyer but it is consonant with facts and the paper given me last evening is not according to the facts.

Very truly,
Your Bro.

Geo. W. Ketcham.

10

EXHIBIT C. 3.

July 22, '97.

Dear Bro.

Your letters rec'd & duly considered.

As you are aware the Holloway matter has been so perplexing that it has all along been difficult to decide what to do. If I should be compelled to pay for unpaid subscription, and had given no notice to the estate of note &c. then it would be too late.

20

But by giving notice, now I cover all possibilities.

I have only wanted to do what was right in the matter. If it would be in any better shape for the estate, I would be willing to withdraw the note if the estate would in some way guarantee me from loss. So many contingencies often arise especially where all the heirs are not fully informed on matters that I feel it best to do what I have.

30

If the enclosed paper will do to put with the note, all right, or if you suggest anything else drop me a line.

Yours truly,
Will.

40

Exhibits C. 4 and C. 5.

EXHIBIT C. 4.

Newark, N. J.

July 22, 1897.

To Mr. Geo. W. Ketcham

Admr Estate of Wm. S. Ketcham dec'd

Whereas,

10 A promissory note made by Wm. S. Ketcham deceased, and dated Aug. 6 1895 for (\$6666.84) sixty six hundred and sixty six dollars and eighty four cents and payable on demand to Wm. S. Ketcham, Jr., having been presented to the Admr. of said estate for payment, it is presented on the following conditions

20 1st No payment is demanded except in the contingency of any loss or payment being demanded of me by reason of my relations to the Clinton Hill Lumber & Mfg. Co.

2. No payment of said note to be demanded in case said estate shall otherwise guarantee *me* against any loss or payment by reason of connection with said Co.

Wm. S. Ketcham, Jr.

30

EXHIBIT C. 5.

New York, Dec. 10th, 1900.

My dear Brother:—

Your note received. I am very glad if you can make some good business arrangement whereby your time can be utilized to profit, and your life rendered happier and better. To seek alliance with some established house seems more desirable than the attempt to exploit some new matter which, at the best, means delay and,

40 possibly, some disappointments.

Exhibit C. 5.

I am most willing to assist. The particular day for division makes no matter to me, provided everything is right. The law provides, and common safety suggests, that in any settlement, all debts should first be cleared off. That has been done except as to the lawsuit: we have practically agreed, all of us, to divide and hold 10
enough in abeyance to cover this contingency, and something to provide for real estate tax and insurance without calling for an assessment each time. So far, so good. But you suggest a heavy complication in a proposed test of a note, which you explain was made to secure you against attack in the Holloway proceedings. I then, as Administrator, must face this problem: First, the present suit against the estate, and then a proposed suit for the same matter, to de- 20
velop what there may be in that note. Here are two suits pertaining to the same issue, which I personally must struggle with, and after the bulk of the estate has been disposed of. In case of my death my estate must carry the burden or the litigation. This I am unwilling to assume either for myself, much less for my wife after me. If we are to settle the estate, then surely it must be *settled in fact*, everything ex- 30
cept the present suit. Let us cover this point, and the sooner done the sooner I shall be satisfied.

Sincerely yours,

Brother George.

Come down any P. M. as before & let it be arranged.

Exhibit D. 3.

EXHIBIT D. 3.

Newark, N. J., Dec. 20, 1900.

This is to certify that I hold a promissory note dated August 6, 1895, for the sum of Sixty six hundred and sixty six dollars and eighty four cents (\$6666 84/100) signed by my father (Wm. S. Ketcham deceased) and payable to me with interest.

That notice of my holding said note was given to Mr. Geo. W. Ketcham administrator of my father's estate within the nine months time allowed by law for filing claims, and being duly sworn to before Mr. Julius Rupperecht, Notary Public of this city.

That said note represents moneys paid by me at various times on account of my father's indebtedness to various persons as follows:

10	Apr. 18 1893	on notes held by Mrs. Campfield	150.00
	May 4 1893	on notes held by Eastern L. Co.	3060.00
	Aug. 2 1893	on notes held by Mrs. C.	150.00
	" 7 "	to W. S. K.	550.00
	" 17 "	" "	100.00
	Sep. 14 "	" " for tax	200.00
	Oct. " "	" "	25.00
30	Sept. " "	S. J. McDonald	25.00
	Dec. 5 " "	Mrs. C.	526.07
	Apr. 9 1894	Deputy Col. Tax	103.07
	" 10 "	Mrs. C.	300.00
	Dec. 11 93	W. J. Knight	23.70
	Feb. 5 95	" Mrs C.	1000.00
	Apr. 10	" "	452.70
			<hr/>
			6665.54
		Filing papers	1.30
			<hr/>
			6666.84

Exhibit C. 6.

That said note was given to secure me against any expenditure that might be incurred by reason of any suit brought against me personally or as a stockholder in the Clinton Hill Lumber & Mfg. Co.

That being the custodian of funds and property turned over by one F. D. Holloway to secure Wm. S. Ketcham I paid out said funds & property for the benefit of Wm. S. Ketcham, together with other moneys of my own. 10

That it is hereby agreed by the undersigned, heirs of Wm. S. Ketcham, deceased, that shares of stock of the Merchants Nat. Bank of this city now held in trust by the administrator Geo. W. Ketcham shall be held as security for this note until suits now pending in chancery against Wm. S. Ketcham, Wm. S. Ketcham, Jr., & Geo. W. Ketcham shall be settled, and that in case Wm. S. Ketcham Jr & Geo W. Ketcham are not called upon to pay any moneys by reason of said suit, then the said note shall become forever null & void, but if Wm. S. Ketcham Jr. & Geo. W. Ketcham or either of them are called upon to pay any moneys on account of said suits then the said administrator & Trustee Geo. W. Ketcham shall apply the proceeds of said bank stock to payment of said note or to pay amount of suit. 20 30

EXHIBIT C. 6.

Newark, N. J., Dec. 1900.

Dear Brother:

Not hearing from you as expected and arranged, I wrote you this P. M.

Send in that paper as agreed and I can adjust things in a day. Have seen the bank & they will split the certificate in an hour—you surely don't 40

Exhibit C. 7.

think we can settle with such a big loophole open.
Let me hear from you tomorrow & we can settle
Monday.

Very truly,
Bro. George.

9 P. M.

10

EXHIBIT C. 7.

Whereas Wm. S. Ketcham Jr. holds a promissory note dated Aug. 6, 1895 for the sum of Sixty six hundred and \$6666 84/100 sixty six dollars and eighty four cents signed by his father Wm. S. Ketcham, deceased, and payable to him with interest;

20 and Whereas said note is barring a settlement of the estate of Wm. S. Ketcham, it is hereby agreed by Wm. S. Ketcham Jr. that if the heirs of Wm. S. Ketcham, deceased, will release Wm. S. Ketcham Jr. from all claims whatsoever that may be adjudged against him by reason of suits now pending in chancery or that may be brought
30 against him by reason of his connection with the Clinton Hill Lumber and Manf'g Co., that he will destroy the said note so that no payment shall be demanded on same. (pencil) The said note having been given me as security against any loss in above suits.

Dated Newark, N. J., Dec. 22, 1900.

Wm. S. Ketcham Jr.

40

Witness present
Julius Rupprecht

Exhibit C. 8.

EXHIBIT C. 8.

(This was suggested by G. W. K., but as it did not truly explain all the facts, I gave him a different paper. 12/00)

The note that I hold against my father dated Aug. 6th, 1895, for \$6666 84/100 was given me as security against any legal attack that might hereafter be made against me personally as the custodian of funds which were the result of sales of lumber that was turned over to my father by F. D. Holloway & Co. in a bill of sale dated about Jan'y 23-1893 to secure my father for moneys loaned Holloway previous to above date. Said lumber was entrusted to me by my father to be sold on his act. & the above sum of \$6666.84 represents the proceeds of said sales which were applied to the payment of the notes which my father had loaned Holloway as the same became due. During the disposal of above lumber, my father was served with papers in several suits & fearing that my connection with the sale which was only that of agent and at the request of my father would bring a suit against me for the value of above lumber, my father agreed to secure me against any loss resulting to me personally & so gave me the said note. In case the present suit results favorably to my father's estate, the above note is of no value. I hold it only in case of some turn in the proceedings whereby I personally should be mulcted in a cause wherein I never had any pecuniary gain & wherein I should not be saddled with any loss.

10

20

30

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Exhibit D. 4.

EXHIBIT D. 4.

Newark, N. J. Apr. 30 1903.

Dear Bro.

10 Your letter received and contents noted, but your proposal is entirely one sided. It is very nice for me to agree to a final settlement that releases all others, but which does not release me from future contingencies. If we are to clean up matters, we must clean up every thing past—present & future that might arise to cause difficulty or differences,—that is the position I want to assume.

20 Your use of the word *appurtenances* does not include personal property—which the machinery formed a part. Therefore I would still hold my claim in that respect open. In regard to the suit, there can be no harm to any one in signing such a paper as I suggested—for in case I was called upon to pay any part of said suit, I would look to you for recompense, as per my legal notice to you within the 9 months time for filing claims. The fact that any one would refuse to put the matter in the shape I suggest is as much as notice to me that they would expect me to pay part of suit adjudged against us. That would mean another suit against estate to recover my loss.

30 I have taken counsel in this matter & must protect my interests if there is no effort to clear it up now.

You are well aware of the rightful position in regard to the suit—that father got all the property—of which fact I showed you written receipts &c.

40 To intimate in any way that I should be compelled by a technicality of law to pay any part of it (except as one of the estate) is a very ungrateful position to take.

Exhibit D. 8.

Let those who want to act right agree to clear this matter up & sign a release all around—those who do not want to—well let it go that way.

To leave anything unsettled is to leave an open sore, which should now be healed when an opportunity affords.

I am ready to settle up clean—farm & all.

10

I don't know what I could say to Charlie as I am not begging any settlement except upon an equitable basis. You know all the facts and can have this settled if you say the word.

Yours truly,
Bro. Will.

EXHIBIT D. 8.

New York May 1, 1903.

20

Dear Brother,

Yours of yesterday received. I object to some of its statements and do not wish to thresh out a lot of old straw.

If my paper was not satisfactory, let it pass. I was looking for something satisfactory. Am sorry if it did not meet the case.

Your proposition to ask a fast contract to "protect" you from "future contingencies" was the one-sided thing that awakened comment.

30

You were in sole charge of the lumber transaction both the sale and the earlier stages of suit and the sisters naturally look to you to assist them. Why should they sign a bond for possibly a large sum is the question as it affects them.

Now why not take a generous view of the facts? The heavy expenses of suit for 9 years have been paid by the estate; not a penny has been asked from your private purse. The Cumberland claim was eliminated by the estate. Last

40

Exhibit D. 8.

evening I was at the telephone talking with Charles on his suggestion, that we adopt a certain course & close out the litigation. Not an idea expressed by any one of the four that you be charged therewith. Then I open your letter suggesting as the only way of settlement that we enter into a written contract for your protection. I confess, Will, I felt your proposition was not only one-sided by decidedly improper.

Isn't it better to take some body on faith—close out a present situation on satisfactory basis and then work zealously for a defeat of Howell. If on a final issue you had any grievance it could stand on its merits but remember we are five and you can not take the position of being wronged when nobody has wronged you or has the least desire so to do.

As regards the "legal notice" please note we have discussed that in a previous letter. You will remember you withdrew the paper and, further, it was after the date and could not be presented to the Admr. on that account.

The closing remark of your letter I do not quite agree with. I would cooperate to any extent to help a settlement but I can not do the work of the others. I would be only too happy to make final disposition: if you have any proposition as to farm & wood lot, let me hear. I will do my part promptly.

Think over what I say and cooperate if willing; if not, we may not be able to control the future.

Most Truly,

Bro. George.

Exhibit D. 9.

EXHIBIT D. 9.

New York, May 5th, 1903.

My Dear Brother:—

I find you cling to the idea that your interests and those of your family are paramount. Have the rest of us then no rights? Can your matters take precedence and must the others step aside? Is it not the part of wisdom to act as though each had equal privileges? I could hope you would take such a view. 10

Now as to that paper.—I can not let your assertion go in the way you put it. You called on me with a certain paper—said the writing was given you to cooper you up against any possible loss by the lumber suit—That writing contained no reference whatever to any such contingency but was a straight document to pay you a specified sum. 20

I did not characterize that paper at the time but I did criticise its form—the purpose not being stated, and I said if you should be taken away, your estate could prosecute that claim and may be set up that such amount was owing you in some other transaction. You admitted the paper was only to be presented in case of a judgment against you personally. I was insistent, in view of the possible complication of its being pressed (by your heirs, not by yourself) as representing *some other transaction* that if the paper be served, it be so modified as to state its real intent. You took the paper away ostensibly for such correction and I have never seen it since. I must maintain this statement for it is the exact fact. 30

Later I asked the Surrogate as to the dates and period of the nine (9) months order and he advised me the paper could not be legally re- 40

Exhibit D. 9.

ceived, the time fixed in the statute having expired. He is my authority. I have since taken counsel and find as no action has been taken within six and one-half (6-1/2) years, the paper is a nullity, both as regards the Administrator and the heirs.

10 Outside of its presentation as legal or otherwise, I never could see the justice or propriety of the proceeding. It would be impossible to know the exact sum at that date, for it is not known yet and then why should you seek release in such form and leave me out? Did I not sign at your request to make an uneven number of Directors, and if you sought protection for yourself would it not be at least decent that I should be included?

20 No, Will, that proceeding was bad and only bad. I cannot condone it. At the same time I am not saying I want you mulcted. Nothing hitherto done can give you such an idea. So far as you acted for Father, well and good, but your subscription and mine, as I was reminded yesterday, were personal and you and I must not seek to cast our private responsibility on others, especially on those we ought to protect.

30 Your remarks as to the former partial settlement of estate are not correct. I did not ask you, in view "of your filed claim," but realizing that whatever the status of your paper you could sue me either as Administrator or heir and you not having returned the revised paper or expressed the fact *in writing* that your paper was for use only in the contingency of a judgment, I wanted that much put down in black and white before division. That you did all right but nothing in that transaction gave legality to your paper which in its form as well as in its presentation, was, as I am informed by counsel, null and void.

40

Exhibit D. 9.

I want you to understand my position as regards that paper and, speaking in your interest, I am sure *you are much safer without it.*

If you set up as a condition precedent to settlement, that we must in some legal form, cooperate you against a possible judgment, I fear, the end is far off.

10

But matters need not drag along. There are suggestions for a forcing of the issues in the lumber suit. I want to act wisely and for the good of all but a closing of the estate may throw the case into new forms and so precipitate the result. That seems now to be the problem.

We had a long consultation yesterday. There is only one point in my mind, the effect on Emery. If I felt safe on that we might go ahead.

20

If the Estate could thus be shielded the only consideration then would be how to help you.— And a method was suggested which pleased me and which I should prefer to detail to you in person and not at arm's length by letter. I think it would please you. And, by the way, isn't it peculiar that two of us should spend two hours in an earnest effort to devise ways of clearing the calendar and planning also for your relief and you, at the same time, writing formidable letters, setting forth the "legal aspects" of your position and demanding cast iron pledges for your benefit!

30

I could wish for you a change in your angle of vision but I almost despair. While earnestly opposed to your method in that note business, I would do everything to save you from the loss of a penny.

Do you care to give your idea about the settlement you suggested? If so, please do so; if

40

Exhibit D. 10.

not, kindly say so promptly so I for one may drop the subject.

If we take any steps as proposed it should be within a short time.

Most truly yours,
Brother George.

10

EXHIBIT D. 10.

Newark, June 24, 1903.

Dear Brother,

Yours 22nd to hand. It is entirely acceptable to me and I am confident will be to the others. Charles & Louise were up this evening. I read it to him & he expressed satisfaction—I told him I should endeavor to settle the suit & any offer made would be with the proviso of cleaning up everything—Howell has been notified we will appeal unless he takes \$1500 to wipe off the entire transaction.

20

My idea in accepting check from sale of homestead is to give receipt in full, each to the other.

You speak of amt. due you in distribution in which you did not participate. I know of only one case in 1898 & 1899 when each was paid \$100 (50.00 in each of two payments) & yours was then omitted by arrangement with yourself. Is this what you mean? Will hear from Howell soon I hope.

30

Most truly,
George.

40

Exhibit C. 9.

EXHIBIT C. 9.

Jany. 2nd, 1906.

George W. Ketcham, Esq.,
100 N. 6th St., City.

Dear Sir:

I applied this morning to Vice Chancellor Emery for a stay of proceedings in the actions at law brought by the Receiver, pending the appeal from his order assessing the stockholders. After some argument he said that he would make the order on condition that the stockholders who have been assessed and who have taken the appeal, shall pay into court the amount of the assessment against each together with interest thereon and the accrued costs in the actions at law; the fund thus deposited in court to remain there subject to the order of the Chancellor. 10 20

Of course no distribution of the fund would be made until after the decision of the Court of Appeals. I have spoken about this to Mr. Holzhauser and no doubt you will hear from him also. My own judgment is that it would be advantageous to pay the money into court and thus stop the accumulation of interest at six per cent.

Very truly yours,

Frank E. Bradner. 30

Dear Will,

This means business.
It requires prompt work.

1/3/05

G. W. K.

Exhibit D. 5.

EXHIBIT D. 5.

April 29/07.

Dear Bro. George:—

I have been thinking over matters lately and would like to call your attention to an injustice that I think is being shown to me.

10 You know that the lumber &c that belonged to Holloway and then to the Clinton Hill Co was sold by me and the proceeds applied to payment of notes which father had given to Holloway and discounted by Mrs. C. Campfield and others.

Further, that the note of Aug. 6, 1895 for \$6666.84 given me by father has never been claimed by me to be a liability against the estate for anything except to secure me against any liability that I might incur because of the sale
20 of the lumber and the disposition of the proceeds, and to protect me against any demand or expense incurred by action of the creditors of Holloway or the Clinton Hill Co.

In payment of such liability I have paid out to May 1st 1907 as judgment, interest, expense &c the sum of \$4213.16 I do not think it fair that I should be out my money, and think I should be reimbursed by the estate for the expenditure to date, leaving any future payments by the estate
30 to depend upon any further liability that may be established against me.

Will you not as administrator, reimburse me for this payment. As the years pass by and these matters get stale, witnesses may die, and my position becomes more difficult on that account. I feel that there is no reason why the estate should not clear up the situation so far as it is capable of being done at the present time. Enough money has been retained by you undis-

40

Exhibit D. 12.

tributed to do this, and which is earning interest, while I am deprived of the use of mine.

Hoping to have your favorable consideration,

Yours truly,

Bro. Will

P. S. You can read this better than my hand writing.

10

EXHIBIT D. 12.

May 2/07

Dear Bro. George:—

The expected decision of judges to which your letter refers, whether rendered in 30—60 days or longer, will not help my case, except that in the event of a favorable verdict to the estate, may render a second assessment on me. I am trying to deal with the first one.

20

You do not have to get the assent of heirs in order to pay just claims, but only be assured that the claims are just and owing.

Let dissatisfied heirs do their objecting in court where they will have to prove that they are right. Upon what do you base your hope that all can be cleaned up in 30 days?

All the rest of the family refused to have the claim settled when I saw them in Dec 1905. I tried to convince them of the justice and right of what I asked, but it was of no avail.

30

Having tried all manner of personal family persuasion, I now ask you as administrator to settle my claim, as you have on several occasions stated it to be a just one should the contingencies agreed upon arise.

These events have arisen and I claim you should make your word good to me now by a

40

Exhibit D. 12.

settlement of expenditure to date viz \$4213.16. If my claim is just and right, then it ought to be paid without further delay. If on the other hand you do not consider it so, please let me have your decision.

10 I have all these years done all that I thought necessary to show the right standing of what I claimed, but if you now deny the legality of it and refuse to pay the amount due, I shall proceed without delay to establish my right. It is up to you to pay or force me to collect.

Knowing all the facts and other matters that would be brought out in the latter case, yet I do not hesitate to proceed when no other course is left me.

20 I have given over a year's leeway, thinking the matter would be amicably settled, but can wait no longer.

Hoping you may see the wisdom of complying with my reasonable request and to avoid future expense which I am assured will eventually have to be paid by the estate,

I remain yours truly,

Bro Will.

P. S. I will suggest one alternative—

30 If you are in doubt as to whether my claim is just and your own right to pay it, I will agree to go with you to some lawyer and each of us state our case, and if he says it should be paid, then I am to have my claim settled, but if he says otherwise, then I will pay for his advice.

Or each of us choose a lay person and submit the matter to them and they if necessary call in a third.

Anything for peace, but Peace with honor and without delay.

40

Exhibit D. 11.

EXHIBIT D. 11.

New York, May 6/07

Dear Will,

Yours 2d received. I must demur, and strenuously, to your saying I ever admitted your "claim" or said it was "just and owing" by the estate. What word of mine to you has not been kept? Pray when or where spoken? 10

I have been your friend all along, anxious to relieve you and agreeing personally to be one to consent to apply estate funds for such purpose. But I have never believed nor said that you had a valid "claim"; the utmost I have hoped is that good will could be extended. If you place matters on any other basis, you make a big mistake.

You write of having failed in getting the sisters to your way of thinking; the suggestion that I, in the face of this fact, apply their funds to the liquidation of your personal debt and leave them to test the validity of same in the courts, is most astonishing. This would involve them and me needlessly in trouble and I should be doing a monstrously improper thing. 20

The situation is summed up in our lawyer's advice to both of us, given in his office and in your presence, viz., that I as Administrator, had no right to use trust funds in this way. 30

The present legal status is far different from what it was when it was supposed the estate might be taxed for father's acts in appropriating the lumber.

My word is the same as in the last letter. I am hoping, as Mr. Bradner writes, that a decision, perhaps in June, may end this suit. If it does, I shall try for consent to aid you in case your judgment stands,—not on the ground of any legal 40

Exhibit D. 7.

right but from good will only. I sometimes think a legal test may be the better way of ending; we want "peace with honor" but not the peace that lets you out and draws the sisters in. I counsel you, as desiring your happiness, to abandon your idea of a "claim" and rely upon the good will
 10 of your kin. In my opinion you will get more out of it. But if you choose any other way, the privilege is yours and the consequences also.
 Bro. George.

EXHIBIT D. 7.

May 7/07

Dear Bro. George:—

20 It will hardly be necessary to discuss the fact that you did on several occasions admit the justice of my claim and that it should be paid if the contingency mentioned arose.

I have all the facts to prove my assertion.

You claim to be my friend, and I give you all due credit for what you have done, even if rest of family did not so act. But now we come to a new turning in the road and your safest course is to admit the justice of my claim and pay it, as I
 30 cannot deal with any one but you as administrator.

You speak of good will, of family, but judging by the past, it has not amounted to much when the test was applied.

Aside from its legality, my claim has a moral status which ought to be sufficient for favorable action. Father got property that the court said did not belong to him and should have been held for other creditors (all this admitted by you)
 40 and instead of the family returning it, I, an in-

Exhibit D. 7.

nocent party (admitted by you) am asked to step up and pay my father's debts—DONT YOU CALL THIS MONSTROUS?

The present legal status of suits pending is only technically different from suits to recover possession of property taken by father,—the real issue is the same.

10

I cannot leave matters rest in so flimsy a basis as good will, but as I have always asserted my legal position, and as you now seem to repudiate it, there is no other course left me but prove it by law.

As your friend and brother I would advise that you admit my claim, if you care to avoid unpleasant consequences. I will merely hint that I have 20 of your letters dating back to beginning of this matter and will establish my position out of your very words, so if you value your good name and record, take my advise and settle now rather than regret later.

20

You know if you pay my claim, the rest of family will not dare contest your action because they have no facts to back up their objection, while you would have my facts &c. to show right action. Hence you must choose as between them and me.

As my case is not before the court for action, any decision rendered in June or later has no bearing. If you have any proposition to make along these lines, please let me hear from you as I am fully determined to have the matter settled.

30

I hope you may be convinced that I am right, but if not, I shall instruct Judge Skinner to proceed to collect without delay.

