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NOTICE OF APPEAL.

Filed February 28, 1927.

In Chancery of New Jersey

Between

COMMERCIAL CASUALTY INSURANCE COMPANY and NEW JERSEY FIDELITY & PLATE GLASS INSURANCE COMPANY,
Complainants,

and

SOUTHERN SURETY COMPANY OF DES MOINES, IOWA,
Defendant.

On Bill, &c.

Notice of Appeal.

The defendant hereby appeals from the order made in this Court by the Chancellor on the advice of Vice-Chancellor John H. Backes in the above-stated cause on February 23, 1927, and from the whole and every part thereof to the Court of Errors and Appeals in the last resort in all causes.

LUM, TAMBLYN & COLYER,
Solicitors for and of Counsel with Defendant.

Dated February 24, 1927.

New Jersey State Library

Notice of Appeal.

I conceive that there is good cause for appeal in the above-stated cause.

CHESTER W. FAIRLIE,
Of Counsel with Defendant.

Service of the within notice is hereby acknowledged this 25th day of February, 1927.

McCARTER & ENGLISH,
Attorneys for Complainants.

Petition of Appeal.

PETITION OF APPEAL.

Filed February 28, 1927.

New Jersey Court of Errors and Appeals

Between	
COMMERCIAL CASUALTY INSURANCE COMPANY and NEW JERSEY FIDELITY & PLATE GLASS INSURANCE COMPANY, *Complainants-Respondents,*	*On Bill, &c.*
and	*On Appeal.*
SOUTHERN SURETY COMPANY OF DES MOINES, IOWA, *Defendant-Appellant.*	*Petition of Appeal.*

To the Honorable Court of Errors and Appeals in the last resort in all causes:

The petition of Southern Surety Company of Des Moines, Iowa, the appellant in the above-stated cause, respectfully shows that your petitioner finds itself aggrieved by the interlocutory order made in the Court of Chancery by His Honor Edwin Robert Walker, Chancellor of New Jersey, on the advice of Honorable John H. Backes, one of the Vice-Chancellors of New Jersey, bearing date the 23rd day of February, 1927, in a cause wherein Commercial Casualty Insurance Company and New Jersey Fidelity & Plate Glass Insurance Company are complainants and said Southern Surety Company of Des Moines, Iowa, is defendant, in this respect, to wit: That the said order denies the application of your petitioner, the defendant, to strike out

the amended bill of complaint filed by complainants in said cause and orders that the restraining order made by said Court on the 15th day of February, 1927, be continued in force pursuant to the terms thereof, to wit, that the defendant, its agents and attorneys, be enjoined and restrained from further prosecuting until the final decree in said cause and until said Court shall order to the contrary the actions mentioned in the bill of complaint theretofore commenced and now pending in the Supreme Court of New Jersey against the complainants.

And your petitioner humbly appeals from the whole and every part of the said order of the Chancellor which orders and directs as aforesaid, upon the ground that the same is erroneous in that the order of the Chancellor should have stricken out and dismissed the said amended bill of complaint because said bill does not allege any ground for equitable relief and because a court of equity will not restrain the prosecution of an action at law when the defenses to the action can be made in the law court as in the equity court, and because all the alleged defenses to the defendant's actions in the Supreme Court, as set forth in said bill of complaint, could be pleaded in said actions at law, and because a court of equity should not relieve the complainants from the result of their own failure to properly set up their defenses in the actions at law, and because an adequate remedy for the complainants exists in the said law actions, and because the complainants were in laches in filing their said bill of complaint; and upon the further ground that said order is erroneous in that it continues the restraint of your petitioner's said actions at law which are pending in the New Jersey Supreme Court, which restraint should not have been continued for the reasons aforesaid, and because the allegations of said amended bill of complaint are not supported by the affidavits thereto appended, and because the allegations of said bill of complaint and of the affidavits thereto appended read in connection with defendant's answering affidavits are not sufficient to justify or warrant said Court in continuing said restraint of said actions at law;

Your petitioner therefore prays that the said order of said Chancellor may be reversed, set aside and for nothing holden, and that your petitioner may be permitted to prosecute its said actions at law and may have such relief in the premises as to this Honorable Court shall seem meet.

LUM, TAMBLYN & COLYER,
Solicitors for Defendant-Appellant.

CHESTER W. FAIRLIE,
Of Counsel with Defendant-Appellant.

ANSWER TO PETITION OF APPEAL.

Filed March 10, 1927.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

COMMERCIAL CASUALTY INSURANCE COMPANY, *et al.*, *Complainants-Respondents*,

and

SOUTHERN SURETY COMPANY, *Defendant-Appellant.*

Answer to Petition of Appeal.

The answer of Commercial Casualty Insurance Company and New Jersey Fidelity & Plate Glass Insurance Company to the petition of appeal of the above-named appellant.

These respondents not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto nevertheless say and admit that an order was on the 23rd day of February last past made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition as is therein stated, but as to the substance and form thereof these respondents pray to refer thereto when the same shall be produced, and these respondents are advised and believe that the said order is agreeable to equity, and they pray that the same may be affirmed with costs to be adjudged to these respondents.

McCARTER & ENGLISH,
Solicitors for Respondents.

ORIGINAL BILL OF COMPLAINT.

Filed November 8, 1926.

IN CHANCERY OF NEW JERSEY.

To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey:

The bill of complaint of Commercial Casualty Insurance Company, a corporation of the State of New Jersey, and New Jersey Fidelity and Plate Glass Insurance Company, likewise a corporation of the State of New Jersey, respectfully shows:

1. That the complainants above named are each incorporated and carry on business in the State of New Jersey, and are authorized to, and actually transacting the business of general insurance, including reinsurance of risks already assumed by other companies, and the writing of surety bonds. The principal offices of both of the complainants are in the City of Newark, in said State.

2. That on the 25th day of February, 1924, the complainant, Commercial Casualty Insurance Company, made and entered into a contract of reinsurance for $50,000.00 with the Southern Surety Company of Des Moines, Iowa. A true copy of said reinsurance agreement is hereunto annexed, made a part hereof, and marked Exhibit A. On the 27th day of February, 1924, the complainant, New Jersey Fidelity and Plate Glass Insurance Company, entered into a similar contract for a like amount, a true copy of which, also made a part hereof, is hereunto annexed and marked Exhibit B. Attached to each of said reinsurance contracts was a copy of the

bond dated the 25th day of February, 1924, made by Southern Surety Company to Carnegie Trust Company, a true copy of which is hereunto annexed, made a part hereof, and marked Exhibit C.

3. That said contracts of reinsurance came about in the following manner: Southern Surety Company, of Des Moines, Iowa (hereinafter called the Southern Company), is a corporation of the State of Iowa, engaged, among other things, in issuing surety bonds and is and was licensed to do business at the date of the issuance of the said contracts, hereinabove referred to, in the State of Pennsylvania. Its agent in the so-called Pittsburgh District in said State was and is one W. J. Zwinggi, who possessed very broad powers throughout the district in negotiating and closing contracts, including the reinsurance contracts hereinabove referred to. At the time the said reinsurance contracts were negotiated, the person having direct charge, on behalf of the complainant Commercial Casualty Insurance Company, of the negotiation and conclusion of such contracts was Harlan W. Short. The person representing the complainant New Jersey Fidelity and Plate Glass Insurance Company (hereinafter called, for brevity, the New Jersey Company), was Harold S. Vreeland. Neither of these gentlemen is now connected with the said companies. In the month of February, 1924, W. J. Zwinggi, desiring to secure reinsurance for a surety contract that the Southern Company was about to make with the Carnegie Trust Company, an institution located a short distance from the City of Pittsburgh, and within the district of said Zwinggi, got in touch with said Short, the agent of the complainant Commercial Casualty Insurance Company (hereinafter referred to as the Commercial Company), and represented to him that the Southern Company was about to execute a surety bond for the Carnegie Trust Company in the sum of $1,400,000 to secure a deposit in said Trust Company of similar amount, to be made by the County of Allegheny. He further stated that the Southern Company would itself retain or carry a liability of $150,000 on said bond; that the president of Carnegie Trust Company was one John A. Bell, who was a man of large financial means, worth at least $1,400,000, and known by him to be worth far in excess of that amount and a sum not less than ten or eleven million dollars; that said Carnegie Trust Company was a solvent and well managed institution; and that the fact of the solvency of the Trust Company and wealth of the said Bell, who was an indemnitor of the Southern Company, would, of course, lessen the risk of the proposed reinsurers. The reinsurance contracts hereinabove referred to were made and entered into expressly in reliance upon the truth and accuracy of the representations so made by said Zwinggi.

4. The complainants have, as hereinafter shown, since learned that the said representations were false and fraudulent in that the said bond of the Southern Company to the Carnegie Trust Company, instead of being an original bond was a renewal, as the said Zwinggi well knew; he further concealed from the complainants the fact that several reinsurers on the bond of which this bond was a renewal had refused to reinsure, and demanded a release of their liability from the prior reinsurance; and that in several ways the Southern Company had manifested its lack of confidence in the Carnegie Trust Company. Had

the complainants known that the said bond was not an original but a renewal, they would not have entered into the reinsurance, for upon being apprised of the fact that it was a renewal, rather than an original bond, they would have learned that some of the reinsurers on the original bond had withdrawn from reinsuring liability for the reason that the Carnegie Trust Company was insolvent and had been improperly managed. Such information would have been sufficient to have deterred the complainants from making the reinsurance contracts. Moreover, it now appears, and the complainants charge that prior to the making of the said reinsurance contracts, the said Zwinggi had been instructed by the officers of the Southern Company at Des Moines that the Southern Company would not retain or carry a liability on said bond in excess of $100,000, which information the said Zwinggi purposely concealed from the complainants.

5. At the times the said representations were made, the said John A. Bell, instead of being worth upwards of ten to twelve million dollars, and worth at least the amount of the bond, was insolvent.

6. The complainants further allege that, at the same time, the said Trust Company, instead of being highly solvent was, in fact, insolvent, and, instead of being well managed, was so carelessly and corruptly conducted by the said John A. Bell, its president, that he has since been convicted of a crime or crimes in connection with such management.

7. On or about the twenty-fifth day of April, 1925, the said Carnegie Trust Company, of Carnegie, Pennsylvania, was adjudged to be in-

solvent and suspended business, and its affairs were taken charge of by the Commissioner of Banking of the State of Pennsylvania, in pursuance of the statutes of the said State. This fact, in connection with the disclosures shortly thereafter following with reference to the management of the said Trust Company by the said Bell, immediately created grave suspicion on the part of the complainants and the other reinsurers on said bond, with reference to the liability of the Southern Company upon its bond to the Carnegie Trust Company. The reinsuring companies, including the complainants, demanded that a full and complete audit of the Carnegie Trust Company be made before its liability upon the said bond to the said Carnegie Trust Company be admitted, in accordance with clause 5 of said insurance contract. While the said Southern Company at first agreed to have a complete audit, they later declined to do so, and, upon a specious, partial and incomplete audit, on or about the fifteenth day of June, 1925, admitted its full liability to Allegheny County upon its said bond, notwithstanding the fact that, prior thereto, each of the complainants had sent the Southern Company a telegram protesting against such admission.

8. The complainants charge that such conduct on the part of the Southern Company evinces a desire on its part to conceal the real facts with regard to the representations made by Zwinggi to the agents and officers of the complainants, and also to conceal the facts with regard to the true condition, with reference to the solvency, of Carnegie Trust Company and John A. Bell, its indemnitor, hereinabove referred to. As a further evidence of such desire in execution of the

fraud and deceit by the Southern Company, in procuring the underwriting agreements hereinabove referred to, the Southern Company gives out and pretends that it has paid the full amount of said bonds, namely, $1,100,000 to Allegheny County, but the said county has refused to surrender the said bond, and the complainants charge that there is doubt as to whether such payment of that amount was, in fact, made, and, if made, properly done, and, until the true facts with reference thereto can be ascertained, it is premature to hypothecate a liability upon the reinsuring contracts.

9. The complainants allege that the reinsuring contracts, hereinabove referred to, were made and entered into in reliance upon the representations or agreements that were made by the said Zwinggi on behalf of the Southern Company and hereinabove set out; that all said representations, as hereinabove set out, were, as the complainants believe and allege, false to the knowledge of the said Zwinggi at the time they were made, except the representation with reference to the financial condition of the said John A. Bell. The complainants believe and charge that while the said Zwinggi may have been and probably was at the time of the making of the representations concerning the financial standing of the said Bell, unaware of the facts with reference thereto, it cannot be claimed, and the complainants do not claim that the said representations were untrue to the knowledge of the said Zwinggi; nevertheless, such representations were affirmations of facts, which affirmations were false, and give ground for the complainants to allege in this Court, and in no other court, the facts with reference thereto, and upon the fraud arising therefrom, as a basis for relief by the complainants from the said contracts made and entered into upon the faith thereof.

10. Shortly after the complainants and the other reinsuring companies heard of the insolvency of the Carnegie Trust Company, meetings were held by their representatives in the City of New York, with the result that an effort was made, on the part of the companies, to secure a complete audit of the finances of Carnegie Trust Company, but without success. In the meantime, Mr. W. Clyde Grubbs, a lawyer of Pittsburgh, Pennsylvania, was retained and has since been employed for the purpose of investigating the matter, and he was empowered to have such an audit made at the expense of the reinsuring companies. He was greatly delayed in securing this by failure to obtain the consent of the Banking Department which was necessary, and the result was that the audit was not completed until about the first of the year 1926. From this report, it appears that Carnegie Trust Company was, at the time the reinsuring contracts above referred to were made, grossly insolvent, and had been improperly managed. In the meantime, depositions of witnesses in Pittsburgh, including John A. Bell, Joseph H. Walker, treasurer of Carnegie Trust Company, and others, were taken in another suit by the Southern Company, from which much of the information hereinabove disclosed was obtained. Those depositions cover over nine hundred typewritten pages, and a copy thereof only came into the possession of the said Grubb about the middle of April, 1926.

