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For Plaintiff.

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NOTICE AND GROUNDS OF APPEAL.

New Jersey Supreme Court

MONMOUTH COUNTY.

FIRST NATIONAL BANK OF BELMAR, N. J., body corporate of the State of New Jersey, *Plaintiff,* *vs.* HARRY V. OSBORNE, Administrator *Pendente Lite* of the Estate of James G. Barnett, deceased, and COLUMBIA HOLDING Co., a body corporate, *Defendants.*	*Action at Law.* *Notice and Grounds of Appeal.*

To Durand, Ivins & Carton and Arthur M. Birdsall, attorneys for plaintiff:

TAKE NOTICE that the defendant, Harry V. Osborne, administrator *pendente lite* of the estate of James D. Barnett, deceased, appeals to the Court of Errors and Appeals of the State of New Jersey from the whole of the judgment entered in this cause on the following grounds:

1. The following question was admitted:

To the witness Edward F. Lyman:

"Why didn't you accept that not?" (p. 33)

2. The following question was admitted:

To the witness Edward F. Lyman:

"Did you know the real relation of Mr. Barnett to the Note?" (p. 36)

3. The following question was admitted:

To the witness Arthur M. Birdsall:

"Why did you bring the suit in that way?" (p. 73)

4. The following question was admitted:

To the witness Paul C. Taylor:

"Were either of you gentlemen to assume any primary liability of the Holding Company by the giving of this mortgage, by reason, of the giving of this mortgage?" (p. 91)

5. The witness Paul C. Taylor was permitted to read in the course of his direct examination a copy of a letter alleged to have been written by him to James G Barnett.

6. The following question was admitted:

To the witness Paul C. Taylor:

"Do you know whether Mr. Barnett carried out the terms suggested in that letter with regard to these other notes?" (p. 97)

7. The following question was admitted:

To the witness Paul C. Taylor:

"Tell us about it?" (referring to arrangements made with the Spring Lake Bank for the taking up of a note other than the one in suit (p. 99)

8. The witness Fred F. Shock was permitted to testify regarding transactions between the said James G. Barnett and the First National Bank of Spring Lake relating to a note which was not the note on which the present suit was based.

9. The Court denied the motion of this defendant for the direction of a verdict for this defendant.

10. The Court refused to charge the jury as follows:

(1) If you find that Mr. Barnett was an endorser of the note on which the suit is based, your verdict should be for the defendant because of the unreasonable length of time which elapsed between the date of the issuing of the note and the date of its presentation for payment.

(1) The note was issued on March 15, 1922, payable on demand. It was presented for payment on October 23, 1925, and notice of protest given to the defendant Harry V. Osborne, administrator *pendente lite* of the estate of James G. Barnett, on October 23, 1925. Under the law that is an unreasonable delay in presentation for payment, and the endorser is therefore discharged from liability.

(5) You also have the right to take into consideration the notary's certificate of protest, in which he recites that he presented the note for payment to E. F. Lyman, Jr., cashier of the bank, at its banking house, and demanded of him payment for the same, to which he replied that he could not pay for want of funds of the makers, Columbia Hotel Holding Company, wherefore he gave notice to the endorsers.

(6) If you find that the First National Bank of Belmar, the plaintiff in this action, did not pay out any money to Mr. Barnett at the time of the making of the alleged agreement between Mr. Lyman, cashier of the bank, and Mr. Barnett, (the alleged agreement I refer to being the one in which Mr. Lyman is said to have agreed to lend to Mr. Barnett an amount in excess of the limit permitted by the Federal statute) and if you find that at that time the bank did not pay out any money to anybody in connection with or as part of the said alleged agreement, nor

change its position in any way whatsoever, your verdict must be for the defendant; because if the plaintiff bank did not pay out any money, nor suffer any loss, nor change its position in any way, the defendant has a right to set up as a defense that certain section of the National Bank Statute of the United States which reads as follows:

"The total liabilities to any association, of any person, or of any company, corporation, or firm for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed ten per centum of the amount of the capital stock of such association, actually paid in and unimpaired, and ten per centum of its unimpaired surplus fund: Provided, however, That (1) the discount of bills of exchange drawn in good faith against actually existing values, (2) the discount of commercial or business paper actually owned by the person, company, corporation, or firm, negotiating the same, and (3) the purchase or discount of any note or notes secured by not less than a like face amount of bonds of the United States issued since April 24, 1917, or certificates of indebtedness of the United States shall not be considered as money borrowed within the meaning of this section, but the total liabilities to any association, of any person or of any company, corporation, or firm, upon any note or notes purchased or discounted by such association and secured by such bonds or certificates of indebtedness, shall not exceed (except to the extent permitted by rules and regulations prescribed by the Comptroller of the Currency, with the approval of the Secretary of the Treasury) ten per centum of such capital stock and surplus fund of such association."

(R. S. par. 5200, amended June 22, 1906, c. 3516, 34 Stat. 451, and Sept. 24, 1918, c. 178, par. 6, 40 Stat.)

(Supplement to U. S. Compiled Statutes, 1919, par. No. 9761.)

(7) There were no circumstances in the case beyond the control of the plaintiff, and not imputable to its default, misconduct or negligence, which excused the plaintiff from making presentment for payment within a reasonable time.

11. The Court charged the jury as follows:

If the plaintiff has failed to establish by evidence to your satisfaction that Mr. Barnett was the maker and that he was still the endorser, then, while he or his estate might not have been held as maker that as a fact he was still liable as an endorser and he or his estate might be held as such.

I feel obliged to say to you gentlemen, that as between these parties, the bank and Mr. Barnett in his lifetime and his estate now, that the Federal statute cannot be pleaded.

The fact appears to be, whether his relation to the note was that of maker or endorser, that it was for a previous indebtedness incurred by the Columbia Hotel Holding Company; and that is a good consideration.

I may say in passing that there is no suggestion that there was not a consideration for this note so far as Mr. Barnett was concerned, whether he in fact was maker or endorser.

So that in those circumstances I incline to the view, which becomes the law in the case because of that fact, that the provision of the Federal statute is not applicable as between these parties.

I apprehend that there is no suggestion as to fraud, even though it was argued here that the

cashier really felt that the acceptance of Mr. Barnett's own note would be a violation of the statute.

But after all, when you come to consider the story involved in this transaction there is really no change in the situation.

But if, on the other hand, the failure to give notice was due to the immediate circumstances involved in the giving of the note, namely, that the bank was willing to wait for an adjustment and final payment by reason of the fact that Mr. Taylor and Mr. Barnett were assuming the obligation, and a mortgage had been given as security—it is true, third in order of priority—upon the real estate in question, and that the bank after all was under no legal obligation, having a demand note, or the circumstances of a factual character were such as not to require notice to be given in the circumstances within the definition of a reasonable time, and that when notice was given it was after the transactions had been practically concluded and there was nothing left to be done but the payment of the note, when it is for you to say whether the notice was given within a reasonable time when it was given; and as you decide that question, assuming you find he was not the maker but an endorser, you decide this case.

And otherwise, if you find that a reasonable notice was not given then of course the plaintiff would not be entitled to recover.

OSBORNE, CORNISH & SCHECK,
Attorneys for Appellant.

Service of a copy of the within is hereby acknowledged this 17 day of Dec. 1926.

DURAND, IVINS & CARTON,
Attys. Plt'ff.

JUDGMENT RECORD.

NEW JERSEY SUPREME COURT.

First National Bank of Belmar, N. J., body corporate, *Plaintiff*, *vs.* Harry V. Osborne, Administrator *Pendente Lite* of the Estate of James G. Barnett, deceased, and Columbia Holding Company, body corporate, *Defendants.*	*Action at Law.* *On Postea.* *Judgment Record.*

Durand, Ivins & Carton, attorneys.

Harry V. Osborne, administrator *pendente lite* of the estate of James G. Barnett, deceased, and Columbia Holding Company, body corporate, defendants in this cause, were summoned to answer unto First National Bank of Belmar, N. J., body corporate, the plaintiff therein, in an action at law upon the following complaint:

(Summons issued February 15, 1926.)

Complaint.

Plaintiff, First National Bank of Belmar, N. J., a body corporate, having its principal place of business in the Borough of Belmar, in the County of Monmouth and State of New Jersey, says that:

1. On March 15, 1922, at Belmar, N. J., and in his lifetime, James G. Barnett endorsed and delivered to plaintiff for value, a certain promis-

sory note of that date made by Columbia Hotel Holding Co., to said James G. Barnett, said note being in the sum of $7,500.00 payable to said James G. Barnett on demand at the First National Bank of Belmar. A true copy of said note and notice of protest is hereto annexed and made a part hereof.

2. On October 23, 1925, the said note was presented for payment at the place where it was payable but was not paid.

3. Notice thereof was duly given to said Harry V. Osborne, administrator *pendente lite* of the estate of James G. Barnett, deceased, and to Columbia Holding Company, body corporate.

4. Prior to the said 15th day of March, 1922, and on the 15th day of December, 1921, a promissory note was made by the Columbia Hotel Holding Company to the said James G. Barnett, payable three months after date at the First National Bank of Belmar. Said note was endorsed by the said James G. Barnett to the said bank. Said note was a renewal of a former note in the said sum of $7,500.00 bearing the names of the same maker and endorser. When said note fell due on the 15th day of March, 1922, the said James G. Barnett promised to plaintiff that he had assumed payment of said $7,500.00 note as well as other notes of Columbia Hotel Holding Company upon which he was liable as endorser and then held by the First National Bank of Spring Lake, certain banks in Trenton and other notes and offered the plaintiff an individual note signed by him as maker with which to take up the $7,500.00 note of December 15, 1921, as aforesaid and also informed plaintiff that he, with one Paul Taylor had taken security in the form of a

$60,000.00 mortgage from the Columbia Hotel Holding Company covering its hotel property in Belmar to secure the payment of said notes and moneys owing to him and the said Paul Taylor from the said Columbia Hotel Holding Company and thereupon agreed to make said $7,500.00 sum his own debt and agreed with the plaintiff to pay same. That the plaintiff at that time stated to the said James G. Barnett that it could not accept his individual note for the said $7,500.00 sum for the reason that said plaintiff had prior to that time loaned the said James G. Barnett the sum of $7,500.00 on another individual note of said Barnett and that said amount with the $7,500.00 represented by the note proposed, would exceed the limit said plaintiff could loan to any one person. Said James G. Barnett and plaintiff thereupon mutually agreed that said Barnett would procure a note of the Columbia Hotel Holding Company for the said sum of $7,500.00 upon which said Barnett would appear as endorser in order to comply with the loan limit of said plaintiff and it was thereupon agreed that said note should be in the form of a demand note so that said Barnett would not be obligated to secure a further note or notes from said Columbia Hotel Holding Company in renewal of same. Said Barnett stated at the same time that the $60,000.00 mortgage taken from the said Hotel Company to secure him with Taylor ran for a period of five years. Said Barnett agreeing at the same time to pay said note and also agreed to pay the interest on said demand note semi-annually until said note was paid. That said Barnett paid interest on said note as follows: June 30, 1922, One Hundred Thirty-three Dollars and Seventy-five cents; December 31, 1922, Two Hundred Thirty Dollars.

5. On the 28th day of December, 1921, the said Columbia Hotel Holding Company made, executed and delivered a mortgage covering its property at Belmar to the said James G. Barnett and Paul C. Taylor. Said mortgage was recorded on the 29th day of December, 1921, in the Monmouth County Clerk's office in Book 614 of Mortgages and page 277 &c. said mortgage being for the sum of $60,000.00.

6. After the death of said James G. Barnett, which occurred . Plaintiff prepared a proof of claim of said demand note dated March 15, 1922, for $7,500.00 with other notes of the said James G. Barnett held by the plaintiff, verified same and presented same to the defendant Harry V. Osborne, administrator *pendente lite*. Thereafter plaintiff brought suit in the New Jersey Supreme Court against the said Harry V. Osborne, administrator, etc., and the said Columbia Hotel Holding Company for the amount due on said note of March 15, 1922, $7,500.00 and the other notes of said plaintiff held by it against the said James G. Barnett. That said suit was answered by the defendant and regularly set for trial at the Monmouth Circuit; that at said trial the plaintiff at the request of the defendant Harry V. Osborne, administrator, etc., withdrew on said suit, its claim on said note of March 15, 1922, and proceeded to judgment for the other obligations sued upon. Said defendant thereup agreed with the plaintiff that he would pay said $7,500.00 note after plaintiff had duly protested same. Said plaintiff thereafter called upon the said defendant for payment and was informed by said defendant that he would pay said note as soon as plaintiff brought suit on same and established its claim

by judgment. Thereafter on the said 23rd day of October, 1925, said note was duly presented for payment and upon payment being refused was duly protested.

7. Plaintiff therefore charges that said note is the principal obligation and indebtedness of the said James G. Barnett and that while his name appears thereon as endorser, yet said Barnett is primarily liable on said note and said note was accepted upon his personal reliability and assumption of same and also that said James G. Barnett took from the said Columbia Hotel Holding Company a mortgage covering its property to satisfy the amount of said note and thereupon made the debt his own.

Plaintiff demands, as damages $7,500.00 with interest thereon from January 1, 1923, together with protest fees and postage and costs of this suit.

DURAND, IVINS & CARTON,
Attorneys for Plaintiff.

The following is a copy of the Note mentioned in the above complaint:

$7500.00 Belmar, N. J. March 15, 1922.

On demand ~~months~~—after date we promise to pay to the order of James G. Barnett Seventy-five hundred and 00/100 Dollars. at the First National Bank of Belmar,

COLUMBIA HOTEL HOLDING CO.

Paul C. Taylor President. E. F. Lyman, Jr. Treasurer.

Value received. with interest.

Endorsed:

James G. Barnett.

Interest Jun 30 1922 133.75

Interest Dec 31 1922 230.

U. S. Rev. Stamps 1.50

(Copy of the Notice of Protest)

UNITED STATES OF AMERICA, } *ss.*
STATE OF NEW JERSEY, }

On the 23rd day of Oct. in the year of our Lord One Thousand Nine Hundred 25 at the request of the First National Bank, of Belmar, N. J., the holder of the original ~~Check~~—Note, I LEON A. WOOLLEY, Notary Public for New Jersey, duly commissioned and sworn, did present the said ~~Check~~. Note to E. F. Lyman, Jr., Cashier of said Bank, at their Banking-house, and demanded of him payment for the same, to which he replied that he could not pay for want of funds of the Makers Columbia Hotel Holding Co. wherefore I duly gave notice to the Endorsers of the non-payment thereof. Wherefore I, the said Notary, at the request aforesaid, did protest,

and by these presents do publicly and solemnly protest, as well, against the said Drawer and Endorsers of said ~~Check~~, Note, as against all others whom it doth or may concern, for exchange, re-exchange, and all costs, charges, damages and interest already incurred and to be hereafter incurred, for want of payment of said ~~Check,~~ Note.

This done and protested at Belmar, in the County of Monmouth, State of New Jersey.

In Witness Whereof, I have hereunto set my hand and affixed my Notarial Seal.

Leon A. Woolley
(SEAL) Notary Public.

(Filed April 10, 1926)

Answer.

Defendant, Harry V. Osborne, administrator *pendente lite* of the estate of James G. Barnett, deceased, of the City of Newark, Essex County, New Jersey, in answering the above complaint says:

1. He has no information sufficient to form a belief as to the allegations of paragraphs one and two.

2. He denies the allegations of paragraph three.

3. He has no information sufficient to form a belie*ve* as to paragraphs four and five.

4. He admits that the plaintiff presented a proof of claim for the said $7,500 note to him;

that the plaintiff subsequently started suit against him for the said $7,500—note and that the said suit was discontinued. He denies that the said suit was discontinued at his request and he denies that he agreed with the plaintiff that he would pay the said $7,500 note after the plaintiff had duly protested the same; the fact being that he told the plaintiff that he would pay the note only if there was judgment against him.

5. He denies the allegations of paragraph seven.

FIRST DEFENSE.

1. The promissory note on which the suit is based was payable on demand and was not presented, nor was payment demanded, within a reasonable time after its issuance.

SECOND DEFENSE.

1. The alleged agreement on which the plaintiff relies to show that the said James G. Barnett assumed primary liability on the said note is illegal; and is a violation of and a fraud upon the law.

THIRD DEFENSE.

1. The alleged cause of action, set up in complaint, is based upon a parol variation and alteration of the terms of the written contract between the plaintiff and the said James G. Barnett, and for that reason plaintiff cannot recover thereon.

OBJECTION IN POINT OF LAW.

1. Defendant will object that the complaint discloses no cause of action; and will base his

objection on the matters alleged the first, second and third defenses hereinabove set forth; all of which matters are apparent on the face of the complaint.

OSBORNE, CORNISH & SCHECK,
Attorneys for Defendant, Harry V. Osborne, Administrator *Pendente Lite* of the Estate of James F. Barnett, deceased.

(Filed May 19, 1926.)

Postea and Judgment.

This case was tried before Judge Rulif V. Lawrence and a jury at the Monmouth Circuit on November 12th and November 15, 1926.

The jury rendered a verdict against the defendants and in favor of the plaintiff for the sum of $9,243 75/100 Dollars, the jury specially found against the defendant, Harry V. Osborne, administrator *pendente lite* of the estate of James G. Barnett, deceased, as endorser on the note sued upon.

Whereupon it is adjudged that the plaintiff First National Bank of Belmar, N. J. body corporate, do recover of the said defendants Harry V. Osborne, administrator *pendente lite* of the estate of James G. Barnett, deceased, and Columbia Holding Company, body corporate, the sum of nine thousand, two hundred forty-three dollars and seventy-five cents damages, together with its costs which have been taxed at the sum of fifty-eight dollars and seventy-three cents, making in the whole the sum of nine thousand, three hundred and two dollars and forty-eight cents.

Postea and Judgment.

Damages	$9,243.75
Costs	58.73
	$9,302.48

Judgment entered December 3, 1926.

WILLIAM S. GUMMERE,
C. J.

I, EDWARD J. KELLEHER, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the notice of appeal and also a copy of the judgment entered in the above-stated cause as the same remains on file and of record in my office.

In testimony whereof I have set my hand and the seal of said court at Trenton, this twenty-second day of December, A. D. nineteen hundred and twenty-six.

EDWARD J. KELLEHER,
(SEAL) Clerk.

Leon A. Woolley, direct.

NEW JERSEY SUPREME COURT.

MONMOUTH COUNTY.

FIRST NATIONAL BANK OF BELMAR, *Plaintiff,* *vs.* HARRY V. OSBORNE, Admr., etc., *Defendant.*	*Action at Law.*

Freehold, N. J., November 12, 1926.

LEON A. WOOLLEY, sworn for plaintiff.

Direct examination by Mr. Carton.

Q Mr. Woolley, are you employed at the First National Bank of Belmar? A I am.

Q How long have you been employed there? A A little over fifteen years.

Q What is your position in the bank? A Notary Public.

Q You have charge of the protesting of notes? A I do.

Q Are you familiar with the note in suit, dated March 15, 1922? A I am.

Q Did you protest that note? A I did.

Q Have you your record of protest with you? A I have.

Q What is the date of protest? A October 23, 1925.

Q And after protest did you send a notice of protest to anyone? A I did.

Q To whom? A To the makers, Columbia Hotel Holding Company, care of P. C. Taylor,

Belmar, New Jersey, and to Harry V. Osborne, administrator *pendente lite* of James G. Barnett, deceased, at 790 Broad street, Newark, New Jersey.

Q I show you note dated March 15, 1922, Columbia Hotel Holding Company, E. F. Lyman, Jr., treasurer, Paul Taylor, president, with the name James G. Barnett as endorser. Is that the note which you protested? A Yes, sir.

Q Is that a copy of your protest notice attached to it? A It is. That is the certificate.

Q Certificate? A Yes.

Q With your name signed to it? A It is. That is my signature.

Mr. Carton: I offer this note. (Submits to Mr. Scheck.)

The Court: I understand there is no objection?

Mr. Scheck: No, sir. I was just looking at the date of it.

The Court: It may be marked.

(Note marked Exhibit P. 1.)

Cross examination by Mr. Scheck.

Q Mr. Woolley, during the fifteen years of your connection with the bank have you always been charged with the duty of giving notice of protest? A I have.

Q And you gave notice of protest to Harry V. Osborne as administrator *pendente lite of* James G. Barnett on other notes of which Mr. Barnett was endorser, did you not? A I don't recall at the present time.

Q Do you remember that the First National Bank of Belmar had one note of $2,500 and one

note of $3,000 or $3,500 on which suit was brought in this court and on which notice of protest was given by you to Mr. Osborne? A I don't recall now.

Q Will you look at your book and see if you have such a record? A I haven't that book here with me.

Q Didn't you testify in those last cases that it was you who gave notice of protest?

By the Court.

Q Do you remember other cases? A There was another case; I don't remember the amount, though.

Q You appeared in evidence, you testified as to the protest of the note, whatever it may be? A Yes, I recall testifying on some note, but I don't recall just what it was now, I have so many of those transactions.

By Mr. Scheck.

Q But you do remember that you gave notice of protest to Judge Osborne for one or more of Mr. Barnett's notes?

By the Court.

Q Do you remember that? A I don't recall now.

By Mr. Scheck.

Q You remember you came here and testified that you gave such notice? A I know there was something in regard to some notes Mr. Barnett was on and I don't recall who I sent notice to at the time.

Leon A. Woolley, cross.

By the Court.

Q You are not asked that; you are asked whether you remember protesting the note now. A Yes.

By Mr. Scheck.

Q And sent notice of protest on those notes? A Yes.

Q But you don't remember whether you sent them to Judge Osborne? A I don't recall who I sent them to.

Q Have you any records, not necessarily here, but have you any records which would show whether or not you gave notice of protest to Judge Osborne since Mr. Barnett's death on a note of Mr. Barnett?

Mr. Carton: I can't see the relevancy of what happened on other notes.

The Court: His purpose is to affect the credibility of the witness as to sending notice; is that the theory?

Mr. Scheck: Not all, your Honor. He may have sent those notices to Judge Osborne several years ago because he knew he was administrator of this estate and had sent him other notices of protest.

Mr. Carton: No question about that.

Mr. Scheck: Will Mr. Carton admit that the bank knew that Judge Osborne has been administrator *pendente lite* of this estate and may have sent notices two or more years ago?

Mr. Carton: We will admit that we knew he was administrator and brought suit on

Leon A. Woolley, cross.

the other notes and collected them; not from the time Mr. Barnett—

Mr. Scheck: No, from the time that they gave notice of protest on the other notes.

The Court: Of course your examination of this witness will depend entirely on his knowledge.

Mr. Scheck: And his records?

The Court: And his records. Now he says he hasn't the particular record here.

Mr. Scheck: I ask for an answer so that he might bring them Monday.

By the Court.

Q Have you your record here? A I haven't it here, no.

Q When did you first know that Judge Osborne was administrator of this estate? A I don't recall the date. The address I received here was from the cashier.

Q From the cashier? A Yes.

By Mr. Scheck.

Q What is the cashier's name? A E. F. Lyman, Jr.

Mr. Scheck: May I ask the Court to request this witness to bring with him Monday the records of the other notices of protest?

The Court: Yes, he can do that.

Q Will you bring them? A Yes, sir.

FRED M. DAVISON, sworn for plaintiff.

Direct examination by Mr. Carton.

Q Mr. Davison, are you employed by the First National Bank of Belmar? A I am.

Q Have been for some time? A Yes.

Q What is your position in the bank? A Bookkeeper.

Q You are serving as bookkeeper now? A Yes, sir.

Q I show you Exhibit P. 1, the note in question, and ask you if the First National Bank of Belmar was the holder of that note? A Yes, sir; they are.

No cross examination.

EDWARD F. LYMAN, sworn for plaintiff.

Direct examination by Mr. Carton.

Q Mr. Lyman, what is your position with the plaintiff bank? A Cashier.

Q And have been for some time? A Since early in 1917.

Q The note sued upon here, you are familiar with that transaction, are you? A Very.

Q Are you acquainted with Judge Osborne? A Yes.

Q And were you acquainted with Mr. Barnett in his lifetime? A Yes.

Q How long had you known Mr. Barnett? A I became acquainted with him shortly after I went to Belmar to live. That was early in 1917.

Q This item represented by this $7,500 note in question, was that the first time this item came in the bank? A No, sir.

Q Or had it been previous? A It was a renewal.

Q Do you know for how long a time the notes for which this note was given had been renewed or had been running in that bank? A I could tell from consulting my record. To my recollection it was about 1918. It may have been 1917.

Q I see you left some papers here beside me. Are these the records here you refer to? A Yes, sir.

Q Well, you might just look at these, if you will, and verify that. (Papers handed witness.) A The note that we have here was a renewal for the same amount and renewed practically every three months from October 14, 1918. It was the original note of $7,500.

Q Whom was that note made by and by whom endorsed, the original note, if you know? A By the Columbia Hotel Holding Company.

Q And by whom endorsed? A James G. Barnett.

Q And did that note, that debt that started at that time, continue on down until the reception of this note sued upon? A Yes.

Q It was a time note, payable in a certain number of months? A Every three months. I would like to correct that statement.

Mr. Scheck: May I interrupt to ask when the witness made that record he is testifying from?

The Court: You may ask him.

By the Court.

Q When did you make that record? A This record was started in 1918.

Q Did you make it? A No, I didn't.

Q In whose handwriting is it? A It is different ones.

Q Well, the clerks in the bank? A Yes.

Q Are you familiar with their handwriting? A Yes. Some of them were former clerks.

Q And the memoranda is in the handwriting of these several clerks? A Yes, indeed.

Q You are familiar with the transaction, you say, independently of your record? A Yes, except the dates.

Q And it would only be necessary to refer to the record in regard to the dates? A Yes.

Q Otherwise you are able to testify independently of your record? A As near as anybody can from their memory.

By Mr. Scheck.

Q Is that the bank's only present record of those transactions? A It is very possible that it is. We had a fire in our bank building, or next door, that communicated to our building, and the water damage and smoke and stain damaged some of our records. Some of them are almost illegible. It might be possible to find the record of every note straight through.