Be wise now, as I am satisfied that even Bradner would say pay my claim, if you laid all the facts that both of us might have before him.

40

Exhibit C. 10.

My action if taken will be for amount of note
and interest to date—

Note 6666.84

Interest 4666.77

Total 11333.61

10

Yours truly,
Bro Will.

EXHIBIT C. 10.

New York, Oct. 8, 1907.

Judge Alfred F. Skinner,

My dear Sir:—

20

Yours of the 2nd, inst., received, I appreciate
the courtesy shown and reciprocate the desire
for settlement. You request that I give my idea
of the status.

30

I am loathe to say very much: my brotherly
feeling leads me to select only kind phrases but
my words are then taken as bolstering a claim.
My letter of ten years since, urging a written
paragraph as to matters verbally explained, has
been one of the things so used. My definition of
a "claim," is one that seeks no outside support,
having sufficient merit of its own. If such a
straight-forward claim had ever been shown or
even now could be shown, the family would lose
no time in contending.

40

My brother was in sole charge of the earlier
litigation; his conduct of the case and particular-
ly, his injunctions to counsel as to his personal
interest are responsible for the present distress.
The result has brought vexation and loss upon
innocent persons who had rights to be protected
and who should not be prodded to hold him im-
mune from his own acts.

Exhibit C. 10.

The present form of demand is for payment of his personal subscription for stock, using trust funds therefor. My brother has been advised this is illegal, yet, I have several recent letters, in one of which he urges immediate payment as "the rest of the family will not dare contest your action because they have no facts to back up their suggestion." I ask you if such unheard-of proposition does not reveal the quality of this contention? Why such strange proceeding if he is possessed of a claim that could be honorably presented for collection; Former demands, as I find by examining his letters, are for transactions of the Lumber Co.—disposition of proceeds, etc., For none of these has he been called in question. 10

Under the circumstances one is puzzled for a reply. I would not hesitate if the case referred to an outsider. Repeatedly I have told him I believed the family would come to his aid in the final event, but such offer would be from good will only. I see no reason to change that statement and Mr. Bradner has practically assured him of the same thing. The sisters still feel kindly although one of them must needs distress herself in the effort. If I were he I would keep quiet and trust his kin to make some adjustment which would help in this dilemma. He cannot expect they, knowing the past so well, will rush to him with pledges—Blood is thicker than the law and feeling of relationship would assuredly prevail. 20 30

An opinion about to be filed at Trenton must affect the case. Until the final decree issues neither party can know his liability. Granted for the moment a valid and legal claim exists, the estate cannot be mulcted until its exact obligation is finally declared. The payment to the re- 40

Exhibit C. 11.

ceiver was tentative; both Mr. Holzhauer and myself are not yet released from his bail bond.

Again thanking you for the courtesy of your communication,

I remain,

Very truly,

Geo. W. Ketcham.

10

EXHIBIT C. 11.

New York, Nov. 26th, 1907.

My dear Judge:—

Yours 25th received: My information is the same as yours. I am told the Judge is proverbially slow.

20

When the decision comes we shall know just what course is open to us; it must bother Judge Vroom to formulate an opinion reversing a decision that father's quota was paid when the evidence was overwhelming and taken from the plaintiff's own witness.

30

As soon as I hear from Trenton I shall do as I suggested and take up the case. I am anxious to finally settle the estate. But please do not make me say I would "adjust the *claim* of my brother against the estate."

I do *not admit any legal claim*. I do, however, most earnestly desire that he be relieved and I will, as intimated to you, use my best endeavors to make final disposition of this vexatious matter.

Very truly,

Geo. W. Ketcham.

40

Exhibit D. 1.

EXHIBIT D. 1.

Dec. 8, 07.

Dear Bro.

Your letter received and word about Turkeys. As to your reference to estate matters, I will take this opportunity to call your attention to a few facts, although, having placed my affairs in Judge Skinner's hands, I concluded to let him do all that was necessary in the way of correspondence &c. Out of courtesy to you, he has deferred any action, giving you the opportunity to hear Judge Vroom's opinion in estate's case, and with a view to settlement.

10

Your letter speaks of my being satisfied to do what the family think reasonable—Well, that is quite indefinite—There is nothing for me to do that I can see, except to ask for *what is justly due me*, and surely that is *reasonable*. If you mean to imply that I should be satisfied to take such sum of money as the family think reasonable, I will say this much, that nothing less than my entire expenditure to date by reason of the Holloway matters will be reasonable and I have instructed Judge Skinner that there is no compromise to be made. Let the family do *what is right* and that will be *reasonable*.

20

You seem to place me in the attitude of a recipient of family favor, but I refuse to assume such a position. I have gone over matters carefully with Judge Skinner and he has told me my claim is perfectly legal and collectible—hence what reason is there for me to ask any family favor—that should have been manifested long ago, if they contemplated it,—now it is a matter of justice.

30

While I am writing you in this matter, I will once more call your attention to certain indis-

40

Exhibit D. 1.

putable facts, not that I desire to argue the case, for the lawyer can do that best, but that you may see the *exact position* of affairs.

You have said you could not pay my personal assessment for stock with trust funds—of course ordinarily you could not, but this is a different case. Here are the facts that can be made clear to any jury and proved by a variety of evidence.

I was elected Treas. of the C. H. L. Co. and later when it was about determined not to proceed with the company, I was elected custodian (Campfield resigning) of the property of the Co.—here I was legally in possession of the same. I sold the goods and banked the proceeds and at father's request, *loaned* him the money by paying some of his outstanding notes &c. In return and as security for loan I received his note.

When you were appointed Admr. I served you with a notice of claim, and also fully explained the conditions on which I would ask payment. This was satisfactory to you, and on that basis you have paid all expenses & costs of lawyer &c. on account of suits against me up to Dec. 1905—so that all these years you have thus acknowledged my claim & kept it alive, and had you not done that I would have immediately begun suit on note.

You therefore would be right in paying all since that time, as judgment &c., even with trust funds as you say, because otherwise my note became due.

Any technical objections made, such as insufficient notice, no suit in 6 years &c. will not avail and form a meritorious defense. I certainly never would take the trouble to make affidavit to a claim & serve you with it, unless I considered it a true & collectible one. I therefore have taken

Exhibit D. 1.

this opportunity to once more call your attention to these facts and show you what a predicament it would place you in, in a suit at law. I paid one hundred dollars for the opinion of one of the best lawyers in the city and having received his favorable advise, I have no fear of the result. It is up to you to choose. The note with interest now amounts to \$11600.00, and that will be the basis of my claim, so if you with to face that, the choice is yours. 10

And now as to a further personal word. After having for 10 years taken care of my father and his person in a way that called for much sacrifice and labor, a work that no hired servant would do, and also in all the Holloway matter having worked for the good of the whole family, even to my own detriment, and all done not for money or gain, but out of a true regard for the family interest, it seems to me to be the height of ingratitude to require me to pay some of father's debts. 20

The whole matter has been misrepresented to the family by Charlie, who has laid to my door all the crimes of the catalog, but every one should think for himself and make full inquiry before such hasty action.

I am not a beggar for charity, nor have I asked one penny for services rendered. I always strove for the good will of all and had reason to expect the same in return, instead of which I am called —thief, robber, and black sheep of the family and thus ostracised. 30

But I am not vindictive, and expect to live peaceably as best I can.

I have ever cherished a few words your late wife uttered about a month before father died. I had called one evening at your house and Emily 40

Exhibit D. 1.

spoke very kindly of the services I had rendered to father, and I think you also added approval. This is all I ever received, not that I desired praise, but coming voluntarily, such words are worth more than dollars & cents.

10 I do not expect to show this letter to any one, and perhaps Judge Skinner would criticise me for not leaving all to him, but you gave me the opportunity & so I have spoken. So please destroy the letter and that will end it.

Yours truly,
Bro Will.

P. S. You forget to see what the outcome might have been had I turned over to the Receiver the note and let him collect it, but I worked with all the rest to have the matter settled by the court first as to the rightful owner. Besides you know
20 I never endeavored to collect that note as due in any other transaction, so I submit if my action all through has not been one of fairness and honesty. You say the sisters had nothing to do with it. Neither had any one but father, but we are all equally responsible for his acts and debts. As to the "bad job from start to finish"—I presume you mean to imply that the case
30 should have been handled differently in the beginning, meaning that father's notes should have been in court &c.—but Judge Skinner has told me that V. C. decided the case on different grounds from what you thought, & so the notes would not have settled it. Errors of judgment are no reason for saddling a person with an unjust burden. I had 3 years in the beginning & you about 7 later, so I think the least said about a "bad job" the better. We can all live and learn and know more about law after we are
40 through with it.

Exhibit C. 12.

I submit further, that while Charlie has treated me so unjustly &c.—yet I believe him to be no fool when it comes to deciding a law matter, and if he was possessed of all the facts in this case as they really are and can be proved, he would tell you to settle this matter without delay—unless he wanted to be obstinate & fight over matters so clear. 10

Bro Will.

EXHIBIT C. 12.

New York, Jan. 6th, 1908.

My dear Judge,—

Yours 3rd to hand: No word from Trenton. I have written the clerk again—also have spoken to Judge Bergen who can not account for the delay. 20

I wish we might hear as I desire to close out the matters as we suggested.

I appreciate your courtesy. The sisters and myself, notwithstanding so many adverse things in this case, are willing to afford help.

My brother may be his worst enemy. Pushing a fictitious claim and wielding a big stick to drive others to “pay up,” with the cry of “no compromise” &c., &c., are not calculated to promote good will. His several recent letters (one only a few days since) give me additional proof that his demand has no rhyme or reason in it. If this be his attitude, there is no need of further waiting. I could wish that you might know the real inwardness of the case from the other side. If I were he I would put myself in your hands bodily and accept your dictum as final. 30

Yours truly,

Geo. W. Ketcham. 40

Exhibit D. 15.

EXHIBIT D. 15.

January 20th, 1908.

Dear Will:—

Your letter of December 8th, 1907, has been
carefully considered. I cordially reciprocate its
10 tone even if not accepting all its statements.

Am very sorry you speak disparagingly of
yourself. Would this not be avoided if you adopt-
ed a change in tactics? Brandishing a fictitious
paper does you no good; it frightens no one and
hurts your case.

Let me say something about those "indisput-
able facts" and do not think me unkind for
using plain words. I would not hurt your feel-
ings for a farm.

20 Running under cover was your undoing. It
was, in my opinion, wholly unnecessary. Acting
in your father's interest or on behalf of the Com-
pany, could bring you no liability unless there
was something illegal in your personal conduct
and, in such case, you could not rightfully or
legally ask protection. That note never was jus-
tified. If considered as immunity, as you have as-
serted all these years, it was void being fictitious
in amount; then the interest clause condemns it.
30 There being no mention of immunity, as would be
required, we are asked to accept whatever inter-
pretation you are pleased to offer. I doubt if
any law will support you in exploiting your per-
sonal explanation to a document which contains
no such reference.

Then your concealment of the paper for more
than two years, until after father's death, thus
preventing any words with him, of itself create
an unfavorable impression. On my appoint-
40 ment as administrator, I conferred with you as

Exhibit D. 15.

to all father's holdings and liabilities *and you never mentioned that note.*

The first I ever heard of it was two years after its date when you brought it to me, after the nine months' order had passed. If Chief Justice Beasley's decision in such cases is to stand, then you are barred as against the Administrator, but of this I will not argue. Let the Courts settle it as also other questions of lapsing. 10

In view of your calls to "pay up," I have reviewed certain papers and I commend this to you:—Reading afresh your stipulation (witnessed by Ruprecht) as to what that note stood for; also my letters criticising the situation; also my zeal to have you declare in writing what you had expressed in conversation, to hold your heirs, in case of your demise—you will see where you stand and whether your point is tenable, that unless I, as administrator, paid forthwith you would sue for the face of the note with interest, or for some \$11,000 which is about three times your judgment. 20

I have sometimes intimated the family would assist in clearing your judgment; to this you demur as suggesting favor where, you assert, a legal claim exists, demanding "no compromise." Well, I am not asking any compromise. I have tried to show a brother's part, working often against odds and, chiefly, against your own acts. If all this is to go for naught, then let it go. You can try your hand and see what comes of it. 30

If I have any notion of the law, I cannot possibly see how you can meet yourself in letters and stipulations and carry your demand.

No word as yet from Trenton except the non-filing of opinion. Whatever the Judge may write, it cannot create for you what did not exist be- 40

Exhibit D. 15.

fore. Judge Skinner has been advised that no opinion has yet appeared,—also that if your attitude be the same as last set forth, there is no need of further delay.

10 Lizzie told me the other evening she wished you would make full statement of all the money transactions on which you base your demand. Then we might have something tangible to work on. As trustee of funds belonging to others, such report is not only proper but required in law. The lack of such itemized statement, as you well know, has been the bane of this lumber history. You can't expect consideration while shielding yourself behind those secret proceedings.—Thus far you have lifted the lid but a trifle and your effort, from first to last, apparently, has
20 been to keep the family ignorant of what they have a right to know.—I concur in what she said; if you would come out in the open, I would traverse the seven seas to help you. I can overlook a lot of things and condone what was inadvertent or because of poor legal service at the beginning.

The big stick is a poor weapon. I once wrote you were better off without it. But you must act
30 your pleasure. Let there be an end, pleasantly, if possible, but, if otherwise, an end somehow.

I will save a copy of this for Judge Skinner. When the opinion arrives I expect to communicate with him as promised.

Most truly,

Bro. George.

I have recently talked with Justices Bergen and Swayze and both are surprised at the delay. They said Judge Vroom has been sick.

Exhibits C. 14 and C. 13.

(Later. Was at Trenton yesterday (21st) and saw the Clerk. He had asked Judge Vroom who promised to file the opinion.)

EXHIBIT C. 14.

New York, Feb. 10th, 1908. 10

My dear Judge:—

Yours received. My letter was intended to be final; had you seen a copy of his letter, believe me *your statements would have been very different*. His concealment of that letter is the cause of the trouble.

The suggestion of our sister was a good one: it was his opportunity. That he should ignore that and every thing else but his demand, is the peculiarity of the situation. To let him *remain silent and we make a definite pledge* would be out of character. 20

I told you of my purpose. When the opinion is filed, I will communicate with you, unless hindered by my brother's acts.

I understand your desire to accomplish something without friction; in all fairness *let him do his part*, if he makes requests from others. I speak for myself only—have no present right to represent the family. 30

Very truly yours,
Geo. W. Ketcham.

EXHIBIT C. 13.

New York, Feby. 15/08

My dear Judge:

Yours 11th to hand. Brother Will particularly requested that I refrain from showing his communication, not wanting even yourself to see it. 40

Exhibit D. 13.

Feeling it to be unwise to give out a copy when under threat of suit, I consulted Mr. Bradner, who agrees with me.

I wish to be courteous to you and have suggested that I give a copy to Mr. Bradner and let him speak with you. So I will follow that plan.

10

Most truly yours,

Geo. W. Ketcham.

EXHIBIT D. 13.

New York, Mar. 6th, 1908.

Dear Will:

Yours of the 26th, ult., was duly received. I concur in the proposition to hold it *confidential*. I will not use it with the lawyers. My only reservation is I must be released if forced to defend a suit.

20

In your foot note you ask my opinion on your statements. I never cogitate on the case except to wonder what father or mother would have said if still with us. I wonder, too, if my position as the older brother is of any avail, inasmuch as you pass over all arguments as if nothing worth, renewing your demand in the same old way.

30

I do not see the force of gathering records from the Bank or from Mrs. Campfield. That a check given to take up a note was deposited, and tallies with another account, is a matter of course;—Nobody disputes the notes were paid: their possession is *ample proof*. That you helped father in these transactions gives you no hold on *property you never acquired*. You paid father's debts with *his own money*; that was all. Suppose that Charles, who was cognizant of father's

40

various sources of income and who helped him

Exhibit D. 13.

make up his tax paper for several of those very years, or suppose that I had helped father, *what claim* would it give us on *his cash or goods?* or suppose that in addition to the goods father turned over, I had paid my \$500.00 and my cash had gone with the rest, would that give you a hold on me personally?

10

Your argument as I see it, is futile. You are talking a *legal claim* and the *legal status* is that the Company had no assets but signatures for stock and these subscribers are called on to pay up.—You seem to say that as father paid in the worth of the goods, you as an “innocent stockholder” owned a part of them. No subscriber has any status in a corporation, until he had *personally paid up his quota*.

Your other theory that you as Treasurer are called to account for disposing of the goods (which has no basis) will not save you for then the proceeds should have been turned over by an itemized accounting, and any personal acquiring of such proceeds is, as you must realize, malfeasance pure and simple—So as I see it, your “legal status” has no foundation.

20

Well, then what? Are the family under obligation? Can you truthfully say that? The case was bungled in the beginning, chiefly by yourself, and by your positive order to so manage it as to shield yourself and, moreover, the Courts have done worse since—so there is a whole lot that is most unfortunate. Its a bad job, first and last.

30

Hence I feel like helping you in the dilemma you are in and when you are willing to cast aside all idea of a legal claim, and see what can be done to relieve the situation, *I am with you heart and soul. I will not make a pledge to be criticised* and I will enter into no conference

40

Exhibits C. 15 and C. 16.

whose results may be rejected and the *threats still continued*. Dont ask me to do anything of that kind, for such request will end all.

If this be not satisfactory let matters go to their conclusion. I am not counting dollars so much as the principal involved.

10 I think in a day or so we shall know what Vroom meant.

Most Truly,
Brother George.

EXHIBIT C. 15.

New York, Mar. 24/08

Judge Alfred F. Skinner,

My Dear Sir:

20 I promised to communicate with you.

The opinion has been filed and Mr. Bradner has copy; he can inform you of contents.

My brother's recent letter was answered by me. He can show you my reply if he chooses. In it I have said all that any one, I think, ought to say and the matter is in his hands—He can free himself from his own net quite easily if he desires; if otherwise he must take the responsibility.

30 Most Truly,
Geo. W. Ketcham.

EXHIBIT C. 16.

April 6, 1908.

Alfred F. Skinner, Esq.,
Prudential Bldg., City.

Dear Sir:—

40 Your favor of the 4th inst. duly received, I will be glad to talk the Ketcham matter over with

Exhibit D. 14.

you, but I suggest that we postpone any conference until Vice-Chancellor Emery has disposed of my application to open the decree. The motion will be heard on April 14th. He has granted an order to show cause and I am inclined to think that he will open the case and let in the specific defence that William S. Ketcham, Sr.'s subscription was paid. In that event, I think there will not be much difficulty about arranging for a contribution by the members of the family to aid your client. 10

Very truly yours,
Frank E. Bradner.

EXHIBIT D. 14.

New York, Oct. 8th, 1908. 20

Dear Will:—

Yours duly received: I do not understand your saying the plea was not according to evidence. Holloway certain so testified and both lawyers have always so insisted.

I am preparing to discharge the judgment. As to other matters in your letter, enough and more has already been said. Surely neither your sisters nor myself have brought this burden upon you; we would gladly see it removed. 30

I hold your written statement that I could not properly take trust funds to apply on your private account. I have also another of your declarations which you must admit effectually disposes of any idea of a legal claim—If you or Judge Skinner, thinks that anything that I have said binds myself or the estate, I trust the test will be made forthwith.

You well know my attitude and you will not ask me to sacrifice my self respect by stating it 40

Exhibit D. 6.

again. If you prefer what appears to me to be a "skeleton" in place of flesh and blood, then you will ignore all, and follow your choice.

I wish to close the estate in a manner just to all the heirs; if delayed in doing this I feel like asking the Court to name another administrator.

10 Richards finds but sixteen barrels of good apples, of which he will send us ten, or two apiece. The dry season has been hard on the farm as you know. Wish we could sell and close out everything. Could you not get busy and secure a purchaser?

Let me hear. Some of those Real Estate people in Sussex might dispose of the farm at a fair price.

Most truly,

Bro. George.

20

EXHIBIT D. 6.

5/13/09.

Dear Bro. George:—

I wish once more to call your attention to the position that it seems to me the suit before Judge Heisley and now the hearing to be held before V. C. Emery assumes, especially in so far as it involves me.

30

In case Emery does not modify his former rulings, then the estate must pay the judgment given before Heisley.

In case he hears testimony with a view of modification of former ruling, I would think I will be the principle witness. What position I would assume, would depend upon how the case was to be fought,—whether as all working together for the estate, or each for his own interest. As it

40

Exhibit D. 6.

now stands, I am intending to protect my individual rights so far as that is consistent with the facts in the case.

Should Emery allow a modification of his orders, and thus declaring the estate as paid up, the inevitable result would be his allowing a second assessment on you and me to make up what he lets the estate escape, so that the whole burden would practically fall on me. 10

My claim against the estate is sufficient to cover both assessments, and if my position is right and my claim good, then how much better off is the estate, if it has finally to pay the whole bill. It will only seem like paying lawyers &c. for nothing.

I wish to call your attention to this phase of the case. Of course if from your standpoint, you think my claim of no account, then you will try to clear the estate regardless of consequences to me. 20

I have no fear of the outcome of my claim as I am assured that from the facts I will bring before the court, the estate will have no chance to avoid payment of my claim.

I have deferred any suit up to the present, as Bradner told Judge Skinner he thought a satisfactory settlement would be made, but as I see none in sight yet, I may wait until hearing before Emery (if not delayed), but certainly no longer. 30

In your last letter bearing on this subject, you laid stress on the point that "I paid father out of his own money," but You and all of us know such is not the case, because I was of record the lawful holder of certain property, later turned into money, and held for whom the Court might prove legally entitled to it—which they did by setting aside bill of sale &c. But I will not at- 40

Exhibit D. 6.

tempt to argue the case, only to show you that as a final outcome, the estate will have to pay the whole claim. My purpose in writing this, is because I met Bradner on Broad street the other day, and from what he said about how the case might be fought so as to prove the estate and possibly most of my subscription paid, I inferred that the end of final settlement might be a long way off.

10 Now, while there might be some plausible legal questions involved in Bradners position, yet I feel assured that I hold the "key note" to the situation, and unless we all work together as one interest, it will be futile. But as you will see, this can only be done by an agreement of estate as to my claim. As you may understand, this is no threat, but only a statement of my individual position which I must now assume.

20 I have certain phases of the matter in mind of my own view of the best way to handle the matter and which I think might succeed, but as my personal interests come first, I will work along that line.

Of course I am and always have been interested to save unnecessary expense to the estate, but being only one of five, I cannot control that.

30 I think you now understand my position, so that any move made in the matter will be clear.

Yours truly,
Bro. Will.

Exhibit C. 17.

EXHIBIT C. 17.

IN CHANCERY OF NEW JERSEY.

*Between*WILLIAM S. KETCHAM, JR.,
*Complainant,**and*GEORGE W. KETCHAM, admin-
istrator of WILLIAM S.
KETCHAM, SR., deceased,
*Defendant.**On Bill, &c.**Interroga-
tories.*

10

To JEROME T. CONGLETON,
Solicitor of Complainant.

20

Sir:

The complainant is hereby required to answer on oath or affirmation, the following interrogatories within thirty days after service hereof upon you.

First Interrogatory: Have you the bill of sale given by Holloway to Clinton Hill Lumber Company for the lumber mentioned in paragraphs four and five of your bill of complaint? If, not, who has possession of the same? 30

Second Interrogatory: Have you an itemized description of the lumber mentioned in said bill of sale? If so, give a full and complete copy thereof.

Third Interrogatory: Were you one of the officers of the Clinton Hill Lumber Company elected and mentioned in paragraph four of your bill? If so, what office did you hold? 40

Exhibit C. 17.

Fourth Interrogatory? If you were Treasurer of the Company, did you take charge of the finances of the Clinton Hill Lumber Company as such treasurer?

10 Fifth Interrogatory: Who were the directors of the Clinton Hill Lumber Company, mentioned as being elected in paragraph four of said bill?

Sixth Interrogatory: Were you elected or appointed custodian of the lumber and property of the Clinton Hill Lumber Company by the directors of that company, and if so, when?