11. On the fifteenth day of September, 1925, the Southern Company commenced a suit in the New Jersey Supreme Court against each of the

complainants herein to recover the amount claimed to be due on account of the said reinsuring contracts. The complaints in the two suits are identical, except for the name of the party defendant. The answers vary slightly, and copies thereof, as well as of the other pleadings, actual and proposed, are attached hereto, marked Exhibits D. to N. The answers were filed in due course, and later, by reason of the discovery of some of the allegations of fraud hereinabove alleged, an application was made to the Honorable William S. Gummere, Chief Justice, presiding in the Essex County Circuit, for leave to file a supplemental answer, setting up such facts. Upon the insistence of the attorneys of the Southern Company, this application was denied by an order included in said papers, the exhibits last referred to, without prejudice, for the reason, among others, as expressed by the Chief Justice, that it was not made to appear that the refusal of the reinsurers on the original bond, who refused to go on the present bond, was due to their fears about the financial situation existing at the time the renewal was made, either with respect to the financial stability of Carnegie Trust Company or knowledge or suspicion on their part, or on the part of anyone of them, of facts which would tend to make the renewal a greater risk than the original bond.

12. In the month of June, 1926, full information was given to the New Jersey attorney of the complainants (the defendants in said suits at law) covering the points desired by the Chief Justice, with instructions for him to take the necessary steps to enable the fraud to be properly pleaded. The complainants have, within a few days before the filing of this bill, discovered

that the said attorney in New Jersey, although said facts were sent to his office and by mistake placed in the file, never personally knew thereof, and hence made no effort whatever, until the sixteenth day of October, 1926, when application was made to file a supplemental answer, copy whereof is also included in the said exhibits, and refused by the Chief Justice on the ground that the defendants in said action were in laches in presenting the matter to the Court so near the time when the trials were to come on. The complainants' said attorney omitted to disclose to the Court at that time the fact that this information had been in his possession since June last. The result of all this is that the complainants herein have no opportunity in the suits at law to set up the matters of fraud hereinabove alleged, and capable of being relied on in that court.

13. The said actions at law are pending and set for trial on the fifteenth day of November, 1926, and if permitted to proceed the defendants therein (the complainants herein) will be unable to introduce so much of the evidence of fraud hereinabove set out as is competent in that court, and a great injustice and irreparable damage will thereby result.

14. The reinsuring contracts, by their express terms, began February 25, 1924, and end with the termination of the liability of the reinsured. The liability of the reinsured ends January 1, 1928. The bond which has been reinsured is still in possession of the County, although it is claimed by the Southern Company that it has been paid, and while said bond is outstanding, and until the first of January, 1928, in view of the question with reference to the payment, in

fact, of the said liability, and in view of the claim that said payment, if made was fraudulently made and may be set aside, the complainants claim herein that they can only be accorded full relief by being relieved of said contracts, as having been fraudulently induced for the reasons hereinabove set out, and having their reinsurance agreement, which never had, because of the fraud in the negotiations leading up to its issuance, and the non-retention hereinabove set out, a legal existence, cancelled and delivered up to them, upon the restoration to the Southern Company of the premium heretofore received by the complainants, which they hereby offer and tender to restore.

15. Supplementing paragraph 4 hereof, the complainants say that after the said W. J. Zwinggi had represented to the complainants that the Southern Surety Company was about to execute, for the Carnegie Trust Company, a bond in the sum of $1,400,000, he was advised by one or more of the reinsuring companies on the prior bond of the Southern Surety Company, of which prior bond the said proposed bond in the sum of $1,400,000 was to be a renewal, that the said reinsuring companies would not renew their reinsurance under the proposed bond on account of the irregularities of the Carnegie Trust Company and its president, John A. Bell, disclosed by an investigation conducted by the Auditor General of the Commonwealth of Pennsylvania at Harrisburg, Pennsylvania, commonly called the Kephart investigation. The said Zwinggi, on or about February, 1924, in writing, notified the officers of the Southern Company, at Des Moines, of the fact that the said reinsuring company, or companies, would not reinsure on account of the

irregularities disclosed by the said Kephart investigation. The reasons that the bond was reduced from $1,400,000 were *inter alia,* the fact that the Southern Company was not able to induce the former reinsurers to remain on the risk on account of the information disclosed by the Kephart investigation, and the results thereof. Among the results of the Kephart investigation was the indictment of Harmon M. Kephart, State Treasurer of the Commonwealth of Pennsylvania, for making false reports of his accounts, and his conviction thereof upon a plea of *nolle contendere,* and also the payment, under compulsion, by Carnegie Trust Company, in December of 1922, to the Commonwealth of Pennsylvania, of $15,049.24, as interest on money of the Commonwealth of which the Carnegie Trust Company had wrongfully had the use as the result of the irregularities between the said Bell and Kephart. That on or about the 25th day of February, 1924, said Zwinggi fraudulently, maliciously and wilfully concealed from the complainants all the information disclosed by the Kephart investigation, and also the fact that the said Kephart had been indicted and convicted as aforesaid, and that the Carnegie Trust Company had been compelled to make the payment of interest to the Commonwealth of Pennsylvania aforesaid, and also fraudulently, maliciously and wilfully concealed from the complainants the fact that many companies to which the risk had been submitted, refused to reinsure on account of the facts disclosed in the Kephart investigation, and also fraudulently, maliciously and wilfully concealed the fact that the reason that the said bond was reduced from $1,400,000 to $1,100,000 was because some of the companies to which the

Southern Company proposed reinsurance, by reason of the knowledge such companies had of the facts so concealed by Zwinggi, refused to reinsure. The said Zwinggi fraudulently, maliciously and wilfully concealing the facts just stated, submitted to the complainants, in writing, the contracts Exhibits A and B, which were accordingly executed by the complainants in reliance upon the representations made to Mr. Short, and in ignorance of the facts so concealed from the complainants by the said Zwinggi. Had the facts so concealed by Zwinggi, or any of them, been communicated to the complainants, they would have declined to issue the said contracts of reinsurance. None of the facts so concealed by the said Zwinggi, came to the knowledge of the complainants, or either of them, until long after the loss under the bond, Exhibit C.

The complainants, by reason of inadequacy of relief in any other court, hereby pray:

A. That the defendant, Southern Surety Company of Des Moines, Iowa, may without oath, answer under oath being hereby waived, specifically answer each of the allegations herein contained.

B. That the said defendant and its agents and attorneys may be enjoined and restrained from further prosecuting the suits pending in the Supreme Court of New Jersey against Commercial Casualty Insurance Company and New Jersey Fidelity and Plate Glass Insurance Company, to recover the amounts claimed to be due on the reinsuring contracts; that it may be decreed that the said contracts were fraudulently induced, and that the complainants herein were fraudulently induced to sign said reinsurance contracts; and that the same may be decreed to

be cancelled upon the terms set out above and delivered up to the complainants.

C. That the complainants may have such other and further relief as may be equitable and just.

D. That a writ of subpoena may issue commanding the defendant to answer this bill of complaint and abide by such decree as this Court may make in the premises.

McCARTER & ENGLISH,
Solictors of Complainants.

G. W. C. McCARTER,
Of Counsel.

IN CHANCERY OF NEW JERSEY.

Between COMMERCIAL CASUALTY INSURANCE COMPANY and NEW JERSEY FIDELITY AND PLATE GLASS INSURANCE COMPANY, *Complainants,* *and* SOUTHERN SURETY COMPANY OF DES MOINES, IOWA, *Defendant.*	*On Bill, &c.*

STATE OF FLORIDA, }
COUNTY OF DADE. } *ss.*

HARLAN SHORT, of full age, being duly sworn, on his oath says: I am at present residing in

the State of Florida. I formerly, and until sometime in the month of January, 1925, was employed as Depository Underwriter by Commercial Casualty Insurance Company, one of the complainants above named, and as such had charge of depository bank underwriting. As such it was my duty to conduct negotiations for the Commercial Company for the reinsurance of depository bonds. A short time prior to February 25, 1924, W. J. Zwinggi, who was the Manager of the Pittsburgh branch office of the Southern Surety Company, the defendant above named, met me by appointment at the Waldorf Astoria Hotel, in the City of New York, for the purpose of negotiating with me, as the representative of the Commercial Company, a policy of reinsurance for the Southern Surety Company on a bond, between the Carnegie Trust Company as principal and the Southern Surety Company as surety, and the County of Allegheny as obligee.

The object of the said bond of $1,400,000 was to secure the County of Allegheny for the deposit of county funds in the said Carnegie Trust Company.

In the course of said negotiations, Zwinggi stated to me that the said bond of the Southern Surety Company for $1,400,000 was an original bond, and in no way intimated that it was a renewal, in fact, misrepresented this fact to me as I afterwards learned. Long after the Commercial Company, at my recommendation, issued its reinsurance policy for $50,000, a copy whereof is attached to the pleadings herein, I learned for the first time that the bond that the Southern Surety Company gave to the County of Allegheny to secure the county's deposit in the

Carnegie Trust Company above referred to, instead of being an original bond, was a renewal of a previous bond of $1,400,000.

Had I, in negotiating the reinsurance for the Commercial Company, been apprised, or known that the bond which we were asked to reinsure in part was a renewal, I would have declined the risk for the reason that had I known it was a renewal, I would at once have inquired who the other insuring companies had been on the prior bond, and I would also have learned that some of them were not included in the list of the reinsurers on the bond in question, and their absence from the present bond would, of course, have been significant, and I would, before making any contract whatever, have satisfied myself of the reasons why they were on the original bond, and not on the proposed one. Had I not been told, and believed, that the indemnitor was highly solvent and worth at least $1,400,000, that the Carnegie Trust Company was solvent, well managed, and that the Southern Company would carry at least $150,000 of the liability on this bond of $1,400,000 I would not have had my company enter into the reinsurance contract in question, nor would I have recommended the risk to the New Jersey Fidelity and Plate Glass Insurance Company.

At the time that the reinsurance policy was issued by the Commercial Company it was informed by letter under date of February 25, 1924, from the Southern Company that the original bond, instead of being for $1,400,000 was $1,100,000.

During said negotiations, Zwinggi further and also represented to me in his efforts to place said reinsurance with the Commercial Company,

that Carnegie Trust Company was highly solvent, well managed and in sound financial condition, and that in addition to the security offered thereby, the Southern Surety Company had as indemnity for the giving of said bond of $1,400,000 an indemnity agreement or contract of John A. Bell, who, Zwinggi represented was, and who in fact was, the President of Carnegie Trust Company, and was stated to be, by Zwinggi to me, a man of large financial means, and worth more than $1,400,000, that he was an excellent banker, as well as the Pennsylvania "coal baron." The representation with reference to the financial standing of the indemnitor, Mr. Bell, was unequivocal, and accompanied by the statement that he knew the facts he averred with reference to him, going so far as to say that his resources were as high as $10,000,000 or $11,000,000. Of course, I realized, as do all reinsurance people, that the risk of reinsurance is decreased by the amount and the value of such indemnity. Zwinggi also represented to me that the Southern Company would retain on the $1,400,000 bond $150,000 as its share of liability.

Furthermore, in the course of such negotiations, Zwinggi asked me if I knew any other company or companies writing reinsurance in New Jersey, and I mentioned to him the New Jersey Fidelity and Plate Glass Insurance Company, whereupon Zwinggi requested me to communicate with that company for the purpose of having it participate in the reinsurance on said bond, and further requested me to carry forward to the New Jersey Company the statements and representations he had made to me as hereinabove set out.

I was myself influenced in making the contract of reinsurance for the Commercial Company by the statements hereinabove referred to made by Zwinggi to me, and Zwinggi, who is an expert in insurance, in charge of the Pittsburgh district for the Southern Company, knew that such misrepresentations were most material, and were made by him expressly for the purpose of securing the reinsurance from the Commercial Company.

After Zwinggi left me, I communicated with Mr. Harold S. Vreeland, at that time superintendent of the Fidelity and Surety Department of the New Jersey Plate Glass Insurance Company, telling him all of the statements made as hereinabove recited by Zwinggi to me respecting said bond, and the financial standing of Carnegie Trust Company and Bell, and the fact that he was an indemnitor, and requested said Vreeland to communicate with said Zwinggi as to whether or not the New Jersey Company desired to take any of the reinsurance.

HARLAN SHORT.

Sworn to and subscribed before me, a Notary Public in and for the County of Dade, in the State of Florida, this 1st day of November, 1926.

G. D. OSLUND,
Notary Public, State of Florida at Large.
My commission expires August 23, 1930.
County Clerk's certificate annexed.

IN CHANCERY OF NEW JERSEY.

Between COMMERCIAL CASUALTY INSURANCE COMPANY and NEW JERSEY FIDELITY AND PLATE GLASS INSURANCE COMPANY, *Complainants,* *and* SOUTHERN SURETY COMPANY OF DES MOINES, IOWA, *Defendant.*	*On Bill, &c.* *Affidavit.*

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

WARREN D. WARD, being duly sworn, upon his oath says:

I am Secretary and Treasurer of New Jersey Fidelity & Plate Glass Insurance Company, one of the complainants, and have been connected in one capacity or another with that company since 1899. In the year 1925, I had personal charge of the fidelity insurance claims, and during the month of May of that year, the fact that the Carnegie Trust Company had failed was brought to my attention, and I attended a meeting of representatives of the reinsurers upon the $1,100,000 bond, held in the City of New York on or about May 15, 1925. I may say at this juncture, that while the bond was originally proposed to be $1,400,000, before the reinsurance was actually written, the amount of the bond to be reinsured was reduced to and made $1,100,000. This meeting, of course, was precipitated by the astounding news that the Carnegie Trust Company had be-

come insolvent; a matter we deemed entirely irreconcilable with the representations made to the several reinsuring companies, including the New Jersey Fidelity & Plate Glass Insurance Company, at the time of our underwriting, that the Carnegie Trust Company was in a highly solvent condition. We knew that our reinsuring contract gave broad powers in the fifth clause to the Southern Company to determine the amount of its liability, and in our fear that such admissions would be made either fraudulently, innocently or prematurely, before the facts could be developed, one of the representatives of the reinsurers then and there telephoned Mr. Huckleberry, the Vice-President of the Southern Surety Company, at Des Moines, requesting that his company refrain from making such admissions until a complete audit of the affairs of the Carnegie Trust Company could be made. He also requested that the Southern Surety Company wire each of the underwriters their conclusion to that effect.