By the Court.

Q Well, what about this record? A This is an exact record. It is the one that I always use for my guidance in figuring up the line of a customer.

By Mr. Scheck.

Q And that is the bank's present official record? A One of them.

By the Court.

Q What is the other? A One is the note itself.

Q This is the first one; what is the next one? A That is the best one.

Q What is your next one? A The next one is what we call a tickler.

Q And what is the next one? A The next one would be this, but this is our liability ledger.

Q I am trying to bring you into a ledger. Where is the ledger?

Mr. Scheck: I am perfectly willing that that should be for all of our purposes the official bank record if this witness will say so.

Q Will you say so? A I will say so, yes.

Mr. Carton: I think it is quite the custom, the way this liability is carried on the liability sheet and not on the ledger.

The Court: I understand there is no ledger. I haven't been in a bank for so long that I don't know what the modern method is.

The Witness: Technically that is the ledger.

The Court: You so regard it?

The Witness: Yes.

The Court: In other words, any payments that have been made would appear upon that card?

The Witness: Yes.

By Mr. Carton.

Q Now, Mr. Lyman, you say that these notes that you refer to there, starting in 1918 and renewals down to the note in question, were time notes. Now the present note I see is a demand note. Do you know why that change was made? A It was made for the accommodation of Mr. Barnett.

Q How did it come about? A Mr. Barnett—

Mr. Scheck: If the Court please, if this witness is to testify to any transactions with Mr. Barnett which would make the relationship of endorser—

The Court: Well, do you invoke the rule under the Evidence Act? Are you invoking the rule under the Evidence Act?

Mr. Scheck: That and also the rule against permitting parol evidence to vary the terms of a written instrument.

The Court: I know, but you are not strictly accurate about that, because the true relationship of an endorser or a party to a promissory note may be shown.

Mr. Scheck: Section 68 of the Negotiable Instrument Act—

The Court: I know, I sat in it. That was the case of First National Bank *v.* Rutter. I am very familiar with it.

Mr. Scheck: It says as between endorsers the true relationship may be shown.

The Court: I am not so sure about endorsers.

Mr. Scheck: That is what the statute says. The statute itself says as between endorsers; and the hotel company here was

maker. Of course we will try and not violate the 4th section of the Evidence Act, your Honor; we appreciate its embarrassment; but on the other proposition, that parol evidence may be given to show the position of the parties on a note and their liability.

The Court: I recall the First National Bank *v.* Rutter, in which I sat. There the endorser appeared as maker. She was allowed to go on the stand and testify who was really endorser.

Mr. Scheck: I was going to call your Honor's attention to a case in the Supreme Court which is very much against me, but it is in the Supreme Court, and before I finished I would have been fair enough to the Court—I do say that the Court of Errors and Appeals must speak in the last analysis; and this case in the Supreme Court is so far fetched and does not accurately state even the situation before it; that while this Court of course, would have to be bound by it, I would nevertheless want to make my objection to get a ruling so that I could go to the Court of Errors. The case I refer to is Ehret *v.* Basso.

(Discussion of authorities.)

The reason I take this position, even in the face of this Supreme Court decision, is not to be obstinate—

The Court: But pardon me a moment. The 68th section, however, is not exclusive of the right to show the relations of the parties themselves to a note, no matter who they may be. Section 68 seems to relate to the order of liability of an endorser. (Reads

statute.) Well, of course that is another phase.

Mr. Scheck: That is only as between endorsers.

The Court: But that does not confine it, however, to the parties, you know. And, in fact, I think there are some other provisions. Isn't the general act here?

(After further argument.)

Q Mr. Lyman, the note in question seems to be dated March 15, 1922. When prior to that time was the former note of which this is a renewal, to which you have referred, given, or when was it dated? A December 15, 1921. It fell due March 15, 1922.

Q Fell due on the day that this note is dated? A Yes.

Q And up until that time it had been a time note? A Yes.

By the Court.

Q Which time, 1922?

Mr. Carton: March 15, 1922.

By Mr. Carton.

Q And then the present demand note was given? A Yes.

Q Why was the demand note given or taken? A I just wonder if I can recall it differently. I said for the accommodation of Mr. Barnett.

Q No, just state why this was changed to a demand note. A Do you want me to give you a long story about it or answer it in a few words?

The Court: Tell us the fact.

Q As briefly as you can. A Mr. Barnett was endorser on all of these notes, successive renewals. Mr. Barnett was given security by the Columbia Hotel Holding Company.

Mr. Scheck: That is what I object to and ask that it be stricken out. How does he know? Somebody must have told him.

The Court: Why don't you ask him, how do you know that he had security?

By the Court.

Q How do you know that he had security of the Columbia Hotel Holding Company? A I knew that a mortgage had been given to him for a certain purpose.

Q You had personal knowledge of a mortgage? A Yes, sir.

Q Go on. A The purpose of that mortgage was to—

Mr. Scheck: I object to that and ask that it be stricken out; that the mortgage speaks for itself, is a written instrument under seal, and this witness cannot testify what the purpose of it was.

The Court: That would be true if the mortgage was in existence. Have you the mortgage?

Mr. Carton: Oh, yes; we will produce it.

The Court: Well, go on. Stop with he said there was a mortgage given as security.

Mr. Carton: I won't go into what the terms were and what the mortgage itself was.

By Mr. Carton.

Q Before we take up the mortgage matter further, how did it come that the note was changed from a time note to a demand note? A The mortgage that was given to Mr. Barnett was given for a term of five years, and it might be paid at any time. The mortgage should be paid if the hotel was sold. That was the understanding.

Mr. Scheck: I object, your Honor, to his testifying to anything that is in the mortgage or the understanding regarding the mortgage.

The Court: Strike it out.

Mr. Carton: He is not testifying what is in the mortgage, your Honor; he is testifying from his own knowledge.

The Court: Go ahead.

A For the convenience of the endorser, Mr. Barnett, it was taken as a demand note, permitting him to pay it off at any time, and without the difficulty of successive renewals. It might be necessary to carry the note for five years, it might be taken care of at any time.

Q And that is the reason why it was made a demand note? A Yes.

Q Did Mr. Barnett know of that transaction, of that situation that you have referred to? A Undoubtedly he did.

By the Court.

Q How do you know he did?

Mr. Carton: If your Honor will let him tell he can tell.

The Court: Is there objection?

Mr. Scheck: I am waiting for a question to which I can object. It has not come yet.

The Witness: I can give you numerous reasons for it.

The Court: Give one. There is no objection.

The Witness: There were many more matters concerned in this same—can I mention the mortgage?

The Court: The same transaction?

The Witness: The same transaction, which Mr. Barnett carried out in accordance with a prearranged plan, every one of them. There were other notes involved.

By Mr. Carton.

Q Mention an instance and where that happened. A Spring Lake Bank had a note of the Columbia Hotel Holding Company endorsed by Mr. Barnett, which Mr. Barnett substituted his own note for.

Mr. Scheck: I ask that that be stricken out for the reason that it is immaterial and is not responsive to the question.

The Court: Yes, it is responsive. It is material because it goes to show the carrying out of this arrangement.

Mr. Scheck: What arrangement?

The Court: I will allow this witness to say this: that this demand note was given as a result of negotiations instituted between the parties at the time. That is all you need know. It was changed from a time note to a demand note; that is what you say?

The Witness: Yes.

The Court: And it was the result of negotiations between the parties in interest?

Mr. Scheck: That would be entirely satisfactory, your Honor; and then I was waiting for a question to which I would object, and the question never came.

Q And you say the reason that was changed from a time note to a demand note was because of an arrangement that happened in connection with that mortgage? A Yes, sir.

The Court: That is as far as you need go.

By the Court.

Q I presume this note was actually discounted in your bank originally? A Yes, indeed, it was.

Q And this renewal is the result of that original transaction? A Yes, sir.

Q It has never been paid, Mr. Lyman? A Never been paid.

By Mr. Carton.

Q And the proceeds paid out by your bank? A Yes, sir.

Q And the note has never been paid? A No, sir.

The Court: He said no.

Q Was an application made to you or your bank to have Mr. Barnett's original note substituted for this note, the former note? A Yes, sir; there was.

Q Did you adhere to that suggestion? A I replied that we could not accept his personal note but we would accept a renewal for the same note with his endorsement. The note was presented to us with Mr. Barnett's name as maker.

Q To take up the old note? A To take up that one, yes.

Q For which this demand note was subsequently given? A That is right, yes.

Q Why didn't you accept that note?

Mr. Scheck: If the Court please, I was waiting for a further question from Mr. Carton and the question didn't come. I ask that the last statement of the witness be struck out because it does not in any way bind the defendant in this suit by any application. He has not shown with whom it was made or with whom that transaction was.

The Court: I will not strike it out. Another note was presented which was not accepted and then the note in question was given?

The Witness: Yes.

The Court: That is the testimony.

Mr. Scheck: I will ask for an exception to the Court's ruling.

The Court: You may have it.

(Objection noted for defendant as ground of appeal.)

Q Why was not the note presented accepted? A We couldn't make another loan of that kind because Mr. Barnett already had the legal amount we could loan to any one individual.

Q On his individual credit? A Yes.

Q And was that the reason why this note in question was taken? A It was taken. This was entirely permissible. It was a renewal of a debt previously contracted. There is a possibility that this note accepted for the Columbia Hotel Holding Company would have been legal, but it was a close technical question that at the time I didn't want to fool with.

Q You mean from a banking standpoint? A Yes.

Q Do you know when Mr. Barnett died? A About the 19th of January, 1923, I think.

Mr. Carton: Is that about right, Mr. Scheck?

Mr. Scheck: About that.

Q Was any interest paid on this demand note sued upon? A Yes.

Q By whom? A Mr. Barnett. We received his check for it.

Q When were payments made and how much were they? (Paper shown witness.) A We charge interest on demand notes twice a year, on June 30th and December 31st. The payment due or the interest due on June 30, 1922, was received July 8, 1922. The accrued interest as of December 30th or 31st, 1922, was received January 20, 1923.

Mr. Carton: I have served notice on my opponents to produce the checks of Mr. Barnett paying these items of interest. Have you those checks, Judge Osborne?

Mr. Osborne: I don't think we have them. We haven't had a chance yet to make search

since notice was received, the last notice; but I told Mr. Carton that we might make a search between now and Monday morning.

Mr. Carton: All right.

Mr. Osborne: We didn't get everything of Mr. Barnett, some of his papers.

Q And those payments that you refer to paid interest on that note, according to your method of charging it at each six months' period during the lifetime of Mr. Barnett, did they not? A Yes, sir.

Q Mr. Barnett having died the following month? A Yes.

Q Mr. Barnett's name, I notice, appears on the back of this note in the usual place where endorsers' name appear; that is a fact, is it not? A Yes.

Q Why didn't his name appear on the front of the notes? A For the reason that it appeared better for us to carry the note in its original form as the Columbia Hotel Holding Company as maker and Mr. Barnett as endorser, because of certain bank statutes in the National Bank Act.

Q What was the liability of Mr. Barnett on that? A On that note?

Q Yes.

Mr. Scheck: That is a question that calls for a conclusion of law by this witness and I object. If it is a fact the question wants—

The Court: I didn't get it.

Mr. Carton: I asked him whether he was primarily liable as maker or endorser.

The Court: That is a conclusion. Try this one: Do you know the relation of Mr. Barnett to this note?

Mr. Carton: That is better, your Honor.

Q Adopting the Court's suggestion, do you know the relation of Mr. Barnett to this note?

Mr. Scheck: I object to that question on the ground that the note speaks for itself.

The Court: Suppose you put the words real relation.

Q His real relation to the note?

Mr. Scheck: I repeat my objection. It is not whether he used the word real or not. I object to the question because it calls for parol evidence on the part of this witness which may vary the terms of this written instrument.

The Court: The objection is overruled and you may have an exception.

(Objection noted for defendant as ground of appeal.)

Q You may answer that. A I would like to hear the question again, please.

By the Court.

Q Do you know the real relation of Mr. Barnett to the note in question? A Yes.

Q What was it? A He was primarily liable.

Q Why? A He had accepted security for this debt which he was to assume.

Q Were the proceeds of the note put to his credit? A No, sir.

Q What did you mean by that former answer? A He had assumed this note, the former notes, the Columbia Hotel Holding Company notes.

Q You know that to be a fact, do you? A Yes, sir.

The Court: Well, proceed.

By Mr. Carton.

Q Do you know that to be a fact because of your association with the Columbia Hotel Holding Company as well as being directly connected with the bank? A Yes, sir.

By the Court.

Q Well, were you in at the various transactions involving that matter? A If I wasn't I knew all about them.

Q Were you present at any conferences that went on between the parties? A Not at any particular conference I wasn't.

By Mr. Scheck.

Q Are you relying on what somebody told you? A I don't always do that.

The Court: Of course you can't rely on what somebody told you. That is the purport of that question.

Q Are you relying for the information which you just gave the Court on what somebody told you, somebody who was present at those conferences if you were not? A What I am relying on is that Mr. Barnett presented his own personal note to take up this one.

By the Court.

Q Which you didn't accept? A Which we didn't accept.

Q But did accept this one in place of it? A Yes.

The Court: Well, go on.

By Mr. Carton.

Q Do you know whether Mr. Barnett received anything of value for changing his position on the former note as endorser to this one as maker? A He received a mortgage.

Q This $60,000 mortgage you referred to? A Yes.

Q Do you know of your own knowledge that other transactions were carried out by the deceased with other banks or institutions as a result of his taking this security?

Mr. Scheck I object to that as being immaterial and irrelevant in this case.

The Court: I think I must sustain that objection.

Mr. Carton: Will your Honor hear me?

The Court: Yes.

Mr. Carton: It is going to be denied that any such arrangement was ever made. Now it seems to me that we can show what Mr. Barnett, the deceased, did in other banks where he was endorser for this hotel company and had been for years at this time that this mortgage was given; that is, substitute his own notes as maker and eventually pay them as a ratification of this agreement that we assert here as actually probative of the truth of that fact.

The Court: The query is running through my mind, what difference does it make whether his estate is held as endorser or maker?

Mr. Carton: It is this: The argument will be that we did not protest the note soon enough.

The Court: Well, what is there in that? It was a demand note.

Mr. Carton: No, but where a maker, your Honor, is primarily liable, it would not have to be protected for him.

Mr. Scheck: For the Court's information I might say that Justice Lloyd has already ruled on that in this particular case.

The Court: Did he strike it for that?

Mr. Scheck: Yes, he struck the complaint and his notice.

The Court: Upon what ground?

Mr. Scheck: Because the demand had not been made within a reasonable time. He held that in this particular case the time within which the demand was made was not reasonable, struck out the complaint and gave the plaintiff leave to file an amended complaint, which is what I told the jury in my opening, and then came this new complaint.

Mr. Carton: It is very embarrassing to have to disagree with counsel. I am fearful that my friend Scheck is not stating the whole story. When this suit was first brought it was brought as an ordinary suit on a note, without setting up the situation at all. Then there came along this notice to strike out, on the ground that it had not been

protested in time enough, and fraud on the part of the bank and all those other things. And on the argument I requested that the complaint be withdrawn and that I be permitted to file a new complaint, which was done; and then my friend Scheck gave me notice to strike that out, and we went back to Merchantville and argued again and it was refused.

Mr. Scheck: Here is the notice of motion to strike out the first complaint with which Mr. Carton has to do, in which they simply stated as hearsay that notice of protest was given and said nothing at all in the complaint about Mr. Barnett's having assumed this note. We appeared before Justice Lloyd on this notice—I haven't the order—and Justice Lloyd said, "Why, yes; the time is unreasonable." And I submitted the memoranda which I have here. Here is my memorandum. Justice Lloyd asked for the original and I gave it to him. Mr. Carton may be right in saying that he then and there asked for leave to withdraw the complaint. I do know that subsequently came this new complaint in which they reverse the position of Mr. Barnett.

The Court: Charge him as maker instead of endorser?

Mr. Scheck: Yes.

Mr. Carton: I might say the reason Mr. Birdsall brought the suit in a different manner, in which it was originally brought, was because of the result of his understanding from Mr. Lyman of his agreement with Mr. Osborne.

The Court: I don't know that you need debate that question now. Is there any unanswered question?

(Question repeated as follows: Do you know of your own knowledge that other transactions were carried out by the deceased with other banks or institutions as a result of his taking this security?)

The Court: The objection stands. You may have an exception.

(Objection noted for plaintiff as ground of appeal.)

Q Mr. Lyman, did you have some conversation with Judge Osborne, the plaintiff, about this note before suit was brought? A Yes.

Q There had been other transactions between your bank and Judge Osborne in the Barnett matter, had there not, outside of this item? A Yes.

Q Where did you have this talk with Judge Osborne? A In Judge Osborne's office.

Q In Newark? A In Newark.

Q And do you recall about when that was? A No, I don't. It has been over a year ago, I think.

Q Well, sometime prior to the time that this note was protested? A Yes, it was previous to that.

Q Sometime prior to the time that note was protested? A During the time we were waiting for a decision on the former case.

Q At that conversation did you talk with him about this note? A I did, showed it to him.

Q What was said about it? A He looked at the note, said that there was no question that

was Mr. Barnett's signature. He said if that was his own name on that note he would pay it, but as administrator for the estate it was his duty to conserve the assets of the estate and we would be compelled to sue to collect it. That may not be the exact words but as near as I can recall it it is the purport of my conversation with him.

Q And then you proceeded to protest the note, I suppose? A Yes.

Q And brought this suit? A Yes.

Q By the way, you have just suggested now, that is Mr. Barnett's signature on that note, is it not?

The Court: That is admitted. I understood it was admitted really in the answer.

Mr. Scheck: It is the signature.

Mr. Carton: Yes, I guess that is so.

Mr. Osborne: As far as we know.

By the Court.

Q You say it is, do you? A I do. I am familiar with it.

Q You saw him write in his lifetime? A Oh, often, yes.

Q Know his signature? A Yes.

Q And that is his signature, is it? A Yes.

Cross examination by Mr. Scheck.

Q Mr. Lyman, when did you first find out that Judge Osborne was administrator of this estate? A It is hard to remember back so many years, but it must have been a few months after Mr. Barnett's death.

Q And Mr. Barnett died in February, 1923, you said? A I don't know whether it was February or January.

Q Well, either January or February, 1923? A Yes, 1923; that is right.

Q And you also knew at that time Judge Osborne's address in Newark, did you not? A I think I did. I could easily have gotten it.

Q You could easily have gotten it? A Yes.

Q You have testified that Mr. Barnett borrowed $7,500 from the Belmar bank? A Yes.

Q Have you records of the bank with you to show us the evidence of that loan? A I have the same ledger account that I previously had, showing a note of his outstanding at that time.

Q May I see it, please? (Examines paper.) A Of course that now shows paid because it was paid by Judge Osborne.

Q Paid October 23, 1924? A I am not looking at that.

Q Is that what you mean, paid October 23, 1924? A Yes.

Q Paid by Judge Osborne as administrator? A Yes.

Q Was that one of the notes that you sued on? A No.

Q This record shows that there was a note of $7,500 payable on demand and was paid October 23, 1924. You now testify that Judge Osborne paid that note without suit? A Yes.

Q With his check as administrator of the estate of James G. Barnett? A I am quite positive it was.

Q Have you a record of that payment other than this? A Yes.

Q Have you it with you? A No.

Q Will you produce it?

The Court: Oh, yes; they are entitled to see any records, of course, that the bank has involving the transaction.

A Well, Judge Osborne has that record himself. He has the canceled check. I can find out.

Q I would like you to find out, because this doesn't show who paid it. A No, but I know who paid it.

Q Then I asked you if you had a record? A Judge Osborne did.

Q I understand you to say you have a record. Now, I ask you to please produce it on Monday, will you? Now, can you tell me when Mr. Barnett gave that note? A Not from this, but it was given—

Q Well, can you tell me from anything? A In about 1916 or 1917. Yes, I can. We have the number here and we can locate the exact date it was given.

By the Court.

Q That was the time note, Mr. Lyman? A Yes.

By Mr. Scheck.

Q But you have never demanded payment between 1916 and 1924? A No, sir.

Q Will you produce Monday all of the records that you have to show the giving of that note, also the interest paid on that note and also the payment of that note? A If it is possible to dig it out I will, surely.

Q Was interest paid regularly on that note? A Yes.

Q Have you with you a record—

By the Court.

Q Who was Mr. Barnett? Where did he live? A He lived in Belmar during the summer—he owned quite a lot of property there—and at Newark during the winter. We thought he was worth about a half a million dollars. He was worth a lot of money.

Mr. Scheck: Well, he was.

By Mr. Scheck.

Q Now, have you with you a statement showing the assets—showing the capital and surplus of your bank in March, 1922? A Yes, sir.

Q May I see it, please? A Yes, sir (produces paper). I will translate it for you if you want me to.

Q No, you don't have to. When was this gotten up? A On the day it is dated at the top.

Q March 15, 1922? A Yes, sir.

Q That shows you have assets of $1,386,830, or reserves; is that right? A $1,386,830.52, yes.

Q That is all of the resources of your bank at that time? A Yes.

Q How much was your surplus at that time? A $25,000, and undivided profits $68,000.

Q $25,000 is only your undivided surplus, isn't it? A No.

Q What was your entire surplus? A The entire surplus?

Q Surplus plus undivided profits. A We carry an amount as surplus and an amount as undivided profits. That is customary.

The Court: He wants them both.

Q Yes, I want the total. A $93,988.91, plus some current earnings not adjusted. I will give you them, too, if you want them?

Q Yes, I want them all. A Current earnings?

Q Yes, I would like to have those, too. A $97,316.05.

Q That is all of your surplus, is it, and earnings? A Outside of the capital.

Q Your capital was $50,000 at that time? A $50,000, yes.

Q Paid in? A Yes.

Q And that made a total of about $143,000, didn't it? A $147,000.

Q $147,000? A Yes, sir.

Q Under the federal statute to which you referred what was the limit, under those figures, which you could loan to any one person? A $7,500.

Q Are you familiar with the statute? A Yes.

Q Were you familiar with it at that time? A Yes.

Q Do you know that the statute says you can loan ten per cent. of your capital plus unimpaired surplus? A Yes.

Mr. Carton: Objected to. Of course he knew it. Objected to as being immaterial.

Mr. Scheck: He said in his complaint and in his testimony he said the reason that they turned down Mr. Barnett's note was because they couldn't under the statute loan him any more money.

The Court: Well, they rather admit—

Mr. Carton: He already had the money.

The Court: But how can Mr. Barnett or his estate take advantage of that?

Mr. Scheck: I am not saying yet how he can.

The Court: As between the parties themselves.

Mr. Scheck: I am trying to show wherein it was not possible—

The Court: He admits that.

Mr. Scheck: No, he doesn't admit it. He says he can loan only $7,500.

The Court: Now he says he couldn't loan to Barnett directly on the note in the form in which it was originally presented, as I understand it.

The Witness: That is right.

The Court: So that the result was that it was loaned to him on the basis of the Columbia Hotel Holding Company being maker and he payee and endorser.

The Witness: That is right.

The Court: But as a matter of fact it was for Mr. Barnett's benefit and the note was discounted in that form.

The Witness: Yes, sir.

Mr. Scheck: Now, I ask the witness whether or not he didn't know that he could loan not only ten per cent. of the capital but ten per cent. of the capital plus ten per cent. of the unimpaired surplus.

The Court: And therefore could have made the loan directly to Mr. Barnett?

Mr. Scheck: And a great deal more than $7,500.

The Witness: Technically, for the purpose of figuring that ten per cent., they only use the amount that you set aside as surplus,

and undivided profits are not calculated in that.

Q Then did you adhere strictly to the statute? A Yes, sir.

Q In all its particulars? A Yes, sir.

Q Then why did you supervene the law by telling Mr. Barnett to bring in the corporation's note?

Mr. Carton: Objected to, because there is no suggestion that he did supervene the law. This money had been loaned prior to this time.

Q Take out the characterization.

By the Court.

Q Why did you tell Mr. Barnett you would have to have the corporation note? A We could continue the former obligation by the same maker and the same endorser. There was no objection to that. That was not in conflict with the law.

By Mr. Scheck.

Q How do you know that? A I am not a lawyer.

Q Then why do you set yourself up as a lawyer and tell us what the law is? A It may be, then, I was wrong in answering.

Q But were you wrong in telling Mr. Barnett to bring in a corporation note when you knew the proceeds went to him? A I didn't make any suggestion of that kind to him. That was brought in and offered to us.

Q What was? A The note which we later accepted.

Q I call your attention to the complaint which your bank filed in this case, in which you say "that the plaintiff at that time stated to the said James G. Barnett that it could not accept his individual note for said $7,500 sum for the reason that the plaintiff (which is the bank) had prior to that time loaned to said James G. Barnett $7,500 on another individual note of said Barnett and that the said amount of $7,500 on the note proposed would exceed the amount said plaintiff could loan to any one person." I say your complaint says that. Is that true?

By the Court.

Q Do you know what that means in the complaint? Why was that put in the complaint? A Maybe I didn't catch all that that said. I didn't see anything wrong with it.

The Court: He says he doesn't see anything wrong with it.

Mr. Scheck: I didn't ask him that. I am asking the witness whether or not—you transacted all this business of the bank, did you not?

The Witness: Yes.

Q Then I ask you whether or not you didn't say to Mr. Barnett, "We can't lend you any more than $7,500 because of the federal statute, because you have exceeded the limit of your liability"? A I said that, yes.

Q Then why did you testify a few minutes ago—

The Court: Not his liability, his loanability.

Mr. Scheck: Yes, his loanability.

Edward F. Lyman, cross.

Q Then why did you say a few minutes ago that they brought in that note of their own accord, this note which you subsequently took? Which one of those statements is true? Did you tell him to go out and bring in another note? A Would you mind reading that over again?

Q I will do better. With the Court's permission I will let you read it.

Adjourned till November 15, 1926, at 10:00 A. M.

Freehold, N. J., November 15, 1926.

EDWARD F. LYMAN, resumed.

By Mr. Scheck.