20 Seventh Interrogatory: What property did you take possession of as such custodian? Give a complete and detailed description of the lumber and property so taken possession of by you, and the date when you took possession of the same.

Eighth Interrogatory: Did William S. Ketcham, Sr., personally take possession of the lumber which had been transferred by Frank D. Holloway to the Clinton Hill Lumber Company, and if so, when, on what date (give the day, month and year if you know) and also a detailed description of the lumber.

30 Ninth Interrogatory: Did William S. Ketcham, Sr. place you in charge of the lumber for him, or were you placed in charge thereof by the directors of the Clinton Hill Lumber Company?

Tenth Interrogatory: Give a detailed statement of the lumber sold and disposed of by you, either as custodian for the Clinton Hill Lumber Company, or for your father, William Ketcham, Sr.; to whom and the times when the

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Exhibit C. 17.

same was sold and the quantity and amount sold to each person.

Eleventh Interrogatory: If this lumber and property was taken possession of by you as custodian for the Clinton Hill Lumber Company, by whose authority was the money received by you from the sale thereof disbursed?

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Twelfth Interrogatory: What did you do with the Seven Thousand Dollars you say you received from the sale of the lumber, that is, did you deposit the same in a bank or banks? If so, in what bank or banks, and when?

Thirteenth Interrogatory: If this money was deposited in a bank or banks, have you the bank book or books showing the deposits for the same?

Fourteenth Interrogatory: How was this money received from the sale of the lumber disbursed—by checks or in cash? If by checks, by whom were the same made, on what banks were they given, and to whom were the same made payable?

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Fifteenth Interrogatory: If this money was disbursed in cash, by whom was the same disbursed, to whom; give the names of the person and the amounts to whom the same was disbursed.

30

Sixteenth Interrogatory: Did you keep a record of the quantity of lumber turned over to you as set forth in your bill, and a record of the amount sold by you, to whom the same was sold, from whom the money was received, the amounts received from each person, where the money was disbursed, and how the same was disbursed by you, and did you keep a voucher for each and every of these transactions? If so, are the same still in your hands?

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Exhibit C. 17.

Seventeenth Interrogatory: Was the entire amount of \$6666.84 which you claimed was loaned to your father, William S. Ketcham, Sr. in paragraph fifteen of your bill, entirely received from the sale of the lumber of which you were the custodian? If not, from what other sources was it received?

10

Eighteenth Interrogatory: Was this money, namely, \$6666.84 loaned to your father by you at one time, or at various times, and was the loan made to him in cash or by check or checks? If by check, on what bank was the check or checks drawn, and by whom were they made?

Nineteenth Interrogatory: If you state that this sum of \$6666.84 was not loaned by you directly to your father, either at one time or at divers times, but was advanced by you to various persons, to whom was the same paid? Give their names and the amount or amounts paid to each person and what each respective payment was for.

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Twentieth Interrogatory: Were these amounts advanced by you in cash to said various parties, or by check? If by check, on what bank or banks were the check or checks drawn, by whom and to whose order?

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Twenty-first Interrogatory: If this money was paid to others than to your father, William S. Ketcham, Sr., did you receive a receipt or voucher from the persons to whom such payments were made? If so, have you such vouchers in your possession? Give copies of same.

Twenty-second Interrogatory: What was the true consideration of the note dated August 6th, 1895 which you claim was given by William S. Ketcham, Sr., to you, and mentioned in your bill of complaint?

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Exhibit C. 17.

Twenty-third Interrogatory: Who was present, if anyone, when William S. Ketcham, Sr. gave you this note?

Twenty-fourth Interrogatory: Was the body of the note written by you or by your father, and if by neither, by whom was it written?

Twenty-fifth Interrogatory: Was there any agreement, either verbal or written, between you and William S. Ketcham, Sr. that the note of August 6th, 1895 was given to you upon certain contingencies or conditions, and if so what were these contingencies or conditions? 10

Twenty-sixth Interrogatory: If there was such an agreement, was it verbal or written, and was the same made before, at or after the time of the making of the note?

Twenty-seventh Interrogatory: When was the note, mentioned in your bill, dated August 6th, 1895, delivered by your father to you? 20

Twenty-eighth Interrogatory: Give a detailed statement of the circumstances under which said note was written, signed by your father and delivered to you, and where did this transaction take place?

Twenty-ninth Interrogatory: Was the note given by your father to secure you personally, or was the same given to you for the benefit of the other stockholders of the Clinton Hill Lumber Company, for money which you received as custodian of lumber belonging to that company and thereafter paid out by you? 30

Thirtieth Interrogatory: Did you inform Thomas N. McCarter, the Receiver of the Clinton Hill Lumber Company that you had been the custodian of the lumber mentioned in your bill of complaint, had sold the same, and had 40

Exhibit C. 17.

received the proceeds therefrom, namely, about Seven Thousand Dollars, and advanced the same to your father? If so, when did you tell him?

10 Thirty-first Interrogatory: Did you advance any money of your own outside of the money received from the sale of the lumber which you held as custodian, to or for your father, William S. Ketcham, Sr. which entered into the consideration of the note in question? If so, how much of your own?

20 Thirty-second Interrogatory: At what time and place did you present the note in question to your brother, George W. Ketcham, Administrator; who was present, and where did the conversation take place, mentioned in paragraph eighteen of your bill?

Thirty-third Interrogatory: Was the total amount mentioned in the note of August 6th, 1895 due to you at the time you presented the same to your brother, George W. Ketcham on July 20th, 1897? If not, how much was due to you at that time?

30 Thirty-fourth Interrogatory: Did you state to your brother at the time you presented this note to him on July 20th, 1897 that the amount mentioned in the note was not then due to you?

40 Thirty-fifth Interrogatory: Did you demand payment from your brother, George W. Ketcham, of the full amount mentioned in the note of August 6th, 1895, when you presented the same to him on July 20th, 1897, or did you demand payment for such sum which you might thereafter be called upon to pay by reason of your connection, either as a stockholder or otherwise, with the Clinton Hill Lumber Company?

Exhibit C. 17.

Thirty-sixth Interrogatory: At whose request was a partial distribution of the Estate of William S. Ketcham, Sr. made by the Administrator, as mentioned in paragraph twenty-four of your bill, and specially state whether it was at your request.

Thirty-seventh Interrogatory: If you acted as custodian of the lumber and property mentioned in Interrogatory number 11, by appointment of the directors of the Clinton Hill Lumber Company, did you ever make a detailed report, either verbal or written to such directors of your receipts, sales and disbursements concerning the disposition of such lumber? If so, when and where, and give copy of such report. 10

Thirty-eighth Interrogatory: Did you ever give a detailed statement to the Administrator showing how said sum of \$6666.84 was obtained naming the items? If so, when and where and give copy of such statement. 20

Thirty-ninth Interrogatory: Were any legal proceedings ever brought by any person or company whatever against you for any act of yours done by reason of your custodianship and disposal of the lumber and property of the Clinton Hill Lumber Company, described in your bill? If so, state by whom, when brought and the nature of the proceedings. 30

Fortieth Interrogatory: After judgment was obtained against you by Thomas N. McCarter, as Receiver, as set forth in your bill, did you visit any of the next of kin of William S. Ketcham, Sr. deceased, and solicit their aid in discharging such judgment? If so, whom? 40

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Forty-first Interrogatory: If you did solicit such aid of such next of kin, did you at such time, state to them or either of them, that you had been misled by promises or pledges of the Administrator, as set forth in your bill?

10 Forty-second Interrogatory: Was the note of \$6666.84 exhibited to your brother, George W. Ketcham, or to any other of the next of kin of William S. Ketcham, Sr., during the lifetime of your father, or from its date to July 20th, 1897? If so, state when and to whom?

DATED May 9th, 1913.

Yours, &c.

SCOTT GERMAN,
Solicitor of Defendant.

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Exhibit C. 17.

EXHIBIT C. 17.

IN CHANCERY OF NEW JERSEY.

*Between*WILLIAM S. KETCHAM, JR.,
*Complainant,**and*GEORGE W. KETCHAM, admin-
istrator of WILLIAM S.
KETCHAM, SR., deceased,
Defendant.

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*On Bill, etc.**Answers to
Interrogato-
ries.*To Scott German, Esquire,
Solicitor of Defendant.

20

Sir:

PLEASE TAKE NOTICE that the following are the answers to interrogatories heretofore served upon the Complainant in the above entitled suit:

ANSWER TO FIRST INTERROGATORY. No. I do not know who has possession of the same.

ANSWER TO SECOND INTERROGATORY. I have no itemized description of the lumber mentioned in the bill of sale referred to in the first interrogatory. It consisted generally of an assortment of pine, spruce and hemlock, approximately as follows: 150,000 square feet of pine lumber, 100,000 square feet of spruce lumber, and 125,000 square feet of hemlock lumber.

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ANSWER TO THIRD INTERROGATORY. Yes. Treasurer.

ANSWER TO FOURTH INTERROGATORY. No, as Treasurer of the company I never received or disbursed any moneys belonging to said company.

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ANSWER TO FIFTH INTERROGATORY. William S. Ketcham, Sr., George W. Ketcham, Frank D. Holloway, Edward E. Camfield and William S. Ketcham, Jr.

ANSWER TO SIXTH INTERROGATORY. Yes, I was appointed custodian on February 6th, 1893.

10 ANSWER TO SEVENTH INTERROGATORY. The lumber mentioned in the answer to the second interrogatory. I took possession on February 6th, 1893.

ANSWER TO EIGHTH INTERROGATORY. No. Only as I did so for him. In the month of February, 1893. It was the same lumber mentioned in the answer to the second interrogatory.

20 ANSWER TO NINTH INTERROGATORY. I was first placed in charge of the lumber as described in the answer to the sixth interrogatory and after the plan to go on with the incorporation of the Clinton Hill Lumber and Manufacturing Company was abandoned, I continued in charge thereof for my father, William S. Ketcham, Sr., at his request.

30 ANSWER TO TENTH INTERROGATORY. Lumber to the extent of \$4,697.48 was disposed of for cash at the yard where Frank D. Holloway had formerly carried on business and I cannot give the names of the parties to whom it was sold and the quantities in which it was sold to them. Lumber to the extent of \$1900 was removed to No. 26 Mercer Street and was used by me in my business there carried on, and which I paid for. The balance of the lumber of the value of about \$400. was still on hand at the death of my father and was later sent to the farm owned by my sisters, my brother and myself as heirs of my father, for use in the erection of a new barn and
40 I never received any payment for this lumber.

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ANSWER TO ELEVENTH INTERROGATORY. The money received by me from the sale of the lumber was disbursed by me by the authority and at the request of my father, William S. Ketcham, Sr., and with the assent and knowledge of my brother, George W. Ketcham, who was at that time advising with my father and myself in relation to our father's affairs. 10

ANSWER TO TWELFTH INTERROGATORY. When I first commenced to make sales of the lumber, I deposited the money received therefor in my own personal account which I then had in the Merchants' National Bank. This only continued for a short time, when I opened a special account in the Second National Bank. I cannot give, at this time, the exact dates, but the deposits were made at or about the time when it was received. 20

ANSWER TO THIRTEENTH INTERROGATORY. No.

ANSWER TO FOURTEENTH INTERROGATORY. The money received from the sale of the lumber was disposed partly by check and partly in cash. The checks were all made by me and the following is a statement of the amounts so disbursed by check:

Date.	Bank.	To whom given.	Amount.	
Apr. 18, 1893	Merchants Nat.	Mrs. Camfield	150.00	30
May 4, 1893	Merchants Nat.	Eastern Lumber Co.	3060.00	
Aug. 2, 1893	Merchants Nat.	Mrs. Camfield	150.00	
Aug. 7, 1893	Second Nat.	W. S. Ketcham, Sr.	550.00	
Sept. 14, 1893	Second Nat.	W. S. Ketcham, Sr.	20000	
Dec. 5, 1893	Merchants Nat.	Mrs. Camfield	526.07	
Dec. 15, 1893	Second Nat.	W. F. Knight	23.70	
Apr. 9, 1894	Merchants Nat.	Tax collector	103.07	
Apr. 10, 1894	Merchants Nat.	Mrs. Camfield	300.00	
Feb. 5, 1895	Second Nat.	Mrs. Camfield	1000.00	
Apr. 10, 1895	Second Nat.	Mrs. Camfield	452.70	

ANSWER TO FIFTEENTH INTERROGATORY. The money received from the sale of lumber which 40

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was disbursed in cash, was disbursed by me and the following is a list of the persons to whom the same was paid and the amounts so paid:

	<i>Date</i>	<i>To whom given</i>	<i>Amount.</i>
	Aug. 17, 1893	W. S. Ketcham, Sr.	100.00
	October 10, 1893,	W. S. Ketcham, Sr.,	25.00
10	Oct. 10, 1893	S. J. McDonald	25.00
	Apr. 10, 1895	Filing paper	1.30
	1893.		
	March		
	to		
	Nov.	James Howard, Driver,	\$216.00
	July or		
	August,	George E. Ketcham,	24.00
		Insurance on lumber,	10.00
		Repairs to wagon,	8.45
20		S. J. McDonald,	25.00

ANSWER TO SIXTEENTH INTERROGATORY. I did keep a record of the quantity of lumber turned over to me, as set forth in the bill of complaint filed in this suit, and a record of the amount sold and to whom the same was sold and the amounts received upon such sales, when the money was disbursed and how the same was disbursed and received a voucher to show for practically all of the disbursements so made to me.

30 The same are not now in my possession.

ANSWER TO SEVENTEENTH INTERROGATORY. No. \$352.81 was advanced by me from my own personal funds.

ANSWER TO EIGHTEENTH INTERROGATORY. No. At various times. Both by check and in cash. The amounts advanced by check are the same amounts mentioned in the answer to the fourteenth interrogatory, to which reference is made.

40 ANSWER TO NINETEENTH INTERROGATORY. The following is a list of the persons to whom pay-

Exhibit C. 17.

ments were made and the amount paid to each person and what said payment was for:

Apr. 18, 1893	to Mrs. Camfield, notes and interest	\$ 150.00	
May 4, 1893	" Eastern Lumber Company, lumber	3060.00	
Aug. 2, 1893	" Mrs. Camfield, notes and interest	150.00	
Aug. 7, 1893	" W. S. Ketcham, Sr., taxes	550.00	
Aug. 17, 1893	" W. S. Ketcham, Sr., cash	100.00	
Sept. 14, 1893	" W. S. Ketcham, Sr., taxes	200.00	10
Oct. 10, 1893	" W. S. Ketcham, Sr., cash	25.00	
Oct. 10, 1893	" S. J. McDonald, collecting	25.00	
Dec. 5, 1893	" Mrs. Camfield, notes and interest	526.07	
Dec. 15, 1893	" W. J. Knight, bill of Dec. 15, 1893	23.70	
Apr. 9, 1894	" Deputy Tax Collector, tax on lumber	103.07	
Apr. 10, 1894	" Mrs. Camfield, notes and interest	300.00	
Feb. 5, 1895	" Mrs. Camfield, notes and interest	1000.00	
Apr. 10, 1895	" Mrs. Camfield, notes and interest	452.70	
Apr. 10, 1895	" Filing paper	1.30	

ANSWER TO TWENTIETH INTERROGATORY. For answer to this interrogatory reference is made to the answers to the fourteenth, fifteenth and nineteenth interrogatories. 20

ANSWER TO TWENTY-FIRST INTERROGATORY. Whenever I made a payment, I received a receipt or voucher from the person to whom such payments were made in practically every case. In cases where notes were paid, I received the notes. These are not in my possession. The only voucher now in my possession is the following:

"Walter J. Knight
Counsellor at Law 30
Room 1015, 1016 Prudential Bld'g.
763 Broad St.
Newark, N. J.
Telephone 1080.

Newark, N. J.
Feb. 18, 1908.

Dec. 15, 1893.

Cr. F. E. Bradner

Clinton Hill Lumber Co.
Strieby *v. et al* 40.
\$23.70

Paid by W. S. Ketcham."

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ANSWER TO TWENTY-SECOND INTERROGATORY. Cash loaned and advanced by me to William S. Ketcham, Sr.

ANSWER TO TWENTY-THIRD INTERROGATORY. No one other than William S. Ketcham, Sr., and myself.

10 ANSWER TO TWENTY-FOURTH INTERROGATORY. I wrote out the body of the note.

ANSWER TO TWENTY-FIFTH INTERROGATORY. No.

ANSWER TO TWENTY-SIXTH INTERROGATORY. No such agreement.

ANSWER TO TWENTY-SEVENTH INTERROGATORY. Aug. 6th, 1895.

20 ANSWER TO TWENTY-EIGHTH INTERROGATORY. All of the lumber, with the exception of the \$400. worth referred to in the answer to the tenth interrogatory having been disposed of and there then being litigation pending against the Clinton Hill Lumber and Manufacturing Company by the creditors of Frank D. Holloway, seeking to make there judgments out of the assets turned over by Holloway to the Clinton Hill Lumber and Manufacturing Company, my father executed and delivered to me the note in question to secure the moneys which I had received from
30 the sale of the lumber and loaned to him. This took place at the home of William S. Ketcham, Sr., No. 26 Mercer Street, Newark, New Jersey.

ANSWER TO TWENTY-NINTH INTERROGATORY. The note was given by my father to secure the money which I had loaned him. It has always been my belief, as I have stated in open Court, that the other stockholders of the Clinton Hill Lumber and Manufacturing Company, are interested in the proceeds of said note, and are entitled to be
40 reimbursed for the amounts which they were

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called upon to pay by reason of their subscriptions to the capital stock of the Clinton Hill Lumber and Manufacturing Company.

ANSWER TO THIRTIETH INTERROGATORY. No, but I testified before Honorable A. V. Van Fleet on November 9th, 1893, in the suit in which Thomas N. McCarter was appointed Receiver, that the lumber had been sold. 10

ANSWER TO THIRTY-FIRST INTERROGATORY. In addition to the proceeds upon a sale of the lumber, I advanced to my father, William S. Ketcham, Sr., \$352.81 of my own money. This item formed a part of the \$6,666.84, and is included in the note.

ANSWER TO THIRTY-SECOND INTERROGATORY. On July 20th, 1897, at about seven P. M. at the residence of George W. Ketcham, No. 100 North Sixth Street, Newark, New Jersey. The only persons present were my brother, George W. Ketcham and myself. The conversation took place in the reception room on the first floor. 20

ANSWER TO THIRTY-THIRD INTERROGATORY. Yes.

ANSWER TO THIRTY-FOURTH INTERROGATORY. No.

ANSWER TO THIRTY-FIFTH INTERROGATORY. I filed my claim with George W. Ketcham, Administrator, on July 20th, 1897, which in itself was a demand in compliance with the law. After having filed said claim, I informed said George W. Ketcham that the note represented the moneys which I had received from the sale of the lumber transferred to the Clinton Hill Lumber and Manufacturing Company by Frank D. Holloway, and had loaned to our father to take up his notes which he had loaned said Holloway, and that if we were successful in the litigation which was then pending against our father's estate and 30 40

Exhibit C. 17.

10 against us and if he, the said George W. Ketcham would pay all of the expenses connected with said litigation, together with any judgment or decree that might be rendered against me by reason of my having sold said property, or by reason of my being a stockholder of the Clinton Hill Lumber and Manufacturing Company, or in any other way connected with said Company, I would consider such payments in lieu of the payment of said note, but that if at any time I should be called upon to pay out of my own pocket, any moneys by reason of my connection with the Clinton Hill Lumber and Manufacturing Company, my claim against the estate should then be due and payable.

20 ANSWER TO THIRTY-SIXTH INTERROGATORY. I requested that a partial distribution of the Estate of William S. Ketcham, Sr., be made, in the latter part of the year 1900.

ANSWER TO THIRTY-SEVENTH INTERROGATORY. I never made a report of any kind to the Directors of the Clinton Hill Lumber and Manufacturing Company.

30 ANSWER TO THIRTY-EIGHTH INTERROGATORY. Yes, at or about the time of the partial distribution made in December, 1900, of which the following is a copy:

“Newark, N. J. Dec. 20 1900.

This is to certify that I hold a promissory note dated Aug. 6, 1895 for the sum of \$6666.84 signed by my father (W. S. Ketcham deceased) and payable to me with interest.

40 That notice of my holding said note was given to G. W. K. Admr. of my father's estate within the 9 months time allowed by law for filing such claims, and being duly sworn to before J. RUP-
RECHT Notary Public

Exhibit C. 17.

That said note represents moneys paid by me at various times on account of my fathers indebtedness to various persons as follows,—

Apr. 18 1893	to Mrs. Campfield	150.00	
May 4 1893	Eastern L. Co.	3060.00	
Aug. 2 1893	Mrs. Campfield	150.00	
Aug. 7 1893	W. S. K. Sr.	550.00	10
Aug. 17 1893	W. S. K. Sr.	100.00	
Sept. 14 1893	W. S. K. Sr.	200.00	
Oct. 1893	W. S. K. Sr.	25.00	
Sept. 1893	S. J. McDonald	25.00	
Dec. 5 1893	Mrs. Campfield	526.07	
Apr. 9 1894	Deputy tax collector	103.07	
Apr. 10 1894	Mrs. Campfield	300.00	
Dec. 11 1894	W. J. Knight	23.70	
Feb. 5 1895	Mrs. Campfield	1000.00	
Apr. 10 1895	Mrs. Campfield	452.70	20
	Filing papers	1.30	
		<hr/>	
		6666.84	

That said note was given to secure me against any expenditure that might be incurred by reason of any suit brought against me personally or as stockholder in the Clinton Hill L. Co. That being the custodian of funds and property turned over by F. D. Holloway, I paid out said funds and property for the benefit of W. S. Ketcham, together with other moneys of my own. 30

That it is hereby agreed by the heirs of W. S. K. deceased, that _____ shares of stock of the Merchants Nat. Bank now held in trust by the Admr. G. W. K. shall be held as security for this note until suits now pending in Chancery against W. S. K. Sr. W. S. K. Jr. & G. W. K. shall be settled, AND that in case W. S. K. Jr. AND G. W. K. are not called upon to pay any moneys by reason of said suit, then the said 40

Exhibit C. 17.

note shall become forever null and void; but if W. S. K. Jr. & G. W. K. or either of them are called upon to pay any moneys on account of said suits, then said Admr. & trustee W. K. shall apply the proceeds of said stock to payment of said note.

10 (signed) W. S. Ketcham Jr."

ANSWER TO THIRTY-NINTH INTERROGATORY. No. But a suit was brought against me by Thomas N. McCarter, Receiver of the Clinton Hill Lumber and Manufacturing Company, to collect an assessment levied by him against me upon my subscription to the capital stock of said company.

20 ANSWER TO FORTIETH INTERROGATORY. After the judgment referred to, had been obtained, I visited my brother, George W. Ketcham, and demanded that he pay said judgment and at his request I visited my sisters, Mrs. Elizabeth Baldwin and Mrs. Ella Smalley and asked them to sign a paper, prepared at the suggestion of George W. Ketcham, that said judgment be paid by George W. Ketcham, Administrator.

30 ANSWER TO FORTY-FIRST INTERROGATORY. When I visited my sisters, as set forth in the answer to the fortieth interrogatory, I did not state to them that I had been misled by promises or pledges of the administrator.

ANSWER TO FORTY-SECOND INTERROGATORY. No. Dated June 6th, 1913.

Yours respectfully,

JEROME T. CONGLETON,
Solicitor of Complainant.

Exhibit C. 18.

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

WILLIAM S. KETCHAM, JR., of full age being duly sworn according to law, on his oath says that he is the Complainant in the suit in which the foregoing answers to interrogatories are made and that the facts set out in the said answers and the statements made therein are true to the best of his knowledge as he verily believes. 10

WILLIAM S. KETCHAM, JR.

Subscribed and sworn to before
 me this 7th day of June, A. D.
 1913.

ARTHUR T. VANDERBILT,
 Notary Public of N. J.,
 (com. exp. Aug. 21, 1917)

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EXHIBIT C. 18.