By this time Mr. W. Clyde Grubbs of Pittsburgh had been employed by all the reinsurers as their local counsel in Pittsburgh, for the purpose of ferreting out the matter.

My company received no reply to the telephone request above referred to, but on June 1, 1926, we had a wire from Mr. Huckleberry stating:

> "As we have heretofore advised you we find no reason for denying liability for deposit Carnegie Trust Company stop Last week President Cobb and Special Counsel Parrish at request certain reinsurers at New York visited New York then conferred all interested at Pittsburgh stop. County Commissioners have ordered their attorney to take judgment on bond unless paid by June fourth stop. All our counsel and independent

counsel at Pittsburgh advise there is no defense to claim of Allegheny County on account of Carnegie Trust Co. We have therefore determined there is liability and we must pay stop On account of accumulated interest amount due by you will be slightly in excess of amount of your reinsurance stop. We request that you mail to Joseph Armstrong Chairman of Board of County Commissioners Pittsburgh Pennsylvania remittance for the amount of your reinsurance payable to Allegheny County, Pennsylvania so as to reach there by June fourth and thereby avoid penalty. We are mailing our portion formal notice and proof follows stop. Final interest adjustment will be handled later. Southern Surety Company, J. H. Huckleberry.''

We were at an entire loss to understand the reasons inducing this precipitous action on the part of the Southern Company. No honest or substantial reason presented itself to us, nor could be learn any therefor, and so at a later meeting of the representatives of the reinsurers held in New York on June 2, 1925, it was determined that a protest should be sent against the Southern taking such a course, and on June 2, 1925, I sent, for my company, a wire to the Southern Company as follows:

''Replying to your wire of the first instant re Carnegie Trust Company stop. On May 15, 1925 your Mr. Huckleberry agreed to obtain a complete audit of the Carnegie Trust Company. You have not kept your agreement. Pending an investigation including a complete audit of the Carnegie Trust Company we protest against any admission of liability by your company hereby reserving any and all rights and defenses we may now or hereafter have.

New Jersey Fidelity & Plate Glass Insurance Co.''

On July 16, 1925, another meeting occurred in New York, at which, besides the representatives of the reinsurers, there were present Mr. Cobb, the President of the Southern Company, Mr. Parrish its General Counsel, and Mr. Zwinggi. Quite a long colloquy occurred. We had in the meantime learned that an investigation had taken place known as the Kephart investigation, in the State of Pennsylvania, the report of which showed that the affairs of the Carnegie Trust Company had been grossly mismanaged; that some kind of a combination existed between its President, Bell, and the State and County officials, and I may say here that I have since learned that as a result of that investigation, Bell has been convicted of embezzel*l*ment and other offenses arising out of his conduct, in connection with the affairs disclosed by this investigation. We learned also that this investigation had taken place anterior to our reinsuring, and I remember distinctly Mr. Zwinggi being asked at this meeting whether he knew at the time of procuring the underwriting by the Commercial and the New Jersey companies of this Kephart investigation. His reply was that he did, but he did not consider it of sufficient importance to apprise the reinsuring companies of any of the facts in connection therewith; that he had considered that it was nothing but a political inquiry on the part of the State officials of Pennsylvania, and that Bell had been vindicated.

Suit was commenced against our company on the reinsurance contract on the 15th day of September, 1925. I placed this in the hands of our attorney, Henry G. Pilch, Esquire, who has been in charge of it since then. Meantime, Mr. Grubbs has been steadily engaged in following the matter

and procuring information with reference to the facts as they existed at the time this underwriting was done. Notwithstanding the pretense of the Southern Company that it was absolutely necessary for it immediately to pay the total claim which it had, as above shown, admitted contrary to our protests, nevertheless from a statement rendered by it to us, it appears that they don't pretend such payment was made otherwise than as follows:

June 1, 1925	$ 100,329.26
June 4, 1925 (paid by New Amsterdam Casualty Co.)....	40,000.00
June 4, 1925 (paid by United States Fidelity & Guaranty Company)	30,000.00
June 6 (paid by Union Indemnity Company)	25,000.00
June 9	385,280.00
June 15	250,246.84
June 25	100,000.00
July 6	170,000.00
July 15	7,395.43
	$1,108,251.53

Mr. Vreeland was the representative of our company at the time the reinsuring occurred who had charge of that particular branch of our business. He left our employ on May 1, 1926, and is now and for some time has been in Los Angeles, California. Of course, it has been difficult to get into immediate communication with him to procure from him the facts with reference to his connection with this underwriting.

WARREN D. WARD.

Sworn to and subscribed before me
a Notary Public in and for the
County of Essex in the State of
New Jersey, this 3rd day of
November, 1926.

FREDERIC N. WEBSTER,
(SEAL) Notary Public of New Jersey.
Commission expires Apl. 3rd, 1928.

IN CHANCERY OF NEW JERSEY.

Between

COMMERCIAL CASUALTY INSURANCE COMPANY, *et als.*, *Complainants,*

and

SOUTHERN SURETY COMPANY OF DES MOINES, IOWA, *Defendant.*

Affidavit.

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES. } *ss.*

HAROLD S. VREELAND, of full age, being duly sworn according to law, on his oath deposes and says that he was the superintendent of the Fidelity and Surety Bond Department of the New Jersey Fidelity & Plate Glass Insurance Company and had been such superintendent since January twenty-first, nineteen hundred and twenty-four and as such superintendent had charge of obtaining reinsurance contracts for said New Jersey Fidelity and Plate Glass In-

surance Company and passing upon reinsurance contracts offered to said Company; that on or about the sixteenth day of February, nineteen hundred and twenty-four, Harlan W. Short, Jr., whom defendant knew to be the superintendent of the Fidelity and Depository Division of the Fidelity and Surety Bond Department of the Commercial Casualty Insurance Company of Newark, stated to deponent that one, W. J. Zwinggi, manager of the Pittsburgh branch office of the Southern Surety Company had negotiated with said Short for the purpose of obtaining from Commercial Casualty Insurance Company a reinsurance contract with Southern Surety Company on a certain bond in the sum of one million four hundred thousand dollars given by Carnegie Trust Company as principal with Southern Surety Company as surety and to the County of Allegheny as obligee securing the County for the deposit of County funds in said Carnegie Trust Company.

That said Short stated to deponent that Zwingge had represented to him that the Carnegie Trust Company was solvent and in sound financial condition and that in addition to the security afforded by the solvency and sound financial condition of Carnegie Trust Company that Southern Surety Company had as indemnity for the giving of said one million four hundred thousand dollar bond an indemnity agreement or contract of one, Bell; who according to the statements and representations of Zwingge was at that time president of Carnegie Trust Company and a man worth between ten and eleven million dollars;

That said Short stated to deponent that Zwingge had asked Short if he knew of any other Company that Zwingge might be able to get re-

insurance from and that Short had stated to Zwinggi that the New Jersey Fidelity and Plate Glass Insurance Company were now writing surety bonds and Zwinggi then asked Short if he would call up the New Jersey Fidelity and Plate Glass Insurance Company and give them all the information that Zwinggi had given Short inasmuch as he, Zwinggi, had to return to Pittsburgh immediately and did not have time to personally visit the office of New Jersey Fidelity and Plate Glass Insurance Company to offer them reinsurance on the bond.

That said Short also stated to deponent at that time that the Commercial Casualty Insurance Company were accepting fifty thousand dollars on the principal of one million four hundred thousand dollar bond of Carnegie Trust Company to County of Allegheny and that Zwinggi had stated that Southern Surety Company would carry one hundred fifty thousand dollars on this bond.

Deponent further says that he relied on the statements made by Short to him and relying on such statements directed that reinsurance contract be entered into by New Jersey Fidelity and Plate Glass Insurance Company with Southern Surety Company.

When our Company came to actually issue the reinsurance agreement we learned for the first time that the amount of the original bond was one million one hundred thousand dollars instead of one million four hundred thousand dollars.

HAROLD S. VREELAND.

Sworn and subscribed before me a Notary Public in and for the County of Los Angeles, in the State of California, this 1st day of November, Nineteen hundred and twenty-six.

(SEAL) MARIE BUTLER.
My Commission expires Oct. 25, 1927.

IN CHANCERY OF NEW JERSEY.

Between

COMMERCIAL CASUALTY INSURANCE COMPANY and NEW JERSEY FIDELITY AND PLATE GLASS INSURANCE COMPANY, *Complainants,*

and

SOUTHERN SURETY COMPANY OF DES MOINES, IOWA, *Defendant.*

On Bill, &c.

Affidavit.

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

BERTRAND H. BRATNEY, being duly sworn upon his oath says: I am the counsel of the Bonding Department of Commercial Casualty Insurance Company, and have been connected with that Company since June, 1923. On or about May 15, 1925, I first had my attention directed to the facts in connection with the issuance of the reinsuring contract by the Commercial Company

referred to in the bill of complaint. At that time I attended a meeting of officers of several reinsuring companies, called for the purpose of discussing the questions arising from the fact that the Carnegie Trust Company had failed, and there was an alleged loss on the reinsurance contracts. I had nothing to do with their negotiation as to underwriting.

At this meeting in New York, it was unanimously decided by all the reinsuring companies on the $1,100,000 bond, that before any action was taken whatever with regard to liability thereon, a complete audit of the Carnegie Trust Company be obtained, whereupon a telegram was sent to J. H. Huckleberry, vice-president of the Southern Company, Des Moines, Iowa, dated May 16, 1925, as follows:

"We think you should employ Main and Company to make audit Carnegie Trust as provided paragraph six reinsurance agreement before admitting liability or paying loss stop. Please wire your decision.
Commercial Casualty Insurance Company."

On that same day the following telegram was received:

"Your wire General Counsel Cohen arrived here this morning and have just telegram Attorney Grubbs as follows I have your telegram addressed Huckleberry Please arrange Main and Company proceed with audit as arranged with County officials keep me advised and quote would appreciate knowing your attitude under your direct obligation to County likewise attitude other companies.
Southern Surety Company."

On the 18th of May, the following wire was received from Des Moines from Mr. Levy, the Pittsburgh counsel of the Southern Company:

"Southern consent audit. Will communicate with you my return Pittsburgh.
Morris G. Levy."

The attorney Grubbs referred to in the telegram of May 16th, is W. Clyde Grubbs, a lawyer of Pittsburgh, who in the meantime had been retained locally by all the reinsuring companies to look after their interests, and it was Mr. Grubbs who had suggested to us the making of the audit by Main and Company, because of their familiarity with the situation. The Southern Company had also expressed an entire willingness that an audit should be conducted by Main and Company.

On the 31st of May, 1925, I received a telegram of which the following is a copy:

"As we have heretofore advised you we find no reason for denying liability for deposit Carnegie Trust Company stop. Last week President Cobb and Special Counsel Parrish at request certain reinsurers at New York visited New York then conferred all interested at Pittsburgh stop. County Commissioners have ordered their attorney to take judgment on bond unless paid by June fourth stop. All our counsel and independent counsel at Pittsburgh advise there is no defense to claim of Allegheny County on account of Carnegie Trust Co. We have therefore determined there is liability and we must pay stop. On account of accumulated interest amount due by you will be slightly in excess of amount of your reinsurance stop. We request that you mail to Joseph Armstrong Chairman of Board of County Commissioners Pittsburgh Pennsylvania remittance for the amount of your reinsurance payable to Allegheny County

Pennsylvania so as to reach there by June fourth and thereby avoid penalty. We are mailing our portion formal notice and proof follows stop. Final interest adjustment will be handled later.
Southern Surety Co. J. H. Huckleberry."

On June 2nd, I wired the Southern Company as follows:

"Replying to your wire of the thirty first ultimo re Carnegie Trust Company stop. On May fifteenth 1925 your Mr. Huckleberry agreed to obtain a complete audit of the Carnegie Trust Company. You have not kept your agreement. Pending an investigation including a complete audit of the Carnegie Trust Company we protest against any admission of liability by your company hereby reserving any and all rights and defenses we may now or hereafter have.
Commercial Casualty Insurance Company."

Getting no satisfaction whatever either in the way of the desired or promised audit, Mr. Grubbs, at our request, at once undertook a thorough investigation of the situation, which he has been conducting from that time to the present, receiving instructions to have a complete audit of the books of the Carnegie Trust Company made by Main and Company. This audit was accordingly made at the expense of the reinsurers. A copy of said audit is in my possession, having been received about the first of the year 1926. This audit discloses that the Carnegie Trust Company was insolvent, and had been insolvent since 1923. I later learned that John A. Bell, had, upon his own petition, been adjudged a bankrupt in August, 1925.

In an amended reply that the Southern Company has filed to the answers of the complainants herein to the complaint of the Southern Surety

Company in suits at law referred to in the pleadings, which reply was filed about the middle of June, 1926, it appears that the Southern Company did not retain $150,000 on the bond. I attach hereto, a copy of that amended reply.

It has recently come to my attention from testimony given in Pittsburgh in February, 1926, in a suit wherein the Southern Surety Company is plaintiff, and the General Reinsurance Company, a corporation of New York, is defendant, in the District Court of the United States for the Southern District of Iowa, Central Division, that Mr. Bell was disclosed to have been guilty of loose and fraudulent practices in connection with the management of his bank, which antedated the execution of our reinsurance agreement and resulted in Mr. Bell later being convicted of crimes in connection with the mismanagement of this bank.

On or about the 15th of September, 1925, two actions were commenced in the New Jersey Supreme Court against the complainants herein, by the Southern Company. Original answers were filed therein, and copies of all the pleadings, actual and proposed, in that case are attached to the bill of complaint.