Q Mr. Lyman, my recollection is that the last question I asked you was relative to whether you had suggested to Mr. Barnett or advised him in March, 1922, to bring in a note of the corporation because the bank could not accept his note in renewal of the corporation's note, and I handed you your bill of complaint from which you might refresh your memory. Will you now look at it and tell us what the situation was? A Well, I don't know what this says, but the situation regarding that was this. We were offered Mr. Barnett's personal note.

Q By whom? A Either Mr. Taylor or Mr. Barnett at that time.

Q Try to remember who brought that note in, will you? A I think when the note was first offered us it was brought in by Mr. Taylor.

Edward F. Lyman, cross.

Q Who was Mr. Taylor? A Mr. Taylor was an officer of the Columbia Hotel Holding Company.

Q What office did he hold? A I think at that time he was president.

Q Well, you know, don't you? A I am not just positive.

Q What is his first name? A Paul C. Taylor.

Q Mr. Taylor brought Mr. Barnett's note to the bank; that is what you say, isn't it? A Yes, sir.

Q But you are the officer of the bank with whom this transaction took place? A Yes, sir.

Q Then this conversation to which you referred in your direct testimony, to the effect that the bank could not accept that note, was between you and Mr. Taylor? A It may have been at that time, but I had a later conversation concerning it with Mr. Barnett.

Q How soon afterward? A It is not easy for me to place a time very definitely. It was within a month or two.

Q After March, 1922? A After March 15, 1922.

Q But it was on March 15, 1922, that your bank accepted the note on which this present suit is based? A It was not.

Q Isn't that the date of the note? A That is the date of the note, yes.

Q Do you mean to say that you got the note after March 15, 1922? A Yes, sir.

Q And it may have been a month or two after? A It may have been, yes.

Q Just how did that take place? A The old note was past due on that date, protested on the day it was due.

Q Protested on what date? A I can't say whether it was the 15th—if the 15th was Satur-

day or Sunday it was protested on the following business day.

Q Of March, 1922? A Yes.

Q I assume Mr. Woolley did the protesting? A I think so.

Q Nobody else in your bank protests notes? A No.

Q And when it was protested was notice of protest sent to anybody? A It was.

Q To whom? A Mr. Barnett and the Columbia Hotel.

Q Will you look at the registry and point that out to me? A Right here on the bottom (indicating).

Q But that is only as endorser. Show me where it says that notice of protest was sent to him. A "Which notice is directed as above on the same date and placed in the postoffice at Belmar."

Q You know, as a matter of fact, though, that Mr. Woolley testified the other day that he sent this notice October, 1925? A I do not.

Q Didn't you hear him testify to that? A No, sir; I didn't.

Mr. Carton: Not the protest in question, Mr. Scheck.

A It was not this note.

Q Oh, you are now referring to the old note, are you, the note that was dated December, 1921? A Yes, which fell due March 15, 1922.

Q You are not referring now to the notice of protest on the note on which this suit is based? A No, I am not.

Q That clears that up. Now, then, you say that Mr. Taylor brought this new note of Mr. Barnett's into the bank in March, 1922? A

Either some time before the 15th of March or some time very quickly thereafter.

Q 1922? A 1922.

Q But that note was for the purpose of taking up the note which was dated December, 1921? A Yes.

Q Is that right? A That is correct.

Q Now, I ask you was it your suggestion to Mr. Taylor or Mr. Barnett or to anybody else that they bring in a note of the corporation because you couldn't accept Mr. Barnett's personal note? A It was not my suggestion only to the extent that we could accept a renewal for the note, a renewal carrying the note as it was, either a term note or payable on demand; but the maker and endorser must be the same as the old note.

Q Why? A I think I have answered that before. Shall I answer it again?

Q Answer it again, please. A Because we couldn't make an additional loan to Mr. Barnett of the $7,500.

Q Why? A It was in violation of the ten per cent. statute.

Q And by that statute you refer to the act of the United States? A Yes.

Q And you told that to the person who brought the note in? A I don't know that I told them as much as I am telling you.

Q Well, you told him that in effect, did you not? A In effect, yes.

Q And you told it to him because you didn't want the First National Bank of Belmar to accept Mr. Barnett's personal note? A Because I could not accept it.

Q Because you could not accept it? A No, sir.

Q So that that suggestion came from you as cashier of the bank? A It might be so taken, but I didn't suggest that they bring this note.

Q How else might it be taken about that? A If I had time I might think of ways.

Q What? A If I had time to consider I might think of other ways that it could be, but that would be the logical effect.

Q As a matter of fact, the person who brought the note in did not know about that or he would not have brought the note in; isn't that true? A It may be; it might not.

Q There is no doubt about that in your mind, is there? A Yes.

Q All right. Now, dispel the doubt for us. We would like to know. A Mr. Scheck, even when people tell me something there are times of doubt in my mind whether they know what they are talking about.

Q That is the only explanation you care to make? A Yes, sir.

Q Now, when you subsequently accepted the renewal of the note with the Columbia Hotel Holding Company as maker and Mr. Barnett as endorser did you in any way change the books of account in the bank relating to this particular transaction? A Other than the renewal was properly recorded.

Q That is all? It was recorded in the books as being the Columbia Hotel Holding Company maker and endorsed by James G. Barnett? A Yes.

Q And that is the way you had been carrying it on your books since 1918? A Yes.

Q And that is the way it is shown on the card to which you have referred? A Yes.

Q Did the bank pay out any money to Mr. Barnett or anybody else when this new note came in? A No.

By the Court.

Q It really took up another note? A It was a renewal, yes; yes, it took up another note.

Q How was Barnett interested in that other note? A As endorser.

Q Merely? A Yes.

By Mr. Scheck.

Q And as far as you know the bank did not in any way change its position by accepting this new note? A No.

By the Court.

Q Therefore the new note was to take up a note for an indebtedness of the hotel company on which Mr. Barnett was endorser? A Yes, and the note had been protested when due.

Q Well, then, in effect, Barnett retained his position as endorser on the renewal of the note, didn't he? A He did, but there were additional facts connected with it. He had accepted security in the shape of a mortgage for his endorsement.

Q And you now claim that this new arrangement made him primarily liable on the new note? A Yes, sir.

Q That is your claim? A Yes.

Q You astonish us, Mr. Lyman. A I am not a lawyer.

Q We are going to decide it; never mind; all we want is the facts. A My understanding regarding it—

Q That is what I am talking about now. A An endorser when he accepts security for an endorsement then becomes primarily liable without notice.

Q If he has to pay it? A Yes, regardless of whether the security was good or bad.

Q Oh, I see; that is your theory of the law, is it? A Yes, sir; with apologies, too, that I am not a lawyer.

By Mr. Scheck.

Q You have opened up a new line of thought, Mr. Lyman. You were treasurer of the Columbia Hotel Holding Company?

The Court: Will you let me interrupt? I am getting at the background of this story. I didn't have it correctly. I got the impression that this note in suit was discounted for the benefit of Barnett.

By the Court.

Q As a matter of fact, you say now that it was merely for the benefit of the hotel company and in a sense a continuation of that original note? A Except this: By an arrangement Mr. Barnett had assumed responsibility for this note along with other notes for which he had taken security.

Q He had taken a mortgage? A Yes.

Q Which you have said had five years to run? A Yes.

Q Well, now, why didn't you present this note to Barnett and demand payment before his death? A We had so much confidence in Mr. Barnett and in his wealth and his general fair dealings with everyone, and knowing the peculiar

circumstances surrounding the matter, that we did not feel it necessary. We felt when Mr. Barnett was ready to pay the note he would pay it.

Q Was it renewed from time to time? A I beg your pardon. This was a demand note and therefore no renewal; you simply held it. I think the claim was filed with Judge Osborne during the statutory time for filing. That was the first real demand that was made for its payment.

By Mr. Scheck.

Q Well, that was more than a year after Mr. Barnett's death, wasn't it? A I don't think so.

The Court: When did Mr. Barnett die?

Mr. Scheck: February, 1923, if I may answer. I think that is right.

The Court: Well, you know that; February, 1923. When was the note presented and demand made? Does the record show?

Mr. Scheck: Well, their own pleadings show it. The evidence is October, 1925.

Mr. Carton: On the protest it is October, 1925. But it had been presented to Judge Osborne in the claim, the regularly proven claim, long before that time, within the statutory time fixed by the rule to bar.

The Court: I understand there is no question raised as to that. Judge Osborne simply disputed the claim and directed the bank to bring suit within the three months' period. That is what happened, I suppose?

Mr. Carton: Yes.

The Court: Proceed.

By Mr. Scheck.

Q I asked you before whether or not you were treasurer of the Columbia Hotel Holding Company in 1922, when this note was brought to the bank? A I think I was, yes.

Q And you signed that note as treasurer, did you not? A Yes.

Q And you knew at that time that the Columbia Hotel Holding Company was insolvent, did you not? A No, sir.

Q It did go out of business, didn't it? A No, sir.

Q Didn't it sell its hotel in December, 1921? A I think not.

Q Well, don't you know? A They hadn't sold it then, no.

Q In December, 1921? A Yes.

Q And you say that they were still in business, running that hotel in Belmar, in March, 1922? A I don't recall the dates when it was sold. The company was in existence at that time.

Q Oh, I don't mean technical existence as a corporation. You know what I mean. The company had gone out of business, hadn't it, of running a hotel? A No.

Q That was the only business of the company, wasn't it, operating the Columbia Hotel in Belmar? A Yes.

Q And isn't it a fact that the company sold that hotel in December, 1921? A No, sir.

Q When did they sell it? A It was sold finally at a foreclosure.

Q Oh, well, when it was sold under foreclosure there was a new owner, wasn't there? A After the sale, yes.

Q Before the sale? A No, I think the title to the property remained the same.

Q In the Columbia Hotel Holding Company? A Either that or a company of a similar name.

Q Organized by whom? A I think Mr. Zizinia was the organizer.

Q When was that organized? A I couldn't tell you.

Q Organized before March, 1922, wasn't it? A I couldn't say positively about that.

Q You wouldn't say that it was not, would you? A No.

Q When was this foreclosure suit started? A I don't know.

Q How soon after December, 1921, was it started? A I think it was a year or more later.

Q What? A It was two years or at least over a year later than that.

Q And the mortgage given to secure Mr. Barnett was wiped out by that foreclosure, wasn't it? A I believe it was, yes.

Q And he never got anything from it, did he? A He was dead then.

Q Well, his estate didn't get anything? A As far as I know they didn't.

Q And you also know that Mr. Paul Taylor, the president of that company, was a joint mortgagee with Mr. Barnett, don't you? A Yes.

Q And that this mortgage was not given simply to Mr. Barnett alone under some arrangement by which he was to assume certain indebtedness, was it? A It was given him on an arrangement by which he was to assume certain indebtedness, but it was not given to him alone.

Q It was given to him and Mr. Taylor? A Yes.

Q And that mortgage was for $60,000? A Yes.

Q And it was a third mortgage? A Yes.

Q Subject to $90,000 mortgages? A Yes.

Q And Mr. Taylor's claim against the company at that time was $50,000, wasn't it? A He never expected to get that.

Q I didn't ask you that. A Not included in that mortgage, it wasn't $50,000.

Q Mr. Taylor's claim against the corporation at the time when he and Mr. Barnett got the mortgage was for $50,000, wasn't it? A No.

Q How much was it? A I don't think it was over thirty, or that much, perhaps not as much as thirty. The hotel owed him for money but he had no claim for it, he had stock.

Q How much did they owe him? A I don't know.

Q Well, $50,000, including his properties that he had sold the company? A Well, owed him plenty, I know that, but I don't know how much. I never saw the figures.

Q You remember that there was a complaint filed by the First National Bank of Belmar against Judge Osborne and the Columbia Hotel Holding Company prior to the complaint on which this present suit is now based? A Yes.

Q In which the bank sought to recover for this $7,500 note? A Yes.

Q And your attorney at that time was Mr. Arthur Birdsall? A Yes.

Q He is the regular attorney for the bank, is he, Mr. Birdsall? A Yes.

Q And do you remember whether or not in that complaint the First National Bank of Belmar set out any of this arrangement to which you have been referring? A We did not.

Q You did not? A Didn't consider it necessary.

Q But in your complaint you simply stated that the Columbia Hotel Holding Company was the maker of the note and Mr. James G. Barnett endorser and that the bank still held the note and you sought to recover? A I think it is correct.

Q And you were present in the home of Justice Lloyd when a motion was argued to strike out your complaint, were you not? A Yes.

Q And you heard the discussion in Justice Lloyd's chambers? A Yes.

Q And it was after that argument that the bank filed the new suit which we are now trying, in which for the first time the bank set up its so-called arrangement making Mr. Barnett primarily liable? A Yes.

Q That is true, isn't it? A Yes.

Q And do you recall that then, before the complaint to which I refer and on which a motion was argued in Justice Lloyd's chambers, the First National Bank of Belmar filed another suit against Judge Osborne as administrator of this estate on this very same note? A You refer to the suit that was included with the Carpenter notes?

Q Yes. A I do.

Q And in that very first suit, which was started on December 4, 1924, did the First National Bank of Belmar set out any of this so-called arrangement with Mr. Barnett under which he is supposed to have become primarily liable? A We did not, but we knew the facts just the same.

Mr. Scheck: I ask that that be stricken out.

The Court: Yes; it is not responsive.

Q Just answer the question and no other. I ask you whether you set it out or not? A We did not, as I recall.

Q All you did in that case was set up the note claiming the Columbia Hotel Holding Company was maker and James G. Barnett endorser? A Yes.

Q I ask you to look at this complaint and ask you if that is the one to which we are both referring, the third count. A You are referring to the original suit?

Q Yes, in which there were two notes of Mr. Carpenter set out in the first and second counts and this $7,500 note was the third count. A I assume that it was. It is signed here by Mr. Birdsall, attorney. Some of these papers are more or less Greek to me.

Q Just look at the one paper, not the others. I show you a summons and complaint in the Supreme Court of New Jersey, Monmouth County, in which the First National Bank of Belmar is plaintiff and W. H. Carpenter, Harry V. Osborne, administrator, &c., and the Columbia Hotel Holding Company are defendants. I refer you to the third count. Does that third count refer to the $7,500 note which is the basis of the suit we are trying today? A Yes.

Q And the exhibit attached is a $7,500 note signed by Columbia Hotel Holding Company, Paul C. Taylor, president, and E. F. Lyman, Jr., treasurer. That is the same note which is the basis of this suit? A Yes.

Mr. Scheck: I ask that this be marked for identification.

The Court: It may be marked.

(Paper marked Exhibit A for identification.)

Mr. Scheck: I have asked Mr. Carton if he has the transcript of the proceedings here and he says no.

Mr. Carton: I have ordered it twice and it is not here.

Mr. Scheck: I want the first complaint in this particular case. I haven't any copy.

Mr. Carton: I haven't that file.

Mr. Scheck: Then I ask that it be stipulated on the record that there was a complaint filed in this court by the First National Bank of Belmar subsequent to the complaint of December 4, 1924, in which the bank sought to recover from Judge Osborne as administrator and from the Columbia Hotel Holding Company $7,500 on this very same note, but in which no reference is made to any arrangement under which it is sought to hold Mr. Barnett primarily liable; the said suit reciting simply the making of the note by the company and the endorsement by Mr. Barnett, seeking to hold Mr. Barnett as endorser.

Mr. Carton: That stipulation will go, and this should go with it: that the reason the suit was brought in that form was because of a talk that the cashier had with Mr. Osborne on all these notes, and Mr. Osborne told him he could bring suit and establish judgment; and with that information given to Mr. Birdsall he simply brought an ordinary suit on the note as presented; and I claim if that suit was heard it would be proper. It is not necessary to set up all this matter. The bank set up a note made by so and so and endorsed by so and so; and that complaint I understand would be suffic-

cient. And the reason no more detail was gone into was because of the talk between Judge Osborne, the administrator, and Mr. Lyman, to bring the suit and establish by judgment.

The Court: You are arguing that. You don't have to do that. The witness has already testified to that. We will allow it to go on record in the absence of the file from the Supreme Court; that is, that the stipulation was in the form as indicated by counsel; and it already appears that a motion was made to strike, and for a reason as to which counsel do not agree, and Mr Justice Lloyd did strike the complaint.

Mr. Carton: Here is a copy of the order. The complaint was withdrawn at my request.

The Court: Mr. Lyman has already testified that that is true; that the complaint was filed on a form the stipulation covered and it did not contain the matter which is now set up in your complaint.

Mr. Carton: It did not contain all those details.

The Court: Now you have your basis for argument in Mr. Lyman's testimony as to a conference with Judge Osborne. And then if you in turn want to put on—or counsel bring a record and give his explanation as to why it was prepared in that form, I will allow that to be done as a matter of explanation.

Mr. Scheck: As I understand it, your Honor, the stipulation as I outlined it should go in without any reasons.

The Court: That is correct.

Mr. Carton: Right in connection with this Mr. Scheck has suggested that we put in the order withdrawing the former complaint.

The Court: In connection with the foregoing stipulation it is consented that the order made by Mr. Justice Lloyd be marked as an exhibit.

(Paper marked Exhibit P. 2.)

Will you allow me to interrupt again?

By the Court.

Q Mr. Lyman, was Mr. Barnett an endorser on the previous note due on March 15th? A Yes.

Mr. Carton: Oh, yes, your Honor, all along.

The Witness: And the note was protested when due.

By Mr. Scheck.

Q I show you, Mr. Lyman, the cards which you referred to the other day containing a record kept by the bank of this note transaction. That is the one that you testified from the other day, isn't it? A Yes.

Mr. Scheck: I would like to have this marked for identification.

(Card marked Exhibit B for identification.)

Q How long did you know Mr. Barnett, Mr. Lyman? A Since about 1917, the early part of 1917.

Q At the time of his death about how old was he? A It is pretty hard to judge his age.

Q Quite an old man, wasn't he? A But I should say sixty-five or sixty-eight, possibly older than that. I perhaps knew at one time but I have forgotten.

Re-direct examination by Mr. Carton.

Q With regard to this stipulation that has just been suggested about the form of the complaint in the former suit, the fact is the former suit included this and some other notes upon which Mr. Barnett was endorser, did it not? A Two other notes.

Mr. Scheck: Yes, it was.

Q And Mr. Birdsall represented you? A Yes.

Q And I don't suppose you saw the complaint when this suit was brought, did you?

Mr. Scheck: Objected to as immaterial. What difference does it make whether this witness saw it? It was filed by an agent of the bank.

The Court: He may answer.

Q Had you seen the complaint? A I had not.

Q Had you had any talk with Judge Osborne prior to the bringing of those suits as to the necessity of bringing suit, or correspondence with him? A I don't think I had a talk with him, but after our claim was filed we received a letter from him; I think it was directed to the bank.

Mr. Scheck: I object to that. The letter must speak for itself, your Honor.

Q Do you remember the substance of what was contained in that letter?

Mr. Scheck: In the first place have you the letter?

The Court: Where is that letter?

Q Have you the letter? A I think Mr. Birdsall had it.

Mr. Carton: Judge Osborne, I asked you to produce a copy of all letters. Have you a copy of this letter?

Mr. Osborne: I certainly have if it was ever written, but I haven't it here this morning. There is a large number of papers here. They have got the original letter if it was ever written.

Mr. Carton: You haven't the original letter?

Mr. Osborne: You have it.

The Witness: I was under the impression that I handed that to Mr. Birdsall. I know that I showed it to him at the time that I received it.

Mr. Carton: Do you remember the substance of it?

Mr. Scheck: They haven't shown that it is not here.

The Court: You haven't laid a proper foundation for it, Mr. Carton.

Mr. Carton: Well, if they haven't the letter that is—

Q The Court asked you when this note in question, the demand note of March 15, 1922—the Court in interrogating you and in calling your

attention to the March 15, 1922, note, asked you, as I recall, whether the proceeds of that note went to Mr. Barnett and you said no? A Yes.

Q That is a fact? A That is a fact.

Q The fact is, is it not, that the proceeds of that note had been credited up away back in 1918?

Mr. Scheck: If the Court please, that is a leading question. This is his own witness and it is not cross examination. I object to it.

Mr. Carton: I have a perfect right, as I understand the practice, to bring out any matter that has been touched upon in cross examination.

The Court: In the first place it has the vice of being leading. However, you may bring out what you are seeking to do by a proper question.

Mr. Carton: Will you read the question, Mr. Kelly?

By the Court.

Q To whom were the proceeds of the original discount credited on this note, tracing it back to its original? A That is the note on which suit is brought?

Mr. Carton: Yes.

A To the Columbia Hotel.

By Mr. Carton.

Q And how far back to the time it was originally discounted? A The time it was originally discounted?

Q Yes. A I think it was in 1918.

Q And this note was simply a renewal? A Yes.

Q Of the original note? A Yes.

Q There was no new notation or no new record made on your books at the time other than its renewal? A That is right, that is correct.

By the Court.

Q Well, if that be so, why didn't Mr. Barnett retain his original position of endorser all through this transaction?

Mr. Carton: Why did he not, your Honor?

The Court: I am asking Mr. Lyman.

A Because he had accepted security for his endorsement of the notes of the company we said that it was necessary for them—

Q Did he say at the time of the renewal, the signing of the renewal, that he would become primarily liable on it? A Not in those words.

Q Did he ever indicate to you that he knew he was becoming primarily liable? A Yes, he did.

Q How? A By outlining to me the conditions, which I already knew, and he ratified them in my presence.

Q In other words, he and Mr. Taylor were taking a mortgage? A Yes.

Q And you claim by reason of that security that Barnett became primarily liable, do you? A Yes, sir.

By Mr. Carton.

Q Well, in addition to that didn't you say that his own note was presented to take this note up? A His own note was presented, yes.

Q What did that indicate to you?

(Objected to. Objection sustained.)

By the Court.

Q He did first present his own note? A Yes, it was presented, I think, before the note dated December 15th, before that came due, before it fell due; and of course we were advised that we could not accept it. The note when it came due was protested. I don't think the renewal was finally given until—

Q A week later? A A week or two weeks later, or a month; it may have been six weeks.

By Mr. Carton.

Q Did you know at that time that Mr. Barnett had assumed other notes of this kind on the reception of the mortgage?

(Objected to. Objection sustained. Objection noted for plaintiff as ground of appeal.)

The Court: You mean in this bank?

Mr. Carton: No, in this and other banks, other notes of the Columbia Hotel Holding Company.

The Court: With this bank?

Mr. Carton: No, this is the only note in this bank, on which Mr. Barnett was endorser; after he received this security assumed them, substituted his own note, as he

offered to do in this instance, and subsequently paid them, and that this witness knew already of that transaction when this note was discounted.

The Court: Are you going to attempt to show that Mr. Barnett himself undertook to make that arrangement with this bank?

Mr. Carton: Yes; and we find that he made a similar arrangement with several other banks to which he was liable in the same way, and carried them out and settled them.

Mr. Scheck: Unfortunately the jury is getting the benefit of all this testimony through what Mr. Carton is saying, and I think it is very prejudicial.

Mr. Carton: We are going to produce the note.

Mr. Scheck: But the proof is irrelevant and cannot go in. I think Mr. Carton ought not to say those things in front of the jury, after the Court has ruled.

The Court: Oh, well, the jury will understand that this is not in proof, the mere statement of counsel. You can't believe all the lawyers say.

Q Mr. Lyman, you say you filed your claim, the bank's claim, with Mr. Osborne as administrator. Do you remember when that was filed? A I don't remember when, but it was filed within the proper time.

Mr. Carton: Will Judge Osborne produce the claim?

Mr. Osborne: Well, I will telephone up to my office and ask my clerk who has

charge of those books and papers to look it up.

Mr. Scheck: Well, you were not noticed to produce it, Judge, were you?

Mr. Carton: Oh, yes, we served two notices to produce, Judge—and I think you have them—everything in connection with this matter.

Mr. Osborne: Well, I didn't look it up but I will telephone up to my office.

Mr. Scheck: Well, if they have copies—

Mr. Osborne: Have you copies?

Mr. Carton: We haven't any copies.

Mr. Osborne: Doesn't your witness know?

Mr. Carton: He says within the statutory period but he doesn't know just when.

The Court: You haven't filed any account?

Mr. Osborne: Not in this county, no.

The Court: Oh, he was a resident of Essex?

Mr. Osborne: Technically, yes; I think he lived down at Belmar.

The Court: Where is this proceeding?

Mr. Osborne: This proceeding is now in the Prerogative Court, and of course I am merely custodian of the estate pending a disposition; I am not the regular administrator.

Q You can't tell us the exact date, Mr. Lyman? A No. I have a copy of that claim somewhere.

Q With you? A No, I haven't it with me.

Re-cross examination by Mr. Scheck.

Q You said that you didn't see the first complaint, the first and second complaints which the bank filed against Judge Osborne; that is so? A Yes.

Q Mr. Birdsall filed it? A Yes.

Q And you gave Mr. Birdsall the facts of the case and turned the note over to him, did you not? A Yes.

ARTHUR M. BIRDSALL, sworn for plaintiff.

Direct examination by Mr. Carton.

Q Mr. Birdsall, you are an attorney and represent the First National Bank of Belmar? A Yes, sir.

Q And did you bring a suit on those other notes, the suit that has been referred to this morning, for the bank against this same defendant? A I did.

Q In that suit was there a count for the note now sued upon? A Yes, it was included as a third count.

Q As well as other counts? A Yes.

Q It has been said that the complaint was a mere formal one, a suit by a holder against maker and endorser; is that a fact? A That is a fact; yes, sir.

Q Why did you bring the suit in that way?

Mr. Scheck: I object. That does not call for a fact; it calls for some conclusion of this gentleman's mind.

The Court: Oh, no; he may state what information he was in possession of at the time.

Mr. Carton: The point has been made—

Mr. Scheck: The question is why it was brought in this way. It does not relate to any information that was given to him.

(Objection overruled. Objection noted for defendant as ground of appeal.)

A The suit as originally brought was on three notes held by the bank; the note for $7,500 in question being one of the notes presented to me by Mr. Lyman.

By the Court.