IN CHANCERY OF NEW JERSEY.

Between

WILLIAM S. KETCHAM, JR.,
Complainant,

and

GEORGE W. KETCHAM, Admin-
 istrator, &c.

*Defendant.**On Bill, &c.* 30

Memorandum of Documentary Evidence offered on behalf of the defendant, George W. Ketcham, administrator, etc.

1. Final decree in the case of Jonathan F. Streiby, *et al. v.* The Clinton Hill Lumber & Mfg. Co., dated November 14, 1893. 40

Exhibit C. 18.

2. Petition of Jonathan F. Streiby, *et al.* in the same cause verified March 18, 1895, filed April 1, 1895.
3. Order for execution in same cause dated April 1, 1895, filed same date.
- 10 4. Bill filed April 9, 1895 in the case of Cumberland Lumber Co., *et al. v.* Clinton Hill Lumber & Mfg. Co.
5. Order appointing receiver in the same cause.
6. Petition to assess stockholders filed June, 1895.
7. Answer of stockholders to petition filed July, 1895
- 20 8. Order assessing stockholders filed November, 1895.
9. Second petition of receiver to assess stockholders filed November, 1899.
10. Answer to said petition by stockholders January 17, 1900.
11. Order assessing stockholders filed June, 1903
- 30 12. Opinion of Vice-Chancellor Emery filed February 13, 1903 on application for assessment of stockholders.
13. Opinion of Vice-Chancellor Emery filed Feby. 11, 1903, on application to assess stockholders and application to open decree.
14. Declaration, pleas and replication in the case of William S. Ketcham *v.* George W. Ketcham, administrator, etc. in the Essex County Circuit Court, summons tested December, 1908.

Opinion.

Opinion.

Filed June 17, 1915.

EMERY, V. C. Complainant, William S. Ketcham, Jr., on December 28, 1908, brought suit against George W. Ketcham as administrator of the estate of their father William S. Ketcham, Sr., upon a note given by the intestate to complainant, for \$6,666.64, dated August 6, 1895, payable to the order of complainant, with interest, on demand. William S. Ketcham, Sr., died September 25, 1896, and on October 20, 1896, the administrator took out the usual rule to limit creditors, upon which an order barring creditors was entered July 21, 1897. Complainant presented to the administrator a claim upon this note, dated and sworn to on July 20, 1897, and claiming the entire amount, with interest, as due to him from his father's estate. One plea in the suit at law was that the claim was not presented within the time limited and was therefore barred. Another plea was that of the statute of limitations, and that the causes of action did not accrue within six years before the commencement of the suit (December 20, 1908). To this plea the complainant as plaintiff replied: First, that the cause of action did accrue within the six years; and, second, that the defendant, on July 20, 1897, being indebted to complainant on this note, by memoranda in writing then signed promised to pay the moneys due on it "when plaintiff should be compelled to pay any sum of money by reason of a certain subscription to the capital stock of the Clinton Hill Lumber & Manufacturing Company, which plaintiff had entered into at the request of the intestate, as his agent," and that within six years be-

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fore the suit he had been compelled to pay "a large sum of money," and therefore plaintiff claimed judgment. The judgment claimed was apparently for the whole amount of the note, and not merely to the extent of the amount plaintiff was compelled to pay, the claim being, 10
apparently, that, on the contingency of the payment named, whenever it might be, the administrator's promise was to be treated as a promise to pay the entire amount of the note. The administrator denied the subsequent promise. On the trial, the plaintiff, as proof of the subsequent promise in writing by the administrator, produced a letter signed by the administrator, dated July 21, 1897, relating to the claim, as presented under oath, objecting that this amount 20
was not truly owing. This letter is set out in full in the bill, and states substantially that plaintiff's claim should be stated differently, and as being a claim only in case plaintiff was obliged to pay any demand that might be made against him personally by creditors, of one Holloway, and also suggesting a form of claim to be put in. On the trial at law the circuit court judge left to the jury the construction of this document and the determination of the question whether it 30
amounted to a new promise by the administrator. Under these instructions, the jury returned a verdict for the plaintiff on this issue of subsequent promise, and upon the other issues joined, and for the whole amount of the note with interest, being then \$12,510.33. The amount paid by plaintiff on account of his liability on the claims of the Holloway creditors was, however, only \$3,658.99, paid in or about July, 1906. This was proved in the suit at law. On application for 40
new trial before another circuit judge, this ver-

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dict was set aside upon the ground that the construction of the letter or memorandum, as being a subsequent promise of the administrator in writing, was for the court, not the jury, and that error was committed in leaving this question of construction of the instrument to the jury; Circuit Judge Adams saying, that the defendant was, as his substantial right, entitled to the decision by the court, and of this construction as a legal question, and was therefore entitled to a new trial, even though the jury might have, in his opinion, as he expressed it to be that the jury had, properly construed the instrument. Upon the new trial being directed, the plaintiff filed this bill to enjoin the defendant from setting up the statute of limitations; and other matters and dealings between the complainant and defendant, as administrator, relating to the claim which had been put in, and his claim for indemnification against liability as subscriber or stockholder of the Clinton Hill Lumber & Manufacturing Company have been set up and proved at length. At the hearing and on the proofs complainant claims to be entitled to further prosecute the suit at law, asking aid from this court only to enjoin the defense of the statute of limitation, and that this equitable relief should be granted, leaving the plaintiff then in position to prosecute at law the claim against his father's estate upon the note and as for the entire amount. This was the claim and its extent as prosecuted by complainant for his own benefit on the trial, and for this he obtained a verdict on a claim as legally entirely due to him and payable from the estate.

On the hearing of this cause the evidence took a very wide range, embracing the series of liti-

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gations referred to in the bill, extending from 1893 to 1908, together with the records in these suits, and proceedings.

10 The facts so far as they bear upon the question as to complainant's right to the special equitable relief, which he prays, or to his status for any equitable relief of any kind upon his claim, are substantially as follows:

20 A company called the Clinton Hill Lumber & Manufacturing Company was organized in January, 1893, for the purpose (among other things) of taking over the stock of lumber of one Holloway and carrying on the lumber business. All or most of the capital for the business of Holloway had been furnished by or on the credit of William S. Ketcham, Sr., and one object which the Ketchams and Holloway had in view in the organization of the company to take over the business was to pay or secure this indebtedness of Holloway to William S. Ketcham, Sr. By bill of sale dated January 23, 1893, Holloway transferred this lumber and other property to the company, the lumber in the transfer being valued at at least \$8,200, and full-paid shares for that amount were issued to the three Ketchams, decedent and complainant each receiving 40 shares and George W. Ketcham 2 shares. They had

30 subscribed, respectively, for 100 shares, 100 shares, and 5 shares, but no further shares than the 82 shares were issued to any persons, nor was any further money paid in. The lumber after this transfer to the company was in the actual custody of complainant, who was one of its directors and officers.

40 Subsequently all of the Ketchams claimed that the incorporation had not been completed according to law, and under a resolution of di-

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rectors of the company on February 6, 1893, complainant was appointed, with one Camfield, custodian of the property. Camfield did not act. The company not going on with its business, later on Holloway himself claimed the property, decedent also claimed an interest in it, under claims against Holloway, and Holloway's creditors claimed it from the Clinton Hill Company by the suit above referred to, which was commenced on March 16, 1893. Complainant now says he thought it well to sell the lumber, and saw no harm in loaning the proceeds of sale to his father and taking his note. By arrangement between the three Ketchams, the property was to be sold and disposed of by complainant for the benefit of decedent, and this was actually done shortly after. The complainant sold the lumber and applied the proceeds \$6,666.84 to the use of the decedent, except about \$250. All of these appropriations had been made, as appears by complainant's statement and letter of December 20, 1900 (Exhibit D. 3), between April 18, 1893, and April 10, 1895, and before the giving of the note in question. As to the consideration and circumstances of giving the note, the complainant's further statement in his answers to interrogatories in this suit is—

“that my father executed and delivered to me the note in question to secure the moneys which I had received from the sale of the lumber and loaned to him.”

The suit in chancery commenced March 16, 1893, was brought by judgment creditors of Holloway (including the Cumberland Lumber Company) to set aside this bill of sale and transfer to the Clinton Hill Lumber Company, and it was set aside as a fraud on these creditors by decree

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November 14, 1893, affirmed on appeal. 52 N. J. Eq. 576, 29 Atl. 589 (1894). To this suit William S. Ketcham, Sr., was a party, and a receiver was appointed to take possession of the property of the Clinton Hill Lumber Company to satisfy the debts decreed to be paid. A further decree
 10 was entered in the suit on April 1, 1895, that the receiver be directed to commence suit against the company and William S. Ketcham, Sr., to recover the property or its proceeds of sale. This suit was commenced on May 13, 1895, against the company as an insolvent corporation, and Mr. T. N. McCarter, Jr., was appointed receiver. On June 17, 1895, the receiver applied for an order for assessing stockholders for unpaid subscrip-
 20 tions to stock, needed to pay the debts proved, amounting then only to \$3,359.01. To this proceeding William S. Ketcham, Sr., the complainant, and George W. Ketcham were parties, and they appeared and answered the petition on June 22, 1895. Pending these proceedings and before any order therein, the note in question was given, and this note was for an amount much more than sufficient to pay all the debts proved against the insolvent company, and, if applied for that purpose, to have relieved all the stockholders from
 30 assessment. The existence of this note was not disclosed pending this proceeding, but these three stockholders united in resisting the making of the assessment. An order for assessment was made on November 7, 1895, but this was subsequently reversed as irregularly made by a decree on appeal in 1899. In the meantime, and on September 25, 1896, William S. Ketcham, Sr., died, and George W. Ketcham was appointed administrator. Subsequently a new application for assess-
 40 ment was made on November 9, 1899, and an

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assessment was directed on June 9, 1903, to pay the sum of \$6,344.97, with interest. The making of this assessment was contested by the complainant and the defendant George W. Ketcham as administrator and individually and among other grounds set up was the claim that suit should be first brought against the estate of William S. Ketcham, Sr., to recover the value or the proceeds of sale of the property in question, but the existence of this note which equitably belonged to the company was not disclosed to the receiver or to the court by the complainant or any of the respondents. All of the stockholders assessed, including complainant, resisted the payment of the assessments in suits at law brought for their collection, but after long litigation the complainant, on or about July 20, 1906, paid \$3,658.99, the amount due on his assessment.

In the meantime, and after the first irregular assessment and before the second, and after the death of William S. Ketcham, Sr., complainant, on July 20, 1897, presented to his brother, George, the administrator, a sworn claim on this note, claiming the whole amount thereof as due to him from the estate, and upon his brother objecting by letter of July 21, 1897, to receiving this claim as an absolute claim, and that there was then no such claim, and, further, that the claim should have been stated as to be pressed only in case he was forced to pay an illegal demand in the Holloway case or any portion of it, suggested a form of claim to be put in. This letter is the letter referred to in the lawsuit by plaintiff as the memorandum of July 20, 1897, and is relied on as the written promise of the administrator, saving the statute of limitations. Following this suggestion, complainant put in another claim (not

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under oath), or rather made a written statement, dated July 22, 1897, that, his claim on this note having been presented to the estate for payment:

10 "It is presented on the following conditions, viz: First. No payment is demanded except in the contingency of any loss or payment being demanded of me, by reason of my relations to the Clinton Hill Lumber & Manufacturing Com-
pany. Second. No payment of said note to be demanded in case said estate shall otherwise guarantee me against any loss or payment by reason of connection with said company."

20 No objection was made to the claim as thus presented. In December, 1900, a distribution of the estate was desired, and, the pending claim of the complainant preventing this, further cor-
respondence took place between the brothers in reference to the status of this claim, in the course of which the administrator suggested a statement (Exhibit C. 8) that the note repre-
sented sales of lumber turned over to their father by Holloway, made by complainant as agent of his father, and the proceeds of which sales were applied to payment of notes loaned by their father to Holloway as they came due, and that,
30 as during the disposal of the lumber the father had been served with papers in several suits, and complainant's connection with the sale, which was merely that of agent and at the request of his father, might render him liable to suit for the value of the lumber, his father agreed to se-
cure him against any loss resulting to him personally and so gave the note. Complainant de-
clined to accept this statement as explaining all the facts, and gave a counter statement, signed by him December 22, 1900, stating that the note
40 was given to him as security against any loss in

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suits referred to, being suits pending in chancery, or that might be brought against him by reason of his connection with the Clinton Hill Lumber Company, and further agreeing that, on being released from all claims that might be adjudged against him by reason of these suits, he would destroy the note, and no payment should be demanded. 10

A partial distribution of the estate was made after the receipt of this statement, which, as will be observed, was about four years after the intestate's death, and while proceedings upon the second assessment against complainant and the estate were pending. Had the complainant in those proceedings disclosed in his own defense the existence of this note held by him against his father's estate for the proceeds of sale of the company's property, and tendered it to the receiver, who was entitled to it, the receiver would, I think, have been entitled to have affirmed the sale of the assets and to have collected it, to the extent needed, and complainant would at once have been relieved from liability. In these proceedings, which were commenced in November, 1899, complainant and the administrator and George W. Ketcham were all parties, and complainant was allowed payment to the extent of 40 per cent. upon his stock subscribed for by reason of the company's ownership of this property as transferred to it by Holloway. It was objected in these proceedings that the receiver had a claim against the estate of decedent for the conversion of these chattels to his own use, and that this right of action should be exhausted before an assessment should be made. But this objection was overruled upon the ground that as the case then appeared upon the evidence, this 20 30 40

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claim, so far from being admitted, was disputed by the estate, and the receiver had no assets for its prosecution (64 N. J. Eq. 520, 54 Atl. 450) and it was then further said that the stockholders paying the assessment might be entitled to prosecute in the receiver's name any claim
 10 against the decedent for the conversion. No disclosure was then made on behalf of complainant as to the true condition of affairs, viz., that complainant, as the custodian in charge of the company's property, had sold the company's property and loaned the proceeds to the decedent, taking for his protection decedent's note for the amount of the loan. Had this been disclosed and the note been tendered to the receiver as part of the assets of the company, the assessments would probably not have been directed, as
 20 this subsequent production of assets sufficient to pay the debts would have barred the proceedings. And this seems to have been the complainant's own view of his silence on this point, for in a letter to his brother of December 8, 1907 (Exhibit D. 1), he says:

“I was elected treasurer of the Clinton Hill Lumber Company, and later, when it was about determined not to proceed with the company, I
 30 was elected custodian (Camfield resigning) of the property of the Company. Here I was legally in possession of the same. I sold the goods and banked the proceeds and at father's request loaned him the money by paying some of his outstanding notes, etc. In return and as security for his loan I received his note”

—and in the postscript:

“You forget to see what the outcome might have been had I turned over to the receiver the
 40 note and let him collect it, but I worked with

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all the rest to have the matter settled by the court first as to the rightful owner."

In the proceedings for assessment the "rightful owner" of the property was held to be the company, and the complainant was given the benefit of this ownership by treating his 40 shares as paid.

I do not think the conclusion can be resisted that it was the intention of all of the parties not to disclose the existence of this note to the receiver, but to suppress all information as to it, and in the meanwhile to resist to the utmost the collection of the assessments upon their stock to pay the company's debts, which was the only other source for payment. The assessment was directed by decree on June 9, 1903, from which a joint appeal was taken by complainant and the administrator. In September, 1903, action was brought against complainant by the receiver to recover his assessment, upon which judgment was obtained and affirmed by the Court of Errors and Appeals November, 1905. On December 26, 1905, an appeal was taken from the order of June 9, 1903, which was dismissed, and after this dismissal, and about July 24, 1906, the complainant's assessment was paid to the receiver. Litigation upon the suit by the receiver against the decedent's estate for the recovery of his assessment was pending in the meantime, and continued until about 1908. A subsequent application was made to this court on behalf of the administrator to modify the order for assessment against the decedent, on the ground that the whole value of the property transferred should have been applied toward payment of the subscription on his stock alone, and in the course of these proceedings complainant notified the administrator, by

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letter of May 5, 1909, that he thought he would be the principal witness, if evidence was taken on the application, and that the position he would assume would depend upon how the case was to be fought, and that he was intending to protect his individual rights so far as that is
10 consistent with the facts in the case—the modification if allowed would be a second assessment on himself and his brother and the whole burden practically on him. He then insists on his claim against the estate (on the note), and that the estate would finally have to pay the whole bill for both assessments. Complainant at this time was insisting upon the estate indemnifying him for his assessment, and claiming that the note was given as security against this claim also, and
20 was not merely held to secure him against claim for the property sold. The administrator, on the other hand, claimed that he had no right to pay the complainant's assessment from the estate, and that the note was given only to secure complainant in case he should be held personally liable for the proceeds of sale. There is no question that the estate paid the entire expenses of the litigation in reference to all these assessments, and the whole course of proceedings shows
30 that all parties intended that complainant's assistance in defending these proceedings for assessment should be accomplished with the concealment or suppression on his part, as well as of the respondents, of the existence of this note, until the receiver's litigation was terminated. On this termination complainant, not being able to bring about the payment of his assessment by the administrator who conceived that he had no right to pay it, commenced suit on the note, and in his suit claimed the entire amount thereof,
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with interest, as belonging to himself. In the suit at law the entire amount of the note was apparently treated as due to the complainant from his father's estate, and the conditional promise to pay, in case plaintiff was held liable on the Holloway claim, set up against the administrator, was treated at law as a promise to pay the entire amount, on the happening of the condition, and not limited to the amount plaintiff was obliged to pay, as being the true consideration of the note, as between the parties thereto. 10

[1-3] Upon the partial distribution of the decedent's estate, made in December, 1900, above referred to, the status of complainant's claim was a matter of discussion between him and the administrator and other persons interested and such partial distribution was made after complainant had made and signed a statement relating thereto, dated December 22, 1900, that the note had been given him as security against any loss in the suits therein referred to, being suits then pending in the Court of Chancery, or that might be brought against complainant by reason of his connection with the Clinton Hill Lumber & Manufacturing Company, and that on being released by the heirs from claims that might be adjudged against him by reason of these suits, he would destroy the note so that no payment shall be demanded on the same. (Exhibit C. 7.) 20

This statement was accepted as satisfactory for the purposes of the division, as appears by the administrator's letter of May 5, 1903 (Exhibit D. 9), in which, referring to the division, he says that before division he wanted it put down in black and white that complainant's paper (the note) was for use only in the contingency of a judgment and, further, "that complainant did this all right." 30 40

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This statement was made in December, 1900, and before the statute had begun to run, and the plain purpose of the offer and of its acceptance was that of delaying the consideration or settlement between the parties of any claim of complainant's upon the note until the termination of the litigations referred to. The commencement of a suit thereon at any time before such termination would or might have required the question of settlement of his claim to be taken up at once, and for obvious reasons either party desired such suit pending the contest with the receiver on the assessments. The object of both parties was to resist the collection of the assessments and also hold in addition the proceeds of sale for the benefit of decedent's estate in which they were all interested. And the procuring and acceptance of this statement, which had and was intended to have the effect of delaying any action or other proceeding on the note until the termination of the proceedings, would, under ordinary circumstances, have the effect of estopping defendant from pleading the running of the statute against suit on the note before complainant had been obliged to pay. Had it been intended that the complainant should be required to admit in writing that the note was held, not for its face value, as an existing debt, but only as security for a contingent liability, and that after having obtained this acknowledgement, the complainant was still expected to sue on the note before it became outlawed, in order to have the benefit of it as security, he was entitled to have been so informed at the time, in order that he might bring his suit in time. The statute had then more than two years to run, and had this necessity of a suit on it within that time, to protect complainant's

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rights to the claim as security, been contemplated by the administrator, the complainant should have been notified, such suit, if brought before the amount for which it was held as security had been determined, must have resulted in a judgment for the whole amount of the note, which would then have been held in lieu of the security, and might have been required to be paid into court, or otherwise held in trust pending the happening of the contingency and the determination of the amount for which the note was held as security. Otherwise the complainant would be deprived of his security. Neither party to the statement or acceptance contemplated any such suit on the note, in my judgment, before complainant's liability had been established, but at the time both understood that, pending the litigation, no such suit should be brought. If this was the understanding, defendant is estopped from setting up the running of the statute during the litigation.

By this statement and its acceptance and the distribution following thereon, the complainant also on his part was equitably estopped from claiming in any suit on the note, or on his claim, more than the amount for which the note was held as security, and his recovery in the suit at law for his own benefit further than this was such a violation of the equitable rights of the administrator as would disentitle complainant to any purely equitable relief to aid him in his suit on the note, if the further prosecution of the suit related merely to his own rights or property. But the note in his hands is the security or evidence of debt taken on the loan of funds held by him as agent of and in trust for the company, and the equitable rights of all the parties to this suit are based on that ultimate fact.

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On the whole evidence as now presented, the case in equity stands thus: The consideration of the note in question was money of the company loaned to decedent, without authority, by complainant, who had this money in his possession as derived from sales of the property of the
10 company, and in equity any recovery upon this note is for the benefit of the company, or the successors to its rights. Legally and equitably the receiver in insolvency has so succeeded; and (the creditors having been paid in full) the receiver would hold the funds if received by him for the benefit of all the stockholders of the company, and for distribution among these stockholders in proportion to their respective interests therein. In such distribution, as it now
20 strikes me, stockholders should be equalized, and those stockholders who have paid their stock subscriptions to the receiver are entitled to have these payments for the company debts refunded proportionately, before any distribution to other stockholders who have not paid. On further consideration these payments of assessments do not now seem to me to be payment of the company's debts by stockholders who stand simply in the relation of sureties to the company
30 as I formerly suggested in the opinion above referred to. 64 N. J. Eq. 520, 54 Atl. 450. And the reason is that these stockholders' payments are made to and recoverable by the receiver as being purely assets of the company, which the receiver recovers as such assets and applies to the payment of its debts, as assets received from any other source would be applied. The equities of the stockholders to reimbursement must therefore, as it now strikes me, be worked out by a
40 preference over the other stockholders on the

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whole equities between the stockholders, as they stand at distribution of its assets after payment of debts, rather than by a supposed immediate right of subrogation for the definite amount paid as surety and recoverable at once from the company as principal debtor, or its successors in title, without regard to the equities between the stockholders. The practical difference between the theories in the working out of the equities lies in this: That if the equity arises from the subrogation of a surety who has paid the principal's debts, then the complainant may, upon payment, have at once an individual action at law or in equity against a cosurety for contribution, and recovery is limited to a proportionate share of the amount paid, and may also as a surety make individual claim in equity against a cosurety for the benefit of securities or assets of the company held by the cosurety for the common benefit of all sureties. This latter claim would be worked out in a suit between all persons interested in the securities as parties. On the other hand, if the equities between stockholders paying assessments for debts are to be worked out by distribution of the company's assets between stockholders, then the whole amount to which the company, or the receiver, its successor in title, are entitled, must be paid to the receiver as company assets, and the equities then adjusted between the stockholders on distribution.

In this case the complainant, except to hold the proceeds for the benefit of the receiver as representing the stockholders, has no equitable right to recovery upon this note; and, for the purpose of prosecuting this note merely to recover the whole amount for his individual benefit, as he has hitherto done, he is entitled to no

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equitable aid of any kind, by injunction or otherwise. An equitable remedy will not be granted where the complainant's fundamental claim is inequitable. *Minzesheimer v. Doolittle*, 60 N. J. Eq. 394, 398, 45 Atl. 611. (Err. and App. 1899.)