After the original answer was filed, certain facts with reference to the fraud that we claimed existed at the inception of our relations with the Southern Company were brought to light, and an effort was made to file a supplemental answer, a copy of which appears in the said pleadings, actual and proposed. The motion was refused by Chief Justice Gummere. A copy of his order is also included in the papers referred to. The basis of such refusal was, as he stated, because among other things the defendants failed to show the reasons why the reinsurers on the original bond had declined to reinsure the $1,100,000 bond. We at once set about to obtain proof to supply the deficiency so that the proposed supplementary answer could be filed, and at once communicated with Mr. Grubbs, who I believe possessed the desired information. Under date of June 10, 1925, Mr. Grubbs wrote me a long letter containing the following:

> "In your letter to me you state that you are wondering 'if you have any information that would support the position we have taken along the lines that the Southern's method of reinsuring this loss at the time it was submitted to us was fraudulent and that they knew that some or at least one company had declined the risk because of the unstable condition of the Carnegie Trust Co.'
>
> In answer to your query, I enclose herewith a copy of a letter written by Mr. Tompkins, President of the U. S. Guaranty Company, No. 3 S. William St., New York. Mr. Tompkins' company was a reinsurer in the sum of $25,000. of the Southern on the $1,400,000 bond issued by the Southern to Allegheny County on the Carnegie Trust Co. in 1920. On June 6, 1922, he wrote a letter to the Southern, a copy of which is hereto attached. We can prove this letter was received and answered by the Southern and it finally ended in the Southern advising Mr. Tompkins that it was not able to release his company as a reinsurer on the old bond. Here is direct notice to the Southern of a serious condition at the Carnegie Trust Co., and a desire by a reinsurer to be released."

On June 15, 1926, I wrote our then attorney a long letter, in which I said:

> "Since my letter to you of June 7th I have received from Mr. Grubbs a great vol-

ume of data which he has sent me in connection with the New Jersey suit. He has also given his version of the question of stipulation which the Southern Surety Company has asked us to stipulate to. I am sending all of this to you for your files; there is included a copy of telegram dated March 23rd and copy of reply under date of March 24th; one of August 10th and a copy of reply under date of August 11th. There is also enclosed a letter dated June 6th, 1922, addressed to Mr. C. S. Cobb, President of the Southern Surety Company written by the President of the U. S. Guaranty Company, which is the sort of a letter together with the telegrams that we want in order to substantiate and sustain our amended answer."

I supposed, until October 15th or 16th, that this information had been used for the proposed supplemental answer, and that the same had been duly filed. To my amazement, on October 15th or 16th, I found that our attorney had never personally seen my letter of June 15th, but that the same had been received in the office and placed in the file without his knowledge, and that accordingly no supplemental answer had ever been filed in this case.

On Saturday, October 23, 1926, an application was made by our attorney for leave to file a supplemental answer setting up most of the matters relied on in this bill of complaint as indicative of fraud, and this application was denied at the suggestion of the attorney for the Southern Surety Company because of the delay in presenting the matter to the Court. Our attorney failed to state to the Court on this application the fact that in June last I had placed him in possession of the facts, and that through

the blunder in his office, no motion was made until October 23rd.

The delay has occurred in the presentation of this bill to the Court by reason of the fact that Harlan Short, a most important witness, left our employ sometime ago, and it has been difficult to learn his whereabouts. It turned out that he was in Florida, and it was necessary to have someone go there to procure his affidavit.

BERTRAND H. BRATNEY.

Sworn to and subscribed before me, a Notary Public in and for the County of Essex in the State of New Jersey, this 5th of November, 1926.

(SEAL) LEAH M. BAILEY,
Notary Public of New Jersey.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

SOUTHERN SURETY COMPANY, a corporation, *Plaintiff,* *vs.* NEW JERSEY FIDELITY & PLATE GLASS INSURANCE COMPANY, a corporation, *Defendant.*	*Action at Law.* *Amended Reply.*

Plaintiff, Southern Surety Company, replying to the answer of defendant, New Jersey Fidelity & Plate Glass Insurance Company, says:

1. As to the third separate and affirmative defense plaintiff denies that it has failed to comply with the covenant and agreement made by it to and with the defendant in paragraph 3 of said reinsurance contract, but on the contrary alleges that the amount of liability retained by plaintiff at its own risk on principal, to wit, on said Carnegie Trust Company of Carnegie, Pennsylvania, was at no time while said reinsurance agreement remained in force less than $150,000, the amount of said liability so retained by plaintiff being as follows:

(a) The amount of liability retained by plaintiff at its own risk under the bond (a copy of which is attached to the complaint) while said reinsurance agreement remained in force was at no time less than $100,000, which amount of liability under said bond was not reinsured.

(*a*) Prior to the execution of the bond and reinsurance contract (copies of which are attached to the complaint) plaintiff executed as Surety for said Carnegie Trust Company of Carnegie, Pennsylvania, as Principal, a certain depository bond (of like character to the depository bond a copy of which is attached to the complaint), in favor of Allegheny County Home of Pittsburg, Pennsylvania, in the sum of $125,000 guarantying the repayment to the said Allegheny County Home of any deposits made by said Home with the said Carnegie Trust Company. Plaintiff reinsured said $125,000 bond to the extent of $40,000 and no more. Said $125,000 bond was and at all times remained in full force and effect from a date prior to the execution of said bond and the reinsurance contract (copies whereof are annexed to the complaint) until January 9, 1925, on which date a new bond of like character was executed by Plaintiff as Surety for said Carnegie Trust Company as Principal in favor of said Allegheny County Home of Pittsburg, Pennsylvania, in the sum of $75,000, which said new $75,000 bond was executed in lieu of and was substituted for the aforesaid $125,000 bond, and thereupon said $125,000 bond was cancelled. At all times while said reinsurance agreement (a copy whereof is attached to the complaint) remained in force from and after January 9, 1925, said new $75,000 bond was and remained in full force and effect, and no part thereof was reinsured.

2. As to the fourth separate and affirmative defense Plaintiff denies that it has failed to comply with the provisions of said reinsurance contract respecting notice and proof of loss under said contract and the presentation of essential documents, and denies that it has not given the Defendant notice of loss and proof of

loss, and denies that it has not exhibited essential documents supporting a claim of loss and payment of loss by Plaintiff, and denies that it has not in all respects complied with the requirements, provisions and conditions of said contract.

LUM, TAMBLYN & COLYER,
Attorneys for Plaintiff.

IN CHANCERY OF NEW JERSEY.

Between	
COMMERCIAL CASUALTY INSURANCE COMPANY and NEW JERSEY FIDELITY AND PLATE GLASS INSURANCE COMPANY, *Complainants,*	*On Bill, &c.*
and	*Affidavit.*
SOUTHERN SURETY COMPANY OF DES MOINES, IOWA, *Defendant.*	

STATE OF NEW YORK, }
COUNTY OF NEW YORK. } *ss.*

DANIEL J. TOMPKINS, of full age, being duly sworn according to law, on his oath deposes and says:

1. I am President of the United States Guarantee Company, a corporation organized and existing under the laws of the State of New York, having its office in the City, County and State of New York.

2. On June 6, 1922, I wrote the following letter to Mr. C. S. Cobb, President of the Southern Surety Company, Des Moines, Iowa, in connection with reinsurance on the Carnegie Trust Company, Carnegie, Pennsylvania, on which Trust Company we, that is to say, United States Guarantee Company, were reinsuring the Southern Company to the extent of $25,000 on the Southern Company's depository bond. The original of this letter is not now in my possession, being in evidence in a certain litigation in Des Moines, Iowa, between the Southern Surety Company and its various reinsurers. An exact copy of this letter is as follows:

"June 6, 1922.

Mr. C. S. Cobb, President,
Southern Surety Co.,
Des Moines, Iowa.

Dear Sir:

This Company is reinsuring your Company under its number 703665 for $25,000 on your Company's Depository Bond to the County of Allegheny, Pa. for $1,400,000 on behalf of the Carnegie Trust Company of Carnegie, Pa. since August 16, 1920.

From certain newspaper reports within the last two months, but which came to our knowledge only some ten days ago, it appears that for two or three years past it has been the practice for the Allegheny County Treasurer to draw certain checks to the order of State Treasurer who would endorse same with a rubber stamp and pass them over to Mr. Bell, President of the Carnegie Trust Company, which he could at once deposit in his institution; Mr. Bell thereupon signing and delivering to the State Treasurer a check for like amount drawn on the Carnegie Trust Company, but which would be withheld by the State Treasurer from deposit to credit of the State until several

months or a year or more later. Thus in effect the Carnegie Trust Company were having the use of State funds which were withheld from deposit to credit of the State for considerable periods. There appear to have been a good many irregularities of this kind as developed through a recent investigation of Main & Co. Public Accountants, who are said to have made a lengthy and detailed report of these occurrences, which report has recently been filed with the Auditor General of the State at Harrisburg, Pa.

We are informed that the 'North American' newspaper of Philadelphia has from time to time, commencing with April 26, 1922 published quite a complete record of the alleged facts, with editorial comments from time to time.

We do not know sufficiently of the facts to have any present opinion as to whether these occurrences affect the financial standing of the Carnegie Trust Company, or not; but, at any rate, these occurrences were highly irregular, and while Mr. Bell President of the Carnegie Trust Company is said to be a man of considerable wealth, yet his connections heretofore have been largely political, and it all induces in us a feeling of strong distrust of the management of the Carnegie Trust Company.

For these reasons we wish to obtain as prompt termination as possible of our reinsurance to your Company. And if you will view the matter anything like as we do, you will probably desire to terminate your depository bond on behalf of the Carnegie Trust Company.

I think your Company is licensed in Pennsylvania and has an agent in Philadelphia. If such agent will consult the files of the 'North American' newspaper for two or three months past, he will be able to send you copies of such paper affording material information if he has not already done so.

Will you please promptly send to me a complete copy of your Company's depository bond to the County of Alleghany on behalf of the Carnegie Trust Company. This so that we may consider with you the most practicable and prompt course for obtaining release from further liability thereunder.

Yours very truly,
(Signed) D. J. Tompkins,
President."

As a result and reply to this letter, I received the following letter from Mr. C. S. Cobb, the President of the Southern Surety Company, under date of June 9, 1922, the original of which is not now in my possession, but is also in evidence in the aforementioned litigation in Des Moines, Iowa. An exact copy of this letter is as follows:

"June 9th, 1922.

Mr. D. Thompkins, President
United States Guaranty
Company
Dear Sir:

I beg to acknowledge receipt of yours of June 6th as President of the Guaranty Company of North America and also as President of the United States Guaranty Company, with regard to your depository bond #703665 Carnegie Trust Company and bond #612364 Carnegie Trust Company.

As requested, I hand you herewith a copy of the form of bond used. I have referred this matter to our attorneys to investigate and report as to the steps necessary to get released. In the meantime, if you have any suggestions on that subject to make, I shall be glad to receive them.

Yours respectfully,
(Signed) C. S. Cobb,
President."

C. S. C. GB Enc.

As a result of these letters, and as a result of the information which came to my knowledge through various newspaper articles which were referred to in my letter of June 6th, the United States Guarantee Company was relieved of its reinsurance on the then current depository bond of Carnegie Trust Company as principal and Southern Surety Company as surety; and when a new and subsequent depository bond on behalf of the Carnegie Trust Company was required, and that company requested our reinsurance for a part of such new bond, I declined to entertain such request and my company did not take any of such reinsurance.

DANIEL J. TOMPKINS.

Subscribed and sworn to this 5th day of November, before me, a Notary Public in and for the County and State aforesaid, as witness my hand and official seal.

(SEAL) HARRY GORDON,
Notary Public Kings County No. 166.
N. Y. Co. Clks. No. 464, Reg. No. 8360.
Commission expires March 30, 1928.

IN THE COURT OF CHANCERY OF NEW JERSEY.

Between

COMMERCIAL CASUALTY INSURANCE COMPANY and NEW JERSEY FIDELITY AND PLATE GLASS INSURANCE COMPANY, *Complainants,*

and

SOUTHERN SURETY COMPANY OF DES MOINES, IOWA, *Defendant.*

On Bill, &c.

Affidavit.

COMMONWEALTH OF PENNSYLVANIA, COUNTY OF ALLEGHENY. } *ss.*

Personally appeared before me, a Notary Public in and for the said County and State, W. CLYDE GRUBBS, the affiant, who, being duly sworn according to law, deposes and says:

That he is a member of the Bar of Allegheny County, Pennsylvania, and has been engaged in the general practice of law at Pittsburgh, Pennsylvania, for more than twenty (20) years.

That he is now, and has been, for more than fifteen (15) years, counsel in Allegheny County, Pennsylvania, for the Ocean Accident & Guarantee Corporation, Ltd., of London, England, and that he has been counsel for the Columbia Casualty Company in said County for more than five (5) years.

That on May 8, 1925, he was called to the William Penn Hotel, in the City of Pittsburgh, by a representative of the two companies aforesaid;

that he arrived at the said hotel at about 4:30 P. M.; that he was advised, upon entering a conference room in the said hotel, that there were present representatives of a majority of the reinsuring companies of the Southern Surety Company on the $1,100,000.00 bond, dated, February 25, 1924, executed by the Southern Surety Company and the Carnegie Trust Company to the County of Allegheny; that the total amount of reinsurance on said bond was $1,000,000.00.

Your affiant was further advised that he, W. Clyde Grubbs, had been selected as counsel by the representatives of the reinsuring companies present to ascertain the facts and secure such information as was necessary to enable him to give an opinion as to whether or not the reinsuring companies of the Southern Surety Company were liable on the said bond. After being advised of this fact one Paul Brown, representing himself to be an officer of the Southern Surety Company, requested the affiant to advise the Southern Surety Company whether or not, in his opinion, the Southern Surety Company was liable on the said bond to the said County of Allegheny. Affiant immediately advised the said Brown that if it should develop that the interests of the reinsurers were antagonistic to the interests of the Southern Surety Company that the affiant would not represent the Southern Surety Company. Whereupon said Brown assured the affiant that there would be no conflict of interests and that the interests of the reinsurers and the Southern were identical.

Affiant advised the representatives of the reinsuring companies and the said Brown that it would be necessary to employ associate counsel. Affiant suggested the firm of Watson & Freeman

in the City of Pittsburgh and the representatives of the reinsuring companies acquiesced in the suggestion.

On May 9, 1925, affiant had a long conference with Mr. Freeman of the firm of Watson & Freeman and several of the members of his firm with regard to what inquiry should be made and what action taken. Whereupon it was decided by your affiant and Mr. Freeman that it would be necessary to have a complete audit of the Carnegie Trust Company made by Main & Company, Public Accountants of the City of Pittsburgh, covering a period at least from January 1st, 1924, to the date of the closing of the Carnegie Trust Company.