Q Did you have any information at the time that there was any special arrangement regarding the note of $7,500? A No; I had no notice of any special arrangement. Mr. Lyman either showed me a letter of Judge Osborne or told me when the notes were brought to my office—

Mr. Scheck: I object to what Mr. Lyman told him, your Honor.

Q As a result of information that you had what did you do? A I brought a suit on the three notes.

Q In the form which appears in the complaint? A Yes, sir.

By Mr. Carton.

Q What information did you have about the necessity of bringing this suit at all? A I feel quite sure—although it has been a long time—I

feel quite sure that I saw a letter of Judge Osborne addressed to the bank—

Mr. Scheck: I object to that. We don't want to be bound by what this witness' recollection of that letter is.

Mr. Carton: It seems to me, your Honor, he can give his best recollection.

Mr. Scheck: He doesn't show that he hasn't the letter.

The Court: No, he can't say what is in it, but he may say as a result of certain information received.

Q Well, you received some information, no matter what it was, that it was a fact, and then you brought the suit in the style in which it was brought? A I did. I have gone over all the data in my office. We have been trying to get together all of the papers for which notice of protest was served; and I have gone through all the papers of the old suit. I have endeavored to locate the letter in question as well as all other correspondence which passed between the bank and Judge Osborne which came into my possession; and I have been unable to find any letter from Judge Osborne or any letters from Judge Osborne addressed to the bank. If they were ever in my possession they have probably been returned by me to the bank or else they have been destroyed.

Q Well, now what happened to that suit that you brought on the three notes? Was it tried? A When the case was in the call and the case was actually up for trial I appeared here in this court room. Then Mr. Scheck was representing the defendant and he suggested to me at the out-

set that there should have been a notice of protest on this $7,500 note. I replied to Mr. Scheck at that time that it was my understanding that it was merely a matter of pressing these notes to judgment in order that it would appear proper from the standpoint of Judge Osborne that he have these notes reduced to judgment, and that he would not pay them promiscuously without being satisfied that they were valid claims; that it was for his protection as administrator *pendente lite* of the estate that they should be reduced to judgment, and I presumed it was a mere matter of form.

Q As a matter of fact what happened then? A The third count—the suit was discontinued as to the third count.

Q That is the note in question? A That is the note in question; and I subsequently started—

Q Then did you go on to judgment on the other two notes? A I went on to judgment on the other two notes. We had quite a lively fight on them, but we finally secured judgment and those notes were paid.

Q And then you brought a new suit on the note in question? A And then I brought a new suit on the note in question, after Mr. Lyman—subsequently to the time he first appeared in court Mr. Lyman then went to see Judge Osborne with a view of getting settlement without the necessity of proceeding to suit; and after Mr. Lyman returned he suggested to me that we give regular notice of protest and then sue on the note, which I did in the same form and the same manner, without setting out any of these complications.

Cross examination by Mr. Scheck.

Q And then on the second suit we gave you notice of a motion to strike it out? A Yes. No, I don't think that you did; I won't say that. I don't recall that.

Q Don't you recall that we argued that motion before Justice Lloyd in his chambers? A Yes, that is true. That is when Mr. Carton came in the case.

Q So it was on the second suit that we moved to strike out? A Yes, that is true.

Q Were you there at Mr. Justice Lloyd's chambers? A No, I was not there; Mr. Carton was there.

Q But it was after the order made by Justice Lloyd in this case that this present complaint was filed? A Absolutely.

LEON A. WOOLLEY, recalled for plaintiff.

Direct examination by Mr. Carton.

Q Mr. Woolley, when on the stand Friday you testified to the protesting of the note in question. I want to ask you now if you protested the former note, which is the note—

The Court: Due on the 15th of March.

Q The note due on the 15th of March. I did.

Q That was what, a note of the Columbia Hotel Holding Company with Mr. Barnett as endorser? A It was.

Q When did you protest that note? A March 15, 1922.

Leon A. Woolley, cross.

Q And what did you do, if anything, with regard to the sending of notice of dishonor? A I mailed notices to the Columbia Hotel Holding Company at the postoffice at Belmar, New Jersey, addressed to the Columbia Hotel Holding Company.

Q And what else? A And a notice to the endorser, James G. Barnett, to Belmar, New Jersey.

Q And when did you protest? A March 15, 1922.

Q The day it was due? A Yes.

Q And it was a note upon which Mr. Barnett was endorser? A Yes.

Q You sent him notice that day? A Yes, sir.

Cross examination by Mr. Scheck.

Q And you made a certificate of that protest, did you, in your book? A Yes; made a copy of the certificate in the book.

Q Well, you have the original book there, have you not? A Yes.

Q And this is the same form of certificate which you issued in connection with the protest of this present note, the note on which this suit is based? A Yes.

Q And your certificate contains a true statement of the facts relating to the presentation of the note and the giving of protest, does it not? A Yes.

Paul C. Taylor, direct.

PAUL C. TAYLOR, sworn for plaintiff.

Direct examination by Mr. Carton.

Q Mr. Taylor, where do you live? A Belmar, New Jersey.

Q In business there? A Yes, sir.

Q Are you now or were you formerly connected with the Columbia Hotel Holding Company? A Yes, sir.

Q Who was interested in the Columbia Hotel Holding Company? A At what time?

Q Well, say in 1921 and 1922. First the year 1922. A I was president in 1921, Mr. Lyman was treasurer, and Mr. Paul T. Zizinia I think had some small interest in it at that time.

Q Was Mr. Barnett interested in that company? A Not interested, no, sir.

Q In what investment was he interested, a stockholder or bondholder? A He was a bondholder.

Q What property, if any, did the company own? A The Columbia Hotel at Belmar.

Q Where did Mr. Barnett live? A Corner of Second avenue and Ocean.

Q In Belmar? A In Belmar.

Q Is that near the hotel? A One lot between on the ocean front.

Q How long had you been acquainted with Mr. Barnett? A Since about 1895.

Q A great many years? A Yes, sir.

Q How long had you been interested with him in the Columbia Hotel Holding Company? A Up till 1922; some three or four years.

Q What was Mr. Barnett's interest in the Columbia Hotel Holding Company? A He had bonds and properties in close proximity, adjoining the hotel property on the rear.

Q Well, did he take an interest in the affairs of the company? A He did.

Q It appears that he had endorsed its notes. You knew of that, did you? A Yes, sir.

Q Did anything happen in the latter part of 1921 concerning the affairs of the Columbia Hotel Holding Company in which Mr. Barnett was interested? A Yes.

Q What? A The hotel changed hands at that time, in December, 1921, and Mr. Barnett and I took a joint mortgage to secure us, partially, at least, for the interest we had.

Q Well, what was that mortgage to—what interest of Mr. Barnett was that mortgage to secure?

(Objected to.)

The Court: It speaks for itself. It is on record, isn't it?

Mr. Carton: Yes, it is on record.

The Court: Go get it. Let's see it. I would like to see it.

Q Have you the mortgage, Mr. Taylor? A Yes.

Q Will you produce it? (Witness produces mortgage.)

The Court: Put it on record, Mr. Carton, as an offer. That is a mere suggestion. If you don't want to, I am not directing your defense, you know.

Mr. Carton: Well, I was looking the mortgage over. Will you tell me what your suggestion was?

Mr. Scheck: Put it on record.

Mr. Carton: Yes, I propose to.

Q Is this the mortgage, Mr. Taylor, to which you referred? A Yes.

Mr. Carton: I ask to have it marked.

Mr. Scheck: May I see it?

Mr. Carton: Yes.

(Mr. Scheck examines mortgage.)

(Mortgage marked Exhibit P. 3.)

The Court: What is the condition of that mortgage, Mr. Carton?

Mr. Carton: The condition?

The Court: Yes.

(Mr. Carton reads.)

The Court: No, that is not it.

Mr. Carton: It is $60,000, and no special condition.

The Court: No special condition?

Mr. Carton: No special condition.

The Court: What is in the fore part? What does it indicate?

Mr. Carton: It is a mortgage from the Columbia Hotel Holding Company to Paul C. Taylor and James G. Barnett, given to secure a bond.

The Court: Given to secure a bond?

Mr. Carton: In the sum of $60,000.

The Court: Conditioned for the payment of $30,000?

Mr. Carton: No, $120,000. $60,000 is the principal sum.

The Court: Whom is that to be paid to according to the mortgage, the $60,000? In the fore part there where it recites the bond doesn't it say?

Mr. Carton: It is not in the fore part, your Honor.

The Court: When is it payable?

Mr. Carton: Payable according to the condition of the bond.

The Court: What does the bond say?

Mr. Carton: Payable $60,000 on the 28th day of December, 1926.

The Court: That is one year after date?

Mr. Carton: Five years after date, interest payable semi-annually.

The Court: Just a straight—

Mr. Carton: Straight bond and mortgage, conditioned for the payment five years after date.

The Court: Made by the Columbia Hotel Holding Company?

Mr. Carton: It is a mortgage made by the Columbia Hotel Holding Company to Paul C. Taylor and James G. Barnett. The mortgage refers to the condition of the bond and I will now have to have the bond marked.

The Court: Yes, offer the bond.

(Bond marked Exhibit P. 4.)

Q Now, Mr. Taylor, the bond and mortgage running to you and Mr. Barnett from the hotel company, dated December 28, 1921, I ask you if you had any conversation or talk with Mr. Barnett prior to the execution of this mortgage.

Mr. Scheck: I object. If it was prior it is merged in the mortgage and the mortgage speaks for itself.

The Court: What do you want to show, Mr. Carton?

Mr. Carton: I want to show what the arrangement was.

The Court: As to what the mortgage was given for?

Mr. Carton: Yes.

The Court: All right; I will allow it.

A I did.

Q When? A About two weeks previous to the giving of this mortgage and subsequent to that date arrangements had been talked over.

Q What was the purpose of taking this mortgage by yourself and Barnett? A To secure Mr. Barnett and I as far as possible, he for his endorsement and I for moneys which the hotel company owed me at that time.

Q Well, what was the fact? Was the hotel company indebted to both yourself and Barnett at that time? A Yes.

Q To Mr. Barnett on his endorsements and you individually? A Yes, sir.

Q Was Mr. Zizinia interested in the hotel company at that time? A Not from a money standpoint.

Q Well, was he in any capacity?

By the Court.

Q Financially, or as a stockholder or bondholder? A He had some bonds of the hotel.

By Mr. Carton.

Q Was he a prospective purchaser of the property? A He was a prospective purchaser.

Q And had that possibility anything to do with the execution of this mortgage, the fact that he was a prospective purchaser? A Yes.

Q What? A We had been endeavoring to dispose of the hotel to Mr. and Mrs. George Leonard, owners of the Buena Vista, but Mr. Zizinia thought he had the hotel sold to Mr. Leonard.

Mr. Scheck: I ask that what Mr. Zizinia thought be stricken from the record as not a statement of fact.

Mr. Carton: Yes, I don't care for that part.

The Court: Yes, strike it out.

A The hotel was in tight straits and something had to be done. Foreclosure had been threatened on the first mortgage and Mr. Zizinia said he would take—

Mr. Scheck: I object to anything that anybody else said, your Honor.

The Court: Yes. What do you want to show? What do you want to show about Mr. Zizinia, Mr. Carton?

Q What considerations were moving between yourself and Mr. Barnett and the Holding Company that led up to the making of this mortgage? A The simple fact that we had to dispose of the property.

Q Well, did the giving of this mortgage, the taking of this security by you, have anything to do with the taking care of the—

Mr. Scheck: I object to that as far as it has gone.

Q —mortgage?

Mr. Scheck: Objected to as leading and suggesting the answer to the witness

The Court: Yes, he may state what it is given for. In fact, he has already said that it was given to secure their endorsers.

Q Did you go over with Mr. Barnett in any detail figures showing how this $60,000 sum was arrived at?

Mr. Scheck: Objected to as being immaterial. What difference does it make how they arrived at it or what they did to it? It is immaterial and irrelevant.

By the Court.

Q Have you given all of the reasons for the giving of this mortgage, stated them all? You stated it was to secure the endorsement which you and Mr. Barnett had made for the security of the Holding Company. Was there any other reason?

By Mr. Carton.

Q I will ask you this question, Mr. Taylor. Did you commit to writing to Mr. Barnett the purposes and object of this $60,000 mortgage? A I did.

Q When did you do that? A In December, 1921.

Mr. Carton: I have asked counsel on the other side to produce the original of that letter writtten by Mr. Taylor to James G.

Barnett on December 30, 1921. Have you that letter, Judge Osborne?

Mr. Scheck: No, we haven't it with us.

Mr. Carton: You haven't it with you?

Mr. Scheck: I don't think we have it at all.

Mr. Osborne: I think Mr. Taylor furnished me with a copy of it sometime later.

Mr. Carton: I ask you to produce the copy.

Mr. Osborne: There is no objection to the use of this copy if it is admissible.

Mr. Scheck: I object to its admissibility, regardless of what it says, because it was written December 30, 1921, and is a self-serving declaration. We cannot be bound by it.

Mr. Carton: Here is a letter, your Honor, written by Mr. Taylor to Mr. Barnett, referring in detail to the purposes of which this mortgage was given. Now if this defendant had produced the original, which I had the right to have—

The Court: I know, but in the event it was after the mortgage was given.

Mr. Carton: It was the next day after.

Mr. Scheck: Oh, no.

Mr. Carton: The mortgage is dated on the 28th of December and this letter is on the 30th, two days later—a contemporaneous arrangement. You see this, your Honor: Mr. Taylor is a party to this mortgage, Mr. Barnett is a party to this mortgage. I have a right to have the original letter written produced. It should be in the hands of these parties and undoubtedly is if they could find

it. If they cannot find it I therefore undoubtedly have a right to produce secondary evidence.

The Court: Now wait a minute. I don't see why you are making all this fuss over this thing. I have allowed you to ask him if there was any other reason than those given. He said the mortgage was given to secure these two gentlemen on their endorsement.

By the Court.

Q Was there any other reason, Mr. Taylor? A No other reason.

Q Were you assuming any other liability of the Holding Company? A Personally I was.

Q Was Mr. Barnett? A No, sir; only his endorsement.

Q Merely an endorser? A Yes.

Q That is all? A Yes.

By Mr. Carton.

Q Was that mortgage given to secure his endorsements? A Yes, sir.

Q For the hotel company? A Yes.

Q Including the endorsement on the note in question? A Yes, sir.

Mr. Carton: I don't know whether your Honor has ruled or not—

The Court: I am going to.

Mr. Carton: My application is to have this letter offered under the secondary evidence rule, for the reason that we have served notice to produce the original. This particular letter has not been produced. We

therefore have a right to produce this copy after we have identified it.

Mr. Scheck: I make clear to the Court that our objection does not go to the fact that this is not the original letter.

The Court: No, I understand your point. You say it a self-serving declaration and immaterial?

Mr. Scheck: Yes; not binding on Mr. Barnett. He did not write it.

Mr. Carton: It can't be a self-serving declaration because the bank is not a party to it.

The Court: But it does not show acquiescence on the part of Mr. Barnett, and the witness himself now says that the only reason that that mortgage was given to Mr. Barnett was to secure his endorsement on the Holding Company note. He says so. Now you might get within the realm of contradicting your own witness.

Mr. Carton: No, I think that letter is so complete, your Honor, and we can show the carrying out of the terms of that letter by Mr. Barnett; that it is necessary, I think, to our case and is admissible.

The Court: Wait a moment. I will read it. It is rather long. (Examines letter.) I will allow you to do this, Mr. Carton: I will allow you to hand this letter to Mr. Taylor, the witness, and let him use it if it be necessary for the purpose of refreshing his memory. Now he may say that he does not desire to refresh his memory. If that is so that is the end of it. But I will allow him to read it and then ask him

whether there was any other reason for Mr. Barnett becoming a party to this mortgage other than as he has stated. Of course it does appear, it might be an indication that Barnett did not yet know that this mortgage had been taken, the third mortgage, until Mr. Taylor wrote it.

Mr. Scheck: If Mr. Carton does accept the Court's suggestion—

The Court: I think counsel had better read that letter over. I will give you time. Take a recess of one minute.

(A recess was taken.)

The Court: The objection still stands and the only way I will allow you to use it, Mr. Carton, if the witness will say, if he does say, that he needs that letter to refresh his memory I will allow it to be used in that way, but for no other purpose.

By Mr. Carton.

Q Mr. Taylor, you recall the writing of this letter? A Yes, sir.

Q And did I understand that you had been in conference with Mr. Barnett shortly prior to the writing of this letter? A Yes, sir.

Q About this particular matter? A Yes, sir.

Q Do you recall now—

Mr. Scheck: If your Honor please, I thought the only question was whether or not this witness needs to refresh his recollection.

The Court: Yes.

By the Court.

Q Have you given all your reasons for this mortgage being given to you and Mr. Barnett, particularly so far as Mr. Barnett is concerned? A Well, as I call to mind, there was another reason. Mr. Barnett was particularly interested in this hotel proposition because it adjoined his property. I would state that.

Q But was the mortgage intended to secure him for other than his endorsement? A No, sir.

Q That was the only reason for the mortgage being given, unless that other which you have just stated is a reason? Well, of course, that is what you say? A Yes.

By Mr. Carton.

Q Do you recall, Mr. Taylor, all of the notes referred to in this matter?

Mr. Scheck: I object to that. That is not a proper question. Whether he recalls them or not is immaterial.

The Court: Yes, that is so.

Mr. Scheck: I want to go on. My objection, I understand, is sustained?

The Court: Yes.

Mr. Scheck: On the other hand, he has not told this Court that he does not recall and needs anything to refresh his memory. He has answered the Court three times that that is the reason.

The Court: Yes.

Q Is that a fact, Mr. Taylor, that you don't need this letter to refresh your memory as to its

contents? A Well, if the matter was gone into in detail I would probably need the letter.

By the Court.

Q But as far as Mr. Barnett's interest in the mortgage was concerned do you need the letter to refresh your memory? A I don't think I do.

By Mr. Carton.

Q Do you need the letter to refresh your memory as to what Mr. Barnett's contract was upon the acceptance of this mortgage? A Yes, I would like to see the letter in regard to those endorsements. I may not have this clear in my mind.

By the Court.

Q But you are clear that he was merely to be secured for his endorsements? A Yes, sir.

Q That is all? A Yes, sir.

By Mr. Carton.

Q What do you mean by the term "secured for the endorsement"?

Mr. Scheck: I object. That does not call for a statement of fact, it calls for a conclusion of the witness.

The Court: Yes, I think it is objectionable.

Q I don't think you answered my question: whether you recall without the examination of this letter what Mr. Barnett was to do as a result of receiving this mortgage.

Mr. Scheck: He answered that very clearly, your Honor, and I think Mr. Carton is merely trying to make him say something he has not said and does not want to say. I object to the continuance of this question.

The Court: I think I will cut the Gordian knot by asking this question:

By the Court.

Q Were either of you gentlemen to assume any primary liability of the Holding Company by the giving of this mortgage, by reason of the giving of this mortgage?

(Objected to. Objection overruled.)

A Yes.

Q Were you to assume a primary obligation to the bank? A Mr. Barnett was on these notes that were out of the bank's. He was to assume the notes.

Q I thought you said the mortgage was given to secure his endorsement? A Well, he was on these notes.

Q In other words, you mean if the notes were not paid by the Holding Company then Barnett as endorser was to pay them? A Yes, that was why the mortgage was given to him.

The Court: Now you have it.

Mr. Carton: I think the witness does not clearly distinguish between securing them on his endorsement or primary assumption.

Mr. Scheck: I most respectfully object to Mr. Carton continuing that, because he is going to put this into the witness' mouth.

The Court: Yes, I won't allow you to do that. Mr. Taylor is an intelligent man. He can tell what the question is.

Mr. Carton: It is clear that Mr. Taylor can't tell after this long time without this letter to refresh him.

The Court: He says he can.

The Witness: I say as regards those endorsements I would like to see that letter.

Mr. Scheck: He has said he doesn't need the letter three or more times.

By Mr. Carton.

Q Can you tell without looking at this letter what Mr. Barnett's contract was in regard to this note?

Mr. Scheck: I object to that question. It is a continuance of the same question all the time by Mr. Carton to have the witness answer it differently from the way he answered it before.

The Court: Objection sustained.

Mr. Carton: Your Honor, we are in this situation. Here is a letter containing an agreement between these parties. It is away back in 1921. This witness probably has not seen it in years—

Mr. Scheck: That is a surmise.

Mr. Carton: It is quite impossible, it seems to me, for him to detail what is in this letter at this time, and it is so highly important in getting out the actual contract between these people that I think we have the right to have this letter go to this

witness and then let him read it and then testify. I think it is the customary rule.

The Court: Oh, I will let him read the letter.

(Objected to. Objection overruled. Objection noted for defendant as ground of appeal.)

(Witness reads letter.)

By the Court.

Q Now, you are asked—you have read the letter, have you, Mr. Taylor? A Yes.

Q Now you are asked what Mr. Barnett's relation to that mortgage was? A Mr. Barnett was a party to this mortgage, because he was to assume these notes on which he was an endorser mentioned in this letter to different banks.

Q And he assumed it? A He assumed them by being a party to the mortgage. He was to pay the notes.

Q If the holding company didn't pay them? A Well, no; he was to pay the notes. He took the mortgage, he took this security. He was to personally pay these. They were his notes after this mortgage was drawn.

Q You mean that he was to pay them as endorser? A Yes, sir; or otherwise. This letter so states.

By Mr. Carton.

Q Does that letter say that he was to pay them as endorser?

Mr. Scheck: I object. The letter is not in evidence.

The Court: It is not. He simply used the letter to refresh his memory.

Q Do you say now, after having read that letter, that Mr. Barnett was to assume these notes, particularly this note in question? A I do.

Q What did he do, if anything, to carry out the assumption of this note? Barnett, I mean? A He renewed the note.

Q How did he renew it? A At the Spring Lake National Bank.

By Mr. Scheck.

Q Not in any other bank? A This particular note.

Q Oh, this particular note? A Yes. Well, I don't think I can give any further evidence than has already been given in that respect.

By Mr. Carton.

Q Do you know what was done in regard to this note, the note that was then running? Do you know what was done with this note after the mortgage was given by Barnett which in any way changed the form of the note as originally made? A If my recollection serves me, and as has already been testified, Mr. Barnett requested that I make an arrangement with the bank in regard to this note, in regard to the renewal; I attempted to have Mr. Barnett's own note substituted for this note.

Q How did you come to do that? A At Mr. Barnett's request.

Q What did he request you to do? A He requested me to see if the bank would take his note in place of this note, his own personal note.

Q Barnett talked with you about that? A Yes, sir.

Q Did you take that up with the bank? A I did.

Q Did they accept that note? A They did not.

Q Did they tell you why? A Yes, sir.

Q What was the reason? A Mr. Barnett was already a borrower there to the limit that the bank could loan to one individual.

Q And what arrangement was then made? A The note was continued in its original form.

Q Did you make that known to Mr. Barnett, the manner of the continuation of the note? A I am not clear in my mind as to whether I was the party to make that arrangement with Barnett or not.

Q Did you have anything to do with its being made a demand note? A No.

Q Do you know why it was made a demand note? A No. Well, you speak now of this renewal?

Q Yes. A This last renewal?

Q The note in question. Was Mr. Barnett to take care of any other notes?

Mr. Scheck: I object to that as being immaterial.

(Objection sustained.)

Q Do you know whether Mr. Barnett actually assumed other notes outside of this as a result of this mortgage?

Mr. Scheck: I object to that as being immaterial. It is the same question in another form.

Mr. Carton: Let's ask him if he knows as a fact.

Mr. Scheck: Even if it is a fact how is it material to this case?

The Court: I think I will sustain the objection.

Q Were other notes of the Columbia Hotel Company upon which Mr. Barnett was endorser referred to in that letter? A Yes, sir.

Q Do you know whether Mr. Barnett carried out the terms suggested in that letter with regard to these other notes?

Mr. Scheck: I object to that.

Mr. Carton: Now, if the Court please, may I state my reason?

The Court: Yes, you may state your reason.

Mr. Carton: The witness has testified that these parties met and made this arrangement. It is confirmed in this letter. Now, it seems to me we have the right to show by ratification if by no other way that Mr. Barnett carried out the very details referred to in this letter, not only this note, and we explained why this was taken care of in this manner, but also in other banks, by giving his original notes for them.

Mr. Scheck: I ask that that be stricken out and the jury instructed to disregard it.

The Court: Yes, disregard it. It is not proof.

Mr. Carton: I know it is not proof, but I have the right to make it proof, I understand; because here is an actual carrying out, if it is a fact, if he knows it, if this man carried out this agreement, carried out

the arrangement that he had with the company.

The Court: I will allow this question to be answered and you may have an exception.

(Objection noted for defendant as ground of appeal.)

Q Do you know as a fact that he carried out the terms of the arrangement personally? A Well, I would like to answer that question this way. I wrote Mr. Barnett—not this letter; other letters after this letter was written—giving him the due dates of these notes and the banks in which they were, and told him he would have to make his own arrangements, and to the best of my knowledge he did so.

By the Court.

Q You never heard any more from the notes, you mean? A No, sir.

By Mr. Carton.

Q Take with regard to the note in the Spring Lake Bank; do you know of your own knowledge what was done with regard to that?

Mr. Scheck: Objected to as being immaterial.

The Court: He is not the best proof on that, unless he himself was a party to the note in some way.

Q Were you a party? A I was a party to the note.

By the Court.

Q In the Spring Lake Bank?

By Mr. Carton.

Q Go on and tell us about it. A I was a party on all these notes—the Mechanics National Bank, the Broad Street National Bank of Trenton.

Q On which Barnett was an endorser? A Yes; and I took this matter up with Mr. Barnett and I know they never called on me to pay these notes, but presumably Mr. Barnett—

The Court: Never mind.

The Witness: Well, they never called on me.

Q Do you know of your own knowledge whether Mr. Barnett gave his own notes to take up those notes on which he was endorser?

The Court: Of your own knowledge.

A I can't state it positively from my own knowledge. I never saw the notes.

Q Did you have anything to do with making arrangements with Barnett for the Spring Lake Bank? A Spring Lake note, yes.