- 10 But this suit, although brought in complainant's own name and, as it appears from his letters before bringing the same, brought for his own personal benefit, to recover the full amount, can now, as it seems to me, be dealt with on the basis of the equitable rights of all the persons interested in the fund which the note represents, and on the line above indicated, viz., as an action requiring all parties to treat it as brought for the benefit and use of the receiver for the recovery of assets of the company, and brought upon
- 20 a note which from its inception belonged to the company as part of its assets, and not to the complainant. And if, in the bringing of the suit at law, complainant had described himself as suing "to the use of the company," or the receiver, there would be no question, in my judgment, that the receiver or the complainant as suing for him, upon the evidence at this hearing, would be entitled to enjoin setting up the statute of limitations. The conclusion cannot be resisted
- 30 that both complainant and defendant in the whole course of the litigation relating to the assessment from June, 1895, before the note was given, until 1906, when the assessments were collected, intentionally joined in the suppression of the existence of this note, to which the receiver all the while was entitled, and to which he is now entitled. And I think it further appears that it was the intention of both complainant and the defendant as administrator, with the consent
- 40 of the other parties interested, that a determin-

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ation or settlement, as between complainant and the estate, of the claim made on this note, should not be made by suit thereon, or otherwise, pending the litigation on the assessments. The expense of this litigation was, in the meanwhile, borne by the estate upon all the assessments, including complainant's. If, therefore, the receiver himself were now suing on this note for the recovery of money needed to pay debts, and the statute of limitations were pleaded, a case appears entitling him to such injunction. As the money, if recoverable in the suit, is however, for distribution among stockholders only, a point of difficulty arises because the complainant and the defendant, being the only stockholders who have paid assessments, had previously thereto, and with notice of the claim on them for assessments, arranged a disposition of all the company's assets (being money in complainant's hands from sales of its property) between complainant and decedent, by which arrangement decedent was to receive the money and complainant, to secure him on the making of the loan, was to receive an individual note to himself for the whole amount, which note was not to be turned over to the receiver, but to be held pending the litigation. The question now is whether both these parties, complainant and the administrator, both as to the defenses on the note and as to the amount recoverable thereon at law should not be left in the position in which they have voluntarily put themselves, and be remitted to their legal rights, both as to the recovery on the note and the defenses thereto. And if it were a matter of intention fraudulent misappropriation of the company's funds for their individual benefit, by the loan of its money, and there were no other persons in-

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10 terested, the case would clearly be one, I think, for the refusal of any equitable relief to complainant, against any legal defense, and on the same ground, it might, in case of a recovery of the whole amount for complainant's own personal benefit bar defendant's right to any equitable relief. But on the whole situation and circumstances relating to the original bona fide claims of the decedent against Holloway, the transfer of the lumber by Holloway to the company, its incorporation and subsequent abandonment and disposal of its property, and the disposition of the proceeds to pay debts incurred by decedent for Holloway, I am satisfied that the appropriation of the company's money for decedent's benefit was not in the nature of actual fraudulent misappropriation, but was made under a bona fide claim that there was not in fact a legal corporation, and that decedent had substantial claims on the property and its proceeds for the payment of his claims against Holloway, and that the note was originally given to protect complainant, if he should be held liable for the loan. And if this be correct, I see no reason why the complainant, if he be now willing from this time forward to prosecute his suit on the note as brought, to the use and for the benefit of the receiver, should not now have appropriate equitable relief against the plea of the statute.

30 I conclude therefore that the complainant is entitled to an injunction against setting up the statute of limitation as prayed, but only upon the condition that the suit at law be continued as being to the use of the receiver, and that any moneys recovered therein be paid to the receiver as assets of the insolvent corporation, for payment of distribution under the order of this court.

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The form in which these conditions should be drawn will be settled on notice, and I will also then hear counsel as to the making of any other conditions of relief to be imposed on complainant, and also as to what further order or direction, if any, should be given, to meet the contingency that the complainant declines to accept the conditions, and elects to proceed with the suit law standing on any alleged legal rights upon the note, as between him and the administrator, to recover the whole amount for his own benefit.

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Final Decree.

Final Decree.

Filed June 2, 1917.

10 This cause having been referred by the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey, to the Honorable John R. Emery, one of the Vice-Chancellors, to hear the same for the Chancellor and to report thereon to him and advise what order or decree should be made therein by an order duly entered in this cause on June 12th, 1913, and it appearing that said cause was duly heard by said Vice-Chancellor in accordance with said order upon bill, answer, replication and proofs taken in open court, in the presence of Jerome T. Congleton, Esquire, solicitor for and of counsel with the complainant, and Scott German, Esquire, solicitor of defendant, and Frank E. Bradner, Esquire, of counsel with defendant, and that having read, heard and considered the pleadings and proofs of the respective parties, and the arguments of the respective counsel and considered the same, filed his conclusions holding that the defendant, George W. Ketcham, administrator of the Estate of William S. Ketcham, Sr., deceased, should be enjoined and restrained from setting up the statute of limitations as a defense in the action at law brought by the complainant William S. Ketcham, Jr., as plaintiff, against the defendant, George W. Ketcham, administrator of the Estate of William S. Ketcham, Sr., deceased, as defendant, pending in the Essex County Circuit Court, upon condition that said suit at law be continued as being to the use of Thomas N. McCarter, Receiver of the Clinton Hill Lumber & Manufacturing Company, but resigned as Vice-Chancellor before advising a decree.

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Final Decree.

And it further appearing that since the filing of the conclusions of his Honor, Vice-Chancellor Emery, the defendant, George W. Ketcham, has resigned as administrator of the Estate of William S. Ketcham, Sr., deceased, and that said resignation has been accepted by the Essex County Orphans' Court and that Worrall F. Mountain has been duly appointed substituted administrator with the will annexed of the Estate of William S. Ketcham, Sr., deceased, by an order of the Essex County Orphans' Court, and has duly qualified and taken upon himself the administration of said estate. 10

And it further appearing that notice of application to settle the decree in this cause and to substitute Worrall F. Mountain, substituted administrator with the will annexed, as defendant in the place and stead of George W. Ketcham in this cause has been duly given by the solicitor for complainant to Scott German, Esquire, solicitor of George W. Ketcham, administrator of William S. Ketcham, Sr., deceased; Worrall F. Mountain, Esquire, Substituted Administrator with the Will annexed of William S. Ketcham, Sr., deceased, and William A. Smith, Esquire, solicitor of Thomas N. McCarter, Receiver of Clinton Hill Lumber & Manufacturing Company, 20 30

It is, on this 31st day of May, 1917, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, on motion of Jerome T. Congleton, solicitor of complainant, and in the presence of Scott German, Esquire, solicitor of George W. Ketcham, Administrator of William S. Ketcham, Sr., deceased; Frank E. Bradner, Esquire, solicitor of Worrall F. Mountain, Substituted Administrator with the will annexed of William S. Ketcham, Sr., deceased, and William 40

Final Decree.

A. Smith, Esquire, solicitor of Thomas N. McCarter, Receiver of Clinton Hill Lumber & Manufacturing Company, ORDERED, ADJUDGED AND DECREED, and the said Chancellor doth, by virtue of the power and authority of this Court, and of the acts of the Legislature in such case made and provided, ORDER, ADJUDGE AND DECREE that Worrall F. Mountain, substituted administrator with the will annexed of William S. Ketcham, Sr., deceased, be, and he hereby is substituted as defendant in this cause, and that the said George W. Ketcham, administrator of the Estate of William S. Ketcham, Sr., deceased, be, and he hereby is enjoined and restrained from setting up the statute of limitations as a defense to the action at law brought by the said William S. Ketcham, Jr., against the said George W. Ketcham, administrator of the Estate of William S. Ketcham, Sr., deceased, now pending in the Essex County Circuit Court, and that Worrall F. Mountain, substituted administrator with the will annexed of William S. Ketcham, Sr., deceased, when substituted as defendant in said action at law above referred to, be, and he hereby is enjoined and restrained from setting up the statute of limitations as a defense to the action at law brought by the said William S. Ketcham, Jr., against the said George W. Ketcham, administrator of the Estate of William S. Ketcham, Sr., deceased, now pending in the Essex County Circuit Court, upon the condition that said suit be continued as being to the use of Thomas N. McCarter, receiver of the Clinton Hill Lumber & Manufacturing Company, and that any moneys recovered in said suit be paid to said receiver as assets of the Clinton Hill Lumber & Manufacturing Company, an insolvent corporation, and be

Final Decree.

distributed by said receiver under an order of this court, and upon the further condition that said suit at law be prosecuted in the first instance at the cost and expense of the complainant, William S. Ketcham, Jr., with leave reserved to him to apply to this Court to be reimbursed for his said costs and expenses out of any judgment he may recover in said suit at law. 10

And it is further ORDERED, ADJUDGED AND DECREED that said defendant do pay to the said complainant his costs of this suit, incurred and to be incurred, including a counsel fee to Jerome T. Congleton in the sum of \$300.00 to be taxed in said costs, and that said complainant do have execution therefor, according to the practice of this court.

E. R. WALKER, 20
C.

We consent to the entry of the above decree.
I consent to the above decree as to form.

SCOTT GERMAN,
Solicitor for George W. Ketcham,
Administrator, etc.

I consent to the form of the above decree. 30

FRANK E. BRADNER,
Solicitor of Worrall F. Mountain,
Sub. Admr. of Wm. S. Ketcham, deceased.

COULT & SMITH,
Solicitors for Thomas N. McCarter,
Receiver, etc.

Signed above May 29, 1917.

F. E. B.

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*Notice of Appeal.***Notice of Appeal.**

Filed June 8, 1917.

10 Worrall F. Mountain, substituted administrator of the goods and chattels of William S. Ketcham, Sr., deceased, the defendant in the above stated cause, having been substituted as such defendant in the place of George W. Ketcham, administrator of the Estate of William S. Ketcham, Sr., deceased, hereby appeals from the final decree made in the above stated cause on May 31, 1917, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated June 7, 1917.

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FRANK E. BRADNER,
*Solicitor for and of Counsel
with Defendant.*

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

FRANK E. BRADNER,
Of Counsel with Defendant.

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Petition of Appeal.

Petition of Appeal.

Filed June 25, 1917.

New Jersey Court of Errors and Appeals

Between

WILLIAM S. KETCHAM, JR.,
Complainant-Respondent,

and

GEORGE W. KETCHAM, admin-
istrator of WILLIAM S.
KETCHAM, SR., deceased,
Defendant-Appellant.

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*Petition
of Appeal*

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The petition of Worrall F. Mountain, substituted administrator of the goods and chattels of William S. Ketcham, Sr., deceased, the defendant in the above stated cause, having been substituted as such defendant in the place of George W. Ketcham, administrator of the estate of William S. Ketcham, Sr., deceased; respectfully shows:

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That your petitioner finds himself aggrieved by a decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of New Jersey, bearing date May 31, 1917, wherein the said William S. Ketcham, Jr., was complainant, and George W. Ketcham, administrator, etc., of William S. Ketcham, Sr., deceased, was defendant; in the following particulars, to wit:

1. Because the said decree adjudges that the complainant is entitled to an injunction restrain-

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Petition of Appeal.

ing the defendant from setting up the Statute of Limitations as a defense to the action at law brought by the complainant against the defendant, and now pending in the Essex County Circuit Court.

10 2. Because the said decree adjudges that the complainant is entitled to proceed in the said action at law for the use of Thomas N. McCarter, Receiver of the Clinton Hill Lumber and Manufacturing Company, and that any moneys recovered in said suit should be paid to said Receiver as assets of the Clinton Hill Lumber and Manufacturing Company, an insolvent corporation, and be distributed by said Receiver.

20 3. Because the said decree reserved to the complainant leave to apply to the Court of Chancery to be reimbursed for his costs and expenses out of any judgment he may recover in said action at law.

4. Because the said decree adjudges that the defendant shall pay to the complainant his costs of the suit in chancery including a counsel fee.

30 5. Because the complainant failed to prove that he had a right of action at law against the defendant in his representative capacity founded upon an honest and just claim; and the decree in that respect is erroneous.

6. Because the evidence proved that the complainant's right of action at law was actually barred by the Statute of Limitations, and the new promise relied upon by the complainant as having been made by the defendant as administrator, did not bind the estate of William S. Ketcham, Sr., and the complainant was not entitled to any equitable relief.

Petition of Appeal.

7. The complainant failed to prove that by reason of the fraud or inequitable conduct of the defendant in his representative capacity, the complainant neglected to commence his action at law within the time limited by statute.

8. Because the testimony of the complainant of transactions with William S. Ketcham, Sr., since deceased, was illegally admitted at the hearing. 10

9. Because the evidence proved conclusively that the complainant had elected a remedy at law and was bound thereby either as an individual, or as the representative of Clinton Hill Lumber and Manufacturing Company.

10. Because the finding of the Vice-Chancellor that there was any concealment of the existence of the promissory note on the part of the defendant as the representative of the estate of William S. Ketcham, Sr., deceased, is contrary to the weight of the evidence. 20

11. Because the evidence proved clearly that the complainant misappropriated the property of the corporation, and if he did take the note for the benefit of the corporation, he concealed that fact from the court and from the Receiver, and he is not entitled to any relief in equity. 30

12. Because the complainant had acquiesced in the situation as it was at the time he brought his action at law, and pleaded to the defendant's answer of the Statute of Limitations and went to trial on that issue, and is estopped by his acquiescence from asking for or obtaining any relief in equity.

13. Because the complainant did not use reasonable diligence in applying to the court of equity for relief. 40

Petition of Appeal.

14. Because upon the proof in the case, the bill of complaint should have been dismissed.

And your petitioner humbly appeals from the said decree of the Chancellor, and from the whole and every part thereof, upon the ground that the same is erroneous in the particulars
10 hereinbefore stated and set forth.

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

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

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*Answer to Petition of Appeal.***Answer to Petition of Appeal.**

Filed.

10 The answer of the above named respondent, to the petition of appeal of Worrall F. Mountain, substituted administrator of the goods and chattels of William S. Ketcham, Sr., deceased, the defendant in the above stated cause, having been substituted as such defendant in the place of George W. Ketcham, administrator of the estate of William S. Ketcham, Sr., deceased.

20 This respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits, that a decree was, on the thirty-first day of May last past, made and entered in the Court of Chancery, in the cause for that purpose mentioned in said petition, as is therein stated; but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced.

30 And this respondent is advised and believes that the said decree is agreeable to equity, and he prays that the same may be affirmed with costs to be adjudged to this respondent.

WILLIAM S. KETCHAM, JR.,
Respondent pro se.

New Jersey Court of Errors and Appeals

November Term, 1917.

Between

WILLIAM S. KETCHAM, JR.,
Complainant-Respondent,

and

GEORGE W. KETCHAM, admin-
istrator of WILLIAM S.
KETCHAM, SR., deceased,
Defendant-Appellant.

*On Appeal
from Court
of Chancery.*

Opinion of Judge Adams, on Rule to Show Cause.

October 19, 1912.

Printed by Respondent.

WILLIAM S. KETCHAM, JR.,
Respondent—pro se.

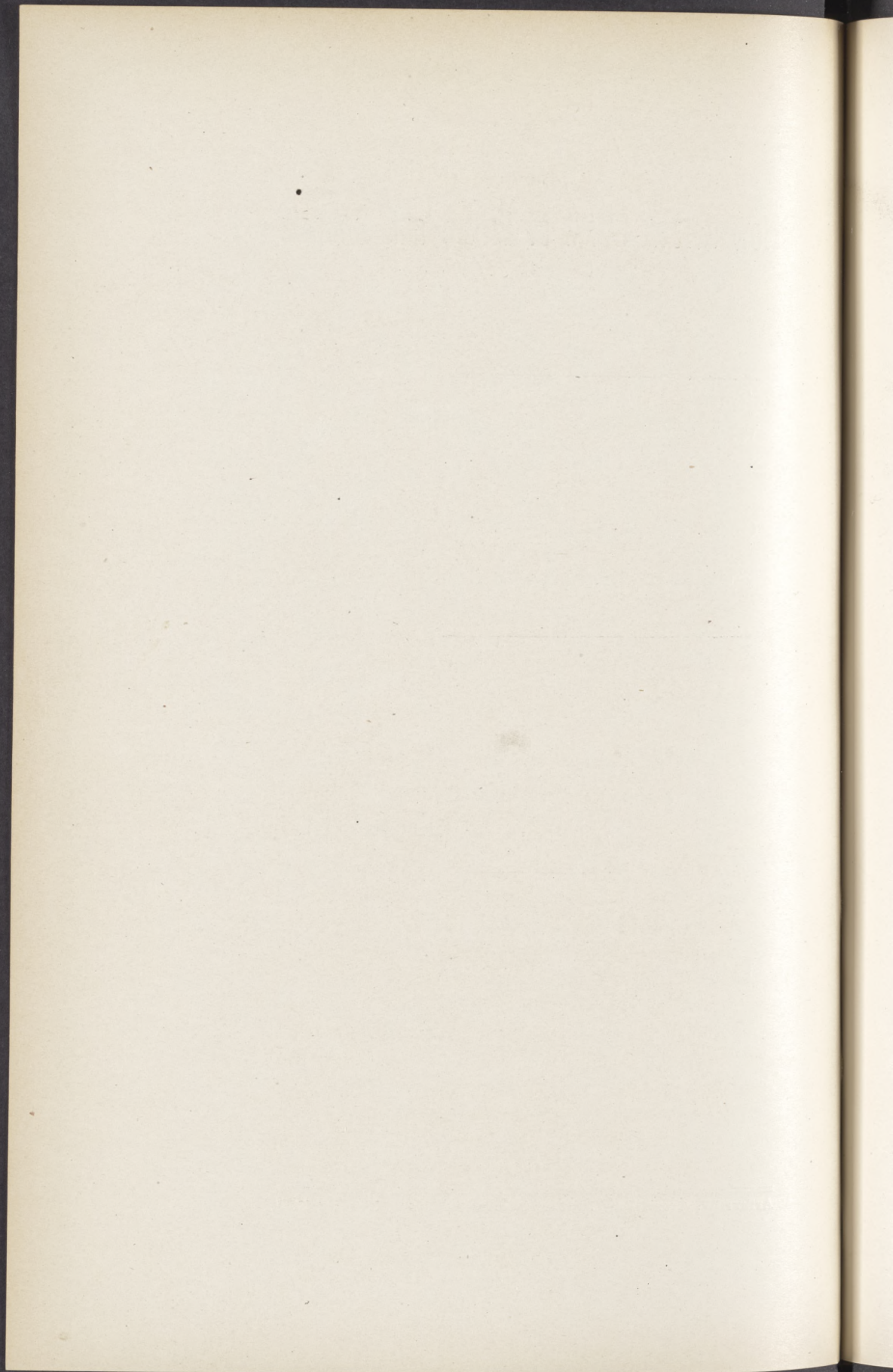


Exhibit A.

Essex Circuit Court.

Saturday, October 19, 1912.

WILLIAM S. KETCHAM, JUNIOR,

*vs.*GEORGE W. KETCHAM, Adm'r,
&c., of WILLIAM S. KETCHAM,
SENIOR.

On Rule to Show Cause.

Mr. Jerome T. Congleton for plaintiff.

Mr. Frank E. Bradner for defendant.

DECISION.

ADAMS, J.

This action is brought by William S. Ketcham, Junior, the payee of a demand note for \$6,668.84, against the administrator of William S. Ketcham, Senior. William S. Ketcham, Senior, is alleged to have been the maker of the note. William S. Ketcham, Senior, was the father of William S. Ketcham, Junior. The note bears date August sixth, 1895. The period of six years limitation, which in case of a demand note is to be calculated from the date of the instrument, expired on August sixth, 1901; see *Larason v. Lambert*, 7 Halsted 247. On September twenty-fifth, 1896, William S. Ketcham, Senior, the alleged maker of the note, died intestate and George W. Ketcham, one of his sons, was on October twentieth, 1896, appointed his administrator. This action was

brought on December twenty-eight, 1908. In answer to pleas of the statute of limitations and that the claim was not duly presented against the estate of William S. Ketcham, Senior, the plaintiff has replied a new promise by the administrator and has joined issue on the plea that due presentation was not made. The defendant has rejoined, denying that a new promise was made. The plaintiff having obtained a verdict in a trial before Hon. Wilbur A. Heisley, a rule to show cause was granted.

The questions suggested by the pleadings are, therefore, these. *First:* Did the legal evidence at the trial sustain the allegation that William S. Ketcham, Senior, signed the note in suit? *Secondly:* Was the plaintiff's claim duly presented to the administrator of the estate of William S. Ketcham, Senior? *Thirdly:* Was a new promise made by the administrator, keeping the plaintiff's claim alive until a date subsequent to the commencement of the action?

My conclusions are as follows: *First:* The legal evidence at the trial sustained the allegation that William S. Ketcham, Senior, signed the note in suit.

The plaintiff relied for proof of the making of the note on the testimony of two witnesses: William S. Ketcham, Junior, who is the plaintiff, and Davis H. Merritt, president of the National Newark Banking Company. The plaintiff when on the stand was shown the note in suit, and was asked and answered as follows:

“Q Do you recognize the signature to that paper? A Yes, sir, I do.

Q Whose signature is it? A My father's.

Q That is, William S. Ketcham? A Yes, sir.”

These questions and answers were objected to upon the ground that section 4 of An Act Concerning Evidence (Revision of 1900) forbids testimony to be given by any party to an action as to any transaction with or statement by any testator or intestate represented in said action, unless the representative offers himself as a witness in his own behalf and testifies to any transaction with or statement by his testator or intestate. The record shows that in this case the representative did not so offer himself. The learned trial judge overruled the objection and granted an exception in these words:

“If the question required him to form an opinion from what he learned by being in contact with his father at that time, I should say there was great force in your objection. But he is merely asked if he recognizes the signature on this paper. If he should say, ‘Yes, I recognize it because I saw my father sign it,’ or ‘because my father told me so,’ undoubtedly it would be a transaction or conversation with the deceased. But I think he is just as much entitled to prove the signature simply by looking at it, and nothing else, as any other person. I overrule the objection, and give you an exception.”

The ruling as to the competency of the testimony was thus made to turn on whether the witness “formed his opinion by being in contact with his father at that time.” This, I think, is not the statutory criterion. The test of inadmissibility in such a case, so far as it depends on section 4 of the Evidence Act, is participation in the transaction, not by the witness, but by the decedent. The statute shuts the mouth of the witness as to matters of which the decedent had legal knowledge, which would have enabled him,

if he were living, either to confirm or deny the testimony of the opposite party. Thus equality is produced. *Wolverton v. Van Sycle*, 28 Vroom 394; *Provost v. Robinson, Executor*, 29 Vroom 222; *Dickerson v. Payne*, 37 Vroom 35; *Baker v. Bancroft*, 40 Vroom 223.

It is obvious that *William S. Ketcham, Senior*, was in a position to affirm or deny that he signed the note in suit. This note, if genuine, was a transaction between the maker and indorser. It cannot, I think, be said that the plaintiff did not give testimony as to a transaction with his father. The legal character of a promissory note is such that when the payee goes on the stand and authenticates the signature of the maker, he does not merely identify an autograph. He proves a contract. Such evidence confers upon the note an evidential character and makes out a *prima facie* case. I therefore think that it was error to receive the testimony of the plaintiff as to the signature to the note in suit.

The plaintiff, on re-direct examination, was shown five other papers, unconnected with this case, bearing the name of *William S. Ketcham*. The witness testified in each instance that the name was in the handwriting of his father. These documents were used in evidence for purposes of comparison. Four other documents were shown the same witness on re-cross examination, and in each case he identified an indorsement as in his father's handwriting.

Mr. David H. Merritt, president of the National Newark Banking Company, testified that he was for twenty-five years paying teller of the Newark City National Bank, where *William S. Ketcham, Senior*, was a depositor; that he was familiar with the signature of *Mr. Ketcham*, and that, in his opinion, *Mr. Ketcham* wrote the

signature to the note in suit. Mr. Merritt testified also that the other documents above mentioned bore Mr. Ketcham's genuine signature.

The proof in support of the execution of the note is thus threefold; first, the direct testimony of the plaintiff; secondly, the direct testimony of Mr. Merritt; thirdly, the argument founded on a comparison of the note in suit with other documents, unconnected with this case, pronounced by the plaintiff and by Mr. Merritt to bear genuine signatures of Mr. Ketcham. There is no other evidence upon either side of this subject of handwriting, and there is no presumption against the genuine character of the signature. If the plaintiff had never testified as to his father's signature to the note in suit, it would have been the duty of the jury to accept the testimony of Mr. Merritt and treat the note as genuine, in the absence of any proof to the contrary. The argument by comparison of signatures may also have some value. I therefore conclude that if it was error to admit the testimony of the plaintiff as to his father's signature, such error was not injurious to the defendant, since without such testimony the conclusion as to the authenticity of the note in suit must have been the same as that which the jury reached.