Affiant further avers that on May 14, 1925, Mr. Cohen of the firm of Parrish, Cohen, Guthrie & Watters, of Des Moines, Iowa, attorneys for the Southern Surety Company, came to the office of your affiant, along with one Morris G. Levy, attorney for the Southern Surety Company at Pittsburgh, and one W. J. Zwinggi, the Branch Manager of the Southern Surety Company at Pittsburgh, and requested your affiant, as a representative of the reinsuring companies, to attend with them a conference with the County authorities in the Controller's Office at Pittsburgh, Pennsylvania.

Your affiant attended that conference and in behalf of all the reinsuring companies demanded that a complete audit be made, by Main & Company, of the Carnegie Trust Company from at least January 1st, 1924, to the date of the closing of the Carnegie Trust Company. The said representatives of the Southern Surety Company, Mr. Joseph G. Armstrong, one of the Commissioners of Allegheny County, Mr. S. D. Foster, the

County Treasurer and Mr. W. Heber Dithrich, Counsel for Allegheny County, all of whom were present at the conference, refused to acquiesce in the demand for a complete audit of the Carnegie Trust Company. They proposed that only a partial audit should be made by Main & Company; that the audit should be limited in its scope to the books of the County Treasurer in his office and the records of the Carnegie Trust Company of the account of the Treasurer of Allegheny County.

That on the same day and before any audit had been made, shortly after the conference in the Controller's Office, the said Zwinggi, Levy and Cohen came to the office of your affiant and requested your affiant to admit liability in the sum of $1,000,000.00 in behalf of the reinsuring companies on the said bond. The said Zwinggi, Levy and Cohen used many kind words and much affected kindness and other inducements by which to persuade your affiant to make such an admission. Your affiant advised the said gentlemen that he would not admit any liability on behalf of the reinsuring companies until a complete audit of the Carnegie Trust Company was made by Main & Company; that it would be necessary for your affiant to have a conference with the reinsuring companies in New York. Your affiant further advised the said Zwinggi, Levy and Cohen that the rights of the reinsuring companies were antagonistic and hostile to the Southern Surety Company.

That your affiant left the said gentlemen in his office, along with the representatives of one or two of the other reinsuring companies, and went to the office of Watson & Freeman and arranged for a meeting of the reinsuring companies to take

place in the City of New York. When affiant returned to his office later, Messrs. Cohen and Levy had left, and Mr. Zwinggi only remained. Affiant advised Mr. Zwinggi that he would no longer represent the Southern Surety Company or take any action in its behalf. Affiant advised Mr. Zwinggi of the proposed meeting in New York the following day and requested that he get in touch with the said Cohen and ask the said Cohen to accompany your affiant to New York. Later on the same evening, to wit May 14, 1925, Mr. Zwinggi notified your affiant that Mr. Cohen would not attend the meeting of the reinsurers in New York and advised your affiant that Mr. Cohen had instructed Zwinggi to say to your affiant that affiant should take no action in the premises affecting the rights of the Southern Surety Company except in the presence of Mr. Levy.

Your affiant proceeded to New York along with a member of the firm of Watson & Freeman and on May 15, 1925, attended a conference of the reinsuring companies in the offices of the Ocean Accident & Guarantee Corporation, Ltd., at which meeting there were present representatives of practically all the reinsuring companies, including representatives of the Commercial Casualty Insurance Company of New Jersey and the New Jersey Fidelity & Plate Glass Insurance Company. Whereupon it was unanimously decided by the representatives of all of the reinsurers present that before any admission or denial of liability on the part of the reinsurers be made a complete audit of the Carnegie Trust Company be made, by Main & Company, from at least January 1st, 1924, to the date of the closing of the said Carnegie Trust Company.

After this decision was arrived at Mr. Roth, connected with the Bonding Department of the said Ocean Accident & Guarantee Corporation, Ltd., called Mr. Huckleberry, First Vice-President of the Southern Surety Company, on the telephone and advised Mr. Huckleberry of the demands made by the reinsuring companies. Your affiant also talked to Mr. Huckleberry and told him that a complete audit of the Carnegie Trust Company should be made by Main & Company. This telephone conversation your affiant confirmed by wire from New York as follows:

"May 15, 1925.

Mr. J. H. Huckleberry,
First Vice-President,
Southern Surety Company,
Des Moines, Iowa.

I APPROVE OF SUGGESTIONS MADE BY REINSURING COMPANIES TO HAVE MAIN AND COMPANY MAKE AUDIT CARNEGIE TRUST COMPANY BEFORE LIABILITY IS ADMITTED OR DENIED.

W. Clyde Grubbs."

On the night of May 15, 1925, your affiant returned to Pittsburgh and on May 16, 1925, your affiant, received, in Pittsburgh, the following telegram from Mr. Cohen sent from Des Moines, Iowa:

"May 16, 1925.

W. Clyde Grubbs,
Berger Bldg.
Pittsburgh, Penn.

I HAVE YOUR TELEGRAM ADDRESSED HUCKLEBERRY PLEASE ARRANGE MAINE AND COMPANY PROCEED WITH AUDIT AS ARRANGED WITH COUNTY OFFICIALS KEEP ME ADVISED

M. H. Cohen"

On May 16, 1925, your affiant went to the office, in Pittsburgh, of Mr. Levy, counsel for the Southern Surety Company, and notified him, verbally, of the decision made by the reinsuring companies in New York and informed him that if the Southern Surety Company admitted liability to Allegheny County on the said $1,100,000.00 bond that it would do so at its own peril. The said Levy informed your affiant that he would proceed to Des Moines.

Affiant thereupon on May 18, 1925, sent a telegram from Pittsburgh to the Southern Surety Company at Des Moines, Iowa, as follows:

"May 18, 1925.

Southern Surety Company,
Des Moines, Iowa.

COHEN TELEGRAM RECEIVED. DO YOU AGREE TO AUDIT OF CARNEGIE TRUST COMPANY? ANSWER

W. Clyde Grubbs"

In reply to this telegram your affiant received a telegram from the Southern Surety Company at Des Moines, Iowa, as follows:

"W. Clyde Grubbs, May 18, 1925.
Berger Bldg.
Pittsburgh, Penn.

YOUR TELEGRAM. LEVY HERE TODAY. RETURNING HOME IMMEDIATELY. WILL CONFER WITH YOU IMMEDIATELY HIS ARRIVAL STOP CERTAINLY WE ARE WILLING FOR AUDIT

SOUTHERN SURETY COMPANY"

Shortly thereafter the said Levy returned to Pittsburgh and advised your affiant that the Southern Surety Company was not in favor of demanding a complete audit of the Carnegie

Trust Company as requested by the reinsuring companies.

That on May 15, 1925, Main and Company began to make an audit of the records of the Carnegie Trust Company. This audit was limited in its scope to the account of Allegheny County. The work was hindered by the former officers of the Carnegie Trust Company and full information with regard thereto was denied by them. This limited audit was finished about May 22, 1925, and a copy thereof, along with the following letter, was, on May 25, 1925, delivered to Mr. Levy in Pittsburgh,

"Morris G. Levy, Esq., May 25, 1925.
Attorney for Southern Surety Co.,
518 Fourth Avenue,
Pittsburgh, Penna.

Dear Sir:

We herewith enclose you copy of the report of Main & Company on the account of the County of Allegheny in the Carnegie Trust Company.

In order to give any intelligent opinion on the situation, it will be necessary to have a complete audit of the Trust Company covering the period, at least from January 1st, 1924, to the date of the bank's closing.

It has been arranged for Main and Company to proceed with such audit as soon as the consent of the banking commissioner can be obtained. We expect this consent can be obtained immediately. In the meantime, in our judgment, you should not admit any liability on your bond.

We shall be glad to co-operate with you in every way in arranging with the County to continue the status quo until the audit of the Trust Company is completed.

Very truly yours,

JMF:EHR W. Clyde Grubbs
Enc. Report Watson & Freeman"

Your affiant industriously endeavored to procure the consent of the Banking Department of Pennsylvania to make an audit of Carnegie Trust Company. The Southern Surety Company, to the knowledge of your affiant, never cooperated, in any effort, to procure a complete audit of the Carnegie Trust Company. Your affiant obtained the consent of the Banking Department of Pennsylvania to make the said audit, in behalf of the reinsuring companies, the latter part of October, 1925, which audit was practically completed in the early part of January, 1926.

W. CLYDE GRUBBS.

Sworn to and subscribed before me
a Notary Public in and for the
County of Allegheny in the Commonwealth of Pennsylvania, this
4th day of November, 1926.

(SEAL) HAVEN V. WOLF,
Notary Public.

My commission expires Feb. 19, 1929.

IN THE COURT OF CHANCERY OF NEW JERSEY.

Between	
COMMERCIAL CASUALTY INSURANCE COMPANY and NEW JERSEY FIDELITY AND PLATE GLASS INSURANCE COMPANY, *Complainants,*	*On Bill, &c.*
and	*Affidavit.*
SOUTHERN SURETY COMPANY OF DES MOINES, IOWA, *Defendant.*	

COMMONWEALTH OF PENNSYLVANIA, COUNTY OF ALLEGHENY. } *ss.*

Personally appeared before me, a Notary Public in and for said County and State, M. C. Conick, who being duly sworn according to law, deposes and says:

I am connected with Main and Company, certified public accounts, Pittsburgh, Pennsylvania. I myself, am a certified public accountant. At the request of W. Clyde Grubbs, Esquire, I, about October or November, 1925, commenced to make an audit, as complete as possible, of the affairs of the Carnegie Trust Company, which is located eight or nine miles from the business center of Pittsburgh. At this time the bank had been closed and was being liquidated by its receiver appointed by the Secretary of Banking. I spent about two and one-half months, along with my assistants, in making this examination. I made a report in two sections, dated January 5, 1926,

which I handed to Mr. Grubbs, attorney for the Reinsuring Companies.

I shall briefly describe certain facts which I discovered as a result of my examination of the records of the Carnegie Trust Company, as follows:

The Carnegie Trust Company was closed and the receiver took over its affairs as of April 25, 1925. The Carnegie Trust Company maintained a depositary account for its funds at the Colonial Trust Company, Pittsburgh, from at least 1916 continuously until April 25, 1925. It used a draft book, and when withdrawals were made from its account at the Colonial Trust Company, a draft would be issued by the bank and recorded as a withdrawal by the Carnegie Trust Company. Considerable sums of money were deposited in the Colonial Trust Company for the account of the Carnegie Trust Company, most of which came from the officials of the County of Allegheny, who in their official capacity carried accounts at the Carnegie Trust Company. These officials, for convenince, made their deposit at the Colonial Trust Company, and the Colonial Trust Company in turn advised the Carnegie Trust Company, by memorandum, that such deposit was made.

Mr. J. A. Bell was president of the Colonial Trust Company for some years prior to and up until sometime in October, 1924. He was also president of Carnegie Trust Company until it was closed. Mr. Bell continued a practice, from 1916 up until the middle of 1923, of drawing checks, signed by himself as president of the Carnegie Trust Company against the account of the Carnegie Trust Company at the Colonial Trust Company. These checks drawn upon said

Colonial Trust Company were not numbered, nor were they the regular form otherwise used by the Carnegie Trust Company for withdrawing funds from its account at the Colonial Trust Company. During the aforesaid period of about nine years, such checks amounting to about Sixteen Million dollars were drawn. They were signed Carnegie Trust Company, by John A. Bell, president; bore no counter-signature, nor were they, immediately upon being drawn, entered as withdrawals upon the books of the Carnegie Trust Company. As a matter of fact, other officers at Carnegie where the Trust Company was located, did not know of such withdrawals until they were so informed by Mr. Bell, or when the withdrawal appeared upon the monthly statements of the Colonial Trust Company sent to the Carnegie Trust Company. For example, on August 10, 1922, John A. Bell, as president drew a check on the depositary account of the Carnegie Trust Company at the Colonial Trust Company in the amount of $500,000 not numbered, payable to Colonial Trust Company. The books of the Colonial Trust Company show this check charged to the account of the Carnegie Trust Company on August 10, 1922. It was recorded on the Carnegie Trust Company books September 18, 1922. Of the said $16,000,000 of John A. Bell, president checks, about $5,000,000 were never entered as withdrawals on the books of the Carnegie Trust Company, because offsetting deposits were made of the same amounts to the account of the Carnegie Trust Company at the Colonial Trust Company. While the John A. Bell President checks that were entered upon the books of the Carnegie Trust Company, amounting to about $11,000,000, represented, in some instances, legitimate payments for loans made, and for

other purposes of the bank, there were many instances when such withdrawals were not in accordance with sound rules of banking.

For example:

Included in the said $16,000,000 were certain John A. Bell President checks aggregating $1,164,950.37. This sum represented about eighteen checks issued between June, 1918, and April, 1921, in varying sums. All of the checks included in said $1,164,950.37 were originally issued by Mr. Bell, blank as to date, blank as to amount, number and payee, and signed "Carnegie Trust Company, by John A. Bell, President." These checks were upon different dates given to the then State Treasurer of Pennsylvania, Harmon M. Kephart in exchange for checks of the Treasurer of Allegheny County made payable to said State Treasurer, drawn upon the Carnegie Trust Company. From time to time the State Treasurer's representative filled in these blank checks and deposited them to the credit of the Commonwealth, and they were finally presented to the Colonial Trust Company for payment out of the account of the Carnegie Trust Company. Mr. Kephart's term as State Treasurer terminated on May 3rd or 4th, 1921, and the practice of issuing blank checks, so far as I know, did not continue thereafter. Most of the facts with respect to the aforesaid blank checks in the sum of $1,164,950.37 were published in some of the newspapers in Pennsylvania sometime about May, 1922.