Q Do you know about that? A The Spring Lake note, yes.

Q Tell us about it. A I took Mr. Barnett's note—

Mr. Scheck: Of course my objection goes to all the testimony relating to the other banks on the ground that they are immaterial and irrelevant.

The Court: I think I must allow this testimony to go in in the circumstances. You may have an exception.

(Objection noted for defendant as ground of appeal.)

Q Go on. A I took a $5,000 note, Mr. Barnett's note, to the Spring Lake Bank and presented it to Mr. Schock to take up a Columbia Hotel Holding Company note of the same amount. Mr. Schock accepted that note without my endorsement, and that note came due I think twice and was renewed twice, that individual note, Mr. Barnett's note. I think the third time I took the note to the bank Mr. Schock requested I put my name on the back of that note. I told him I didn't like to do that—

Mr. Scheck: I object to all testimony regarding conferences between this witness and Mr. Schock.

The Court: Yes.

Mr. Carton: I don't care about that.

The Witness: Well, what else do you want me to say about that note?

Q The note that you took to the Spring Lake Bank—

By the Court.

Q Did you put your name on a note there? A I did. That is what I was leading up to.

Q Barnett? A That is what I was leading up to; about the third renewal.

By Mr. Carton.

Q But when the individual note was first given by Barnett to take care of the company note on which he was endorser your name was not on that, was it? A No, sir.

Q What was Barnett's position on that note? A His note.

Q Maker? A Maker.

Q And that was to take up, you say, a note of the company? A Yes, sir.

Q Did you appear as endorser on the note in the Broad Street National Bank of Trenton and the Mechanics National Bank? A I was previous to this mortgage.

Q Did you discontinue your endorsement from that time on? A Yes.

Q Do you know how those notes were taken care of after the execution of this mortgage, how the notes in these other banks were taken care of?

The Court: Of your personal knowledge.

A I don't know of personal knowledge.

The Court: No personal knowledge?

The Witness: No.

By the Court.

Q Do you know whether the company continued them? A No, but I know they were continued.

Q How do you know that? Were you an officer of the bank? A I was an officer of the bank.

By Mr. Carton.

Q But you don't know who did continue them? A I can't say.

Q Referring to this letter again, is there anything in that letter that would indicate who took care of those notes in the Trenton banks?

Mr. Scheck: I object to that question because the letter is not in evidence.

The Court: No, the letter is not in evidence. He only used it to refresh his memory.

A I would say by looking at the letter that Mr. Barnett took care of them.

By the Court.

Q Do you know? A I can't say as a positive fact.

The Court: He doesn't know.

Cross examination by Mr. Scheck.

Q Mr. Taylor, at the time you got this mortgage in December, 1922, or 1921, how much did the Columbia Hotel Holding Company owe you? A They owed me for materials furnished and for moneys advanced about $52,000.

Q They owed Mr. Barnett some money for moneys advanced, did they not? A Yes.

Q How much? A Around, actual money, $16,000, if I recall.

By the Court.

Q That is independent of these notes upon which he was endorser? A Yes, sir.

By Mr. Scheck.

Q You had arranged with Mr. Barnett to get his endorsements to these various notes for the company, had you not? A I had.

Q When the $7,500 note in question was first given to the Belmar Bank in 1918 you arranged

to get Mr. Barnett's endorsement? A I think probably I did.

Q And as each renewal date came from 1918 down to December, 1921, you again arranged for Mr. Barnett's endorsement? A Yes.

Q Did you not? A Yes.

Q Where did you see Mr. Barnett on all of these various occasions? A I saw Mr. Barnett at his home in Belmar and his home in Newark.

Q And you went to him each time also to get his endorsement on all of these other notes, did you not? A Yes.

Q You were the go-between between the Columbia Hotel Holding Company and Mr. Barnett? A Well, I don't know that I would answer that by saying yes, that I was the go-between. I would like to know what you mean by go-between.

By the Court.

Q It has an offensive sound to you? A Yes.

Q They don't mean it that way. A I was acting at that time as agent; I think that is a better phrase.

By Mr. Scheck.

Q I will take your phrase. You were an agent for the company? A Yes.

Q But there was nobody else in the company who went to Mr. Barnett to get his endorsement, was there? A Not up to that time, to my knowledge.

Q I mean between 1918 and 1921. A Yes.

Q You did it each time? A Yes.

Q You had known Mr. Barnett for many years? A Yes, sir.

Q He was an old man, was he not? A Well, about sixty-five, I think, when he passed away.

Q And when you made this arrangement to take from the corporation the $60,000 mortgage to secure your indebtedness of $52,000 and all of his endorsements, was there a prior mortgage on the piece of real estate? A There was a prior mortgage.

Q How much was it? A There were two mortgages.

Q How much did they amount to? A There was a $40,000 first and $50,000 second, secured by bond, the $50,000 second.

Q And the first mortgage was past due? A Yes.

Q And the company had been a losing venture from its very beginning, had it not? A Yes, the company had.

Q The company had never paid a dividend? A No, sir.

Q The company had never made any money? A No, sir.

Q And the only property that it owned was this hotel? A Yes, sir.

Q Were you the largest creditor? A At what time?

Q When you got this mortgage in December, 1921. A I presume I was.

Q Why do you say you presume? Don't you know? A Well, I haven't the facts clear in my mind as to all the details in regard to the bonds.

Q The company didn't owe anybody else anywhere near $50,000, did they? A Not to my knowledge.

Q Well, you would know, having been the president? A I presume I would.

Q And you were the largest stockholder at that time, were you not, December, 1921? A Stockholder?

Q Yes. A No, I wouldn't say that.

Q Who had more shares of stock than you? A Well, I can't refresh my memory on that, but I don't think I was the largest stockholder.

Q Well, it was a small corporation, not more than half a dozen stockholders, were there? A I wouldn't say.

Q Well, please tell us how many stockholders there were. A I don't know.

Q Well, about how many? A I don't know.

Q Were there more than ten? A I don't know.

Q Were there more than twenty? A I don't know.

Q How is it that you don't remember that and do remember the dates and details of this agreement that you have so glibly testified about?

The Witness: Your Honor, I object to the manner in which counsel addresses me.

The Court: Oh, he is just representing his client. Strike out the characterization.

Q I will take out the word "glibly." I want to know about how many stockholders this corporation had in 1921? A I don't know.

Q Did they have fifty stockholders? A I don't know.

Q You don't know anything about that?

The Court: He says he doesn't.

A I have no knowledge of the stockholders at this time.

Q Do you know how many shares of stock you had? A No, sir.

Q Do you know how much the company owed you in December, 1921, for merchandise? A I do.

Q How much? A Around $30,000.

Q And how was the remainder of that debt represented? A By moneys I advanced to the hotel.

Q And what evidence of the indebtedness did you get? A None.

Q Didn't you get bonds? A No.

Q Weren't you a bondholder? A I was.

Q Then why do you say you didn't get any bonds? A I bought them and paid for them.

Q Exactly. How many? A I had at one time, I think, around $5,800 worth of them.

Q In bonds? A Yes.

Q And about $30,000 in merchandise, and the company owed you all together $50,000? A $52,000.

Q Was that balance of stock holdings? A No, sir.

Q Well, what did that represent? A Moneys that I had loaned the hotel company in which I had no security.

Q Did you have a note? A No, sir.

Q Nothing at all? A No, sir.

Q Now this mortgage that you and Mr. Barnett took was to secure your $52,000? A No, sir.

Q What was it? Plus Mr. Barnett's indebtedness; is that so? A No, sir; the arrangements between Mr. Barnett and myself on that mortgage were these: Mr. Barnett was to be protected above my interest. We so talked it over.

Q What was your interest? A Above my interest; that his interest would be protected first on that mortgage; and for Mr. Barnett, if the hotel were sold and did not bring sufficient

money to pay this mortgage in full, whatever the hotel brought, if it were $20,000 or $25,000, I would see that he got that money. I was to be the loser.

Q You told him that orally? A Orally.

Q Why didn't you put it in that letter? A Why didn't I put it in that letter?

Q Yes. A I don't know that I can give you any good reason why I didn't.

Q That letter was supposed to express your entire contract with Mr. Barnett, was it not? A Well, there might be some other reason.

By the Court.

Q Read the first paragraph of that letter, Mr. Taylor, and see whether you didn't put it in.

(Witness examines letter.)

A Well, that refers to—

Q Don't you speak of the sale of the property? A Yes, to Mr. George W. Leonard it speaks of a sale.

Q Well, now, was the letter based upon your idea that that sale to the Leonards was going through? A Yes.

Q That was the condition, wasn't it? A Well, we thought—

Q And if went through then these various matters were to be taken care of? A Yes, sir.

By Mr. Scheck.

Q But where in that letter do you say that Mr. Barnett was to be paid first? A It don't say so.

Paul C. Taylor, cross.

Q Now I ask you why you didn't say so? A No reason.

Q Now I again ask you if that letter was not supposed to represent the entire agreement between you and Mr. Barnett? A As far as it goes.

Q As far as it goes? A Yes, as far as it goes. But you didn't put it all in.

Q How do you know what arrangement was made after this letter was written?

Mr. Scheck: I ask that that be stricken out.

The Court: Yes.

By the Court.

Q You may answer, when was the arrangement made, before or after the letter was written? A After the letter was written.

Q After the letter was written? A Yes.

By Mr. Scheck.

Q And that is the reason it was not put in? A It was after that, sir. Well, I felt very kindly toward Mr. Barnett. He had put in his good money, the same as I, and I thought I would like to protect him as well as myself, as a gentleman's agreement.

Q So feeling that way toward Mr. Barnett, you agreed with him, according to your testimony, that he should assume the notes outstanding of the company in various banks and pay out additional money; is that so? A According to the mortgage, yes. He was protected by the mortgage.

Q There is nothing in the mortgage about that, is there? A What is that?

Paul C. Taylor, cross.

Q There is nothing in the mortgage which says that Mr. Barnett should pay out money to these various banks?

Mr. Carton: He was already liable to do that.

A I would say it was in the mortgage. He was a party to the mortgage.

By the Court.

Q You say that was the reason? The mortgage was already given? A He was a party to the mortgage.

By Mr. Scheck.

Q Now, I ask this witness why, if he was so kindly disposed to Mr. Barnett, the agreement was that Mr. Barnett should dig down in his clothes and pay out additional money to these various banks, while there is nothing in the mortgage that you should pay out additional money? A I had already paid mine.

Q And from that time on you were going to have Mr. Barnett pay out his? A He assumed these notes.

Q Can you recollect how many of these notes Mr. Barnett was to assume? A I can by referring to this letter.

Q Go ahead and refer to it. A It so states: "You are to assume the note at the First National Bank of Belmar for $7,500, the note at the First National Bank of Spring Lake for $5,000, note to George E. Rogers for $5,800, note at Mechanics' National Bank of Trenton for $2,000, and note at Broad Street National Bank of Trenton for $500."

Q Will you total those up, Mr. Taylor? A If I am correct in my addition, $20,800, the notes.

Q That Mr. Barnett was to pay out $20,800 of his money to take up these notes? A Yes.

Q And you were not to pay out any money, were you? A Not on these notes.

Q Were you to pay out any money on anything, according to that letter? A I assumed something in this letter, yes.

Q Where? What did you assume? A Well, I will now just refer to it.

Q Go ahead. A This aggregates—speaking of other obligations—$21,300, and I personally agreed to take care of any amount over the $20,000.

Q Who was that for? A Everett Tilton (?)

Q Who was that indebtedness to? A Milk bills and the ordinary run of bills of a hotel.

By the Court.

Q Current bills? A Current bills which had not been paid.

By Mr. Scheck.

Q It came to about $1,000 which you were to pay?

The Court: $1,800.

Q But Mr. Barnett was going to pay out $20,800 under this arrengement? A That was the arrangement, yes.

Q And you made the arrangement, did you not? A Yes.

Q And after you made it you wrote to Mr. Barnett telling him that you had made it? A I don't just get you.

Q After you made the arrangement to take this $60,000 mortgage you wrote that letter to Mr. Barnett in which you say, "I have arranged to take the mortgage"? A Yes.

Q That is right? A Yes.

Q Now, that mortgage was wiped out by foreclosure, was it not? A Yes, sir.

Q Did you or Mr. Barnett get anything out of that mortgage, in the foreclosure? A I didn't, and to the best of my knowledge Mr. Barnett didn't.

Q Neither one of you? A No.

Q But in the dissolution of the company you got about $30,000, didn't you? A I did not.

Q How much did you get? A At the dissolution of the company I had bonds I think aggregating some $4,600, if my memory serves me right, on which I was compelled to sue after the hotel was sold, and I got something around, I think, forty per cent. of that amount, or, in other words, some $2,700 or $2,800.

Q That is all you got? A Yes.

Q Do you remember testifying in the Spring Lake case on the question as to how much you got on the dissolution of the company? A I remember testifying, yes.

Q Do you remember saying this: "Q How many bonds did you have? A $46,000 at that time. Q What did you get? A Thirty odd per cent. Q Do you know whether any other bondholders got the same dividend of thirty per cent.? A I don't know." Do you remember testifying to that? A I remember testifying $46,000 was a mistake. It should have been $4,600. Hundred and thousand were mixed.

By the Court.

Q You say that is the stenographer's mistake? A I don't know whether it was or not. If I said forty-six it should have been forty-six hundred, not forty-six thousand.

By Mr. Scheck.

Q Didn't you just say you had $5,200? A No, I didn't; I said between twenty-seven and twenty-eight, to the best of my knowledge.

Q So it is not true that you got thirty per cent.? A I got thirty per cent. of the forty-six, whatever it was, not thousands but hundreds.

Q In the dissolution of the company? A No. No, I had to sue for that afterwards.

Q And from whom did you get it? A I got it from the Court of Chancery.

Q Out of the proceeds of the sale of the Columbia Hotel's real estate? A Yes, out of the proceeds of the sale, yes.

Q Was it out of the proceeds of the sheriff's sale? A No, it was out of the proceeds of the sale that Mr. Zizinia made to Mr. Sexton after he obtained possession of the property.

Q Sometime later? A Yes.

Q But you don't know whether Mr. Barnett ever got anything? A Not to my knowledge.

Q I want to reiterate, Mr. Taylor, something which I thought I had in the record but apparently there is some doubt. In December, 1921, when you and Mr. Barnett got this mortgage, your financial interest in the Columbia Hotel Holding Company was as follows; you correct me if I am wrong: Merchandise, about $30,000; cash lent to the company, about $20,000; is that right? A Yes.

Q Bonds about $5,700? A Yes.

Q And in addition you were a stockholder in an amount which you did not mention? A No.

Q Do you remember how much money you originally invested in the purchase of stock in this company? A I don't call to mind. A very nominal amount.

Q Did you subsequently increase your stock holdings? A Not to my knowledge.

Q Did you always have just a nominal amount? A To the best of my knowledge.

Q Well, you were the largest stockholder? A I don't think so.

Q Do you remember testifying to that in a previous case, Mr. Taylor? A I don't remember.

Q Do you remember testifying this in the Spring Lake case: "Q Can you tell us how many shares of stock you had at any time in the company? A About $4,000 on the sale. Q You mean in 1921? A Yes." A I was confused as to stock or bonds in that answer. That should have been bonds, not stock. I never had, I don't think, to the best of my knowledge that much stock in the hotel.

Q Then were you twice confused in giving this testimony, once when you said you had $46,000 worth of bonds? A Yes, twice confused.

Q And now that you state you had $4,000 worth of stock? A Must have been.

Q Must have been confused? A Yes.

By the Court.

Q These notes referred to in your letter that you or Mr. Barnett was to assume were notes on which he was already endorser? A Yes, sir.

Q All of them? A Yes, sir.

Paul C. Taylor, cross.

Mr. Carton: Your Honor has asked the only one question that I wanted to ask. Here is one other question.

By Mr. Carton.

Q I will ask you, Mr. Taylor, these two prior mortgages that you have referred to, you say the first was a $40,000 mortgage? A Yes.

Q And the second a $50,000 mortgage? A Yes.

Q That was given to secure a bond issue, was it not? A The second mortgage, yes, $50,000.

Q Do you know or happen to know the price for which the hotel was sold to the present owners? A Well, of course I didn't see that transaction. I understood around $140,000.

By Mr. Scheck.

Q How much do you think? A $140,000.

Q That was the present sale. How much was it sold for in 1921? A That was not Mr. Carton's question.

Q But it is my question.

By the Court.

Q How much was it sold for in 1921? A 1921? Do you mean—

Mr. Carton: I don't think it was sold at all in 1921.

Mr. Scheck: Oh, yes; December, 1921.

The Court: Sold?

Mr. Scheck: Yes.

The Court: At foreclosure?

Mr. Scheck: No, it was sold.

Paul C. Taylor, cross.

The Witness: Changed hands.

Mr. Scheck: Changed hands in December, 1921.

Q Do you know what it was sold for then? A It changed hands and this letter so states. I haven't figured it out. But here is the indebtedness that was assumed by Mr. Zizinia at the time when he took over the hotel.

Q Did Zizinia buy it? A Yes, he took over the hotel.

Q Got a deed for it? A Yes.

Q Did he assume the obligations? A Certain obligations; the letter so states.

By Mr. Scheck.

Q That title was closed in December, 1921, the deed actually delivered? A To the best of my knowledge it was.

Q So that in March, 1922, when the corporation signed this note and gave it to the bank, the corporation did not own that hotel? A Not to the best of my knowledge.

Q Didn't own anything, did it? A I would rather not testify to that. The records in Freehold will speak for that.

Q Well, we are in Freehold now. A I haven't looked them up.

Q One more thing. Do you remember testifying in the previous case also—I should have continued reading—regarding your stock holdings and other holdings? "Q Did anyone have any greater interest in this company than you? A Not from this standpoint. Q You had more money tied up in this company than anyone else? A Yes." A Well, I referred then to

the moneys they owed me, not from a stock standpoint.

By Mr. Carton.

Q The company did own the hotel, however, when it gave this mortgage, didn't it? A It did.

FRED F. SCHOCK, sworn for plaintiff.

Direct examination by Mr. Carton.

Q Mr. Schock, you live at Spring Lake, I suppose, and are you president of the Spring Lake Bank? A I am.

Q Do you know whether your bank discounted any note or notes for the Columbia Hotel Holding Company? A We did.

Q Do you know whether or not James G. Barnett was endorser on any of the company's notes? A He was.

Q How many notes did your bank hold from the Columbia Hotel Holding Company?

Mr. Scheck: I object to that question as being immaterial. I assume I should have objected to the last question, but I didn't. I do now object to it.

The Court: Well, go ahead to the Barnett transaction.

Q Reference has been made by the previous witness to a $5,000 note in your bank. Did you have such a note? A Yes, sir.

Mr. Scheck: I want to object. I object to all testimony regarding any transactions

that did not relate to the First National Bank of Belmar.

The Court: Objection overruled. You may have an exception. Proceed.

(Objection noted for defendant as ground of appeal.)

Q Was the maker of that note changed at any time? A Yes, on February 27, 1922.

Q What happened then? A Why, a note made by Mr. James G. Barnett was substituted for the Columbia Hotel Holding Company note due on February 23, 1922.

By the Court.

Q On which latter note Mr. Barnett was an endorser? A Yes, sir.

By Mr. Carton.

Q The former note had been a Columbia Hotel Holding Company note with Barnett as endorser, and that came due February 23, 1922, you say? A February 23, 1922.

Q And that was taken up by Mr. Barnett's individual note? A Yes, sir.

Q And the holding company eliminated? A Yes, sir.

Q Was that note afterwards paid? A Yes, sir.

Q By whom? A By the estate of James G. Barnett.

No cross examination.

PLAINTIFF RESTS.

The Court: What is the status of the case now?

Mr. Carton: We have rested, your Honor.

The Court: Are all your exhibits in? You simply have the notes?

Mr. Carton: I think everything is in.

The Court: The protest book.

EVIDENCE FOR THE DEFENSE.

Mr. Scheck: I offer in evidence the pleadings in the previous case, particularly the complaint, which has been marked for identification A; also the record of the First National Bank of Belmar, which has been marked B for identification; and the financial statement of the First National Bank of Belmar as of March 15, 1922, which was used by Mr. Lyman and which has no mark on it.

(Papers marked Exhibits D. 1, D. 2 and D. 3.)

I made some notes as to what I want to offer in evidence, and in this mass of papers I seem to have—I think that is all. If I do find it I ask for permission to put it in. And we have no evidence and I should like to make the motion that I suggested.

(Counsel and the Court withdraw to chambers.)

MOTION FOR DIRECTION.

Mr. Scheck: I move for the direction of a verdict for defendant in this case on the following grounds:

The note was made on March 15, 1922. It was not presented for payment until October 15, 1925. The Columbia Hotel Holding Company, a corporation, is the maker and James G. Barnett is endorser. The unreasonable length of time between the date of the issuance of the note and the date when it was presented for payment discharges the endorser.

It is true that under the Negotiable Instruments Act if the delay in presentment is caused by circumstances beyond the control of the holder and when such delay is not imputable to the default, misconduct or negligence of the holder there is an excuse for delay, and that the time again begins to run after those circumstances have terminated.

Now, there isn't anything in this case which justifies the holder of this note, the plaintiff, in delay in presenting it for payment. Mr. Barnett lived in Belmar, also in Newark, both addresses having been known to Mr. Lyman, cashier of the bank, from the time of the making of the note in March, 1922, to the time of his death in February, 1923. Mr. Lyman testified that he knew of Judge Osborne's appointment as administrator *pendente lite* of this estate soon after his appointment, which was, I think, in July, 1923; knew his address and could have sent notice of protest. Also, Mr. Lyman was treasurer of the maker of the note during all of this period and could have presented it to the maker for payment. He knew where the corporation was.

So I say there isn't anything in the case which justifies that delay, excepting, perhaps, if it be the arrangement testified to by the plaintiff to the effect that Mr. Barnett assumed the note primarily. That arrangement, even if made, does not change the status of the case and does not change the position of Mr. Barnett from endorser to maker, because that arrangement is void. It is in contravention of the United States statute which limits the amount which any person may borrow from a national bank to ten per cent. of the amount of its capital and unimpaired surplus. It is true that that statement has been construed by the United States Supreme Court to this effect: that a borrower who has actually received money from the bank in making that loan may not set up that statute as a defense; he cannot hide behind the statute; the leading case on which is—

The Court: You need not bother to cite the case.

Mr. Scheck: Union Gold Mining Company of Colorado *v.* Rocky Mountain National Bank of Central City, Colorado, in 96 U. S. 640, so construes that statute. But it puts its position squarely on this ground: that it would be to the injury of the interest of the creditors and stockholders of the bank to allow such a borrower to set up this statute as a defense. In that particular case an officer of the bank made an excessive loan through error. I have run down the case to date and have found it cited in several State cases, and all of the cases construe this statute. So that the reason that the defendant may not set up this statute as a defense is that he actually received the proceeds of the bank, and also they do not want to do injury to

the creditors and stockholders of the bank by depleting the bank's assets.

That case is clearly distinguishable from the case in hand. It appears from the testimony of Mr. Lyman, the cashier of the bank, that when that arrangement was made in 1922 the bank did not give up any money, the bank did not change its position in any way whatsoever; it did not as a result of this agreement suffer any loss; it did not even change its bookkeeping; it continued to carry the corporation as the maker and Mr. Barnett as the endorser.

The construction of that statute, therefore, by the cases cited is not binding, particularly in view of the decisions in this State, which provide that where a contract relied upon is fraudulent the Court will leave the parties where it found them; the Court will not aid either party to a fraudulent contract to recover from the other. That is clearly established as the law in this State, and I shall cite cases if necessary.

In view of those defenses which appear clearly from the entire case of the plaintiff, I say that the plaintiff has no right to hold Mr. Barnett as the maker of this note and that his personal representative—

The Court: Or as an endorser?

Mr. Scheck: Or as an endorser, and that his personal representative is discharged from liability.

The Court: I will hear what you have to say, Mr. Carton.

(Mr. Carton replies.)

The Court: It appears in the case that there are issues of fact which would lead to a denial of this motion, both with regard to the character

of liability, if any, either made or assumed by Mr. Barnett in his lifetime, and also in regard to the delay in the presentment or demand for payment and the protest. In view of the fact that a mortgage appears to have been given as security and there is testimony in the case which tends to indicate that the transaction was not to be immediately concluded, but to be carried on for the benefit of Mr. Barnett until final adjustment by him in some form, and, moreover, that the original debt was merely continued in the form in which it now appears in the present suit, the Court does not feel as a matter of law that it can hold that the plaintiff has not made out a case for the jury.

With regard to the application of the federal statute the Court is of the opinion that Mr. Barnett in his lifetime and the representative of his estate at this time cannot take advantage of the provision of that act if it applies. The Court inclines to the view that it does not apply to the present transaction.

The motion for direction is denied and you may have an exception.

(Objection noted for defendant as ground of appeal.)

MOTION FOR DIRECTION.

Mr. Carton: I wish to make a motion on behalf of the plaintiff for the direction of a verdict for the plaintiff for the amount of the claim, on the ground that there is no dispute at this time on the case as it has been concluded but that Mr. Barnett assumed and made this debt his own. The proofs are plenary on that; it is not denied. It is testified to by Mr. Lyman and Mr. Taylor and inferentially by Mr. Schock and that testimony has not been controverted. That testimony is conclusive on the proposition that this defendant Mr. Barnett made this debt his own and carried out that arrangement, paid the interest on this note as long as he lived, and there is no denial of that. That is the complete and accepted proof in this case; and that not being disputed there is no question to go to the jury and I am entitled to the motion for a direction for the plaintiff.

The Court: This motion will be denied, in view of the fact that the note sued on bears on its face *prima facie* indication of the apparent fact that Mr. Barnett in his lifetime assumed liability merely as an endorser; and if that be so then the question of proper presentment would be an issue of fact under the charge that the Court will make to the jury on that subject; and that the testimony which tends to contradict or contravene the *prima facie* proof as indicated by the note itself appears to be a matter for the jury to pass upon as a fact; that is to say, involving the claimed assumption of primary liability as a maker on the part of Mr. Barnett in his lifetime. The case appears from either angle, as presented by the plaintiff or the defendant, to be peculiarly a question of fact for the jury to determine.