Secondly: I find that the note in suit was duly presented to the administrator of the estate of William S. Ketcham. On October twentieth, 1896, the administrator took out the usual rule to limit creditors, and on July twentieth, 1897, which was the last day allowed by the rule, the plaintiff presented to the administrator verified proof of the note. It is true that on the following day the administrator returned the proof and suggested that it be made in another form, but

this cannot affect the fact that timely proof was made.

At this point the case discloses a complexity. The testimony, though not wholly in accord, warrants the conclusion that the plaintiff when he presented his written proof, duly verified, stated to the administrator that the note, though in form absolute, was in fact conditional, and that the real engagement between him and his father was that the note for \$6,000 should not become due until he, the present plaintiff, should be compelled to pay a claim made against him by the creditors of one Holloway. It appears that the plaintiff was a subscriber to the capital stock of The Clinton Hill Lumber & Manufacturing Company, and that this company had acquired property of one Holloway under such circumstances that the creditors of Holloway had instituted or threatened to institute proceedings in Chancery to compel a return of the Holloway property by the stockholders of the company. The plaintiff, so the testimony tends to show, stated to the administrator when he made his proof that the obligation of William S. Ketcham to pay the note was dependent upon this condition subsequent; that is, that the note would not become due until the defendant should first be compelled to pay the Holloway claim thus asserted against him as one of the stockholders of The Clinton Hill Lumber & Manufacturing Company.

Thirdly: Was a new promise made by the administrator in writing, and signed by him, to pay the note in suit upon the happening of this condition subsequent? An administrator may bar the operation of the statute of limitation by a new promise. *Hewes v. Huff*, 40 Vroom 263. The following cases are examples of conditional promises to pay antecedent notes. *Parker v. Butter-*

worth, 17 Vroom 244; *N. Y. Fire Ins. Co. v. Tooker*, 4 N. J. L. J. 334. The amended replication alleges that on July twentieth, 1897, such a new promise was made. For proof of this the plaintiff relies upon a letter written and sent by the administrator to the plaintiff, not, as stated in the replication, on July twentieth, but on July twenty-first, 1897, of which the following is a copy:

“July 21st, 1897.

“My dear Brother:

I did not read your paper until this morning and after consideration, I feel I have no right to receive it in its present form; with your explanation of last evening, viz: that it is a claim only in the contingency of *your being mulcted* in the Holloway suit, it might stand but you recite no facts and your affidavit says the amount of \$6,666.84 ‘is truly owing you.’ Now this as you and we all know is not the case. Nothing is owing you unless at some future time you should be called upon to pay the Holloway claim. As your action in that matter was not in any personal interest, it would appear that no such contingency could arise.

As administrator I must do my duty faithfully: I am under bonds to do so and you are one of the bondsmen. I cannot receive, without explanation, a paper which states positively that you hold a claim of \$6,666.84, for the legal time (9 months) has passed and besides at the present time there is no such claim.

Why did you not say plainly that the claim would be pressed in case you were forced to pay an illegal demand in the Holloway case or any portion of same?

I know your interest to protect yourself, and as I said, I believe you are entirely safe by a careful presentation of the facts in the present suit against the estate, but if you are anxious to put yourself on record, let it be in another form.

Suppose you make another paper about as follows:

To the Administrator,

Estate Wm. S. Ketcham.

I claim from above estate, in a certain contingency, the sum of \$6,666.84, being a promissory note of my father of date Aug. 6th, 1895. The said note was given to protect me against any demand that might be made against me personally by the creditors of one Holloway. Should no claim be pressed against me, then said note and claim to be null and void.

The above form is only a suggestion. I do not wish to be held responsible for its validity, as I am not a lawyer, but it is consonant with facts and the paper given me last evening is not according to the facts.

Very truly, your Brother,

Geo. W. Ketcham."

Among the questions that arise concerning this letter, two are prominent. Was the duty of construing it for the Court or for the jury? Does it, when properly construed, amount to a new promise, deferring the operation of the statute until the performance of a condition subsequent, with the effect of keeping the plaintiff's claim alive until after suit was brought?

If the duty of construing this letter was performed by the wrong agency, that is, by the Court, when the jury should have done it, or *vice versa*, error was committed. If this duty

was performed by the right agency, does the letter bear the construction attributed to it by the plaintiff—that is, was it a new promise, taking the case out of the statute? This construction was necessary to the maintenance of the action, for, on any other view, the plaintiff's claim was outlawed before suit was brought. This is apparent when the dates are noticed. As I have already said, the note bears date August sixth, 1895, and, by its terms alone, would have become outlawed on August seventh, 1901. This action was commenced on December twenty-eighth, 1908, more than thirteen years after time began to run on the note and more than eleven years after the date of the alleged new promise. It was, therefore, a vital matter that the plaintiff should prove at the trial that a new promise was made establishing the liability of the maker at some date within six years before the suit was brought. Otherwise the claim was outlawed. This burden the plaintiff assumed. As proof of the performance of the condition subsequent before mentioned, and plaintiff proved that, in consequence of proceedings in the Court of Chancery and Essex Circuit Court, the plaintiff was compelled to make, and did make, a payment upon the Holloway claim. The date of this payment was January seventeenth, 1906. (Book, p. 5.) The amount of it does not distinctly appear in the book, as the necessary exhibits are not spread in full in the testimony. The amount of the payment is stated, correctly, I assume, in the brief of counsel for the plaintiff to have been the sum of \$3,885. If the letter of July twenty-first, 1897, was a new promise effectual to make the note due on January seventeenth, 1906, the date of this payment, then the action, which was commenced within less than three years from that date, was brought in time.

Was the duty of construing this letter for the Court or for the jury? The rule is that the interpretation of a written instrument is for the Court. In *Jones on Evidence, Second Edition, Sec. 175*, the law is thus stated:

“It is firmly established that the judge is to construe and interpret the contracts and other written instruments of every description that are offered in evidence. * * * But when a written instrument cannot be construed without the aid of parol evidence or the reference to facts outside the writing itself, or when its construction involves questions of fact, the instruments should be submitted to the jury rather than to the judge to find the facts. But the legal effect of the contract is still a question of law for the judge.”

In *Wigmore on Evidence, Vol. 4, Sec. 2556*, it is said:

“The construction of all written instruments belongs to the Court. It may be necessary to hear evidence of the surrounding circumstances that fill out the meaning of the words, as well as of any local or commercial meanings attached to particular words by usage, and the ascertainment of this is for the jury. But subject to the amplification or precision of the meaning thus ascertained, as well as of any local or commercial meanings attached to particular words by usage, it is the duty of the jury to take the construction of the instrument from the Court.”

The case of *Smith v. Clayton*, 5 Dutcher 357, is to the same effect.

There is a line of decisions which in certain cases extend the exception still further. A refer-

ence to them may be found in *Wigmore on Evidence*, Vol. 4, Sec. 2556 and notes. For example, it is said that where a contract is partly oral and partly in writing, its terms, if disputed, are to be tried by the jury as a question of fact, subject to the instructions as to the legal effect of the words. One case is *Nash v. Classen*, decided by the Supreme Court of Illinois in 1896; 163 Ill. 409, 45 N. E. 277. Here the question was whether the relation of principal and agent existed between the parties. The Court said:

“If a contract or other instrument be offered for the express purpose of proving the relation of partnership agency or like character, and the allegation be founded on such instrument, then the construction of the instrument is for the Court. In a case, however, where it is sought to establish the question of agency by parol proof of various acts, conduct and business transactions of the parties, and a written instrument is offered, not for the express purpose of proving the agency, but as an element tending to prove it, and in corroboration of parol proof, no construction need to be given it by the Court, but it is a question for the jury as to whether all the evidence, taken as a whole, establishes the relationship of principal and agent.”

Another case is *Eureka Fertilizer Co. v. Baltimore Copper, &c., Co.*, decided by the Court of Appeals of Maryland in 1893; 78 Md. 179, 27 Atl. 1035. In this case the Court says:

“As the contract of sale was partly in writing and partly in parol, its construction was not for the Court, but for the jury. *Roberts v. Bonaparte*, 73 Md. 191, 20 Atl. 918. It was consequently for the jury to say, under proper instructions, whether, taking all

the evidence, both written and oral, together, and crediting such of it as they might believe, there was a warranty by the vendor."

The case of *Roberts v. Bonaparte*, above cited, was decided by the Court of Appeals in Maryland in 1890. The first head note is this:

"It is for the jury to find whether the whole contract was in writing, and if not, to find from all the evidence, written as well as oral, what the contract was."

Cassett v. Glazier was a case decided by the Supreme Court of Massachusetts in 1896; 165 Mass. 473. It is the case of an oral contract. The Court says:

"It is contended that the construction of the words used is for the Court; and so it is, when an oral contract is distinct in its terms. But where a contract is to be gathered from talk between the parties, and especially from talk on more than one occasion, the question what the contract was, if controverted, must usually be tried by the jury as a question of fact."

The case of *Spragins v. White* was decided by the Supreme Court of North Carolina in 1891; 108 N. C. 449, 13 S. E. 171. This was the case of an unambiguous oral contract. It was held that the interpretation of it was a question of law for the Court.

It is apparent that these decisions have no application to the case in hand, where the new promise is alleged to be contained in a single written instrument, and where, moreover, by a statutory requirement, the new promise must be in writing and signed by the party to be charged. Under the circumstances, the evidence *aliumae* should be restricted to what is merely interpre-

tive of the terms of the letter of July twenty-first, 1897. For example, evidence was admissible to show that the words "your paper" referred to the proof of claim, and to explain the expressions, "Holloway suit," "Holloway claim" and "Holloway case."

I conclude that the construction of this instrument was for the Court.

The next inquiry is: How was this matter of construction dealt with on the trial? As I have already said, this letter was set up by the plaintiff's replication as a new promise. It was offered as a new promise, was objected to upon the ground, among other things, that it contained no promise, was admitted, marked Exhibit P. 2 for plaintiff and an exception was allowed and taken. (Book, pp. 12 to 12.) At the close of the plaintiff's case the counsel for the defendant moved for a non-suit. In support of this motion the counsel for the defendant, among other things, read this letter in full, commented at some length upon the construction of it, and again insisted that it contained no promise to pay. The Court, as to the various considerations urged by the counsel for the defendant, which included this matter of the construction of the letter, said: "I am in doubt about it, and I think it should go to the jury." The motion to non-suit was denied and an exception was allowed and taken. (Book, pp. 41 to 48.)

On the defendant's case Mr. George W. Ketcham was called as a witness and examined at large, on direct and cross examination, as to Exhibit P. 2 and the preceding conversation with the plaintiff. (Book, pp. 52, 53, 54, 55, 56, 79, 81, 83, 84, 85.) He gave other testimony as to the financial relations between himself and the plaintiff which, it might be supposed, would

throw light on Exhibit P. 2. The plaintiff, William S. Ketcham, Jr., was called in rebuttal, and testified as to the conversation with his brother on the evening of July twentieth, 1897, when he presented the proof of claim. His testimony as to this conversation does not altogether agree with that of the administrator. The plaintiff testified that he said on that occasion to his brother:

“If you will pay all the expenses connected with these suits”—that is, the litigation about the Clinton Hill Lumber Company—“or any costs, together with any judgment that may be rendered against me by reason of my having these goods, or being a stockholder, or in any way connected with this company, why, I will consider that in lieu of payment of the note. But if at any time I am called upon to pay out any moneys, then the note shall become due and payable.”

“Q What did he say to that? A With that explanation he said he was satisfied, and told me that in that contingency he would pay the claim.”

On his cross examination I find this question and answer:

“Q But you told your brother on July 20, 1897, that you loaned six thousand and some odd dollars to your father and took the note? A Yes.”

And on re-direct examination:

“Q And did you tell him what the money was that you loaned? A Yes. I gave him a list of what moneys I paid out for my father.

Q Did you tell him where you got it? A Yes, it was the money I had received from the sale of lumber that I got from being custodian of the Clinton Hill Lumber Company.

“Q Did you tell him that? A I did.”

The administrator, being called in sur-rebuttal, denied that he had expressed himself as satisfied and had promised to pay the note. (Book, pp. 90, 91, 92, 93.)

The testimony being closed, defendant's attorney then moved, among other things, to strike out the replication and the proofs under it, because there was no evidence of a new promise. The Court said:

“I think it debatable ground, and I think, under the circumstances, I will deny the motion.”

The defendant's attorney then moved for a direction of a verdict in favor of the defendant, because, among other things, the plaintiff had failed to prove a new promise or an acknowledgment of the indebtedness, and, specifically, because the letter of July twenty-first, 1897, could not be construed as an acknowledgment of liability. The Court denied the motion, and distinctly left it to the jury, both in denying the motion and in his charge, to say whether the administrator had made an acknowledgment from which a promise could be inferred. By requests to charge and by exceptions to the charge the defendant's counsel again presented his view that the letter of July twenty-first, 1897, contained no promise. He was further allowed an exception on that part of the charge which left the construction of the letter to the jury. (Book, pp. 93 to 117.)

If the interpretation of this letter was for the Court, as I think that it was, it may be said that the Court at first so regarded it, and admitted it in evidence, against objection, when offered as proof of a new promise, and that the subsequent submission of that question to the jury was not injurious to the defendant, for the verdict showed

that the jury agreed with the Court as to the meaning of the instrument, and so merely corroborated the Court. The difficulty is that the Court submitted the matter to the jury, not for corroboration, but for decision. Having very early in the case adopted the interpretation of the case in the letter which the plaintiff insisted upon, the Court later in the case, either upon further reflection or in view of further testimony, or both, came to regard the question as an open one, and left it to the jury because it was doubtful and debatable. But this did not warrant a submission to the jury. If the question was an open one, the defendant was entitled to have the Court close it by some definite decision. This was a substantial right. Of this right the defendant was deprived by the submission to the jury, and, upon this ground, I conclude that there should be a new trial.

This disposition of the case makes it unnecessary to consider other questions which have been regularly argued before me, among them the question as to the correct interpretation of the letter in question. I may, however, look at the subject of the construction of this letter so far as to see whether the view which the jury must have adopted is obviously right, that is, so clearly right as to admit of no reasonable difference of opinion. If it is, then, in the interest of justice, it should not be disturbed. I am unable to say that it is, in this sense, obviously right. I agree with the learned trial judge, that the matter of construction is "debatable ground."

I will sign a rule directing a new trial.

New Jersey Court of Errors and Appeals

Between

WILLIAM S. KETCHAM, JR.,
Complainant-Respondent,

and

GEORGE W. KETCHAM, Ad-
ministrator of WILLIAM S.
KETCHAM, SR., deceased,
Defendant-Appellant.

On Appeal,
&c.

Answering Brief.

Answering brief submitted by Scott German, of counsel with George W. Ketcham, former administrator, the nominal appellant on the record, on behalf of said former administrator, and of Frank E. Bradner, of counsel with Worrall F. Mountain, present administrator, and the real appellant, to the brief of respondent.

The various points presented by the respondent why the decree of the Court of Chancery should be confirmed, will be considered altogether under the following points:

POINT 1.

The decree should be reversed because it granted relief knowingly to a wrongdoer.

a. Because respondent intentionally and wrongfully after he had been appointed custodian by the Clinton Hill Lumber Company of the lumber in question, took possession of the lumber for his father, and sold it, placed the proceeds in his own bank, and intentionally and wrongfully, and in violation of his trust, used

the proceeds received from the sale of the lumber, as he says, for the use of his father. If he took possession of the lumber as custodian for the company he committed a breach of trust, by turning over the proceeds to anyone except the legal or proper representatives of the company, and if he took possession for his father, as he says he did (case, pp. 84 and 250), and sold the same, and used these trust funds for his father's debts, he was equally guilty of intentional wrong doing. It should be remembered that the father at this time was a man of about eighty years of age, of poor health, and confined to his bed most of the time, (see case, p. 184) and who must have been influenced by the respondent, who was and is a shrewd, conniving man, conversant with business, and presumably so with law, to the extent that he feels competent to delve into its intricacies, and prepare the elaborate brief, and present his cause in person before this highest court of jurisdiction. This act was described by Vice-Chancellor Van Fleet in *Clinton Hill Lumber Company v. Strieby*, 52 Equity 576, 579, as "a plain case of fraud."

b. Because respondent intentionally and wrongfully secured a note, as he alleges, from his father, for this fraudulent transaction, and included in the note, which, if he had been justified in receiving at all, should have been given to the Clinton Hill Lumber Company for the amount for which the lumber was sold, a personal transaction between himself and his father to the extent of \$352.81, which he said was for money of the respondent which he had loaned to his father. (Case, pp. 89-90-252.)

c. Because respondent wrongfully and intentionally concealed the note from the receiver of Clinton Hill Lumber Company, when he knew

that the receiver was entitled to the largest interest therein.

d. Because respondent intentionally and wrongfully made and presented to the administrator the false affidavit claiming that the entire amount of the note, \$6,666.66 (case, p. 199), was due to him, when he knew at that time, and admitted afterwards, that the amount at that time actually due was \$352.81, and that the remainder thereof, if due at all, was contingent upon the happening of certain events.

e. Because respondent intentionally and wrongfully, and with intent to deceive, commenced an action on the note in his own name, when it should have been prosecuted if at all to the use of the receiver, and to himself to the extent of \$352.81.

f. Because respondent knowingly and wrongfully concealed the true consideration of the note from the administrator, and by such deception induced him to act and to bring about the situation now complained of, and there is no assurance that the administrator would have so acted had he known the circumstances surrounding the giving, and the true consideration of the note, and the rights of the receiver and of the respondent therein.

g. Because respondent knowingly and wrongfully deceived the creditors and receiver of the Clinton Hill Lumber Company, an officer of the Court of Chancery, and hence knowingly deceived the court. He deceived the administrator, who was only resisting, as the legal representative of those for whom he acted, what he conceived to be an unjust claim of respondent, that is to pay him \$6,666.66, and which he made oath was due to him. Vice-Chancellor Emery charac-

terizes the respondent as a wrongdoer, and he himself admits on page 41 of his brief that he concealed the note.

h. The respondent has not come into equity with clean hands. He has not done equity. He has committed a fraud upon the court through one of its officers, the receiver, is an intentional wrongdoer, and as such is not entitled to contribution or to relief for the reasons set out by the appellant in point one of the appellant's brief. See also *Bigelow v. Old Dominion Copper Mining and Smelting Co.*, 74 Eq. 457; 71, Atl. 153, particularly page 176.

The fundamental claim upon which respondent claims relief is not equitable and he is not entitled to relief.

Minzesheimer v. Doolittle, 60 Eq. 394-398.

POINT 2.

The decree should be reversed because the Vice-Chancellor granted relief to an admitted wrongdoer knowingly guilty of wrong.

Vice-Chancellor Van Fleet so states. Vice-Chancellor Emery brings out circumstances in his opinion which indicate intentional concealment and deceit on the part of respondent, and the respondent in his brief so admits, and the testimony in the case so shows.

The Vice-Chancellor's opinion says, that if there were no other parties in interest except respondent and the administrator, and those he represents, and respondent did not hold the note for the benefit of the receiver, respondent would not be entitled to relief.

There is no denial that the item of \$352.81 was a personal transaction between respondent and

his father, and had nothing to do with the sale of the lumber. There is no reason given why it was included in the note, except respondent testified that he advanced this sum to his father from his own funds at the time of the lumber transaction, and was included in the money claimed to have been paid by respondent for his father. The note then to the extent of \$352.81 had nothing to do with the receiver, nor with the Clinton Hill Lumber Company. There is no need of the intervention of a receiver so far as this transaction was concerned.

Why then should the court give personal relief to this wrong-doing respondent for \$352.81? The question is not solely whether the administrator acted equitably, but whether the complainant himself has so acted.

While the interest of respondent in the note, perhaps, may be small, it is not so small that it should be disregarded.

See *Felt v. Steiger*, 40 Vr. 92.

It is the respondent who has brought about the present situation. He alone is the original wrongdoer. He was a large stockholder of the Clinton Hill Lumber Company, and should not now be given relief through the receiver of that company for the fraudulent act of which he himself was the cause.

The wrong doing of respondent cannot be separated. If he committed a fraud in part, he did in whole. How can the court say that he is entitled to relief in the note when the court admits that as to a part of the note, at least, he is not entitled to relief, by permitting respondent to prosecute the suit on the note in the name of, or to the use of the receiver. Why the intervention of a receiver? The Cumberland Lum-

ber Company has no debts. The receiver was appointed to assess stockholders, and they have paid their assessment. There is no need to wind up its affairs. There are no parties interested except the respondent and the present administrator representing the estate of William S. Ketcham, Sr., and to a small extent George W. Ketcham, former administrator.

Any proceedings in which the company is interested, the receiver should have been a party. Neither the company nor the receiver was a party to the suit brought by respondent.

See *McDermott v. Woodhouse*, 101 Atl., p. 375, citing *Cumberland Lumber Company v. Clinton Hill Lumber Company*, 57 Eq. 627.

See *Weatherly v. Baker*, 35 Eq. 501-508.

If, on the other hand, it be said that there are other stockholders, and that Canfield is interested in the company, as respondent claims, then the court has decided an issue not raised in the record, nor involved in the pleadings, and therefore should be treated as a nullity.

As Chief Justice Beasley says in *Mundy v. Vail*, 34 Law, 418, "Jurisdiction may be defined to be the right to adjudication concerning the subject matter in the given case." To constitute this there are three essentials.

1. The Court must have cognizance of the class of causes to which the one to be adjudged, belongs.
2. The proper parties must be present.
3. The point decided must be in substance and effect within the issue.

The administrator was not called upon to meet the question whether the receiver was entitled to relief. Canfield was not made a party, and relief should not be given to him.

POINT 3.

The decree should be reversed because respondent was not misled by the administrator from bringing suit on the note for the use of the receiver, even though, as respondent claims, he was deceived by the action of the administrator from bringing such suit in his own name.

The evidence shows that during all the negotiations between respondent and the administrator, they both treated the note as a personal obligation which the respondent claimed was due to him, and there was not the slightest evidence that the administrator in his letters to the respondent, had anything to do with the right or claim of the receiver to the note. What the administrator would have done, or would have written to the respondent had he known of the receiver's claim to the note, is entirely problematical, and not in issue. The fact is, the respondent treated the matter as a personal one between himself and the administrator, and the administrator acting in his official capacity so treated it.

The stress laid upon certain portions of Mr. Bradner's testimony concerning the payment of his bills by the administrator for the carrying on of the litigation, and on the testimony given by the administrator in the Circuit Court concerning the payment of these bills is not material, because both Mr. Bradner and the administrator explain the payment of these bills, in such testimony. (See case, pages 83-84 and page 178, and other portions of the administrator's testimony.)

POINT 4.

The decree should be reversed because respondent is estopped by his laches.

See *Cumberland Lumber Company v. Clinton Hill Lumber Company*, 64 Eq. 517, in which case respondent as a stockholder of the plaintiff company was a party. Vice-Chancellor Emery in 1903, at page 520, specifically states that the stockholders of the plaintiff company, if they desire, may prosecute in the receiver's name, any claim the company may have against the estate of respondent's father, for the conversion of the goods. Thus in 1903 respondent knew that his claim should have been prosecuted in the receiver's name.

The administrator did not mislead respondent nor prevent him from bringing this suit in the name of the receiver, or for his use. He waited for more than five years before he commenced the action, and for more than ten years before he filed his bill in this suit.

POINT 5.

Vice-Chancellor Emery says that he desires that the parties should be left in the position in which they voluntarily placed themselves, but by granting relief to respondent he has not done so. He has given advantage to one of the parties, that is to the respondent, and therefore for the reasons given by the appellant in his brief, and for the above reasons, the decree should be set aside.