While the books of the Carnegie Trust Company on their face showed a surplus of assets over debts as of December 31, 1923, nevertheless this examination disclosed certain facts existing at that time which affected this showing as follows:

On December 31, 1923, the Carnegie Trust Company's balance sheet showed capital stock and surplus of $691,078.53. On April 25, 1925, when its doors were closed by the Banking Commissioner, it showed $726,838.12. An analysis of the books of the bank as of December 31, 1923, showed that the deposit account of E. M. Kenna, the then Delinquent Tax Collector of Allegheny County, was understated by $125,000, and when this deposit was restored to its proper amount, sometime in January of 1924, a note was substituted as an asset, in the amount of $125,000, of the Harmon Creek Coal Company which the Carnegie Trust Company held until its doors were closed on April 25, 1925, and was then appraised at nothing. The said Harmon Creek Coal Company was a company which Mr. Bell controlled.

A separate and distinct transaction involving the Harmon Creek Coal Company was as follows:

On December 31, 1923, the deposit account of the Harmon Creek Coal Company carried with the Carnegie Trust Company showed no balance. The books of the Harmon Creek Coal Company showed that it had on deposit on December 31, 1923, $131,564.23. This was the proper balance. This erroneous entry is one of the reasons for the previous statement that the books of the Carnegie Trust Company as of December 31, 1923, did not disclose its true condition. Likewise, the books of the Carnegie Trust Company showed that the Carnegie Coal Company had on deposit with it on December 31, 1923, $6,856.48, whereas the books of the Carnegie Coal Company (another of Mr. Bell's enterprises) showed $522,-108.90, on deposit with the Carnegie Trust Company as of the same date. This difference was adjusted by later entries and transactions, all subsequent to December 31, 1923.

Further, as of December 31, 1923, the books of the Carnegie Trust Company showed total assets of about $5,430,000, of which amount $3,-303,000 odd represented loans and discounts. Of these loans and discounts, $2,195,163.92 represented loans to various officials and directors of the Carnegie Trust Company and companies with which said officials and directors were affiliated at that time. The loans to the same interests when the bank closed on April 25, 1925, amounted to approximately $2,435,000. The total loans in the bank when it closed its doors on April 25, 1925, amounted to about $2,908,000, which the appraisers valued at $692,704.

Among the aforesaid loans was a loan to the Avella Coal Company of $163,000. The history of this loan goes back to November 9, 1918. The maker was the Avella Coal Company, and it bore the endorsement of John A. Bell. It carried no collateral, and was appraised at nothing by the appraisers on April 25, 1925, and since the bank closed I was informed by J. N. Jarvis, Receiver for John A. Bell, that the Avella Coal Company never existed.

On December 31, 1923, there was included among the assets of the Carnegie Trust Company a loan to Morton Oil & Gas Company in the amount of $57,000. When the bank closed its doors on April 25, 1925, the appraisers placed a value of nothing on said loan. The loan, which represents five individual notes, with no security or collateral, goes back of December 31, 1919.

On December 31, 1923, the bank carried among its loan $50,000 represented by three notes of the

Tahlequah Gas Company. On April 25, 1925, when the bank closed its doors, the appraisers placed a value of nothing upon these notes. One note, amounting to $12,000 of said total goes back of December 31, 1912; a $15,000 note to February 9, 1916, and a $23,000 note to November 8, 1916.

Summing up the above, as of December 31, 1923, the Bank's books, in the light of subsequent developments, understated its liabilities by about $750,000, and carried on its books certain worthless assets, as indicated by the analysis above given, in the sum of $270,000, approximately, while at that time its capital and surplus was $691,078.53.

My opinion is that these facts and much other information obtained by me from an audit of the Carnegie Trust Company demonstrate that the Carnegie Trust Company was insolvent in 1923 and so remained until the closing of said Carnegie Trust Company in 1925.

M. C. CONICK.

Sworn to and subscribed before me,
a Notary Public in and for the
County of Allegheny in the Commonwealth of Pennsylvania, this
6th day of November, 1926.

(SEAL) FRANK F. MANNS,
Notary Public.
My commission expires March 2, 1929.

Exhibit A.

SCHEDULE B.

(Standard Form of Reinsurance Agreement Adopted by the Surety Association of America, May 12, 1915.)

SOUTHERN
SECURITY (Cut) COMPANY
Home Office—Des Moines, Iowa,

Re-Insurance Agreement
Amount $50,000.00

Reinsurer's No..... Reinsured's No.....

IN CONSIDERATION of the premium stated in Section 1 hereof COMMERCIAL CASUALTY INSURANCE COMPANY hereinafter called the Reinsurer, does hereby reinsure the Southern Surety Company, Des Moines, Ia. hereinafter called the Reinsured, under bond numbered...., hereinafter called the bond, issued by the Reinsured in the penalty of ONE MILLION ONE HUNDRED THOUSAND AND NO/100 ($1,100,000.00) Dollars, in favor of COUNTY OF ALLEGHENY, PENNSYLVANIA (obligee), and in behalf of CARNEGIE TRUST COMPANY, of Carnegie, Pennsylvania (principal), against loss thereunder and against costs and expenses, as hereinafter defined. A copy of the bond is or is to be attached hereto, and is hereby made a part of this agreement.

THE FOREGOING AGREEMENT IS SUBJECT TO THE FOLLOWING CONDITIONS:

1. The premium payable hereunder by the Reinsured to the Reinsurer shall be TWO HUNDRED FIFTY AND NO/100 ($250.00) Dollars,

less thirty per cent, for one year term of the bond.....

2. The Reinsurer's total liability hereunder, hereinafter called the reinsurance, is limited to FIFTY THOUSAND AND NO/100 Dollars, and the Reinsurer's proportionate share of costs as defined in condition numbered 5 hereof and of expenses as described in condition numbered 6 hereof; but the Reinsurer shall in no event be liable hereunder for a greater proportion of any loss, costs, and expenses than the proportion that the amount of reinsurance bears to the amount of the bond.

3. The amount of liability retained by the Reinsured at its own risk on Principal while this agreement remains in force shall in no event be less than ONE HUNDRED FIFTY THOUSAND AND NO/100 dollars ($150,000.00).

4. The Reinsured, upon the receipt at its home office of a notice of any claim or loss under the bond, shall give the Reinsurer immediate written notice thereof at the Reinsurer's home office. The term home office wherever used herein shall be deemed to mean the home office in the United States.

5. The Reinsured shall take charge of all matters arising under the bond. It shall decide whether or not it is liable thereunder, and shall determine the amount of its liability in case it decides that it is liable. It shall settle or compromise any claims, and defend, settle, or compromise any suits, and take such other action, not involving the extension of credit or the advancing of money, in connection with any claim matter arising under the bond as it may deem advisable. Any such decision, determination, settlement, defense, compromise, or other action

of the Reinsured in connection with any claim matter arising under the bond shall be final and conclusive and unconditionally binding upon the Reinsurer; provided that no payment or other method of settlement by the Reinsurer shall preclude the Reinsurer from showing that the alleged liability or any part thereof for loss under the bond exists or existed under any other bond or bonds given at any time by the Reinsured.

The Reinsurer's proportionate share of a loss under the bond, and if costs as hereinafter defined, shall be paid to the Reinsured upon proof of such loss and costs, and proof of the payment thereof by the Reinsured, and upon delivery to the Reinsurer of copies of all essential documents concerned with such loss and costs and the payment thereof. The Reinsured may, however, give the Reinsurer at least ten days' written notice of its intention to pay the loss on a certain date, and may require the Reinsurer to pay its proportionate share of such loss before such date; but in that case the Reinsurer, if it desires to do so, may pay its share of the loss by means of a check drawn in favor of the obligee under the bond.

The Reinsurer may inspect the original documents relating to claims and losses under the bond in the possession of the Reinsured.

The term costs shall mean all expenditures made in investigating and settling any claim under the bond; all expenditures made in investigating, settling, or defending, or attempting to defend, any suit, or proceeding based upon the bond; all expenditures made in procuring or attempting to procure restitution or recovery on account of any loss, costs, or expenses; all

expenditures made in prosecuting or attempting to prosecute any person causing a loss under the bond; but the term costs shall not be held to include the compensation of any person employed by the Reinsured on salary.

6. If the Reinsured shall receive information about the subject of the bond prompting a special investigation, the Reinsurer shall pay the Reinsured a proportionate share of any expenses incurred by the Reinsured in making such investigation and taking any action that it may deem advisable to prevent or diminish a loss under the bond.

In the case of fiduciary and public-official bonds the Reinsurer shall pay the Reinsured a proportionate share of any expenses incurred by the Reinsured in auditing the accounts of the principal under the bond.

7. In case any change or alteration in the bond, or in any instrument, contract, or agreement concerned with the bond, shall be proposed, the Reinsured shall not make such change or permit such alteration without securing, from the Reinsurer's home office, the consent thereto of the Reinsurer in writing. If such consent be given, and the change or alteration be made, the Reinsured shall give notice thereof in writing to the Reinsurer, at the Reinsurer's home office.

This action, however, shall be deemed not to apply to any immaterial change or alteration made or permitted by an agent of the Reinsured's without knowledge of such change or alteration on the part of any officer or executive located at the home office of the Reinsured.

8. If the bond provides in terms for cancellation at any time by the Reinsured, then and not

otherwise this agreement may be canceled by the Reinsurer at any time by a written notice stating when the cancellation takes effect, served on the Reinsured, or sent by registered mail to the Reinsured at its home office, at least forty days prior to the date when the cancellation takes effect. In case of such cancellation the Reinsurer shall be entitled only to the earned premium pro rata.

9. If the bond does not provide in terms for cancellation at any time by the Reinsured, but if in the opinion of the Reinsurer the Reinsured through legal proceedings or otherwise can procure a valid release from liability under the bond, the Reinsurer may require the Reinsured to take the necessary steps to procure such release, by notifying the Reinsured of its desire to terminate its liability and by giving the Reinsured detailed and complete information as to the course that it should take to procure the said release; and if the Reinsured shall fail to institute the necessary proceedings within thirty days from the date on which it has received from the Reinsurer the said notification and the said complete information, and diligently prosecute the same, the liability of the Reinsurer hereunder shall terminate at the expiration of the said thirty days as to any and all subsequent breaches of the bond. In the event of such termination of liability the Reinsurer shall be entitled only to the earned premium pro rata. If a release from liability is procured, or if an attempt is made to procure a release, through legal or other proceedings, undertaken at the instance of either the Reinsurer or the Reinsured, the Reinsurer shall share the cost of such proceedings, aside from the cost included in the

compensation of any person employed on salary by the Reinsured, in the proportion that the amount of the reinsurance bears to the amount of the bond.

10. No action shall lie against the Reinsurer hereunder unless brought within twelve months after the date of the final settlement of all obligations under the bond.

11. The Reinsurer shall be entitled to share with the Reinsured, in the proportion that the amount of reinsurance bears to the amount of the bond, any collateral security or indemnity held by the Reinsured, or any right of action possessed by the Reinsured, in connection with the bond. The Reinsurer and the Reinsured shall share any salvage or recovery, except a recovery based on additional agreements of reinsurance, made by either on account of any loss in the proportion that the amount of the reinsurance bears to the amount of the bond.

12. The liability hereunder of the Reinsurer begins February 25th, 1924, and ends with the termination of the liability of the Reinsured. If the liability of the Reinsured, by the terms of the bond, be continuable by the issuance of a continuation certificate, and if the liability be so continued, and if the Reinsurer shall not thirty days previously have notified the Reinsured, in writing at the latter's home office, of its desire not to continue the reinsurance, this agreement shall apply to such continuation of liability for one year.

13. Every premium payable by the Reinsured to the Reinsurer shall be an absolute obligation, whether or not the Reinsured shall collect from its own debtor the premium on the bond; and such obligation shall be discharged as follows:

A. The initial premium shall be paid—by the tenth day of the month following that in which this agreement is executed, if ninety days have elapsed between the date of the bond and the date of this agreement; if ninety days have not so elapsed, by the tenth day of the month following that in which the Reinsured collects the premium from its own debtor, and in any event by the tenth day of the fourth month after the date of the bond.

B. Subsequent premiums shall be paid by the tenth day of the month following that in which the Reinsured collects such subsequent premiums from its own debtor, and in any event by the tenth day of the fourth month after the date on which such subsequent premiums are due to the Reinsured from its own debtor. In case, however, subsequent premiums upon uncancelable bonds cannot be collected by the Reinsured because of the insolvency of the Reinsured's principal, prior to the time stipulated for payment herein, no such subsequent premiums shall be payable by the Reinsured to the Reinsurer.

The validity of this agreement shall be in no wise impaired or affected by the failure of the Reinsured, for any cause, to pay the Reinsurer either the initial premium or any subsequent premium due from the Reinsured to the Reinsurer.

IN WITNESS WHEREOF, the COMMERCIAL CASUALTY INSURANCE COMPANY has caused this contract to be signed by its Resident Vice President and its corporate seal to be hereunto annexed, attested by its Resident

Assistant Secretary this 25th day of February 1924.

COMMERCIAL CASUALTY
INSURANCE COMPANY
By Raymond T. Crowe
Resident Vice President

Attest:

Harlan N. Short, Jr.,
(SEAL) Resident Vice Secretary

Exhibit B.

(Standard Form of Reinsurance Agreement Adopted by the Surety Association of America, May 12, 1915.)

SOUTHERN
SURETY (Cut) COMPANY

Home Office in Des Moines, Iowa

Reinsurance Agreement
Amount $50,000.00

Reinsurer's No. 40008 Reinsured's No.....

IN CONSIDERATION of the premium stated in Section 1 hereof NEW JERSEY FIDELITY & PLATE GLASS INSURANCE COMPANY, hereinafter called the Reinsurer, does hereby reinsure the Southern Surety Company, St. Louis, Mo., hereinafter called the Reinsured, under bond numbered....., hereinafter called the bond, issued by the Reinsured in the penalty of ONE MILLION ONE HUNDRED THOUSAND AND NO/100 ($1,100,000.00) Dollars, in favor of COUNTY OF ALLEGHENY, PENNSYL-

VANIA (obligee), and in behalf of CARNEGIE TRUST COMPANY, of Carnegie, Pennsylvania (principal), against loss thereunder and against costs and expenses, as hereinafter defined. A copy of the bond is or is to be attached hereto, and is hereby made a part of this agreement.

THE FOREGOING AGREEMENT IS SUBJECT TO THE FOLLOWING CONDITIONS:

1. The premium payable hereunder by the Reinsured to the Reinsurer shall be TWO HUNDRED FIFTY and NO/100 ($250.00) Dollars, less thirty per cent., for one year term of the bond.