The motion is denied and you may have an exception.

(Objection noted for plaintiff as ground of appeal.)

CHARGE OF THE COURT.

Gentlemen of the Jury: The plaintiff bank seeks to recover the amount alleged by it to be due on a note bearing date March 15, 1922, payable to the order of James G. Barnett, the defendant's decedent, on demand, and made by the Columbia Hotel Holding Company, with the signatures of Paul Taylor as president and E. L. Lyman, Jr., as treasurer, attached. If I recall the testimony correctly there is no suggestion that the note has been paid. The controversy arises over the question as to the liability of Mr. Barnett in his lifetime and his estate since his decease.

Generally speaking, it would appear to be a question here as to the capacity in which Mr. Barnett became associated with or a party to the note in evidence; and therefore, as the Court sees it, it becomes peculiarly an issue of fact for you gentlemen to decide, guided, of course, by the rules of law that the Court will give you. Those rules are laid down in what we know as our Negotiable Instrument Act, and the case comes to you in two aspects: first, whether in fact Mr. Barnett was a maker of the note in question, although on its face the indication is that of an endorser; or, in the second place, whether his relation to it was merely that of endorser. Because you will observe that under the law if he were the maker then no protest of the note was required either to himself or to his estate. If, on the other hand, he was an endorser, then notice of protest was legally necessary.

Now to the end that you may have a proper notion of the law applicable I propose to give to you sections of the Negotiable Instrument Act

bearing, as it seems to me, upon the issues with which you are to deal. I may say generally that since the plaintiff bank seeks to hold Mr. Barnett's estate because of its claim that he assumed the note in question and became liable as maker intentionally, that it carries the burden of satisfying you under the greater weight of the evidence that he so intended. Because when you come to examine the note you will discover that it is in the usual form of an undertaking by an endorser; that is to say, Mr. Barnett appears as the payee, not as the maker, and his endorsement is on the back of the note. Therefore that makes out a *prima facie* case of endorsement, not an assumption of primary liability as a maker. So, that the plaintiff bank must satisfy you under the greater weight of the evidence that he did not intend to assume liability as a mere endorser but as a maker; and that is peculiarly your function to decide.

If you decide that the plaintiff has carried the burden of establishing its claim that Mr. Barnett was the maker then I charge you that no protest was necessary, and not only he but his estate would be liable for the amount which you find due upon the instrument, with interest from the date that demand for payment was made of his estate.

Our statute defines an accommodation party. It is this:

"An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person; such a person (that is to say, an accommodation party) is liable on the instrument to a holder for value" (the holder in this case being

the plaintiff bank, which admittedly had loaned on the original note of which it claims the note in suit was a renewal the principal sum thereof less the discount); such a person therefore is liable on the instrument to the holder for value, "notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party."

So, that under the statute it is open to the bank to prove the true relation of Mr. Barnett to this paper; and that they have undertaken to do.

Again in our act we find this provision:

"A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity." Therefore it was open to the plaintiff bank to show that instead of his being an indorser he really was a maker of the instrument in question. Now, whether they have satisfied you under the greater weight of the evidence, of course, is a question for you to decide.

In the event that you find that Mr. Barnett was not a maker but an indorser of this note, then I charge you that the following sections of the Negotiable Instrument Act are applicable:

"Where the instrument is not payable on demand, presentment must be made on the day it falls due; where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof."

Now, the statute has undertaken to define a reasonable time; it is this:

"In determining what is a 'reasonable time' or an 'unreasonable time' regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case."

Then again: "Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence; when the cause of delay ceases to operate, presentment must be made with reasonable diligence."

Now, that is in issue here, the charge being made that there was no presentment within a reasonable time within the definition of the statute, and that proper diligence was not exercised by the plaintiff bank. It appears in the case that the demand and presentment or protest was made to Judge Osborne as custodial administrator of the estate of Mr. Barnett. There was no presentment made, apparently, during his lifetime, so far as I recall. If there is evidence in the case of course you will recall it, because you are the judges of the fact and your recollection must prevail.

The provision of the statute with reference to presentment where a party to a note is dead is this:

"When any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence, he can be found; if there be no personal representative,

notice may be sent to the last residence or last place of business of the deceased."

Then again the act carries this provision:

"Notice of dishonor is not required to be given to an indorser in either of the following cases:" and I shall read to you part three of that paragraph, which is 115 of the act: "Where the instrument was made or accepted for his accommodation."

Now, you are to observe that, translated into plain language, even if you find that Mr. Barnett was an indorser of this note and not the maker, notice of protest was not necessary if you conclude as a fact that this note in suit was accepted by the bank for the accommodation of Mr. Barnett himself, as appears to be suggested by the plaintiff. I repeat that: that if you find that he was an indorser and that the bank had not exercised that reasonable diligence required by the statute in making presentment, but nevertheless the note in question really was accepted by the bank for the accommodation of Barnett, then I charge you no notice of protest was necessary to him or to his estate.

Now, you will bear in mind, of course, that I am merely giving you what I conceive to be the law applicable. There is no suggestion on my part at all that it is a fact that the note was given for his accommodation. I am simply suggesting to you that if you find under the evidence in the case that after all this note was accepted by the bank for the accommodation of Barnett, then the statute with regard to the lack of requirement of notice of protest would apply.

Now, gentlemen of the jury, the case is one of importance, necessarily. This representative

of the estate is obliged to protect such estate against claims that have no legal foundation; and on the other hand, the bank should not be subjected to loss of its debt if it has presented evidence here which indicates in the minds of you jurors, within the rules of law given you by the Court, that the defendant's estate is liable. I may say that in the matter of presentment ordinarily the presentment is made where the note is payable on demand made of the maker of the note, which in this case—in a *prima facie* sense only now I am speaking of—the Columbia Hotel Holding Company appears to have been the maker and the notice of protest offered in evidence does indicate that demand was made upon that company at the banking house of the plaintiff, and that then subsequently a notice of protest was sent to Judge Osborne as custodial administrator of the Barnett estate.

There has been some discussion of the testimony in the case which the Court finds it not necessary at all to make any comment on. As I see it the case must be submitted to you under the law in the two ways that have been suggested. If the plaintiff has failed to establish by evidence to your satisfaction that Mr. Barnett was the maker and that he was still the indorser, then, while he or his estate might not have been held as maker that as a fact he was still liable as an indorser and he or his estate might be held as such.

There has been offered in the case some evidence of what has been termed a violation of a section of the Federal Banking Act. That was brought out by the fact that the cashier testified here that it was the intent of Mr. Barnett to assume primary liability for this debt; that he

brought his own note to the bank for the purpose of securing it; that they concluded by reason of some previous loans made, or some indebtedness —I do not recall of what character—that they were unable to accept a note signed by Mr. Barnett as an individual. I may say in comment I do not see what difference it made whether they accepted his notes signed by him as maker or whether, as now, they seek to recover on it still as maker even though his name appears as indorser. In either aspect they are attempting to hold Mr. Barnett as maker. I feel obliged to say to you, gentlemen, that as between these parties, the bank and Mr. Barnett in his lifetime and his estate now, that the federal statute cannot be pleaded. It appears that as a matter of fact there was no actual loan made by the bank to Mr. Barnett at the time of this transaction or as a consideration for it. The fact appears to be, whether his relation to the note was that of maker or indorser, that it was for a previous indebtedness incurred by the Columbia Hotel Holding Company; and that is a good consideration. If that be the consideration for this note it is a valid one under our statute, for the reason that we find this in the act:

"Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value.

"Value is any consideration sufficient to support a simple contract; an antecedent or preexisting debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time."

I may say in passing that there is no suggestion that there was not a consideration for this note so far as Mr. Barnett was concerned, whether he in fact was maker or indorser.

So, that in those circumstances I incline to the view—which becomes the law in the case because of that fact—that the provision of the federal statute is not applicable as between these parties. I apprehend that there is no suggestion of any fraud—that is, intentional fraud—even though it was argued here that the cashier really felt that the acceptance of Mr. Barnett's own note would be a violation of the statute. You heard him say that he thought it was a technical violation. But after all, when you come to consider the story involved in this transaction there is really no change in the situation. Mr. Barnett was the indorser on the previous note, admittedly so; and this transaction seems to have continued the same debt, that is all. The only question submitted here is whether he assumed primary liability which would obviate any necessity for protest, or whether he still remained an indorser and thereby the bank became liable to give the notice of protest within a reasonable time.

So, that the case is finally left with you for your determination. If he was the maker no protest was required. If he was not the maker but remained an indorser, then protest and notice of dishonor was required within a reasonable time within the definition of the statute; and if the bank failed in that respect then I charge you there can be no recovery in this case. But if, on the other hand, the failure to give notice was due to the immediate circumstances involved in the giving of the note, namely, that the bank was

willing to wait for an adjustment and final payment by reason of the fact that Mr. Taylor and Mr. Barnett were assuming the obligation, and a mortgage had been given as security—it is true, third in order of priority—upon the real estate in question, and that the bank after all was under no legal obligation, having a demand note, or the circumstances of a factual character were such as not to require notice to be given in the circumstances within the definition of a reasonable time, and that when notice was given it was after the transactions had been practically concluded and there was nothing left to be done but the payment of the note, then it is for you to say whether the notice was given within a reasonable time when it was given; and as you decide that question, assuming you find he was not the maker but an indorser, you decide this case. If you decide it in favor of the plaintiff you will give judgment for the full amount of the note with interest from January—what is it?

Mr. Carton: January 1, 1923.

The Court: January 1, 1923?

Mr. Carton: Paid up to December 31, 1922.

The Court: And otherwise, if you find that a reasonable notice was not given then of course the plaintiff would not be entitled to recover. In saying that, however, the Court expresses no opinion one way or the other. You are the judges of the fact and you will decide this case in accordance with the rules of law the Court has given.

Mr. Scheck: Will the Court rule on the requests to charge which I have handed up?

The Court: I am requested by counsel for the defendant to charge as follows:

3. In determining whether the plaintiff considered Mr. Barnett as maker or endorser of the note in question, you have the right to take into consideration the first complaint filed by the plaintiff in this cause, in which it alleged that the Columbia Hotel Holding Company was maker and James G. Barnett was endorser.

I so charge you. I am further requested to charge:

4. You also have the right to take into consideration the fact that the plaintiff bank caused to be given to the defendant a notice of protest of the character usually given to an endorser.

The form of the notice of protest I have already discussed with you and you will take that into consideration. I decline to charge the other requests.

DEFENDANT'S EXCEPTIONS.

Mr. Scheck: I except to that portion of the Court's charge in which the Court said that the federal statute did not apply.

2. I also except to that portion of the Court's charge in which the Court said that Barnett brought his own note to the bank to take up the corporation's note in 1922; the evidence having been that Taylor and not Barnett acted for him in taking the note to the bank.

3. I also except to that portion of the charge in which the Court said that there is no suggestion of fraud involved in this case.

4. I also except to that portion of the Court's charge in which the Court said that the bank was under no legal obligation to give notice, having a demand note.

The Court: If they found that he was the maker of the note and not an endorser.

Mr. Osborne: 5. I except to what the Court said in regard to the acceptance for accommodation, no notice being necessary as there was no evidence in the case to justify any suggestion to the jury.

6. I except to that part of the charge in which the Court said that a previous indebtedness was good consideration, or an antecedent debt—what the Court said about that in its application to this case.

7. I except to what the Court said about there being no change in the situation.

8. I except to what the Court said in regard to reasonable notice of protest.

9. I also except to the Court's refusal to charge the requests of the defendant as submitted.

PLAINTIFF'S EXCEPTION.

Mr. Carton: For the plaintiff I only wish to except to your Honor's refusal to charge my third request.

(After the jury had retired they were recalled to the court room and further instructed by the Court as follows):

The Court: Gentlemen of the jury, I have been requested by counsel to say to you that in returning the verdict in this case, should you find the plaintiff entitled to recover, you will indicate whether you find Mr. Barnett, and consequently his estate, liable as though he had been the actual maker of the note or as endorser. The note in the present form, you will recall,

carries Mr. Barnett's name on its back as endorser and on its face as payee. And in returning your verdict, should you find for the plaintiff, you are directed to indicate whether you ascertain as a fact that the liability is that of maker or endorser. Now that does not indicate what verdict you are to return, because that is entirely your function. You decide the case in accordance with the facts and the law as the Court has given it to you.

(The defendant's requests to charge which were refused by the Court were as follows):

1. If you find that Mr. Barnett was an endorser of the note on which the suit is based, your verdict should be for the defendant because of the unreasonable length of time which elapsed between the date of the issuing of the note and the date of its presentation for payment.

2. The note was issued on March 15, 1922, payable on demand. It was presented for payment on October 23, 1925, and notice of protest given to the defendant Harry V. Osborne, administrator *pendente lite* of the estate of James G. Barnett, on October 23, 1925. Under the law that is an unreasonable delay in presentation for payment, and the endorser is therefore discharged from liability.

5. You also have the right to take into consideration the notary's certificate of protest, in which he recites that he presented the note for payment to E. F. Lyman, Jr., cashier of the bank, at its banking house, and demanded of him payment for the same, to which he replied that he could not pay for want of funds of the makers, Columbia Hotel Holding Company, wherefore he gave notice to the endorsers.

6. If you find that the First National Bank of Belmar, the plaintiff in this action, did not pay out any money to Mr. Barnett at the time of the making of the alleged agreement between Mr. Lyman, cashier of the bank, and Mr. Barnett (the alleged agreement I refer to being the one in which Mr. Lyman is said to have agreed to lend to Mr. Barnett an amount in excess of the limit permitted by the federal statute), and if you find that at that time the bank did not pay out any money to anybody in connection with or as part of the said alleged agreement, nor change its position in anyway whatsoever, your verdict must be for the defendant; because if the plaintiff bank did not pay out any money, nor suffer any loss, nor change its position in any way, the defendant has a right to set up as a defense that certain section of the National Bank statute of the United States which reads as follows:

"The total liabilities to any association of any person, or of any company, corporation, or firm for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed ten per centum of the amount of the capital stock of such association, actually paid in and unimpaired, and ten per centum of its unimpaired surplus fund: Provided, however, That (1) the discount of bills of exchange drawn in good faith against actually existing values, (2) the discount of commercial or business paper actually owned by the person, company, corporation, or firm, negotiating the same, and (3) the purchase or discount of any note or notes secured by not less than a like face amount of bonds of the United States issued since April 24, 1917, or certificates of indebtedness of the United States shall not be considered as money borrowed within the meaning of this section, but the total liabilities to any association, of any person or of any company, corporation, or firm, upon any note or notes purchased or discounted by such association and secured by such bonds or certificates of indebtedness, shall not exceed (except to the extent permitted by rules and regulations prescribed by the Comptroller of the Currency, with the approval of the Secretary of the Treasury) ten per centum of such capital stock and surplus fund of such association."

(R. S. par. 5200, amended June 22, 1906, c. 3516, 34 Stat. 451, and Sept. 24, 1918, c. 176, par. 6, 40 Stat.)

(Supplement to U. S. Compiled Statutes, 1919, par. #9761.)

7. There were no circumstances in the case beyond the control of the plaintiff, and not imputable to its default, misconduct or negligence, which excused the plaintiff from making presentment for payment within a reasonable time.

(The plaintiff's requests to charge were as follows):

1. If you find that the bank discounted the note sued on, the defendant in this case cannot avoid the payment to the bank on the ground that the loan made by the bank was in excess of the amount which the bank was authorized to loan to any one person. An excessive loan cannot be set up by the borrower as a defense in an action to recover the money so loaned and you should not consider whether or not the loan was excessive.

2. If you find that the plaintiff and Barnett entered into an agreement whereby it was agreed

that the demand note of $7,500 was for the accommodation of Barnett, even though Barnett appeared on the note as an endorser, then in that event I charge you that no protest or notice of dishonor was necessary to hold Barnett liable on said note.

3. If you find that Barnett received a mortgage as security for payment of the demand note of $7,500, then in that case no notice of protest or dishonor was necessary to hold Barnett liable on said note, even though you find he was only an endorser on the note.

EXHIBIT P. 1.

Note. Printed in full in Complaint on page 12.

EXHIBIT P. 2.

SUPREME COURT OF NEW JERSEY.

MONMOUTH COUNTY.

FIRST NATIONAL BANK OF BELMAR, N. J., body corporate of the State of New Jersey, *Plaintiff,* *vs.* HARRY V. OSBORNE, Administrator *Pendente Lite* of the Estate of James G. Barnett, deceased, and COLUMBIA HOLDING CO., a body corporate, *Defendants.*	*Action at Law.* *Order.*

IT APPEARING to the Court that the defendant Harry V. Osborne, Administrator *Pendente Lite* of the Estate of James G. Barnett, deceased, has given notice to the plaintiff of a motion to strike out the complaint, and the motion having been argued, and the plaintiff having made application to withdraw the complaint and have leave to file a new complaint;

IT IS THEREFORE, on this 22d day of March, 1926, ORDERED by the Court and permission is hereby given to the plaintiff to withdraw its complaint and substitute and file a new complaint

Exhibit P. 2.

within ten days, and that the said defendant shall plead to said new complaint within the regular time provided for pleading, from the date of service of the new complaint upon said defendant with costs of this notice to defendant and counsel fee of ten dollars.

On motion of

DURAND, IVINS & CARTON,
Attorneys for Plaintiff.

Rule entered,
March 25, 1926,

On motion of Durand, Ivins & Carton.

That the above order be entered on the minutes.

FRANK T. LLOYD,
Justice Supreme Court.

A true copy.

EDWARD J. KELLEHER,
Clerk.

Exhibit P. 3.

EXHIBIT P. 3.

THIS INDENTURE, MADE the 28th day of December, in the year of our Lord One Thousand Nine Hundred and Twenty-one

BETWEEN Columbia Hotel Holding Company, a Corporation of the State of New Jersey having its principal office in the Borough of Belmar in the County of Monmouth in said State of New Jersey, party of the First Part;

AND Paul C. Taylor, of the Borough of Belmar, in the County of Monmouth, and State of New Jersey, and James G. Barnett, of the City of Newark in the County of Essex and State of New Jersey party of the Second Part;

WITNESSETH, That the said party of the First Part, for and in consideration of ONE DOLLAR, and other valuable considerations, lawful money of the United States of America, to it in hand well and truly paid by the said party of the Second Part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the First Part being therewith fully satisfied, contented and paid hath given, granted, bargained, sold, aliened, enfeoffed, conveyed and confirmed, and by these presents doth give, grant, bargain, sell, alien, enfeoff, convey and confirm unto the said party of the Second Part, and to their heirs and assigns, forever,

ALL that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Borough of Belmar in the County of Monmouth and State of New Jersey, bounded and described as follows, to wit:—

Exhibit P. 3.

Being lots numbers five (5), six (6), Four Hundred (400), Four Hundred and One (401), and Four Hundred and Two (402), and part of lots numbers Four (4), and Four Hundred and Three (403), on a plan of lots of the Ocean Beach Association, filed in the Monmouth County Clerk's Office,—

Beginning at a stake standing at the intersection of the Northerly line of Third Avenue with the Westerly line of Ocean Avenue, and running thence (1) Northerly, along the westerly line of Ocean Avenue, One Hundred and Twenty (120) feet to a stake for a corner; thence (2) Westerly, parallel with Third Avenue, One Hundred and Fifty (150) feet to a point in the Easterly line of Lot Number Four Hundred (400); thence (3) Northerly, parallel with Ocean Avenue, Thirty (30) feet to the Northeasterly corner of Lot Number Four Hundred (400); thence (4) Westerly, parallel with Third Avenue, Two Hundred (200) feet to the North-east corner of lot number Four Hundred Four (404); thence (5) Southerly, along lot number Four Hundred Four (404), Fifty Two and Seventy-seven hundredths feet (52.77 ft.) to a stake for a corner; thence (6) Easterly, parallel with Third Avenue, Forty-six (46) feet to a stake for a corner; thence (7) Southerly, parallel with Ocean Avenue, Ninety Seven and Twenty-three hundredths feet (97.23 ft.) to a stake in the Northerly line of Third Avenue; thence (8) Easterly, along Third Avenue, Three Hundred and four (304) feet to the place of Beginning.

Being the same premises conveyed unto the said Columbia Hotel Holding Company, body corporate, by Frederick W. Gnichtel, Trustee,

Exhibit P. 3.

etc. by deed dated June 12th., 1918, and duly recorded in the Monmouth County Clerk's Office in Book 1065 of Deeds, on pages 165, etc.

Subject, nevertheless, to mortgage encumbrances aggregating $90,000.00; namely,—one mortgage in the sum of $40,000.00 and another mortgage in the sum of $50,000.00; said mortgages being duly recorded in the Office of the Clerk of Monmouth County. This mortgage being third and subsequent only to the said two mortgages above mentioned and recorded.

Provided always, and it is agreed by and between the parties to these presents that the said party of the first part shall and will keep the buildings erected and to be erected upon the lands above conveyed insured against loss or damage by fire in some safe and responsible insurance company or companies to an amount not less than Sixty Thousand Dollars, and assign the policy and certificate thereof to the said party of the second part as collateral security for the payment of the principal and interest aforesaid, and in default thereof it shall be lawful for the said party of the second part to effect such insurance and the premium and premiums for effecting the same shall be a lien on the said mortgages premises, added to the amount of the said bond or obligation and secured by these presents and payable on demand with legal interest.

Together with all and singular the profits, privileges and advantages, with the appurtenances to the same belonging, or in anywise appertaining. Also, all the estate, right, title, interest, property, claim and demand whatsoever, of the said party of the First Part, of, in and to the same, and of, in and to every part and

Exhibit P. 3.

parcel thereof: To HAVE AND TO HOLD all and singular the above described tract or lot of Land and Premises, with the appurtenances, unto the said party of the Second Part, their heirs and assigns, to the only proper use, benefit and behoof of the said party of the Second Part, their heirs and assigns forever.

PROVIDED ALWAYS, and it is agreed by and between the parties to these presents, that if the said party of the First Part, its successors, do and shall well and truly pay, or cause to be paid, to the said party of the Second Part, or to their certain attorney or attorneys, heirs, executors, administrators or assigns, the sum of SIXTY THOUSAND ($60,000.00) DOLLARS according to the conditions of a certain Bond, made, executed and given by the said party of the First Part to the said party of the Second Part, bearing even date herewith, drawn in the penal sum of ONE HUNDRED and TWENTY ($120,000) DOLLARS then, and from thenceforth, these presents and said obligation, and everything herein and therein contained, shall cease and be void; anything herein and therein contained to the contrary in any wise notwithstanding.

AND IT IS ALSO AGREED by and between the parties to these presents, that the said party of the First Part shall and will pay, on or before the thirty-first day of December in each year while this Mortgage remains in force, all taxes which may be assessed upon the said mortgaged premises; and in default thereof, the entire principal sum of money mentioned herein, together with all interest, shall, at the option of the said party of the Second Part, become forthwith due and payable, anything hereinbefore contained to the contrary thereof notwithstanding; and the

Exhibit P. 3.

party of the Second Part may pay the said taxes, and the sum so paid, together with legal interest thereon, shall form a part of this Mortgage and be payable and collectible in the same manner as the principal sum hereof is collectible. And the said party of the First Part agrees not to claim any deduction from the taxable value of the mortgaged property because of this mortgage, nor any credit upon the interest payable upon the mortgage because of the taxes levied on the mortgaged premises.

And the said party of the First Part for itself and its successors, doth covenant and agree to and with the said party of the Second Part, their heirs and assigns, that the said party of the Second Part, their heirs and assigns, shall and may, from time to time, and at all times after default shall be made in the performance of the proviso or condition herein contained, peaceably and quietly enter into, have, hold, use, occupy, possess and enjoy all and singular the above granted and bargained premises, with the appurtenances, without the let, suit, trouble, hindrance or denial of the said party of the First Part its successors or assigns, or of any other person or persons whatsoever.

IN WITNESS WHEREOF, the said party of the First Part hath caused its corporate seal to be hereto affixed and these presents to be signed by its President the day and year first above written.

COLUMBIA HOTEL HOLDING COMPANY,

(SEAL) By Paul C. Taylor, President.

Attest

Paul T. Zizinia, Secretary.

Exhibit P. 3.

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

BE IT REMEMBERED, That on this 28th day of December in the year of our Lord One Thousand Nine Hundred Twenty-one, before me the subscriber, a Notary Public of the State of New Jersey, personally appeared PAUL T. ZIZINIA known to me to be the Secretary of the Columbia Hotel Holding Company a Corporation, the Mortgagor within named, who being by me duly sworn on his oath said and made proof to my satisfaction that he is such Secretary, and that he well knows the Common Seal of said Corporation, and that the Seal affixed to the within Deed is such Common Seal and was thereto affixed by Paul C. Taylor, the President of said Corporation, and that the said Deed was by the said President also signed and delivered as and for the voluntary act and deed of said Corporation in the presence of said Deponent, who thereupon subscribed his name thereto as attesting witness.

PAUL T. ZIZINIA.

Subscribed and sworn to before me,
this 28th day of December, 1921.

HELEN M. HUBER,
(SEAL) Notary Public.

Exhibit P. 4.

MORTGAGE

Columbia Hotel Holding Company, a body corporate,

to

Paul C. Taylor, and James G. Barnett.
Dated, December 28, 1921.

Received in the Clerk's Office of the County of Monmouth N. J. on the 29 day of December A. D., 1921 at 11 o'clock in the forenoon, and Recorded in Book 614 of Mortgages for said County, on pages 277 &c.

Joseph McDermott,
Clerk.

(Stamped)
Compared.

EXHIBIT P. 4.

KNOW ALL MEN BY THESE PRESENTS: That COLUMBIA HOTEL HOLDING COMPANY, a corporation, of the State of New Jersey is held and firmly bound unto PAUL C. TAYLOR, and JAMES G. BARNETT, in the sum of ONE HUNDRED and TWENTY THOUSAND ($120,000.) DOLLARS lawful money of the United States of America, to be paid to the said PAUL C. TAYLOR, and JAMES G. BARNETT, or to their certain attorney, executors, administrators or assigns: To which payment well and truly to be made, said corporation binds itself and its successors firmly by these presents.