FRANK E. BRADNER,

*Of Counsel with Worrall F. Mountain,
Present Administrator and Appellant.*

SCOTT GERMAN,

*Of Counsel with George W. Ketcham,
Former Administrator, and Appellant
on the Record.*

New Jersey Court of Errors and Appeals

NOVEMBER TERM, 1917.

Between

WILLIAM S. KETCHAM, JR.,
Complainant-Respondent,

and

GEORGE W. KETCHAM, ad-
ministratoꝛ of WILLIAM S.
KETCHAM, SR., deceased,
Defendant-Appellant.

*On Appeal
from Court
of Chancery.*

Brief for Respondent.

This is an appeal by Worrall F. Mountain, substituted administrator in place of George W. Ketcham, administrator of the estate of William S. Ketcham, Sr., deceased, from a decree of the Court of Chancery granting an injunction against any pleading of the statute of limitations as a defense in an action at law commenced by William S. Ketcham, Jr., and now pending in the Essex County Circuit Court.

The said action at law is on a promissory note for the sum of \$6,666.84, dated August 6, 1895, executed by William S. Ketcham, Sr., and payable, with interest, to William S. Ketcham, Jr.

Facts.

This cause is an outgrowth from the case of Thomas N. McCarter, Receiver, *v.* The Clinton Hill Lumber and Manufacturing Company, which case was recently before Chancery and

other courts and on various appeals to this honorable court.

The material facts of the above reference case as essential to a full and clear understanding of the present issue are as follows:

Late in 1892, Frank D. Holloway obtained from William S. Ketcham, Sr., (then in his seventy-seventh year) the latter's several promissory notes to an amount of over nine thousand dollars, without giving any security therefor; and with the discounted proceeds of these notes, bought lumber and started a lumber business in the city of Newark, under the firm name of F. D. Holloway and Company.

Bill of Complaint p. 1,
admitted in answer, p. 30.

Early in 1893, for the purpose of securing William S. Ketcham, Sr., for the loan of these notes, The Clinton Hill Lumber and Manufacturing Company was organized and subscriptions to the capital stock of this company were made by the following persons:

Frank D. Holloway.....	100 shares
Edward E. Campfield.....	100 shares
William S. Ketcham, Sr....	100 shares
William S. Ketcham, Jr....	100 shares
George W. Ketcham.....	5 shares

the shares being of the par value of one hundred dollars each, under an agreement between Holloway and William S. Ketcham, Sr., whereby Holloway was to turn over by a bill of sale to the company, his lumber business, and that capital stock of the company was to be issued to William S. Ketcham, Sr., in payment of Holloway's indebtedness to him.

Bill of Complaint pp. 2, 3,
admitted in answer, p. 30.

After the election of directors and officers of the company, Holloway executed and delivered to the company the bill of sale referred to.

Bill of Complaint p. 3.
admitted in answer, p. 30.

In the attempt to complete the organization of the company, a call was made by the directors and officers for the payment of forty per cent. of the subscriptions, but neither Holloway nor Campfield paid any of their subscription. The three Ketchams offered to pay their forty per cent. of subscriptions by an apportionment of the equitable value of the property turned over by Holloway to the company by the bill of sale. This offer on the part of the three Ketchams was later treated by the Chancery Court as a payment of their forty per cent. of subscriptions.

Testimony pp. 72, 73.

After several meetings of the directors and officers of the company were held, at which the tangled financial affairs of Holloway were first ascertained and discussed, the conclusion was reached that it was inadvisable to proceed further with the formation and business of the company, and therefore the scheme was abandoned.

Bill of Complaint pp. 3, 4,
admitted in answer, p. 30.

By resolution of the parties in interest before the abandonment, William S. Ketcham, Jr., and Edward E. Campfield were appointed custodians of the property of the company represented in the bill of sale from Holloway, Campfield later resigning and not serving.

Bill of Complaint p. 4.
Testimony pp. 66, 67, 68, 111.

Answer to seventh interrogatory
p. 250, not denied in answer.

The property (lumber) was sold by William
S. Ketcham, Jr., as custodian,

(W. S. K., Jr.) Testimony pp. 68,
109, 81.

(G. W. K.) Testimony pp. 150,
156.

Bill of Complaint pp. 9, 10.

and the proceeds of sale banked and later paid
to and for the account of William S. Ketcham,
Sr., by taking up some of the outstanding
promissory notes loaned by William S. Ketcham,
Sr., to Holloway, and other obligations of the
former.

Testimony pp. 81, 90, 91.

Bill of Complaint p. 11,
denied in answer.

this sale of the property and loan of the pro-
ceeds to William S. Ketcham, Sr., being done
at his request and with the full knowledge of
George W. Ketcham at the time that this was
being done.

(W. S. K., Jr.) Testimony pp. 65,
108, 190.

(G. W. K.) Testimony pp. 150,
156.

Bill of Complaint pp. 9, 10.
denied in answer.

In return for the payment of these moneys to
William S. Ketcham, Sr., which was treated as
a loan, he executed and delivered his promissory
note dated August 6, 1895, for the sum of \$6,-
666.84 to William S. Ketcham, Jr., being payable
on demand with interest,

Bill of Complaint, pp. 9, 10.

Testimony pp. 82, 91,
denied in answer.

Wm. S. Ketcham, Sr., died intestate September 25, 1896, George W. Ketcham was appointed administrator on October 20, 1896, and took out a rule to limit creditors October 20, 1896, and an order barring creditors July 21, 1897.

Bill of Complaint pp. 10, 11,
admitted in answer and testimony
pp. 43, 44.

Following the abandonment of the company scheme, certain creditors of Holloway, finding no assets of the latter upon which to levy by reason of his confessed judgment to them brought an action in chancery against the company, seeking to have the bill of sale made by Holloway to the company, set aside as in fraud of creditors,

Bill of Complaint p. 4,
admitted in answer p. 30.

At the hearing of this cause before Vice-Chancellor Van Fleet, testimony was given to the effect that the lumber, etc., received by the bill of sale from Holloway had been sold and Wm. S. Ketcham, Sr., received the proceeds of sale.

See Book 1.

This litigation resulted in having the bill of sale set aside, the company adjudged a "*de facto*" corporation, a Receiver appointed and the debts of Holloway adjudged as debts of the "*de facto*" company.

Bill of Complaint p. 5.
admitted in answer p. 30.

Further litigation between these parties extending over several years, and in various courts, finally resulted in a decree "*in personem*," the appointment of a Receiver of the insolvent corporation, the levying of an assess-

ment on the stock subscriptions of the stockholders, individual suits by the Receiver to collect the assessments, and the final decree upholding the Receiver in these actions.

Bill of Complaint pp. 5, 6, 7, 8,
admitted in answer p. 30.

As a result of this litigation, the three Ketchams paid to the Receiver their various assessments on stock subscriptions including costs, etc., the amount paid by William S. Ketcham, Jr., being the sum of \$3,658.99. The amounts paid by the three Ketchams being the full assessment levied by the Receiver and sufficient to pay all the claims of the Receiver.

Bill of Complaint pp. 8, 9.

No litigation to collect assessments was made against Holloway or Campfield by the Receiver, but on March 28, 1912, the administrator, George W. Ketcham, brought an action in chancery against Campfield to collect his proportionate share of assessment (the three Ketchams having paid the entire assessment).

Testimony p. 96.

After the death of William S. Ketcham, Sr., and the appointment of George W. Ketcham as administrator of the former's estate, and while the various litigation against the company above referred to was under way, William S. Ketcham, Jr., on July 20, 1897, filed with the administrator a written verified proof of his claim against the estate, based on the promissory note of William S. Ketcham, Sr., delivered to William S. Ketcham, Jr., for the loan of the moneys paid on his father's account.

Bill of Complaint p. 11.

(W. S. K., Jr.) Testimony pp.
44, 61.

(C. 1 Exhibits) p. 199,
admitted in answer p. 32.

At the time of filing the claim with the administrator, which was about 7 o'clock in the evening of July 20, 1897, at the residence of George W. Ketcham

(W. S. K., Jr.) Testimony p. 61.

(A. O'N.) Testimony p. 123.

a verbal statement was made by William S. Ketcham, Jr., of the circumstances under which the note was received, and a verbal agreement was made with the administrator, whereby the payment of the claim was made to depend on the happening of certain contingencies and the performance on the part of the administrator of certain agreed actions.

Bill of Complaint pp. 11, 12.

(W. S. K., Jr.) Testimony pp. 46,
64, 76,

denied in answer p. 33

which contingencies eventuated

Bill of Complaint p. 9.

Testimony pp. 48, 49, 50,

admitted in answer p. 30

and the administrator performed part of his agreed actions

Bill of Complaint p. 14.

(W. S. K., Jr.) Testimony p. 58.

(G. W. K.) Testimony pp. 152,
153, 154, 155, 163, 169, 170, 171,
172, 186, 188.

This verbal agreement was corroborated by a written and signed memorandum received by William S. Ketcham, Jr., from the administrator on July 21, 1897—the day following the presentation of claim.

Bill of Complaint p. 13.

(W. S. K., Jr.) Testimony p. 45.

Exhibit C. 2, pp. 199, 200,

agreement denied in answer p. 37.

Other written memorandum bearing on the above agreement were given and received subsequently

Exhibits C. 3, p. 199

Exhibits C. 4, p. 200

Exhibits C. 5, p. 202

Exhibits D. 3, pp. 204, 205

Exhibits C. 6, p. 205

Exhibits C. 7, p. 206

Exhibits C. 8, p. 207

Upon the happening of the above mentioned contingency, a demand was made upon the administrator for the payment of the note claim as agreed, and upon his refusal to pay the same, an action at law was brought against the administrator, who among other defenses, pleaded the statute of limitations. Plaintiff sought to meet this defense by an acknowledgment and new promise on the part of the defendant as contained in the written memorandum of July 21, 1897, marked Exhibit C. 2, p. 199, as well as in other memorandum cited.

Upon trial of the case a verdict was rendered by the jury for the full amount with interest.

An application was made by the defendant for a rule to show cause, which rule was finally made absolute and a new trial granted by Judge Adams based on the grounds that the trial judge erred in sending the case to the jury when he should have decided it himself on the law points involved, and for this infringement of defendants' rights the court granted a new trial.

Decision of Judge Adams p. 30,
annexed to bill (printed by Respondent).

Previous to entering upon a new trial, complainant filed his bill in chancery praying an injunction against the administrator, George W.

Ketcham, setting up the statute of limitations as a defense in the action at law then pending, on the ground of the wrong conduct, doings and pretenses of the defendant, the said actions, doings and pretenses being contrary to equity and good conscience, and tending to the manifest wrong, injury and oppression of the complainant. This action resulted in the decree of the Court granting the injunction asked for.

From this decree the defendant now appeals.

The date of the promissory note sued on is August 6, 1895.

The statute of limitations barred the note August 6, 1901 (opinion of Judge Adams).

Suit was brought on the note Dec. 28, 1908.

Points.

Respondent prays that the decree of the Chancery Court be affirmed, and presents the following points:

I.

That at the time of the decease of William S. Ketcham, Sr., complainant had a valid and just claim against him.

(a) That it is immaterial to the issue as to whether the claim was held personally or in any representative capacity.

(b) That it is immaterial to the issue as to whether the consideration for the note belong wholly or in part to William S. Ketcham, Jr., or to third parties.

II.

That complainant's claim against the administrator was valid and just, and the new promise of the administrator bound the estate of decedent.

III.

That complainant was misled by the administrator to defer action on the note until after the bar of the statute had fallen.

IV.

That complainant's equitable relief is not barred by laches, or acquiescence, or any want of diligence; nor by any choice or remedy.

V.

That it would be inequitable to deny complainant his equitable relief as sought, and as decreed by the Chancery Court in the action appealed from by the defendant.

Argument.**POINT I.**

That at the time of the decease of William S. Ketcham, Sr., complainant had a valid and just claim against him.

The consideration for the note was the loan of moneys paid to and on account of William S. Ketcham, Sr. This is shown by the testimony of complainant and especially as brought out by questions of the court.

Testimony pp. 81, 83, 84.

Q (*By the Court.*) "What did you do with the money received from the sale of the lumber?"

A "From time to time as my father had notes outstanding which he loaned Holloway, and some other indebtedness, and from time to time I helped pay these notes, and then I paid him some money by check, to

him personally; the bulk of it was paid on the notes he had outstanding.”

P. 82:

Q “Did your father give you the note to represent these moneys which you say you paid out for him from the sale of this lumber?”

A “He did.”

Q “That is the only reason he gave you the note?”

A “For those payments that I had made, yes.”

P. 82:

Q “What was said by either you or your father when he gave you this note?”

P. 84:

A “I said to my father, now this matter is complicated, these suits are going on, I do not know how they will turn out, I want to have it so that at any time I can demand this money back. I will pay on your notes—first I said—you can take the lumber and give me a note for its value, but I knew my father couldn’t sell that, so I said—I will sell the lumber for you and take your note for just what I get for it, and then I can have that note so that I can use it in my own discretion—and I think it took, according to the payments made, a year and a half before I consummated the entire sale, and then I got the note as agreed.”

Q (*By the Court.*) “You didn’t get it until the sale had been completed, and on rendering an account?”

A “Yes, not until then.”

Testimony p. 67.

Q "Did the directors name you as custodian of this lumber?"

A "I do not pretend to give the legal explanation of that."

(*Court.*) "You mean the directors officially as a board?"

(*Court.*) "Or the persons who were directors?"

Q "By resolution?"

A "There was a resolution appointing Mr. Campfield and myself as custodians of the property of the company."

P. 68:

Q "Then you took possession of the lumber as custodian under this resolution?"

A "I did."

P. 80:

Q "You sold the lumber, keeping an account of the sales?"

A "Yes."

Q "What did you do with the money which you received from the sale of the lumber?"

A "I sold the lumber and put the money in the bank."

P. 95:

Q "You knew the money had been received from the sale of property that was not yours?"

A "I never pretended personally to have a personal right in the matter other than as I was conserving it for others."

P. 96:

Q "Why wasn't the note given to the company then?"

A "Well, we were contending it was no legal company, that it hadn't been fully

formed. Mr. Bradner fought it out on that issue."

P. 97:

Q "Did the Receiver tell you to loan this money to your father?"

A "No, sir."

Q "Nobody did?"

A "Only my brother."

P. 100:

Q "When you told the family or Mr. Holzhauser at this meeting (family) that you had papers to protect you, did anybody inquire what papers you had?"

A "I didn't say 'papers'; my recollection is I said I was secured or had security; I don't recall, but I remember making that statement, because it was called out by the fact that he said Howell might jump on me, and I wanted him to understand that I was secured in that."

Q "Did Mr. Holzhauser at that time ask you what security you had?"

A "Not that I have any recollection of."

Q "Didn't Mr. Holzhauser at this conversation with you ask what security you had and that you told him you would tell him at the proper time?"

A "Never, not a word like that."

P. 103:

Q (*By Mr. Bradner.*) "Then the note does not represent indemnity, does it, it was given for money loaned?"

A "Well, I call it security, the same as any note is a security."

(*Mr. Congleton.*) Read the balance of the answer.

A (Continuing.) "If I borrow money at the bank and I give my note, they have got that as security."

P. 113:

Q "Why didn't you tell the Receiver that you had the note?"

A "I didn't have any note then; I didn't have the note until 1895."

Q "You had the note when testimony was taken in March, 1900?"

A "That might have been, too, there have been several of these suits."

Q "Why didn't you disclose to the Receiver or to the court at that time that you held this note?"

A "The matter didn't come up in any way, not relevant in any way that I saw; there was no attempt to conceal, if that is the thing you mean to imply, not a bit of it."

P. 114:

Q "You thought and understood at that time that the note was intended to cover that lumber—take the place of the lumber?"

A "I sold the lumber and got the money for it and instead of keeping the money in the bank, I made my father the bank and loaned it to him at six per cent. interest, so that at any time I could call for that I chose to."

P. 114:

Q "So you could turn it over either to the company or to the Receiver if you were called upon to do so?"

A "In any way that the court might finally say who owned the lumber and what should be done."

Q "When the decree was made making the assessment against you, why didn't you hand over the note?"

A "Because we wanted to contest the matter. You (Mr. Bradner) carried it on for years in various phases, the rights of the Receiver, and we as honorable men wanted to contest it, and when we were finally defeated the Receiver got his money."

Q "You didn't have any agreement with your brother to conceal the note?"

A "No, not by any means, and didn't intend to either, neither of us, we ain't that kind of people."

P. 245: Twenty-ninth interrogatory—

"Was the note given by your father to you to secure you personally, or was the same given to you for the benefit of the other stockholders of the Clinton Hill Lumber Company, for money which you received as custodian of lumber belonging to that company and thereafter paid out by you?"

P. 254: Answer to twenty-ninth interrogatory—

"The note was given by my father to secure the money which I had loaned him. It has always been my belief. AS I HAVE STATED IN OPEN COURT, that the other stockholders of the Clinton Hill Lumber and Manufacturing Company are interested in the proceeds of said note, and are entitled to be reimbursed for the amounts which they were called upon to pay by reason of their subscription to the capital stock of the Clinton Hill Lumber and Manufacturing Company."

The above testimony in regard to the consideration for the note—what the note represented—although varying in form—in substance is to the effect that the note was given for the loan of moneys in the hands of complainant and received principally from the sales of the property of the lumber company of which complainant was custodian, to William S. Ketcham, Sr.

The proofs also show

Testimony p. 89.

Exhibit D. 3, p. 205

31 Interrogatory p. 246

31 Answer p. 255

that a portion of the moneys (about 1/19) was paid out of complainant's personal funds and formed part of the total of the moneys loaned.

Counsel for the defendant has sought to show that the note was given only as security, using that word in its most limited sense, and complainant—although using the expressions—"the note was given for security"—has explained what was meant by that expression.

(Testimony p. 103) quoted

also the expression—"the note represents the sale of the lumber in the Holloway or lumber transaction"—These expressions were only used as any layman would use them and not in the confined or technical meaning attributed to them by the legally trained mind.

The proofs show that complainant as custodian of the property of the company sold the same (principally lumber) because of the perishable nature of same, obtaining its equivalent in money and banking the proceeds of sale, previous to loaning it.

Testimony p. 68—quoted.

Testimony p. 66.

As custodian of the property of the company, or of the proceeds of sale of same, complainant realized the complex situation of affairs and in his endeavor to act honest and just, stated to his brother, the administrator, and to others—including the court—the purpose of complainant as to how he intended to use the note.

Testimony p. 77.

Defendant's counsel has misused this statement regarding the purpose on the part of complainant to make it appear that that was the real consideration for the note, but the proofs show to the contrary.

Testimony p. 77 referred to

Testimony p. 84.

The "purpose" of complainant in the use of the note was not for any personal advantage, other than rightly belonged to him, but to hold the note pending the lumber litigation—not the particular or definite "action" that might be under way at the time, but in ANY way that the litigation might result to hold the custodian responsible for the return of the property, or as it did finally eventuate—to secure complainant for his subscription made for stock in the company—this latter "action" resulting because the property had been sold and the Receiver chose this way of his recovery.

Attention is called to the situation in regard to the parties "in interest" of this company—of the five only and original subscribers to the stock of the company—two of them—Holloway, having paid nothing into the company (Holloway stating at the time he made the transfer of property to the Clinton Hill Lumber and Manufacturing Company by the bill of sale—that it all belonged to William S. Ketcham, Sr.).

(See Book), nor had Campfield paid any money or property into the company.

This so far as complainant could judge left the three Ketchams as the only parties in interest; in other words, it was a mere family matter, not considered as involving any others, and dealt with from an entirely layman's standpoint—without legal advice—and with no purpose to do otherwise than was right and equitable in the matter.

To this end complainant saw no harm in loaning the proceeds of sale to his father and taking an equivalent in the form of a promissory note that could be used as the later developments of the case should warrant.

Testimony pp. 66, 67.

Opinion V. C. p. 265—line 13.

As to the turning over the property or proceeds of sale to the company—this in the mind of complainant was not required, as to do so, would as thought, have precluded any contest in court as to the right of the creditors and Receiver in the matter, and even after the court decided that the Receiver was entitled to the property—it was not turned over (being then in the promissory note) as the contest was still going on to determine the rights of the Receiver to assess the stockholders and other various defenses which the three Ketchams then acting together desired to have settled by the court.

When the final decree was entered against the three Ketchams, each paid to the Receiver the judgment recovered, being sufficient to meet all the claims of creditors, costs and counsel fees and receiver's fees.

Testimony p. 114.

This saved the Receiver any further trouble even to collect on the note, had that been turned over to him.

Complainant assumed that the note question would be one to be settled amicably as a family matter later.

No intentional concealment of this note was intended by complainant (nor by defendant as far as known).

There was no demand, or inquiry as to the note by the Receiver, although the latter was fully aware as far back as 1893 when the lumber case was before Vice-Chancellor Van Fleet—that the property had been sold and William S. Ketcham, Sr., got the proceeds of such sale. This testimony was given by decedent himself at that hearing. (See Book 1)

Also testimony pp. 113, 115.

The Receiver's counsel (Mr. Howell) was also aware of the holding of the note by complainant, for the reason that in hearing of the case to collect the assessment on the stock of William S. Ketcham, Sr., (represented by the administrator)—Mr. Chandler Riker as associate counsel with Mr. Bradner in the case, stated to the court that William S. Ketcham, Jr., held a note of his father's representing the sale of the lumber.

Testimony of complainant is to the effect that in the early stages of the lumber litigation Mr. Bradner who was then counsel for the three Ketchams, and to whom all papers served on the latter were taken—was aware both of the sale of the property of the company and the loaning of the proceeds to William S. Ketcham, Sr.—

Testimony pp. 71, 72, 73, 74 being the answer to the petition of the

Receiver of the Clinton Hill Lumber and Manufacturing Company filed on June 28, 1895, by Mr. Bradner as counsel for the three Ketchams.

Also that Mr. Bradner was early aware of the fact that complainant held the promissory note of William S. Ketcham, Sr., for the proceeds of sale of the lumber.

Testimony p. 192.

The above reference as to knowledge by Mr. Bradner is given without any purpose to cast any reflection, but merely to show that no caution or advice was given to complainant by counsel that he should turn the property or note over to the Receiver.

Mr. Bradner is well aware that no intentional concealment of the note was intended at that time and it is unfortunate that being now the attorney for the adverse party he assumes the present position with reference to the said action as being fraudulent.

No one suffered by the concealment—neither the Receiver nor creditors of the company who were eventually paid in full. If anybody suffered, it was this complainant, who, trusting in the good faith of the family and working in good conscience with them to honestly contest the lumber litigation, is now met by the charge that he is guilty of fraudulent transactions.

No party conceals anything purposely to his own harm—to conceal a matter with fraudulent intent is to gain some material advantage.

Counsel also refers to the original hearing of the lumber case before Vice-Chancellor Van Fleet—stating that as the bill of sale from Holloway to the company represented a valuation of \$15,000.00 and the indebtedness of Hollo-

way to Ketcham being only \$9,610.00—that therefore the Ketchams fraudulently obtained \$5,400.00 that did not belong to them.

But Mr. Bradner fails now to show that acting later as counsel for the three Ketchams, he showed to the court that while the indebtedness of Holloway to Ketcham was \$9,610.00, that the *actual* assets received from the bill of sale was only of the value of about \$7,000.00.

Holloway still retained possession of a lease of property with buildings on, railroad switch, etc., which, although nominally mentioned in the bill of sale, were still controlled by Holloway, and *never* possessed by the company or the three Ketchams.

In reality, the note was given for the moneys loaned, but in its equitable bearing, as viewed by the Vice-Chancellor in his opinion.

Opinion p. 276

the recovery is for the company or its successors to its rights.

This view is thoroughly acquiesced in by complainant, who, although holding the note, absolute on its face, has at all times shown his purpose to make equitable distribution of same.

Answer to 29 interrogatory—cited

—p. 254.