2. The Reinsurer's total liability hereunder, hereinafter called the reinsurance, is limited to FIFTY THOUSAND AND NO/100 ($50,000.00) Dollars, and the Reinsurer's proportionate share of costs as defined in condition numbered 5 hereof and of expenses as described in condition numbered 6 hereof; but the Reinsurer shall in no event be liable hereunder for a greater proportion of any loss, costs, and expenses than the proportion that the amount of reinsurance bears to the amount of the bond.

3. The amount of liability retained by the Reinsured at its own risk on principal while this agreement remains in force shall in no event be less than ONE HUNDRED FIFTY THOUSAND AND NO/100 Dollars ($150,000.00).

4. The Reinsured, upon the receipt at its home office of a notice of any claim or loss under the bond, shall give the Reinsurer immediate written notice thereof at the Reinsurer's home office. The term home office wherever used herein shall be deemed to mean the home office in the United States.

5. The Reinsured shall take charge of all matters arising under the bond. It shall decide whether or not it is liable thereunder, and shall determine the amount of its liability in case it decides that it is liable. It shall settle or compromise any claims, and defend, settle, or compromise any suits, and take such other action, not involving the extension of credit or the advancing of money, in connection with any claim matter arising under the bond as it may deem advisable. Any such decision, determination, settlement, defense, compromise, or other action of the Reinsured in connection with any claim matter arising under the bond shall be final and conclusive and unconditionally binding upon the Reinsurer; provided that no payment or other method of settlement by the Reinsured shall preclude the Reinsurer from showing that the alleged liability or any part thereof for loss under the bond exists or existed under any other bond or bonds given at any time by the Reinsured.

The Reinsurer's proportionate share of a loss under the bond, and of costs as hereinafter defined, shall be paid to the Reinsured upon proof of such loss and costs, and proof of the payment thereof by the Reinsured, and upon delivery to the Reinsurer of copies of all essential documents concerned with such loss and costs and the payment thereof. The Reinsured may, however, give the Reinsurer at least ten days' written notice of its intention to pay the loss on a certain date, and may require the Reinsurer to pay its proportionate share of such loss before such date; but in that case the Reinsurer, if it desires to do so, may pay its share of the loss by means of a check drawn in favor of the obligee under the bond.

The Reinsurer may inspect the original documents relating to claims and losses under the bond in the possession of the Reinsured.

The term costs shall mean all expenditures made in investigating and settling any claim under the bond; all expenditures made in investigating, settling, or defending, or attempting to defend, any suit or proceeding based upon the bond; all expenditures made in procuring or attempting to procure restitution or recovery on account of any loss, costs, or expenses; all expenditures made in prosecuting or attempting to prosecute any person causing a loss under the bond; but the term costs shall not be held to include the compensation of any person employed by the Reinsured on salary.

6. If the Reinsured shall receive information about the subject of the bond prompting a special investigation, the Reinsurer shall pay the Reinsured a proportionate share of any expenses incurred by the Reinsured in making such investigation and taking any action that it may deem advisable to prevent or diminish a loss under the bond.

In the case of fiduciary and public-official bonds the Reinsurer shall pay the Reinsured a proportionate share of any expenses incurred by the Reinsured in auditing the accounts of the principal under the bond.

7. In case any change or alteration in the bond, or in any instrument, contract, or agreement, concerned with the bond, shall be proposed, the Reinsured shall not make such change or permit such alteration without securing, from the Reinsurer's home office, the consent thereto of the Reinsurer in writing. If such consent be given, and the change or alteration be made, the

Reinsured shall give notice thereof in writing to the Reinsurer, at the Reinsurer's home office.

This action, however, shall be deemed not to apply to any immaterial change or alteration made or permitted by an agent of the Reinsured's without knowledge of such change or alteration on the part of any officer or executive located at the home office of the Reinsured.

8. If the bond provides in terms for cancellation at any time by the Reinsured, then and not otherwise this agreement may be canceled by the Reinsurer at any time by a written notice stating when the cancellation takes effect, served on the Reinsured, or sent by registered mail to the Reinsured at its home office, at least forty days prior to the date when the cancellation takes effect. In case of such cancellation the Reinsurer shall be entitled only to the earned premium pro rata.

9. If the bond does not provide in terms for cancellation at any time by the Reinsured, but if in the opinion of the Reinsurer the Reinsured through legal proceedings or otherwise can procure a valid release from liability under the bond, the Reinsurer may require the Reinsured to take the necessary steps to procure such release, by notifying the Reinsured of its desire to terminate its liability and by giving the Reinsured detailed and complete information as to the course that it should take to procure the said release; and if the Reinsured shall fail to institute the necessary proceedings within thirty days from the date on which it has received from the Reinsurer the said notification and the said complete information, and diligently prosecute the same, the liability of the Reinsurer hereunder shall terminate at the expiration

of the said thirty days as to any and all subsequent breaches of the bond. In the event of such termination of liability the Reinsurer shall be entitled only to the earned premium pro rata. If a release from liability is procured, or if an attempt is made to procure a release, through legal or other proceedings, undertaken at the instance of either the Reinsurer or the Reinsured, the Reinsurer shall share the cost of such proceedings, aside from the cost included in the compensation of any person employed on salary by the Reinsured, in the proportion that the amount of the reinsurance bears to the amount of the bond.

10. No action shall lie against the Reinsurer hereunder unless brought within twelve months after the date of the final settlement of all obligations under the bond.

11. The Reinsurer shall be entitled to share with the Reinsured, in the proportion that the amount of reinsurance bears to the amount of the bond, any collateral security or indemnity held by the Reinsured, or any right of action possessed by the Reinsured, in connection with the bond. The Reinsurer and the Reinsured shall share any salvage or recovery, except a recovery based on additional agreements of reinsurance made by either on account of any loss in the proportion that the amount of the reinsurance bears to the amount of the bond.

12. The liability hereunder of the Reinsurer begins February 25th, 1924, and ends with the termination of the liability of the Reinsured. If the liability of the Reinsured, by the terms of the bond, be continuable by the issuance of a continuation certificate, and if the liability be so continued, and if the Reinsurer shall not thirty

days previously have notified the Reinsured, in writing at the latter's home office, of its desire not to continue the reinsurance, this agreement shall apply to such continuation of liability for one year.

13. Every premium payable by the Reinsured to the Reinsurer shall be an absolute obligation, whether or not the Reinsured shall collect from its own debtor the premium on the bond; and such obligation shall be discharged as follows:

A. The initial premium shall be paid—by the tenth day of the month following that in which this agreement is executed, if ninety days have elapsed between the date of the bond and the date of this agreement; if ninety days have not so elapsed, by the tenth day of the month following that in which the Reinsured collects the premium from its own debtor, and in any event by the tenth day of the fourth month after the date of the bond.

B. Subsequent premiums shall be paid by the tenth day of the month following that in which the Reinsured collects such subsequent premiums from its own debtor, and in any event by the tenth day of the fourth month after the date on which such subsequent premiums are due to the Reinsured from its own debtor. In case, however, subsequent premiums upon uncancelable bonds cannot be collected by the Reinsured because of the insolvency of the Reinsured's principal, prior to the time stipulated for payment herein, no such subsequent premiums shall be payable by the Reinsured to the Reinsurer.

The validity of this agreement shall be in no wise impaired or affected by the failure of the Reinsured, for any cause, to pay the Reinsurer either the initial premium or any subsequent

premium due from the Reinsured to the Reinsurer.

IN WITNESS WHEREOF, the NEW JERSEY FIDELITY & PLATE GLASS INSURANCE COMPANY has caused this contract to be signed by its Vice-President and its corporate seal to be hereunto annexed, attested by its Assistant Secretary this day of February 1924.

NEW JERSEY FIDELITY & PLATE GLASS CO.

By V. E. H. Hoagland
Vice-President

Attest:
T. W. Hayer
Assistant Secretary

Exhibit C.

BOND

KNOW ALL MEN BY THESE PRESENTS That CARNEGIE TRUST COMPANY, of Carnegie, Allegheny Co., Penna. as Principal, and SOUTHERN SURETY COMPANY, a Corporation of the State of Iowa, and authorized to do business in Penna. and approved in Courts of Ally. Co. Pa., as Surety, are held and firmly bound unto the County of Allegheny, in the Commonwealth of Pennsylvania, in the sum of ONE MILLION ONE HUNDRED THOUSAND ($1,100,000.00) Dollars, lawful money of the United States of America, to be paid to the said County of Allegheny, its successors and assigns, for which payment, well and truly to be made,

said Principal binds itself, its successors and assigns, and said Surety does bind itself, its successors, and assigns jointly and severally, firmly by these presents.

WHEREAS, Said CARNEGIE TRUST COMPANY has been selected and designated as a depository of the County funds of said County of Allegheny, for the term of the present County Treasurer of said County, beginning on the first Monday of January, 1924 and has entered into an agreement with said County for the faithful performance of its duties with respect thereto, and providing for the payment of interest on daily balances of said funds, such interest to be computed quarterly on the first days of January, April, July, and October of each and every year following the date hereof during said period, at the rate of 4.05 per centum per annum, computed on the basis of 360 days to the year, but providing that interest shall not be allowed upon a deposit for the particular day on which such a deposit is made, but that all other days shall be reckoned as interest-bearing days.

NOW THE CONDITION OF THIS OBLIGATION IS SUCH, That if the said Principal shall well, honestly and faithfully keep, pay out and account for all the County funds and property of said County that may come into its hands, and make payment of all interest on moneys deposited in such depositories in accordance with said contract, then this obligation to be void, otherwise to be and remain in full force and virtue.

AND FURTHER, That said Principal and the said Surety do hereby authorize and empower any attorney of any Court of record in Pennsylvania, or elsewhere, to appear for and confess judgment against them, or either of them, for the sum of ONE MILLION ONE HUNDRED THOUSAND ($1,100,000.00) Dollars, with or without declaration, with costs of suits, release of errors, without stay of execution, and with an additional five per centum for attorney's fees. And we do further hereby waive and release all relief and benefit from all appraisement, inquisition, stay or exemption laws of this State, or of any other State, now in force or hereafter to be passed. Said attorneys' fees is hereby authorized and directed to be added in and to constitute a part of said debt and judgment; and we further agree that execution may issue upon such judgment so confessed for the full amount of the money and interest and the full value of the securities, chattels and other property that may be due and owing from, or deliverable by the said Principal to the said County of Allegheny, or its County Treasurer, with such attorneys' fee, upon filing suggestion in writing in the proper court wherein such judgment shall be entered.

WITNESS the hands and corporate seals of the said Carnegie Trust Company duly attested, and the corporate seal of the Surety this 25th day of February 1924.

CARNEGIE TRUST COMPANY

By

President

ATTEST:

Secretary

SOUTHERN SURETY COMPANY

Surety

By W. J. Zwinggi—Attorney in fact.

ATTEST:

Exhibit D.

The State of New Jersey to Commercial Casualty Insurance Co., a (SEAL) New Jersey corporation:

YOU ARE SUMMONED to answer the annexed complaint of Southern Surety Co. of Des Moines, Iowa, in an action at law in the Supreme Court. AND TAKE NOTICE that unless you 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.

WITNESS, William S. Gummere, Chief Justice of the Supreme Court at Trenton, this 15th day of September, Nineteen hundred and Twenty-five.

EDWARD J. KELLEHER,
Clerk.

LUM, TAMBLYN & COLYER,
Attorneys.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

SOUTHERN SURETY CO. OF DES MOINES, IOWA, *Plaintiff,* *vs.* COMMERCIAL CASUALTY INSURANCE CO., a New Jersey corporation, *Defendant.*	*Action at Law.* *Complaint.*

The plaintiff, Southern Surety Co., a corporation organized under the laws of the State of Iowa, with its principal place of business in the City of Des Moines, Polk County, says that:

1. The plaintiff, Southern Surety Co., by its character is authorized to engage in and is engaged in the business of becoming surety upon the depository and other forms of bond and of writing and issuing other forms of insurance and is now and was at all times hereinafter mentioned duly authorized to transact such business.

2. The defendant, Commercial Casualty Insurance Co., is a corporation organized under the laws of the State of New Jersey, with its principal office in the City of Newark, in said State and is and was at all times hereinafter mentioned authorized to become surety upon the depository and other forms of bond and to reinsure the risks of other surety companies, who became sureties on such bond.

3. That on or about the 25th day of February, 1924, Carnegie Trust Co., a corporation organized

under the laws of the State of Pennsylvania, with its principal office in Carnegie, Pennsylvania, as principal and this plaintiff as surety, executed and delivered to the County of Allegheny in the State of Pennsylvania, a certain depository bond in the penal sum of One Million, One Hundred Thousand Dollars ($1,100,000.00); that a copy of said bond is hereto attached and marked "Schedule A," and made a part hereof.

4. That said bond amongst other things, provided as follows:

> "Whereas, said Carnegie Trust Company has been selected and designated as a depository of county funds of said County of Allegheny, for the term of the present County Treasurer of said County, beginning on the first Monday of January, 1924, and has entered into an agreement with said County for the faithful performance of its duties with respect thereto, and providing for the payment of interest on daily balances of said funds, such interest to be computed quarterly on the first days of January, April, July and October of each and every year following the date hereof during said period, at the rate of 4.05 per centum per annum, computed on the basis of 360 days to the year, but providing that interest shall not be allowed upon a deposit for the particular day on which such a deposit is made, but that all other days shall be reckoned as interest-bearing days.
>
> Now the condition of this obligation is such that if the said principal shall well, honestly and faithfully keep, pay out and account for all the County funds and property of said County that may come into its hands, and make payment of all interest on moneys deposited in such depositories in accordance with said contract, then this obligation to be void, otherwise to be and remain in full force and virtue."