Sealed with the corporate seal of said corporation and dated the 28th day of December,

Exhibit P. 4.

in the year of our Lord One Thousand Nine Hundred and Twenty-one.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That if the above bounden corporation or its successors, shall well and truly pay, or cause to be paid, unto the above named PAUL C. TAYLOR, and JAMES G. BARNETT, executors, administrators or assigns, the just and full sum of SIXTY THOUSAND ($60,000.00) DOLLARS lawful money aforesaid on the 28th day of December A. D. One Thousand Nine Hundred and Twenty-six, and the interest thereon, to be computed from December 28, 1921 at and after the rate of six (6) per cent. per annum, and to be paid semi-annually without any fraud or other delay, then the above obligation is to be void, otherwise to remain in full force and virtue.

AND IT IS HEREBY EXPRESSLY AGREED, that should any default be made in the payment of the said interest or of any part thereof, on any day whereon the same is made payable, as above expressed, or should any tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in the mortgage accompanying this bond, and become due and payable; and should the said interest or any part thereof remain unpaid and in arrear for the space of thirty days, or said tax, assessment, water rent, or other municipal or governmental rate, charge, imposition or lien, or any or either of them, remain unpaid and in arrear for the space of sixty days, then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods, as the case may be, the aforesaid principal sum of money or so much thereof as shall then remain

Exhibit P. 4.

unpaid with all arrearage of interest thereon, shall, at the option of the said obligees or the legal representatives of said obligees become and be due and payable immediately thereafter, although the period first above limited for the payment thereof may not then have expired, anything hereinbefore contained to the contrary thereof in anywise notwithstanding.

AND IT IS FURTHER EXPRESSLY AGREED, that the said obligor shall not be entitled to and will not claim any credit on the interest payable on the mortgage securing this bond for taxes which may be levied upon the mortgaged premises, or for any part of said taxes.

COLUMBIA HOTEL HOLDING COMPANY
per Paul C. Taylor
President

Signed, Sealed and Delivered
in the Presence of

Attest
Paul T. Zizinia
(SEAL) Secretary.

BOND

Columbia Hotel Holding Company, a body corporate,

to

Paul C. Taylor, and James G. Barnett.

Amount, ...$60,000.00

Date, December 28th, 1921.
Due, December 28th, 1926.
Interest Payable, Semi-annually.

Exhibit D. 1.

EXHIBIT D. 1.

SUMMONS AND COMPLAINT.

Filed February 23, 1926.

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

DANIEL DEMAREST, JR., Special Deputy Sheriff of the County aforesaid, being duly sworn, on his oath deposes and says that on the 16th day of Feb. A. D. 1926, he delivered personally to the said defendant Harry B. Osborne, Administrator *Pendente Lite* of the Estate of James G. Barnett Dec'd, a true copy of the within summons and complaint, with a ten days' notice endorsed thereon.

DANIEL DEMAREST, JR.

Subscribed and sworn to, this 18th
day of Feb. A. D. 1926

THE STATE OF NEW JERSEY to HARRY B. OSBORNE, Administrator *Pendente Lite* of the Estate of James G. Barnett, deceased, and COLUMBIA HOLDING CO., body corporate.

YOU ARE SUMMONED to answer the annexed complaint of First National Bank of Belmar, N. J., a body corporate, in an action at law in the Supreme Court, And take notice that unless your file your answer to said complaint with the Clerk of the SUPREME COURT, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Exhibit D. 1.

WITNESS WILLIAM S. GUMMERE, Chief Justice of the Supreme Court at Trenton, this 15th day of February, Nineteen Hundred and Twenty-six.

EDWARD J. KELLEHER,
Clerk.

ARTHUR M. BIRDSALL,
Attorney.

(See Notice endorsed upon annexed complaint.)

Exhibit D. 1.

SUPREME COURT OF NEW JERSEY.

MONMOUTH COUNTY.

FIRST NATIONAL BANK OF BELMAR, N. J., body corporate of the State of New Jersey, *Plaintiff,* *vs.* HARRY V. OSBORNE, Administrator *Pendente Lite* of the Estate of James G. Barnett, deceased, and COLUMBIA HOLDING CO., a body corporate, *Defendants.*	*Action at Law.* *Complaint.*

Plaintiff, First National Bank of Belmar, N. J., a body corporate, having its principal place of business in the Borough of Belmar, in the County of Monmouth and State of New Jersey, says that:

1. On March 15, 1922, at Belmar, N. J., and in his lifetime, James G. Barnett endorsed and delivered to plaintiff for value, a certain promissory note of that date made by Columbia Hotel Holding Co., to said James G. Barnett, said note being in the sum of $7,500.00 payable to said James G. Barnett on demand at the First National Bank of Belmar. A true copy of said note is hereto annexed and made a part hereof.

2. On October 23, 1925, the said note was presented for payment at the place where it was payable but was not paid.

3. Notice thereof was duly given to said Harry V. Osborne, Administrator *Pendente Lite*

Exhibit D. 1.

of the Estate of James G. Barnett, deceased, and to Columbia Holding Company, body corporate.

4. Said note is now the property of plaintiff and is unpaid. Plaintiff demands as damages $7,500.00 with interest from March 15, 1922.

ARTHUR M. BIRDSALL,
Attorney for Plaintiff.

Copy of the mentioned in the above complaint.

The following is a copy of the Promissory Note mentioned in the above complaint:

$7500.00 Demand

Belmar, N. J., March 15, 1922.

On demand after date we promise to pay to the order of James G. Barnett

Seventy-five hundred and 00/100.....Dollars at the First National Bank of Belmar.

Value received with interest.

COLUMBIA HOTEL HOLDING CO.

Paul C. Taylor, President — E. F. Lyman, Jr., Treasurer

Endorsement—James G. Barnett.

NOTICE TO THE WITHIN NAMED DEFENDANT:

In case the within Summons and Complaint are served upon you personally then take notice that if you intend to make a defense to said action, you must file an Affidavit of Merits within ten days from the date of service thereof upon you, and must file your answer within twenty days from the date of such service, and in default of the filing thereof judgment will be entered against you. Lawful service upon a Corporation

Exhibit D. 1.

is deemed personal service for the purpose of the rule under which this notice is given (P. L. 1912, p. 394, Rule 56).

ARTHUR M. BIRDSALL,
Plaintiff's Attorney.

I hereby appoint and depute Daniel Demarest, Jr., to serve the within writ.

Witness my hand and seal this 16th day of Feb'y, 1926.

HARRY B. O'CONNELL,
Sheriff.

By CONRAD DEUCHLER,
(SEAL) Under Sheriff.

Sheriff Fees $3.78

Served the within Summons & Complaint with ten days notice endorsed thereon Feb. 16, 1926 Personally upon Harry V. Osborne, Administrator *Pendente Lite* of the Estate of James G. Barnett dec'd within named defendant at his principal place of business 790 Broad Street, Newark, N. J.

HARRY B. O'CONNELL,
Sheriff.

By D. DEMAREST, JR.,
Sp. Deputy.

A true copy.

EDWARD J. KELLEHER,
Clerk.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

FIRST NATIONAL BANK OF BELMAR, N. J., body corporate of the State of New Jersey,
Plaintiff-Respondent,

vs.

HARRY V. OSBORNE, Administrator Pendente Lite of the Estate of James G. Barnett, deceased, and COLUMBIA HOLDING COMPANY, a body corporate,
Defendants,

HARRY V. OSBORNE, Administrator, etc.,
Defendant-Appellant.

Action at Law.

On Appeal from Supreme Court.

BRIEF OF DEFENDANT-APPELLANT.

Facts.

This is an appeal from a judgment entered in the Supreme Court in favor of the plaintiff for the sum of Nine Thousand Two Hundred and Forty-three Dollars and Seventy-five Cents ($9,243.75).

The action was based on a promissory note made on March 15th, 1922, by the COLUMBIA HOLDING COMPANY, a corporation, and endorsed on that day by James G. Barnett. It was payable on demand at the First National Bank of Belmar (the plaintiff in this cause).

Mr. Barnett died on January 14th, 1923, and on June 30th, 1923, HARRY V. OSBORNE was appointed administrator pendente lite.

The note was not presented for payment until October 23rd, 1925. It was presented on that day at the First National Bank of Belmar, was not paid and notice of non-payment was then given to the defendant, Harry V. Osborne, administrator, as aforesaid.

Suit was started on the said note on February 15th, 1926 (see summons and complaint on pages 150-154 of the State of the Case, from which it will appear that the plaintiff sought to hold the Columbia Hotel Holding Company as maker and this defendant as endorser) and a motion was made on behalf of this defendant to strike out the complaint on the ground that:

> "It appears in the complaint that the promissory note referred to in the said complaint was payable on demand and was not presented, nor was payment demanded, within a reasonable time after its issue."

This motion was argued before Mr. Justice Lloyd at his chambers in Merchantville; and at the close of the argument the plaintiff asked leave to withdraw its complaint and to substitute and file a new complaint, in which the plaintiff desired to set up facts to show that the said Barnett was, in effect, the maker on that note and not the endorser; and that since he was the maker no presentation and notice of non-payment were necessary.

Mr. Justice Lloyd granted the plaintiff permission to withdraw its complaint, and to substitute a new complaint.

In the new complaint subsequently filed the plaintiff repeated the allegations of the first complaint, but added a long series of allegations seeking to establish the liability of Barnett as a maker of the note and not merely as endorser; so that by reason of the said allegations no presentment and notice of non-payment would be necessary.

At the trial it was undisputed that the note was made on March 15th, 1922; that Mr. Barnett died on January 14th, 1923; that Judge Osborne was appointed administrator pendente lite on June 30th, 1923, and that the note was presented at the First National Bank of Belmar on October 23rd, 1925, and notice of protest sent to Judge Osborne subsequent to that date (see testimony of Leon A. Wooley on pages 17-18).

Considerable testimony was taken also to show that Mr. Barnett had assumed primary liability on the note by reason of his having been made a joint mortgagee with one Paul C. Taylor, in a mortgage executed by the Columbia Hotel Holding Company, the maker of the note (which mortgage was shown to have been valueless and wiped out by the foreclosure of a former mortgage), and also by reason of an arrangement alleged to have been conceived and concocted by the cashier of the plaintiff bank and the said Paul C. Taylor.

The story of that arrangement is as follows:

That some time around March 15th, 1922, Barnett brought to the plaintiff bank a note made by himself for $7,500 to take up a note then in the bank on which the Columbia Hotel Holding Company was maker and Barnett endorser; that the cashier of the bank told Barnett that the bank could not accept his paper because he had already reached his borrowing limit as fixed by the National Banking Act of the United States, but that they could circumvent that statute by having Barnett bring to the bank a note made by the Columbia Hotel Holding Company (as theretofore) and endorsed by him; that then the bank would be taking a note of the corpora-

tion and that the amount thereof would not be added to the Barnett borrowings; and that while on the face of the transaction it would be a loan by the bank to the COLUMBIA HOTEL HOLDING COMPANY, it would be, in effect, a loan by the bank to Barnett.

Those allegations are contained in the *plaintiff's complaint,* and constituted the *plaintiff's story* as to the defendants' liability.

In submitting the case to the jury the court instructed them to determine whether this defendant's liability was that of maker or endorser.

The jury found this defendant liable as endorser.

Our appeal is based on exceptions to the admission of certain evidence; on an exception to a denial by the trial court of defendant's motion for the direction of a verdict; to exceptions to certain portions of the court's charge, and to exceptions to the refusal of the Court to charge certain requests made by this defendant.

Certain of our exceptions were predicated on the assumption that this defendant might be found liable as maker of the note; but in view of the fact that the jury's finding was that the defendant was not liable as a maker but only as an endorser, we may eliminate from further consideration all exceptions based on the defendant's alleged liability as a maker and confine our argument to our liability as endorser. It will be unnecessary, therefore, to advert to the alleged arrangement worked out by the cashier of the plaintiff bank to circumvent the Federal statute; because that part of the plaintiff's case sought to hold the defendant liable as maker.

The facts relating to the presentation and notice of dishonor are simple and not in dispute.

It is settled that the note was made on March 15, 1922; that Mr. Barnett died January 14, 1923; that Judge Osborne was appointed administrator pendente lite on June 30, 1923; that presentment for payment was made on October 23, 1925.

Between March 15, 1922, and January 14, 1923, there was a lapse of ten months.

Between June 30, 1923 (the date of Judge Osborne's appointment), and October 23, 1925, there was a lapse of two years and three months.

Between March 15, 1922, and October 23, 1925, there was a lapse of three years and seven months.

Where the facts are not in dispute a lapse of two years, three months, and a lapse of three years, seven months, are both unreasonable periods for presentment of a demand note as a matter of law.

Section 71 of the Negotiable Instruments Act of New Jersey (3 C. S. 3744) provides as follows:

> "Where the instrument is not payable on demand, presentment must be made on the day it falls due; *where it is payable on demand, presentment must be made within a reasonable time after its issue,* except that in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof."

Section 193 of the Act (3 C. S. 3757) is as follows:

> "In determining what is a reasonable time or an unreasonable time regard is to be had

to the nature of the instrument, the usage of trade or business (if any) with respect to such instrument, and the facts of the particular case."

The same requirement of presentment and demand within a reasonable time was exacted under the common law:

"Except where it is otherwise provided by statute, paper payable on demand or at sight, in order to charge endorsers or the drawer, must be presented and payment demanded within a reasonable time, unless there is something to show a contrary intention." (8 C. J. 535).

The Courts of this State have determined in various cases what is a reasonable time for the presentation of a demand note.

In *Perry* v. *Green,* 19 N. J. L. 62, Chief Justice Hornblower, said, p. 63:

"It was admitted on the argument, that the indorsee of a promissory note payable on demand must use due diligence; that is, he must make a demand of payment of the maker, within a reasonable time; and in case of non-payment, give notice as in other cases, to the indorser."

The note in that case was dated June 2nd, 1835, payable on demand, with interest; demand for payment was made and notice of protest given March 18th or 19th, 1839. *The Court held that this was not a reasonable time.*

A delay of nine months in the presentation of a note was held to be unreasonable in the case of *Foley* v. *Emerald Brewing Co.,* 61 N. J. L. 428.

The note in that case was dated September 4th, 1895. An agreement was made between the maker and the holder to the effect that the maker should pay $5 per week. He made the weekly

payments for some time and then stopped. On June 10th, 1896, which was approximately nine months after the making of the note, plaintiff demanded payment and payment being refused gave notice to the endorser.

Justice Dixon said (pp. 430-431):

"The question, therefore, on this note is, when after its date should the holder make demand of payment and give notice of default to the endorser, in order to make his obligation to pay absolute. The cases all hold that that must be done in a reasonable time; or, as it is sometimes stated, the holder must use due diligence.

The circumstances to be considered in determining whether a demand has been made in due time are scarcely suggested by the phrase 'a reasonable time,' but the form of the rule requiring due diligence in the holder indicates what, in *Merritt* v. *Todd,* 23 N. Y. 28, Chief Justice Comstock declared to be the true principle, *that it is merely the reasonable ability of the holder which can be considered, excluding any notion of credit or indulgence to the maker.*

On this principle it is manifest that due demand of this note was not made. *There is not the slightest evidence of any reason, outside of indulgence to the maker, for postponing the demand from September 5th, 1895, until June 10th, 1896.*

In view of these decisions we must conclude that the present defendant's right to be discharged, because of the plaintiff's failure to demand payment of the note before June 10th, 1896, could not be impaired by the parol evidence of his contemporaneous agreement for the indulgence of the maker."

Both of the said cases were cited with approval, by the Supreme Court in the case of *Hill Savings & Drawing Club* v. *Baronowitz, et al.,* 97 Atl. 28. (Not officially reported.)

The note in the latter case was given by Baronowitz on April 9th, 1914, with four endorsers. Under the by-laws of the association the note was payable in weekly installments, and if the borrower became four weeks in arrears in such payments, he would be then in default, and the endorsers would then become liable for the balance due on the note. None of the endorsers were informed of the exact terms upon which Baronowitz was to pay the note. He made payments until the note was reduced from $500 to $172, and then made default for more than four weeks. The four weeks expired on a Tuesday in November and notice of such default was given to the endorsers on Saturday of the same week.

The Court, in deciding for the endorsers, said that the case was controlled by *Foley* v. *Emerald Brewing Co.,* 61 N. J. L. 428, and said on page 29:

> "In that case it was further held that in order to make an indorser's obligation to pay absolute on a note payable on demand, the holder should make demand within a reasonable time and give notice of default to the indorser.
>
> Neither Section 71, nor section 193 of the Negotiable Instruments Act, 3 C. S., pp. 3744, 3757, changes the legal rule laid down in *Foley* v. *Emerald Brewing Co., supra,* regarding notes payable on demand.
>
> There was evidence which justified the finding of the trial judge that a demand for payment of the note was not made within a reasonable time after the date thereof, and that due notice of the maker's default in payment was not given to the indorsers.
>
> The judgment will be affirmed, with costs."

In other states the courts have had before them the question of what is a reasonable time within which presentment of a demand note must

be made and in the following cases have held that the time was unreasonable:

Merritt v. *Jackson,* 62 N. E. 987, 187 Mass. 68, the time was from three to three and a half months, held to be unreasonable;

Field v. *Nickerson,* 13 Mass. 131, eight months was held to be unreasonable;

Commercial National Bank of Syracuse v. *Zimmerman,* 77 N. E. 1020, 185 N. Y. 210, three and a half years was held to be unreasonable;

Miller v. *Dell Rio, etc., Co.,* 136 Pac. 448, 25 Idaho 83, four years was held to be unreasonable.

There is nothing in this case to show that demand could not have been made and notice of protest given.

On the contrary, it appears from the note which is attached to and made part of the complaint, that it was payable at the First National Bank of Belmar, which is the plaintiff in this action. The plaintiff has held the note since delivery to it and could have presented it at its own cashier's window for payment at any time.

Plaintiff does not show anything unusual about the nature of the instrument, nor does it show any usage of trade or business with respect to such instrument which stood in the way of its presentation of the note and demand for payment and notice to the endorser within a reasonable time.

In *Merritt* v. *Jackson* (*supra*), the Supreme Court of Massachusetts said (on page 989 of 62 N. E.):

> "We have no doubt that when the holder of such a note seeks to hold an endorser, the burden is on him to show that a demand was

made upon the maker within a reasonable time; and that, if there is any usage of trade or any fact or circumstance to excuse the delay, the burden is on him to show it."

The Court referred to the fact that in *Field* v. *Nickerson* (*supra*) Chief Justice Parker instructed the jury that the demand must be made in a reasonable time, and that *what was a reasonable time was a question of law in that case.*

At the time of the decision in the case of *Merritt* v. *Jackson* (*supra*), the Uniform Negotiable Instruments Act was in force in Massachusetts and the Court cited in its opinion Sections 71 and 193, which are set forth above.

In the New York case of *Commercial National Bank of Syracuse* v. *Zimmerman* (*supra*), the note was dated September 20th, 1899, and was presented April 9th, 1903—three years, seven months and eleven days. The opinion was delivered by the Court of Appeals in 1906, and was based on the Negotiable Instruments Law, which was passed in 1897. It is the same law as is in effect in this State. The Court said the Negotiable Instruments Law nullified the decision of *Merritt* v. *Todd,* 23 N. Y. 28, as to any distinction between demand notes payable with interest and those payable without interest. In the previous case the New York Court had held that where the note was payable with interest it was regarded as a continuing security and no dishonor attaches until payment is required and is refused; and that in cases of notes without interest, the holder, if he wishes to charge the endorser, must make demand without delay.

The Court also said (page 1022 of 77 N. E.):

"The burden is on the holder of a note, when seeking to charge an indorser, to prove

due and timely presentment, and the giving of notice to the indorser is conditional upon all the steps having been taken by the holder, which the statute has prescribed as to presentment, and as to notice of non-payment, etc. The negotiable instruments law is the codification of the law merchant upon the subjects treated, and in setting forth what is required of the holder of a note it casts upon him the burden to prove that the requirements were all complied with. They were necessary conditions of his right to recover. Presentment of a demand note within a reasonable time is a requirement of the statute, and the liability of the indorser to make good the contract of the maker, unlike that of a guarantor, is conditional and depends upon the holder's having made a case under the statute of an obligation, which he has caused to mature and, by appropriate legal steps, to become an indebtedness of the contracting parties. Therefore I think it would be incorrect to hold of this defense that it is of an affirmative nature and, like the defense of usury, or any other defense which avoids an obligation, that it must be pleaded to be available."

(p. 1021):

"In my opinion what the legislature intended to accomplish by the provision of the Negotiable Instruments Law in question was to do away with the distinction between notes or bills, payable on demand, which *Merritt* v. *Todd* has created, and to leave the question of their reasonable presentment for payment, in order to charge the parties to them, *as one for the determination of the Court upon the facts.* That question, if the facts were unsettled and the testimony was conflicting, might be a mixed one of law and fact, which the jury should decide, under the instructions of the Court as to the law; but where they are ascertained, and are not in dispute, the question is one of law."

It was argued by the appellant that the fact that the note was not presented within a reasonable time after its issue was one which should have been specially pleaded in the answer. The Court said that that objection was untenable.

In a recent case in this State (*Gershman* v. *Adelman,* 5 Advanced Reporter 183, decided January, 1927), Justice Black speaking for the Supreme Court said (p. 185):

> "*Under ordinary circumstances* from the date of the note, January 13th, 1921, to the commencement of the suit, September 11th, 1925, it might well be said that such a lapse of time might be considered an unreasonable time, but the circumstances concerning the issuance of the note were peculiar and extraordinary."
>
> (p. 186) "If the facts are *involved in dispute* the question is one of mixed fact and and law, which should be submitted to the jury under the direction of the court. The facts are so unusual in this case from necessity the trial court, under the 193 Section of the statute, in determining what is a 'reasonable time', regard being had that the facts of the 'particular case' properly left the question to the jury, hence we think the verdict of the jury should not be disturbed."

It will be noted that Justice Black took pains to point out that the question is left to the jury when the facts involved are in *dispute or where they are peculiar, extraordinary or unusual.*

The mortgage given to Barnett and Taylor did not relieve the plaintiff of the obligation to make presentment within a reasonable time and give notice of dishonor to Barnett.

The plaintiff submitted evidence showing that the COLUMBIA HOTEL HOLDING COMPANY, maker of the note, gave a mortgage to Barnett in which one, Paul C. Taylor, a creditor of the company, was a joint mortgagee, as security for Barnett's and Taylor's endorsements on the commercial paper of the company; and the plaintiff has argued that because of the giving of the said mortgage, the note became the primary obligation of Barnett and presentation for payment and notice of dishonor became unnecessary. The plaintiff offered the mortgage in evidence and it will be found printed on page 141 of the State of the Case. The mortgage was to secure $60,000, and was subject to prior mortgages of $90,000. From the testimony of Paul C. Taylor (p. 111 of the State of the Case) it will be noted that the said mortgage was wiped out by foreclosure of one of the prior mortgages and that Barnett realized nothing out of that mortgage.

In *Jordan* v. *Reed,* 77 N. J. L. p. 584, Mr. Justice Green, delivering the opinion of the Court of Errors and Appeals, said (p. 593):

> "As we first review the law invoked, it is manifest that the argument of the defendant in error rests upon the doctrine that, when an endorser has received full security or indemnity for the amount of a note or bill, or has received money or property for the very purpose of taking up such note or bill at maturity, the holder of the paper is excused from the duty of presenting it for payment and of giving notice to such endorser of the dishonor. *Story Prom. N.* 281, 282, 357; *Story Bills* (4th ed.) 316, 374; *Chit.*

Bills (9th Lond. ed.), *440, *449, *506, notes. This principle, thus broadly stated, although approved by some eminent authors, such as Story and Kent, and having with us the countenance of a *Dictum in Perry* v. *Green,* 4 Harr. 61, 63, is doubted or denied by other writers (see 2 *Dan. Neg. Inst.* (5th ed.), 1129, 1134), and it is not now necessary for this court either to endorse or condemn it. It will be observed that the stronger cases which apply the principle base the excuse upon the facts that the endorser himself has received enough or ALL (if not enough) of the maker's property for the purpose of securing the former against his liability, or for the purpose of meeting the obligations which he has incurred on behalf of the latter. *Corney* v. *Da Costa,* 1 Esp. N. P. 302, 303, approved, *Arguendo, in Brown* v. *Maffey,* 15 East 216, 222; *Bond* v. *Farnham,* 5 Mass. 170, 171, 173; *Banton* v. *Baker,* 1 Serg. & R. 334, 336; *Mechanics Bank* v. *Griswold,* 7 Wend. 165, 166, 167, 170. As we turn to the facts brought out in the case in hand, we recall that Moore as endorser did not alone receive the property of the maker of the note in suit. The taking over of the property was by four and not by one, and, therefore, there is lacking a fact or circumstance deemed by many to be essential to the application of the principle invoked. It would seem manifestly unjust, because of waiver or excuse based upon the holding of property, to enforce against Moore or his executor, alone, a liability for a whole debt, if or while the property, out of which the debt was intended to be met, is, in title or possession, vested largely in others."

That opinion fits our situation perfectly and leaves no basis for the contention that the mortgage referred to changed Mr. Barnett's situation nor his rights to presentment and notice of dishonor within a reasonable time.

With relation to the liability which is alleged to have attached to this defendant by the giving of this mortgage, the court asked the witness Paul C. Taylor the following question (p. 92):

> "Were either of you gentlemen to assume any primary liability to the Holding Company by the giving of this mortgage, by reason of the giving of this mortgage?"

This question was objected to and objection overruled. We submit that error was committed by the court's permitting this question and in overruling our objection. It called for a conclusion of law, and left it to this witness to state the binding effect of an arrangement upon the defendant Barnett without showing his authority to bind Barnett and without showing whether Barnett acquiesced or joined in the alleged agreement to assume primary liability.