Defendant says there are no other persons interested in the distribution of any assets of the company than the three Ketchams, and while this view was also held by complainant when loaning the money to his father, yet Mr. Bradner fails to inform the court of the now changed condition in this respect by reason of the suit brought by Mr. Bradner as counsel for defendant to compel Campfield to pay his proportionate share of assessment to the stockholders who

have paid the entire or full assessment (the three Ketchams having paid all the assessments).

Testimony p. 96

this action being begun in chancery on March 28, 1912.

This action was heard before Vice-Chancellor Emery who held up the further prosecution against Campfield until the termination of this action of complainant—the Vice-Chancellor remarking—that if the estate of Wm. S. Ketcham, Sr., should compel Campfield to pay his proportionate contribution, then Campfield would have a claim against the said estate or against Wm. S. Ketcham, Jr., as custodian of the property of the company.

Complainant desires to say that upon receiving notice from Mr. Bradner of his contemplated action against Campfield, complainant immediately wrote Mr. Bradner, denouncing the said contemplated action against Campfield as unjust and inequitable by reason of the fact that William S. Ketcham, Sr., got all the assets of the company and in justice and all fairness should *pay all the debts of the company*.

And further—that complainant would, in every way, protest said action as being unjust, uncalled for, and of no avail, in that if Campfield could be compelled to pay his proportionate assessment, he would then have claim against complainant as custodian of the property of the company for the diversion of same to William S. Ketcham, Sr.

And further—that complainant thereupon gave Campfield his written agreement that he would pay to said Campfield any moneys that might be collected against him in said suit, as soon as complainant collected on the promissory note held by complainant against his father, given

to complainant by decedent so that complainant could at any time call for the return of the moneys so loaned to meet just such contingencies.

The Vice-Chancellor evidently had in mind this action of the defendant against Campfield as evidenced in his opinion in this present action.

See opinion p. 279—line 37—on

“And if it were a matter of *intentional* fraudulent misappropriation of the Company’s funds for their individual benefit, by the loan of its money, and there were *no other persons interested*, the case would clearly be one, I think, for the refusal of any equitable relief to complainant, against any legal defense, and on the same ground, it might, in case of a recovery of the whole amount for complainant’s own personal benefit *bar defendant’s* right to any equitable relief.”

“But on the whole situation and circumstances relating to the original *bona fide* claims of the decedent against Holloway, the transfer of the lumber by Holloway to the Company, its incorporation and subsequent abandonment and disposal of its property, and the disposition of the proceeds to pay debts incurred by decedent for Holloway, I am satisfied that the appropriation of the Company’s money for decedent’s benefit *was not in the nature of actual fraudulent misappropriation*, but was made under a *bona fide* claim that there was not in fact a legal corporation, and that decedent had substantial claims on the property and its proceeds for the payment of his claims against Holloway, and that the note was originally given to protect complainant, if he should be held liable on the loan.”

“And if this be correct, I see no reason why the complainant, if he be now willing from this time forward to prosecute his suit on the note as brought, to the use and for the benefit of the re-

ceiver, should not now have appropriate equitable relief against the plea of the statute."

Who, better than the distinguished Vice-Chancellor was better qualified to form an opinion in this matter.

Not only had he heard this case, but for several years he had heard the same parties in the lumber litigation, and was thoroughly familiar with all the minutest details.

His conclusions are most equitable not only to this complainant, but also to the defendant and all other interested parties.

The law in the case of Fraud and Concealment is well set out in Pomeroy's Equity jurisprudence.

Third Edition—Vol. 2.

Sec. 901. "It is certain that every concealment or failure to disclose material facts known to one party is not fraud in equity or at law, whatever quality it may have before the individual conscience."

"While the decisions admit these propositions, they are agreed, on the other hand that it is only *silence* which is permitted. If in addition to the party silence there is any statement, even any word or act on his own part which tends affirmatively to a suppression of the truth, to a covering up or disguising the truth, or to a withdrawal or distraction of the other party's attention or observation from the real facts, then the line is overstepped, and the concealment becomes fraudulent."

American Encyclopædia of Law—Vol. 14, p. 66.

"It is a general rule that the mere failure of a party to a contract to disclose material facts—that is mere silence, without

more, does not amount to fraud if no inquiry is made by the other party. Something must be said or done to conceal the truth, or there must be a partial or fragmentary statement, or else the relation of the parties or the nature of the subject matter of the contract must be such as to impose a legal or equitable duty to disclose all the material facts."

Wood vs. Amory, 105 N. Y., 278.

Peoples Bank vs. Bogart, 81 N. Y., 101.

"An action for deceit will not lie in a purchase or sale if there be no designed misrepresentation by words or deeds, and no active intentional concealment and no intentional silence where there is a duty to speak."

Crowell vs. Jackson, 53 N. J. L., 656.

In this case the court said:

"We are of the opinion that in contemplation of law there can be no fraud without moral delinquency, in other words, that there is no actual fraud which is not also moral fraud."

There was no intentional misappropriation of the property of the company. Complainant sold the lumber and received in return an *equivalent* in the shape of money. Instead of keeping this money in bank, complainant loaned it to his father at 6 per cent. interest, taking in return his father's promissory note. As the decedent was entirely sound financially (as is his estate today), there was no actual misappropriation of a fraudulent character.

Complainant has ever stood ready to account for this property to the proper authorities, and has been, and is now, only prevented

by the refusal of defendant to pay his just obligation on the note.

There are none of the essential elements of fraud in this transaction, no wilfulness, no misrepresentation, no loss to any one.

1 a

It is immaterial to this issue as to whether the claim was held by complainant as an individual or in any representative capacity.

“Words describing the official position of the payee may be disregarded as being mere description, such as ‘agent.’”

Preston vs. Dunham, 52 Ala. 217.

This has been held even where the principal was clothed with a *quasi* public character as “Durkee, agent of the proprietors of the town of Sand Hill.”

Bryant vs. Durkee, 9 Mo. 169.

1 b

It is immaterial to this issue as to whether the consideration passed from William S. Ketcham, Jr., or belonged to third parties.

The payee of a note may sue thereon, though the consideration paid belonged to another for whose benefit the note was taken.

Cooper vs. Hayward, 69 N. W. 638, 67 Minn 92.

“If the defendant makes a note payable to plaintiff, generally he is estopped to set up in defense that the plaintiff was only the agent for others in whom is the beneficial interest.”

Grigsby's Exrs. vs. Nance, 3 Ala. 347.

In the case of

R. M. Owen and Co. vs. Storms and Co.,
78 N. J. L. 154.

“The payee or indorser of a promissory note who is in possession of it, though not the beneficial owner, may sue thereon in his own name by consent of the owner, and for such purposes may strike out his own and subsequent endorsements.”

Reference in above case to

Middletown vs. Griffith, 28 Vroom 442,
Laws 1902, p. 583-592, 614.

POINT II.

That complainant's claim against the administrator is valid and just, and the new promise of the administrator bound the estate of decedent.

The consideration for the new promise of the administrator (defendant) is based on the moral obligation of the original claim against decedent.

Other consideration is found in the fact that the estate would have the continued use of the moneys and would in all probability be required to pay a much less sum by reason of the contingent agreement, than by payment of the full face of the note as presented.

At the time of presentation of the claim to the administrator—the fact and sufficiency of which presentation is met in the opinion of Judge Adams—decision of Frederic Adams, Judge, annexed to bill, p. 20, also in the opinion of Vice-Chancellor Emery—

Opinion, p. 267.

An agreement or new promise was entered into between the complainant and defendant, whereby the payment of the claim was made to depend on the happening of certain contingencies, which contingencies later eventuated.

This agreement or new promise was confirmed by a letter from the administrator to the complainant on the day following the presentation—

Exhibit C 2, pp. 199-200-201.

This letter corroborated the fact of the due presentation of the claim and the agreement entered into at that time. No objection is therein made to the claim as to its intrinsic merits, but only to the *form* of its presentation, and the written suggestions of a new form is presented by the administrator. The suggestion of the administrator was complied with, although written in a different way, by written communication of July 22, 1897, being two days after the presentation of claim.

Exhibits C. 3—C. 4, pp. 201-202.

Presentation was made within the nine months' time allowed—

Orphans' Court Act C. S. 1910. Vol. 3, p. 3833, Sec. 67.

Bohles vs. Prudential Ins. Co., 83 Atl. Rep. 904, Affirmed 86 Atl., Rep. 438.

If the administrator decided to dispute this claim, it was his duty to so notify claimant in writing.

Orphan's Court Act C. S., 1910. Vol. 3, p. 3835, Sec. 71.

Clark vs. Augustine, 62 N. J. Eq. 689-690.

The letter from the defendant (Ex. C. 2) is not such a notice as is contemplated by the 71st section of the Orphan's Court Act above referred to.

Personett vs. Johnson, 40 N. J. Eq. (13 Stew) 173-181.

That the administrator did not contemplate any rejection of the claim is further evidenced by his letter to complainant May 5, 1903 (Exhibit D. 9, pp. 211, 212, 213, 214) in which he says, p. 211, line 22:

“I did not characterize that paper at the time, but I did criticize its *form*” —“your estate could prosecute that claim,” etc., etc.—line 35, “you took that paper away”—“and I have never seen it since.”

Concerning this latter statement about “taking away” of the paper (affidavit of claim), although in the action at law the administrator was subpoenaed to produce all such papers, he failed to do so, declaring, under oath, that the paper had been withdrawn by plaintiff; but on the hearing of the case in chancery, the defendant *produced the identical paper* himself.

Testimony, p. 44.

Mr. Congleton. “Have you that claim?”

Mr. German. Yes, sir” (producing same).

Testimony, p. 163.

Q “Senator Ketcham, after your brother filed with you his proof of claim on July 20, 1897, the same has been in your possession ever since, has it not?”

A “Yes, it has.”

The contingent agreement of complainant with the administrator, which is fully set forth in the various proofs—

Testimony, pp. 64, 76, 77, 78, 79.

The administrator stated in regard to the conversation with complainant at the time of presentation of claim, that complainant said—

Testimony, p. 146, line 25.

“George, don’t think this a debt; father does not owe me this money.”

That this statement was said or even thought of, is not warranted either by the facts of the case or by the actions of the administrator. If complainant said or thought such a thing, then the fact of his presenting any claim whatsoever was utterly absurd—why present a claim if it was not a debt.

The letter of July 21, 1897 (Exhibit C. 2, pp. 199, 200), disproves this statement of the administrator (line 40), “Nothing is owing you unless at some future time you should be called upon to meet the Holloway claim,” etc.

Why should the administrator ask the complainant to make “*a new form*” and “*put it on record,*” unless he recognized that the claim was valid and just?

Why put it “*on record?*” The only purpose could be that the claim should be paid as agreed.

The administrator was fully cognizant of all the early matters connected with the lumber transaction with Holloway and of the latter developments in the selling of lumber for decedent’s benefit.

He testified in court that decedent got all the property.

Testimony, pp. 156, 157, 158.

He was also aware that complainant held the note of his father, or at least held “*security,*” as testified at the family gathering by Mr. Holzhauser.

Testimony, pp. 132, 133, 134.

He knew of the note claim on July 19, 1897, the day before the presentation of claim. His “*new promise*” was, therefore, based on full

knowledge of the facts necessary to establish an agreement.

Coming now to the time of the partial division of the estate in December, 1900, as a prerequisite to any division of the estate, the administrator demanded a further paper explaining the status of the note claim as entered into in 1897. (See testimony, p. 166.)

Complainant, while not in the least way voiding the arrangement as entered into previously in 1897, yet was willing to give all the explanation desired by the administrator as to the claim.

The paper (Exhibit D. 3, p. 204) containing a statement of the various amounts paid out on account of decedent, refers to the notice of the note claim as previously given the administrator, and the *further* papers given the administrator at this subsequent period were not in the nature of a *new agreement*, but in *corroboration of the former*.

Such expressions as "That notice of my holding said note was given to Mr. Geo. W. Ketcham, administrator of my father's estate, within the nine months' time allowed by law for filing claims and, being duly sworn to before Mr. Julius Rupprecht, notary public of this city," show that the previous agreement with the administrator was considered by him as binding. (Also in Exhibit C. 7, p. 206):

"Whereas, said note is barring a settlement of the estate of William S. Ketcham, Sr."

Why should the note claim be barring a settlement of the estate claim, unless it was considered a valid claim against the estate?

In this exhibit the expression, "The said note having been given me as security against any

loss in above suits," was used, as has been explained by complainant, as expressing his purpose in the use of the note.

The Vice-Chancellor in his opinion, referring to this expression, concludes that it bound the complainant thereby to use the note only as such, which is entirely in accord with complainant's purpose from the start.

The Vice-Chancellor also says in that connection (see opinion, p. 273, line 15 on) that it also bound the administrator to inform complainant if he intended the latter to bring suit on his "security."

The letters and papers, both of 1897 and 1900, should be considered as parts of one and the same agreement, the latter merely supplementing the former.

This agreement, or new promise of the defendant, bound the estate of decedent.

Shreve vs. Joyce, 7 Vr. 44.

The administrator had a right to enter into such agreement coupled with a contingency—also showing the happening of the contingency.

Parker vs. Butterworth, 46 N. J. L. (17 Vr.) 244.

Cooper vs. Colson, 66 N. J. Eq. (21 Dick) 328, 333.

N. Y. Fire Ins. Co. vs. Tooker, 4 N. J. L. J. 334. Wood on Limitations, Sec. 77.

POINT III.

That complainant was misled by the administrator to defer action on the note until after the statute had fallen.

As evidence that the defendant was carrying out the contingent agreement, he paid all the

expenses of complainant in the various litigations of the lumber or Holloway case, Mr. Bradner being the attorney engaged by complainant and sending all his bills for services, costs, etc., to the administrator, who now admits paying the same. The various bills are set forth on pages 152, 153, 154, 155, 156, 169, 170, 171, 172, 173.

The defendant says he paid these bills because he "thought proper to do so."

Testimony G. W. K., p. 160.

The administrator knew he could not pay such bills as "charity," but only as a just obligation of the estate which the contingent agreement with complainant necessitated.

His mind on matters like this is shown in his letter (Exhibit D. 11, p. 219), under date of May 6, 1907, wherein he says: "The situation is summed up in our lawyer's advice to both of us," "That I as administrator had no right to use trust funds in this way" (that is to pay personal debts—see line 21).

It will be noticed that this "advice" was given as of date May 6, 1907, and yet *all previous* to that time, as well as *continuing after*, the administrator *did continue* to pay the personal obligations of complainant. Why?

See Exhibits, p. 172, being bill of Mr. Bradner of date February 20, 1908.

The administrator continued to pay all these expenses and costs up to and after the judgment rendered against complainant on his stock subscription, payment on said judgment being made by complainant on January 17, 1906, of the sum of \$3,685.00, and on the amount of \$3,658.99 was paid to the receiver and a rebate of interest received by complainant.

Not only did defendant pay all these expenses, etc., but he paid part of the original claim of the creditors of Holloway against the lumber company; viz., the claim of the Cumberland Lumber Co.

Testimony G. W. K., pp. 174, 175.

The note is dated August 6, 1895.

The statute would run against it August 7, 1901.

The new promise was made July 20, 1897.

Relying on this contingent agreement made with the defendant, complainant deferred any suit on the note claim until the happening of the contingency agreed upon: viz., January 17, 1906, when the judgment against complainant was paid, that being the first moneys that complainant was obliged to pay out on account of his connection with the "lumber company" or "Holloway matter" as agreed upon.

The statute had fallen in 1901, several years previous to this, but complainant had no proof that the defendant would not carry out his part of the agreement—which, in fact, he *was* doing—until defendant refused to pay the judgment aforesaid.

Had complainant begun any suit on the note claim previous to this contingency mentioned, he would have been non-suited by being met with the signed agreements given the administrator that complainant would not demand payment on the note claim so long as defendant continued to pay the costs, expenses of litigation mentioned, or until any judgment should be rendered against complainant and he be compelled to pay the same.

Brick v. Campbell, 50 N. J. L. (21 Vr.) 282. Affirmed 51 N. J. L. (22 Vr.) 563.

The administrator had a right to enter into such agreement, which waived the statute of limitations or stopped its running.

Quick vs. Corlies, 39 N. J. L. (10 Vr.) 11.

Freeholders vs. Veghti, 44 N. J. L. (15 Vr.) 509, 515.

Shreve vs. Joyce, 36 N. J. L. (7 Vr.) 44.

Everett vs. Williams, 45 N. J. L. (16 Vr.) 140.

Hewes vs. Hurff, 69 N. J. L. (40) 263.

The various exhibits of the defendant, being mostly letters passing between the defendant and complainant.

Exhibits D. 4, D. 8, D. 9, D. 10, D. 5, D. 12, D. 11, D. 7, D. 1, D. 15, D. 13, D. 14, D. 6

and dated from 1903 to 1908—it will be observed are *all after* the bar of the statute had fallen (1901) and while the hands of complainant were yet tied against any suit on the note, by reason of the defendant *still* carrying out his part of the contingent agreement or option of payment of the note claim.

The claim of counsel for the defendant, that complainant was not estopped from bringing his suit before the date actually done, is, therefore, not well taken.

Complainant was, therefore, misled and did defer any action on the note by reason of this misconduct on the part of the defendant.

Particular attention is called to the reference case of *Hewes vs. Hurff*, 69 N. J. L. (40) 263, as to its similarity to facts, dates, memorandums, etc., in this present case.

POINT IV.

That complainant's equitable relief is not barred by laches, or acquiescence, or any want of diligence; nor by any choice of remedy.

After filing his claim with the administrator and entering into the contingent agreement, complainant had no right to enforce his claim so long as the defendant was carrying out his part of the agreement, which continued until January, 1906, when the judgment against complainant was paid.

Upon the happening of that contingency complainant immediately placed his case in the hands of ex-Judge Alfred F. Skinner, who first endeavored to obtain a peaceful settlement, which consumed quite some time in the negotiations. The letters passing between the defendant and Judge Skinner (Exhibits C. 10, C. 11, C. 12, C. 13, C. 14, C. 15) throw much light on the reasons for delay, which delay was largely suggested by the defendant himself.

Failing in this peaceful method of settlement, the action at law was brought by Judge Skinner, which also consumed much time before hearing and its reference to Judge Adams on the rule to show cause, etc.

After the decision of Judge Adams, granting the new trial, Mr. Jerome T. Congleton again took up the matter as attorney for complainant and, as soon as facts could be formulated and the proper papers drawn up, started the action in chancery.

This action also consumed much time, the learned Vice-Chancellor Emery taking almost two years in rendering his decision.

There was no want of diligence or any laches. No witnesses have been lost, no harm has come to the defendant.

The acquiescence of complainant and his choice of remedy in the action at law was, because complainant was not fully informed of the legal status or bearing of such choice of remedy.

But beyond that, upon going to trial on the action at law, complainant expected to meet the plea of the statute of limitations as a defense on the part of the defendant by a reliance on the fact of the new promise of the administrator and the fact that the administrator was carrying out his part of the contingent agreement of the new promise by paying all the personal bills of complainant in all the lumber or Holloway litigation.

Although complainant had never seen any of these bills for expenses, etc., Mr. Bradner having sent them direct to the administrator, yet reliance that the administrator had paid such bills was had on the letter of the administrator to complainant of date May 1, 1903

Exhibit D. 8, p. 209, line 36 on, which says:

“Now take a generous view of the facts.”

“*The heavy expenses of suit for 9 years have been paid by the estate; not a penny has been asked from your private purse.*

The Cumberland claim was eliminated by the estate.”

Upon hearing of the action at law, the administrator was subpoenaed to bring all letters, papers, bills, etc., showing payments on account of complainant. Upon being questioned by Mr. Skinner and asked to produce these bills, papers, etc., the administrator absolutely

denied that he had any such bills, or had paid any such bills.

He also failed to produce important papers for which he was subpoenaed to bring into court.

Complainant's case was thereby greatly jeopardized and harmed by this refusal on the part of the administrator.

Testimony G. W. K., p. 161.

Q "Then, Senator, I ask you why you testified before Judge Heisley, on March 14, 1910, in the trial of the suit of William S. Ketcham, Jr., against you as administrator, when you were asked this question: 'Didn't you pay the expenses of it?' referring to the suit of your brother?"

A "No, not that I know of. I was deceived in the bill if I did. I never paid his bill for litigation, never."

Q "Didn't you pay Mr. Bradner's bill?"

A "I paid Mr. Bradner's bill, but not for William S. Ketcham, Jr. I want that understood."

(P. 162; further questioning and answers, p. 163.)

At a later hearing in the Essex County Orphan's Court before Judge Davis and later Judge Osborne, the administrator was cited to render his accounting.

He thereupon produced many bills paid for which he asked and received allowance, which were bills containing personal charges against William S. Ketcham, Jr.

These bills as paid were produced in evidence in the chancery proceedings and admitted by defendant as having been paid by him.

Testimony pp. 169, 170, 171, 172, 173, etc.

This fraudulent misrepresentation of the administrator in regard to the payment of these bills, entirely changed the aspect of complainant's case, and which evidence, had it been produced, would undoubtedly have greatly strengthened the complainant's issue.

Defendant therefore is equitably estopped by his fraud from pleading any acquiescence or choice of remedy on the part of complainant in his action at law. He does not so plead with clean hands.

The opinion of Judge Adams left doubt as to complainant's remedy at law, largely, no doubt, because Judge Adams was not then cognizant of this fraud of the defendant.

The bringing of the action against Campfield to collect on his assessment by the administrator has also altered the status of complainant's cause, in that it has now introduced other equitable considerations not contemplated at the time of the institution of the action at law by complainant.

The change of action to the equity court will undoubtedly save a multiplication of suits. It does not work any harm or loss to the defendant, but, on the other hand, secures to him certain equitable considerations not obtainable in the action at law opinion of Vice-Chancellor Emery, p. 275.

POINT V.

That it would be inequitable to deny complainant his relief as sought and as decreed by the Chancery Court in the action appealed from by the defendant.

It might be well to ask the question, what motive prompts this defendant in his appeal from the chancery decree?

If he is seeking equity and justice, then that is met by the decision rendered by that honorable court, being most equitable, not only to complainant, but also to the defendant.

But it would appear that the defendant is only seeking to use this honorable court of appeals as a means to rid himself of his just obligation on the note claim.

This, under the established facts of the case, would be most inequitable.

It is not denied that the decedent got all the proceeds of the property of the lumber company, and for which he gave his promissory note.

The present defendant, being the estate of the decedent, now seeks to repudiate that just obligation of deceased, and upon the ground that the original claim of complainant was founded in fraud and concealment.

The defendant being willing that the decedent should also be classed as having committed a fraud, if thereby his estate may escape paying a just obligation.

The Court of Chancery has the authority, under such facts as have been shown in this case, to restrain the defendant from having the benefit of the statute of limitations.

Doughty v. Doughty, 10 N. J. Eq. (2 stock) 347.

Freeholders v. Veghti, 44 N. J. L. (15 Vr.) 509.

Lamb v. Martin, 43 N. J. Eq. (16 Stew) 34.

Holloway v. Appelget, 55 N. J. Eq. (10 Dick) 583.

Clark v. Augustine, 62 N. J. Eq. (17 Dick) 689, 25 Cyc., p. 1016.

Conclusion.

In view of the foregoing:

That complainant had a valid and just claim against the decedent:

That he had a valid and just claim against the defendant (administrator):

That he had been misled by the defendant to defer action on the note until after the bar had fallen:

That he is not guilty of negligence or any laches, and that any acquiescence or choice of remedy is chargeable to the fraud of defendant in withholding important papers for which he was subpoenaed to bring into court, as well as perjured statements in regard to payment of the expenses of the lumber litigation:

And that it would be inequitable to deny complainant his equitable relief as sought:

And, further, because complainant is not guilty of any intentional concealment of the note.

Complainant herewith humbly prays that the decree of the Chancery Court be affirmed, and that complainant have such further relief as to costs, counsel fee, etc., as may seem equitable to this honorable court.

WILLIAM S. KETCHAM, JR.,

Respondent—pro se.