Under the law as pointed out in the case of *Jordan* v. *Reed* (*supra*), an endorser of a note does not assume primary liability by accepting any kind of security and particularly when the security is shared by others and when it is of no value. Therefore whether Barnett assumed primary liability by reason of the execution of this third mortgage by the Columbia Hotel Holding Company is a matter of law and is not a fact as to which the witness Taylor should have been permitted to testify.

Exception was also taken to the testimony given by the witness Taylor regarding notes paid by Barnett to banks other than the plaintiff bank (p. 99).

The transactions of Barnett with the other banks were irrelevant and immaterial and the admission of that testimony was prejudicial to Barnett in this case.

The appellant excepted also to the court's permitting Taylor to read a letter which Taylor is alleged to have written to Barnett in which letter Taylor told Barnett of arrangements which he, Taylor, had made with the COLUMBIA HOTEL HOLDING COMPANY for the taking of the mortgage in question and for the assumption of Barnett, by reason of the taking of the mortgage, of notes of the COLUMBIA HOTEL HOLDING COMPANY on which he, Barnett, was an endorser (exception noted on page 94). Taylor had said throughout his examination that it was not necessary for him to read the letter to refresh his memory (see page 91).

Prior to the reading of the letter Mr. Taylor testified that Mr. Barnett was not assuming any primary liability and that his liability was only that of an endorser (p. 87).

Subsequent to his reading the letter he testified that Mr. Barnett agreed to pay the notes of the various banks and actually did pay them.

Even though the jury found, as hereinabove stated, that the liability of this defendant is that of an endorser and not that of maker, yet the admission of testimony regarding payments to various other banks by Mr. Barnett (to which objection was also taken when testified to by the witness Fred F. Schock, page 117) might surely have created in the minds of the jury the feeling that since Barnett received an interest in the mortgage and since he paid obligations of the COLUMBIA HOTEL HOLDING COMPANY to other banks he should be made to pay the note held by the plaintiff bank.

Conclusion.

1. The trial court committed error in admitting testimony over our objections hereinabove specified.

2. The trial court should have granted this defendant's motion for the direction of a verdict on the following grounds:

This defendant was discharged from liability as an endorser because of the unreasonable length of time between the date of the issuance of the note and the date when it was presented for payment. If it be said that Barnett waived presentment and notice by paying interest on the note during his lifetime, then the time from the date of Judge Osborne's appointment (June 30th, 1923) and the date of presentment (October, 1925), a period of two years and three months, was likewise unreasonable as a matter of law. *There was no excuse for the delay other than indulgence to the maker;* the note was payable at the plaintiff's own bank and it could have made presentment there within a reasonable time and given notice of non-payment to Mr. Barnett in his lifetime or to Judge Osborne after his appointment as administrator pendente lite. *There was no dispute of fact to be left to the jury.* As a matter of fact the defendant presented no evidence, so there could not have been any controversy of fact. It was the duty of the trial court to find as a matter of law that the time which elapsed before the presentment of the note was so unreasonable that the defendant's liability as endorser was discharged.

3. The court should have charged our request numbers one, two and seven (printed on page 135 of the State of the Case).

4. The trial court erred in charging the jury as follows (pages 131-135 of the State of the Case):

> "But if, on the other hand, the failure to give notice was due to the immediate circumstances involved in the giving of the note, namely, that the bank was willing to wait for an adjustment and final payment by reason of the fact that Mr. Taylor and Mr. Barnett were assuming the obligation, and a mortgage had been given as security—it is true, third in order of priority—upon the real estate in question, and that the bank after all was under no legal obligation, having a demand note, or the circumstances of a factual character were such as not to require notice to be given in the circumstances within the definition of a reasonable time, and that when notice was given it was after the transactions had been practically concluded and there was nothing left to be done but the payment of the note, then it is for you to say whether the notice was given within a reasonable time when it was given; and as you decide that question, assuming you find he was not the maker but an indorser, you decide this case."

The judgment of the Supreme Court should be reversed.

Respectfully submitted,

OSBORNE, CORNISH & SCHECK,
Attorneys for Defendant-Appellant.

New Jersey Court of Errors and Appeals

FIRST NATIONAL BANK OF BELMAR, N. J., Body Corporate of the State of New Jersey, Plaintiff-Respondent, vs. HARRY V. OSBORNE, Administrator Pendente Lite of the Estate of James G. Barnett, deceased, and COLUMBIA HOLDING COMPANY, a body corporate, Defendants, HARRY V. OSBORNE, Administrator, etc., Defendant-Appellant.	Action at Law On Defendant-Appellant's Appeal from Supreme Court.

Brief of Plaintiff-Respondent

DURAND, IVINS & CARTON
Attorneys for Plaintiff-Respondent.

SCHUYLER PRESS, ASBURY PARK, N. J.

NEW JERSEY COURT OF ERRORS AND APPEALS

FIRST NATIONAL BANK OF BELMAR, N. J., Body Corporate of the State of New Jersey, Plaintiff-Respondent, vs. HARRY V. OSBORNE, Administrator Pendente Lite of the Estate of James G. Barnett, deceased, and COLUMBIA HOLDING COMPANY, a body corporate, Defendants, HARRY V. OSBORNE, Administrator, etc., Defendant-Appellant.	Action at Law On Defendant-Appellant's Appeal from Supreme Court.

BRIEF OF PLAINTIFF - RESPONDENT

This case is before the Court on an appeal from a judgment entered in the Supreme Court on a verdict at a trial held in the Monmouth Circuit. A verdict was rendered by the jury on November 15th, 1926, in favor of the plaintiff and against the defendants for the sum of $9,243.75, and the jury especially found against the defendant Harry V. Osborne, Administrator Pendente Lite of the Estate of James G. Barnett, Deceased, as endorser on the note sued upon.

STATEMENT OF FACTS

This action was brought to recover upon the demand note made by the Columbia Holding Company, dated March 15th, 1922 for the sum of $7,500.00, which note was endorsed by James G. Barnett and

was payable at the First National Bank of Belmar.

Prior to March 15th, 1922, the plaintiff was the holder of a note for the same amount which note was dated December 15th, 1921, payable three months after date, at the Bank of the plaintiff. It fell due on March 15th, 1922 (S.C. 28) and was protested for non-payment.

In March, 1922, Barnett presented his own note (S.C. 37) to replace the former note. The cashier of the Bank told Barnett that the Bank could not accept Barnett's note (S.C. 53) as the acceptance of this note as Barnett's would be in contravention of the Banking Act, in that it would be an excessive loan to one person.

Thereafter and after the protest of the three month's note on March 15th, 1922, a demand note was presented to the Bank which note was made by the Columbia Holding Company and endorsed by Barnett. The cashier had previously told Barnett that the Bank would be willing to accept a note of this character. This note was accepted by the Bank for the accommodation of Barnett (S.C. 26, 47). It was made a demand note for the convenience of Barnett (S.C. 30) who had become mortgagee with one Paul C. Taylor and the holder of a mortgage for $60,000.00 made by the Columbia Holding Company to said Barnett and Taylor. This mortgage was dated December 28th, 1921, and was payable in five years. Barnett did not expect to pay the note at an early date and to avoid frequent renewals it was made a demand note so that if necessary it might run until the maturity of the mortgage. Barnett accepted this mortgage as security for the said demand note dated March 15th, 1922 (S.C. 55) and to secure him for the liability which he assumed on other notes originally made by the Columbia Holding Company and payable at various Banks (S.C. 92, 94). The purposes and objects of this mortgage, which was a third mortgage and was subsequent to mortgages for $50,000.00

and $40,000.00 on the Columbia Hotel property, were reduced to writing and sent to Barnett by Taylor on December 30th, 1921 (S.C. 85).

Barnett took care of the other notes in other Banks (S.C. 98, 101) and Barnett paid the interest on the demand note at the Belmar Bank from the time said note was made up to the time of his death in 1923 (S.C. 34). It was the understanding that Barnett was to assume the payment of the note in the Belmar Bank (S.C. 36) as well as the other notes. These notes aggregated $20,800.00 and in addition there were $16,000.00 owed to Barnett by the Columbia Holding Company.

Taylor was a creditor of the Columbia Holding Company to the extent of $52,000.00 (S.C. 102). It was the agreement between Barnett and Taylor (S. C. 106) that Barnett was to be protected to the extent of the indebtedness due to him before Taylor received any of the proceeds from the payment of this mortgage. Both Barnett and Taylor were interested in the Hotel property, Barnett having some bonds and Taylor being the president and a stockholder.

After Barnett's death the first mortgage on the property was foreclosed and the third mortgage was wiped out and the hotel sold to the present owners for $140,000.00 (S.C. 114).

The claim of the plaintiff was presented to the Administrator Pendente Lite within the time required by law (S.C. 157) and a suit was brought on this note together with two other notes on December 4th, 1924 (S.C. 61). This suit was discontinued as to the note in suit. The note was protested for non-payment on October 23rd, 1925. Notice of non-payment was given to the defendant, Harry V. Osborne, Administrator as aforesaid, and a new suit was thereafter instituted.

POINT I.

IT WAS PROPER FOR THE JURY TO DETERMINE WHETHER OR NOT THE NOTE WAS PRESENTED WITHIN A REASONABLE TIME.

The facts in the suit at bar were complicated with respect to the circumstances under which the demand note was given and unlike the ordinary case. The testimony showed that a mortgage was given in December, 1921, to run for five years (S.C. 30). Within two days thereafter Taylor, one of the mortgagees, outlined the conditions under which Barnett and Taylor accepted this mortgage for $60,000.00. Barnett by this arrangement was to assume the payment of the time note of the Columbia Holding Company, for $7,500.00, then in the Belmar Bank, and which note would fall due on March 15th, 1922. Barnett was to assume the payment of other notes of the Columbia Holding Company in various Banks and as the testimony of the witness, Schock, shows he did pay the note originally made by the Columbia Holding Company in the Spring Lake National Bank.

The testimony of the witness Taylor indicates that Barnett also paid notes in various other Banks, the payment of which he assumed according to Taylor by the acceptance of the mortgage. The note then in the Belmar Bank was protested by reason of its non-payment at maturity on March 15th, 1922 and a demand note was taken with the understanding that it might not be paid until the maturity of the mortgage. This demand note was accepted because of this arrangement between the Columbia Hotel Holding Company, Barnett and Taylor (S.C. 32).

Although Section 71 of the Negotiable Instruments Act provides that where an instrument is payable on demand presentment must be made within a reasonable time, Section 193 of the Negotiable In-

struments Act provides as follows:

> "In determining what is a reasonable time or an unreasonable time regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instrument, and the facts of the particular case."

As to defendant's comments that this case offered no complications, it would seem that the entire testimony showed that the circumstances were very unusual. There is no question but what Barnett actually intended and did make this demand note his own. First he offered his individual note and after that was refused by the Bank he circumvented the excess liability rule by endorsing the demand note. He changed the former practice between the parties on the time note and made it on demand because the Bank limit required it, after he had offered his own note. He personally paid the interest on the new note down to within two months of his death. This payment of interest in itself, showed that it was intended that demand of payment should not be made but that the note was to be held for a long time.

The company making the note owned only the hotel property; its financial condition was poor; shortly thereafter it went out of business. It was evident from the foregoing circumstances and understood by all the parties that the maker was no longer to be considered as being the Columbia Hotel Holding Company but that it was for all purposes to be Barnett.

Another unusual circumstance in this case was that the mortgage securing Barnett was for five years. It had been made only a few months previously. The payment of the demand note prior to the maturity of the mortgage, depended upon the sale of the hotel property.

After Barnett died his estate was in litigation;

an administrator pendente lite was appointed. The cashier of the Bank interviewed Osborn and as a result of this interview it was the bank's understanding that the administrator would take care of the payment of this note. This note was included in a former suit and withdrawn upon the understanding that it would be taken care of.

All these circumstances show that the transaction was unusual and out of the ordinary and sufficient to bring the case within those contemplated by the statute and to make the time of the demand reasonable under the circumstances and a proper question of facts for the jury to pass upon.

The knowledge of Lyman, the cashier of the Bank, that the note had been accepted for the accommodation of Barnett; that Barnett had assumed the payment and that the maker, the Columbia Hotel Holding Company, was a defunct corporation, created a situation where there was no one to demand payment from except Barnett; no one else of whom it was expected and therefore there was no necessity of protest, as Barnett stood in the position of maker. We contend therefore, that the jury was justified, under the circumstances, in finding, as it did find, that the demand was made in a reasonable time and also that Barnett's estate was liable in any event as the proofs were complete to establish Barnett's primary obligation of his assumption of the debt and that the note had been taken by the Bank for the accommodation of Barnett. Whether notice had been given or not he was still liable under the proofs and under the law on his primary obligation.

Furthermore Barnett was absolutely liable to the Bank on his endorsement on the prior time note which was properly protested on March 15th, 1922. The maker then was insolvent or became so shortly thereafter and Barnett had the burden of either paying the old note or making other arrangements to take care of it. His position had then changed from

that of a mere accommodation endorser to a position which obliged him to make arrangements to take care of a liability actually present. He understood this and offered to give his own note for the amount but which could not be accepted because of the creating of an excess liability. With this situation but little testimony was needed to show that Barnett actually became primarily liable.

Lyman's testimony as to the circumstances under which this demand note was given and the further circumstances of the endorser instead of the maker paying the interest on same are conclusive of Barnett's primary obligation.

Defendant has cited several cases in support of his contention that the note in suit was not presented for payment within a reasonable time after its issue. The cases cited by him, however, do not show any peculiar circumstances in connection with the demand notes on which these suits were instituted.

It has been repeatedly held that the mere lapse of time is no reason why a demand note should not be paid or that such delay is unreasonable if there are any unusual circumstances in connection with the making of the note.

In Hussey vs. Sutton, 96 Misc 552 (N.Y.) it was held that presentment after a delay of two years was not unreasonable owing to the peculiar relation of the parties, and in Van Buren vs. Wensley, 102 Misc 248 (N.Y.) it was held that while a delay of demand for over four years would ordinarily be held as unreasonable, yet in that case, under the peculiar facts therein shown, such delay was not unreasonable.

> "The Courts have not fixed on any particular time as a reasonable time within which to present paper payable on demand or at sight but what is a reasonable time depends on all the circumstances of each particular case." 8 C J. 537.

When the circumstances are peculiar and complicated as they are in the present case, the determination as to what is a reasonable time is a matter to be left for the jury to determine. This principle has been upheld in our own State and by the great weight of authority in many other states.

This rule is laid down in 8 Corpus Juris, 1069:

> "While there is a considerable conflict of authority on the question, some courts holding that due diligence to charge an indorser or drawer is a question of law only, others that it is a pure question of fact, at least in so far as notes payable on demand are concerned, the better view, and that supported by the weight of authority, is to the effect that it is a mixed question of law and fact, to be decided by the jury under the direction of the court on a general verdict, or to be decided by the court where the facts are undisputed or are found by a special verdict."

In Gershman vs. Adelman, reported in 135 Atl. 688 and cited by the defendant, the Court held that what is a reasonable time or an unreasonable time, having regard to the facts of the particular case, for presenting a promissory note payable on demand, with interest, under the circumstances of the case, is a question of fact to be submitted to the jury under instructions from the Court.

The note in that case was dated January 13th, 1921 and suit was not brought until September 11th, 1925, a lapse of more than four years and a longer time than intervened between the making of the note in suit and its presentment for payment.

The Court however held that the circumstances concerning the issuance of that note were peculiar and extraordinary.

The Court further held that a provision for the

payment of interest on a demand note generally shows or indicates that immediate presentment was not contemplated and that this fact is generally to be considered in determining whether the note has been presented within a reasonable time.

In the suit at bar the testimony shows that Barnett paid the interest on June 30th, 1922 and on December 31st, 1922, which was certainly an indication that it was not the intention of the parties that this note was to be presented immediately.

The Court further said in Gershman vs. Adelman, supra:

> "The topic is fully presented and discussed, with a wealth of illustrative citations, in 7 Cyc. p. 975 (b). According to some courts a note payable on demand, with interest, is a lasting security, and is not dishonored until payment is demanded. 3 R. C. L. p. 1047, 252. There is no precise time when such a note is to be deemed dishonored, as it must depend upon the circumstances of the case and the situation of the parties. If the facts are involved in dispute, the question is one of mixed fact and law, which should be submitted to the jury under the direction of the court.
>
> The facts are so unusual in this case, from necessity, the trial court, under the 193 section of the statute, in determining what is a "reasonable time," regard being had to "the facts of the particular case," properly left the question to the jury; hence we think the verdict of the jury should not be disturbed."

In the recent case of Zucchi vs. Thomas, decided by the Supreme Court of Rhode Island and reported in 133 Atl. 437, the Appellate Court refused to disturb a verdict of a jury where the trial Court had ruled that it was a question of fact for the jury

whether from the mere lapse of time a demand note was overdue.

The Court said:

> "There was no error in this ruling, as some nine or ten months, at least, had elapsed after the making of the note prior to its transfer. In the circumstances of this case the question of the effect of this lapse of time was one of fact rather than of law."

In Bacon vs. Harris, 15 R.I. 599 it was held that the better view is that the question as to a reasonable time is a mixed question of law and fact and that except where the facts are few, simple and undisputed it should be left to be decided by the jury under the direction of the Court upon the particular circumstances of the case. The same principle has been followed in New York and numerous other states.

POINT II.

BY BARNETT'S ACCEPTANCE OF THE MORTGAGE FOR $60,000.00, PRESENTATION OF THE NOTE FOR PAYMENT AND NOTICE OF DISHONOR BECAME UNNECESSARY.

As consideration for his assumption of the demand note and his change of position as endorser on the old note, Barnett together with Paul C. Taylor, became mortgagee of a $60,000.00 third mortgage (S.C. 38). This mortgage was given to secure Barnett on his endorsement and by virtue of the fact that Barnett was to assume payment of this note and several other notes (S.C. 92). Barnett was to be protected before Taylor, in the payment of the obligations due him, from the proceeds of this mortgage. Barnett was a creditor of the Columbia Hotel Holding Company to the extent of about $16,000.00 in addition to the notes on which he was endorser and which he agreed to pay (S.C. 102).

Perry vs. Green, 19 N. J. Law, p. 61, held that where an endorser has received effects into his hands to satisfy the debt no demand or notice is necessary.

At page 65 the Court said:

> "The case of Bond et al. v. Farnham, 5 Mass. R. 170; The Mechanic's Bank of New York v. Griswold, 7 Wend. R. 165; Barton v. Baker, 1 Serg and Rawle, 334; Corney v. Dacosta, 1 Esp. R. 302, and Brown v. Maffey, 15 East, 222, all show that where the indorser takes an assignment of all the estate of the maker, for the purpose of meeting his responsibilities; or has received effects into his hands to satisfy the amount of the indorsement, no demand or notice is necessary. The indorser, in such case, has made the debt his own, and he has no right to complain of the want of notice. Upon this ground, therefore, judgment might properly have been given for the plaintiff, in the case of Vreeland v. Hyde; and I do not therefore, consider it as furnishing any support to the present action."

The defendant cited in opposition to this rule the case of Jordan vs. Reed 77 N. J. Law, 584. The Court in that case expressly stated that it was not necessary in that suit either to endorse or condemn the principle determined in the suit of Perry vs. Green. The facts in that case, as an examination shows, were entirely different from the suit at bar. The property received by Moore, the endorser of this note, was shared with three others. Whereas the facts in the present case show that this mortgage

was given to Barnett and Taylor for a sum largely in excess of Barnett's obligation and that Barnett was to be protected prior to Taylor (S.C. 106).

The mere fact that this property was foreclosed at a much later date and this third mortgage was wiped out by such foreclosure is of no significance. The interests of Barnett could have been protected at the sale by purchase. That there was ample equity in the property to cover Barnett's interests in the mortgage is shown by the fact that the property was valued at $140,000.00 (S.C. 114) and was sold at that price to the present owners.

Under this point defendant submits that error was committed by overruling the objection of the defendant to the following question:

> "Were either of you gentlemen to assume any primary liability to the Holding Company by the giving of this mortgage, by reason of the giving of this mortgage?"

Plaintiff submits that this question was entirely proper and did not call for any conclusion of law as is alleged in defendant's brief. If such question was erroneous it was harmless error and not harmful to the defendant. An examination of page 92 of the State of the Case shows that counsel did not state the ground of his objection and did not except to the Courts' ruling.

Quellmalz vs. Atlantic Coast Electric Company, 94 Law, p. 474.

Daley vs. Ewald, 88 N. J. Law, p. 707.

In the latter case the record did not contain any exceptions or objections to adverse rulings by the trial judge and it was held that nothing was presented for review by the Appellate Court.

Defendant also contends that the testimony given by the witness, Taylor, regarding the notes paid by Barnett to other banks was irrelevant and

immaterial. This testimony was given to show a contemporaneous arrangement with Barnett at the time the mortgage was given to Taylor and Barnett. It also proved thatthe arrangement was, as the witness testified, in that the payment of the demand note was assumed by Barnett. The subsequent conduct of Barnett in paying interest and principal corroborated the testimony of Taylor as to the reasons for the giving of this mortgage.

The letter written by Taylor to Barnett setting forth the arrangements between Barnett and Taylor and the Columbia Hotel Holding Company as to the taking of the mortgage and the assumption by Barnett of the various notes, was not offered in evidence and was read by Taylor only to refresh his memory as to Barnett's contract upon the acceptance of the mortgage (S.C. 91). Taylor said that the reading of this letter was necessary to refresh his memory (S.C. 91).

Defendant contends that the admission of testimony regarding payments to various other Banks by Barnett (S.C. 117) was erroneous. At page 116 defendant objects to all testimony by Schock regarding any transaction that did not relate to the First National Bank of Belmar. Prior thereto, however, (S. C. 109) defendant's counsel specifically asked the witness, Taylor, to refer to the letter of December 30th and tell how many notes Barnett was to assume. The witness, Taylor, at the request of defendant's counsel read the names of the banks holding the notes and the amounts of same. This was the first time during the trial that the amounts of the notes had been specifically given, with the exception of the note in suit and the note in the Spring Lake Bank.

If defendant was harmed by the testimony of Schock he can not object to same when he had previously asked a question of the same character and such testimony had been given in response to the request of his own counsel.

POINT III.

THE DEMAND NOTE WAS ACCEPTED BY THE PLAINTIFF FOR THE ACCOMMODATION OF BARNETT AND NO PRESENTMENT OR PROTEST WAS NECESSARY.

Section 115 of the Negotiable Instruments Act provides that notice of dishonor is not required to be given an indorser where the instrument was made and accepted for his accommodation.

Even though the jury found that Barnett was liable as an indorser on the note, such verdict would not indicate that a notice of protest was necessary but rather indicates that the jury believed the testimony of plaintiff's witness that the Bank had accepted this note as an accommodation for Barnett.

The witness Lyman testified that Barnett assumed the payment of the demand note, that he paid the interest on same (S.C. 34-36) and that Barnett presented his own note to take up the $7500.00 note expiring March 15th, 1922 which note the Bank refused to accept. The cashier also specifically testified that the demand note was accepted by the Bank for the accommodation of Barnett (S.C. 26, 28). This testimony was very plausible. Barnett was a wealthy man and was probably worth a half million dollars. It was very natural for the Bank to prefer the assumption of payment of this note by a man of such financial responsibility as Barnett and to look to him as a primary debtor rather than to the Holding Company, whose sole asset was this mortgaged property.

In the case of Park Bank vs. Naffah, 119 Atl. Rep. 923 (Pa.) the Court held that in an action against the indorser of a note payable to a bank, where the bank's cashier testified that credit was extended to the endorser under an arrangement whereby the notes were to be given by the maker

and indorsed to the bank, while defendant denied having received credit and claimed the note was given to him by a customer for goods sold and indorsed in the ordinary course of business, the question whether the note was for the indorser's accommodation, so that notice to him of dishonor was unnecessary under the Negotiable Instruments Act was for the jury.

POINT IV.

THERE WAS NO ERROR IN THE ADMISSION OF TESTIMONY OR IN THE COURT'S CHARGE TO THE JURY.

Under "Conclusion" defendant contends that the trial Court committed error in the admission of testimony over objections previously specified in defendant's brief. We have already commented on these objections and it is not necessary to repeat them under this point.

Defendant also contends that the trial court should have granted defendant's motion for the direction of a verdict, basing his contentions on the alleged fact that the delay in the presentment of the note was unreasonable as a matter of law. The Courts of our own state have held as indicated in Gershman vs. Adelman, supra, a view opposed to the contentions of defendant.

The mere lapse of time does not, as a matter of law, determine the reasonableness or unreasonableness of the time of presentment. Each case must be decided upon its own circumstances. It is manifest from the testimony that there were circumstances in the case at bar of a peculiar nature and sufficiently so to be left to the jury to determine under the instructions of the Court.

Even if a delay of three years and seven months could be said to be an unreasonable time, as a matter

of law, nevertheless plaintiff was entitled to have this case submitted to the jury on the question as to whether or not the note was accepted by the plaintiff for the accommodation of Barnett.

Defendant also contends an error in the ruling of the trial court by refusing to charge certain of his requests, particularly Nos. 1, 2, and 7 (S.C. 135, 137). An examination of these requests clearly shows that they were jury questions and were properly submitted to the jury for its determination. Requests 1 and 2 dealt with the delay between the issuing of the note and its presentation and requested the court to charge as a matter of law such delay was unreasonable and that Barnett by that delay was discharged from liability. Request No. 7 provides:

> "There were no circumstances in the case beyond the control of the plaintiff, and not imputable to its default, misconduct or negligence, which excused the plaintiff from making presentment for payment within a reasonable time." (S.C. 137).

Under the circumstances of the case, particularly where this mortgage was not expected to be paid before its maturity unless the property was sold and the payment of the demand note, prior to that time, depended upon the sale of the property, (S.C. 30) manifestly it was a question for the jury and not for determination by the Court.

On page 18 of his brief, defendant contends that the trial court erred in its charge to the jury. An examination of the context of the charge rather than the isolated portion set out by defendant, clearly shows that no error was committed by the Court (S.C. 131).

The judgment of the Supreme Court should be affirmed.

Respectfully submitted,

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