5. That on or about the 25th day of February, 1924, the defendant, Commercial Casualty Insurance Co., for a valuable consideration then paid, executed and delivered to the plaintiff a certain reinsurance contract in the penal sum of Fifty thousand dollars ($50,000.00), by which it undertook to reinsure the plaintiff against such proportion of any sum which the plaintiff might be required to pay by reason of the execution as surety for the Carnegie Trust Co., of the bond referred to in paragraph 3 of this complaint, as the sum of Fifty thousand dollars ($50,000.00) bore to the penalty upon said principal bond, to wit: the sum of One million, one hundred thousand dollars ($1,100,000.00), said liability of the defendant being limited to the sum of Fifty thousand dollars ($50,000.00) and interest and its proportion of certain costs and expenditures referred to in said reinsurance contract; a copy of said reinsurance contract is hereto attached marked "exhibit B" and made a part hereof;

5. The said contract amongst other things, provided as follows:

> "The reinsured shall take charge of all matters arising under the bond. It shall decide whether or not it is liable thereunder, and shall determine the amount of its liability in case it decides that it is liable. It shall settle or compromise any claims, and defend, settle or compromise any suits, and take such other action, not involving the extension of credit or the advancing of money, in connection with any claim matter arising under the bond as it may deem advisable. Any such decision, determination, settlement, defense, compromise, or other action of the reinsured in connection with any claim, matter arising under the bond shall be final

and conclusive and unconditionally binding upon the reinsurer; provided that no payment or other method of settlement by the reinsured shall preclude the reinsurer from showing that the alleged liability or any part thereof for loss under the bond exists or existed under any other bond or bonds given at any time by the reinsured.

"The reinsurer's proportionate share of a loss under the bond, and of costs as hereinafter defined, shall be paid to the reinsured upon proof of such loss and costs, and proof of the payment thereof by the reinsured, and upon the delivery to the reinsurer of copies of all essential documents concerned with such loss and costs and the payment thereof. The reinsured may, however, give the reinsurer at least ten days' written notice of its intention to pay the loss on a certain date, and may require the reinsurer to pay its proportionate share of such loss before such date; but in that case the reinsurer, if it desires to do so, may pay its share of the loss by means of a check drawn in favor of the obligee under the bond."

That the term "reinsured" in said contract meant and was intended to mean the plaintiff and the term "reinsurer" meant and was intended to mean the defendant.

6. That on or about the 25th day of April, 1925, the said Carnegie Trust Co., of Carnegie, Pennsylvania, became insolvent and suspended business and its affairs were taken charge of by the Commissioner of Banking of the State of Pennsylvania, in pursuance to the statute of said state.

7. That on the said 25th day of April, 1925, there was due to the County of Allegheny in the State of Pennsylvania from said Carnegie Trust Co., on account of the deposits made by the said County in the said Trust Co., with interest

thereon, the sum of One million, three hundred and twenty-nine thousand one hundred and seven dollars and thirty-five cents ($1,329,107.35).

8. That on the first day of May, 1925, and again on the 14th day of May, 1925, the County of Allegheny in said State of Pennsylvania acting through its proper officer, the County Comptroller of said county, made demands on the plaintiff for the payment of the amount due the said County of Allegheny from the said Carnegie Trust Co., on account of deposits by said County in said Trust Co., to the extent of the penalty in plaintiff's bond.

9. That on the 25th day of April, 1925, the County of Allegheny in the said State of Pennsylvania, also held certain depository bonds of like character of the depository bond executed by the plaintiff, guaranteeing the repayment of any deposits by said County in the said Trust Co., one executed by the National Surety Co. of New York, as surety in the sum of one hundred and fifty thousand dollars ($150,000.00) and one executed by the Commercial Casualty Co., of Newark, N. J. in the sum of eighty thousand dollars ($80,000.00).

10. That the plaintiff's proportion of the amount due from the Carnegie Trust Co., to the County of Allegheny on the 25th day of April, 1925, on account of said deposits and interest on the bond set forth in paragraph 3 of the complaint, was the sum of one million, ninety-nine thousand two hundred and forty-four dollars and sixty-five cents ($1,099,244.65).

11. That on the first day of June, 1925, plaintiff determined that it was liable as surety upon the bond executed in favor of the County

of Allegheny in the State of Pennsylvania for its proportion of the amounts on deposit by the County of Allegheny in the Carnegie Trust Co., on the 25th day of April, 1925, with interest thereon at the rate of 4.05 per cent. per annum, from the first day of March, 1925.

12. That on said first day of June, 1925, it gave notice to the defendant of its determination of liability and also gave notice to the defendant of the plaintiff's intention to pay said loss on or before the 15th day of June, 1925, and requested the defendant to pay its share of said loss in accordance with the terms of said bond, which the defendant neglected and refused to pay and still neglects and refuses to pay.

13. The plaintiff has paid or caused to be paid to the County of Allegheny in the State of Pennsylvania, in full settlement of its liability as surety upon the bond referred to in paragraph 3 of the complaint, the sum of one million, ninety-nine thousand two hundred and forty-four dollars and sixty-five cents ($1,099,244.63) with six per cent. interest thereon from the 25th day of April, 1925.

14. The plaintiff has complied with all the conditions and terms of the reinsurance contract, copy of which is hereto attached and made part hereof and marked "Schedule B."

15. By reason of the facts hereinbefore stated, the defendant is indebted to the plaintiff in the sum of forty-nine thousand nine hundred and fifteen dollars and sixty-six cents ($49,915.66) with six per cent. interest thereon from the 25th day of April, 1925, all of which is past due and unpaid.

Plaintiff claims as damages the sum of forty-nine thousand nine hundred and fifteen dollars and sixty-six cents ($49,915.66) with six per cent. interest thereon from the 25th day of April, 1925, and costs of suit.

(Sgd.) LUM, TAMBLYN & COLYER,
Attorneys for Plaintiff.

Exhibit E.

(SEAL) THE STATE OF NEW JERSEY TO NEW JERSEY FIDELITY & PLATE GLASS INSURANCE COMPANY, a New Jersey Corporation: YOU ARE SUMMONED to answer the annexed Complaint of SOUTHERN SURETY CO., of Des Moines, Iowa, in an action at law in the Supreme Court. AND TAKE NOTICE that unless you 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.

WITNESS, William S. Gummere, Chief Justice of the Supreme Court at Trenton, this 15th day of September, Nineteen Hundred and Twenty-five.

EDWARD J. KELLEHER,
Clerk.

LUM, TAMBLYN & COLYER,
Attorneys.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

SOUTHERN SURETY CO., OF DES MOINES, IOWA, *Plaintiff,* *vs.* NEW JERSEY FIDELITY & PLATE GLASS INSURANCE COMPANY, a New Jersey corporation, *Defendant.*	*Action at Law.* *Complaint.*

The plaintiff, Southern Surety Co., a corporation organized under the laws of the State of Iowa, with its principal place of business in the City of Des Moines, Polk County, says that:

1. The plaintiff, Southern Surety Co., by its charter is authorized to engage in and is engaged in the business of becoming surety upon the depository and other forms of bond and of writing and issuing other forms of insurance and is now and was at all times hereinafter mentioned duly authorized to transact such business.

2. The defendant, New Jersey Fidelity & Plate Glass Insurance Company, is a corporation organized under the laws of the State of New Jersey, with its principal office in the City of Newark, in said State and is and was at all times hereinafter mentioned authorized to become surety upon the depository and other forms of bond and to reinsure the risks of other surety companies, who became sureties on such bond.

3. That on or about the 25th day of February, 1924, Carnegie Trust Co., a corporation organized under the laws of the State of Pennsylvania, with its principal office in Carnegie, Pennsylvania, as principal and this plaintiff as surety, executed and delivered to the County of Allegheny in the State of Pennsylvania, a certain depository bond in the penal sum of one million, one hundred thousand dollars ($1,100,000.00); that a copy of said bond is hereto attached and marked "Schedule A," and made a part hereof.

4. That said bond amongst other things, provided as follows:

> "Whereas, said Carnegie Trust Company has been selected and designated as a depository of county funds of said County of Allegheny, for the term of the present County Treasurer of said County, beginning on the first Monday of January, 1924, and has entered into an agreement with said County for the faithful performance of its duties with respect thereto, and providing for the payment of interest on daily balances of said funds, such interest to be computed quarterly on the first day of January, April, July and October of each and every year following the date hereof during said period, at the rate of 4.05 per centum per annum, computed on the basis of 360 days to the year, but providing that interest shall not be allowed upon a deposit for the particular day on which such a deposit is made, but that all other days shall be reckoned as interest-bearing days.
>
> "Now the condition of this obligation is such, that if the said Principal shall well, honestly and faithfully keep, pay out and account for all the County funds and property of said County that may come into its hands, and make payment of all interest on

moneys deposited in such depositories in accordance with said contract, then this obligation to be void, otherwise to be and remain in full force and virtue.''

5. That on or about the 27th day of February, 1924, the defendant, New Jersey Fidelity & Plate Glass Insurance Company, for a valuable consideration then paid, executed and delivered to the plaintiff a certain reinsurance contract in the penal sum of fifty thousand dollars ($50,000), by which it undertook to reinsure the plaintiff against such proportion of any sum which the plaintiff might be required to pay by reason of the execution as surety for the Carnegie Trust Co., of the bond referred to in paragraph 3 of this complaint, as the sum of fifty thousand dollars ($50,000) bore to the penalty upon said principal bond, to wit: the sum of one million, one hundred thousand dollars ($1,100,000), said liability of the defendant being limited to the sum of fifty thousand dollars ($50,000) and interest and its proportion of certain costs and expenditures referred to in said reinsurance contract; a copy of said reinsurance contract is hereto attached, marked ''Exhibit B'' and made a part hereof.

5. The said contract amongst other things provided as follows:

''The reinsured shall take charge of all matters arising under the bond. It shall decide whether or not it is liable thereunder, and shall determine the amount of its liability in case it decides that it is liable. It shall settle or compromise any claims and defend, settle or compromise any suits, and take such other action, not involving the extension of credit or the advancing of money, in connection with any claim matter arising under the bond as it

may deem advisable. Any such decision, determination, settlement, defense, compromise, or other action of the reinsured in connection with any claim matter arising under the bond shall be final and conclusive and unconditionally binding upon the reinsurer; provided that no payment or other method of settlement by the reinsured shall preclude the reinsurer from showing that the alleged liability or any part thereof for loss under the bond exists or existed under any other bond or bonds given at any time by the reinsured.

''The reinsurer's proportionate share of a loss under the bond, and of costs as hereinafter defined, shall be paid to the reinsured upon proof of such loss and costs, and proof of the payment thereof by the reinsured, and upon the delivery to the reinsurer of copies of all essential documents concerned with such loss and costs and the payment thereof. The reinsured may, however, give the reinsurer at least ten days' written notice of its intention to pay the loss on a certain date, and may require the reinsurer to pay its proportionate share of such loss before such date; but in that case the reinsurer, if it desires to do so, may pay its share of the loss by means of a check drawn in favor of the obligee under the bond.''

That the term ''reinsured'' in said contract meant and was intended to mean the plaintiff and the term ''reinsurer'' meant and was intended to mean the defendant.

6. That on or about the 25th day of April, 1925, the said Carnegie Trust Co., of Carnegie, Pennsylvania, became insolvent and suspended business and its affairs were taken charge of by the Commissioner of Banking of the State of Pennsylvania, in pursuance to the statute of said State.

7. That on the said 25th day of April, 1925, there was due to the County of Allegheny in the State of Pennsylvania from said Carnegie Trust Co., on account of the deposits made by the said County in the said Trust Co., with interest thereon, the sum of one million, three hundred and twenty-nine thousand one hundred and seven dollars and thirty-five cents ($1,329,107.35).

8. That on the first day of May, 1925, and again on the 14th day of May, 1925, the County of Allegheny in said State of Pennsylvania, acting through its proper officer, the County Comptroller of said County, made demands on the plaintiff for the payment of the amount due the said County of Allegheny from the said Carnegie Trust Co., on account of deposits by said County in said Trust Co. to the extent of the penalty in plaintiff's bond.

9. That on the 25th day of April, 1925, the County of Allegheny in the said State of Pennsylvania, also held certain depository bonds of like character of the depository bond executed by the plaintiff, guaranteeing the repayment of any deposits by said County in the said Trust Co., one executed by the National Surety Co. of New York, as surety, in the sum of one hundred and fifty thousand dollars ($150,000) and one executed by the Commercial Casualty Co. of Newark, N. J., in the sum of eighty thousand dollars ($80,000).

10. That the plaintiff's proportion of the amount due from the Carnegie Trust Co. to the County of Allegheny on the 25th day of April, 1925, on account of said deposits and interest on the bond set forth in paragraph 3 of the complaint, was the sum of one million, ninety-nine

thousand two hundred and forty-four dollars and sixty-five cents ($1,099,244.65).

11. That on the first day of June, 1925, plaintiff determined that it was liable as surety upon the bond executed in favor of the County of Allegheny in the State of Pennsylvania for its proportion of the amounts on deposit by the County of Allegheny in the Carnegie Trust Co. on the 25th day of April, 1925, with interest thereon at the rate of 4.05 per cent. per annum from the first day of March, 1925.

12. That on said first day of June, 1925, it gave notice to the defendant of its determination of liability and also gave notice to the defendant of the plaintiff's intention to pay said loss on or before the 15th day of June, 1925, and requested the defendant to pay its share of said loss in accordance with the terms of said bond, which the defendant neglected and refused to pay and still neglects and refuses to pay.

13. The plaintiff has paid or caused to be paid to the County of Allegheny in the State of Pennsylvania, in full settlement of its liability as surety upon the bond referred to in paragraph 3 of the complaint, the sum of one million, ninety-nine thousand two hundred and forty-four dollars and sixty-five cents ($1,099,244.65) with six per cent. interest thereon from the 25th day of April, 1925.

14. The plaintiff has complied with all the conditions and terms of the reinsurance contract, copy of which is hereto attached and made part hereof and marked "Schedule B."

15. By reason of the facts hereinbefore stated, the defendant is indebted to the plaintiff in the

sum of forty-nine thousand nine hundred and fifteen dollars and sixty-six cents ($49,915.66) with six per cent. interest thereon from the 25th day of April, 1925, all of which is past due and unpaid.

Plaintiff claims as damages the sum of forty-nine thousand nine hundred and fifteen dollars and sixty-six cents ($49,915.66) with six per cent. interest thereon from the 25th day of April, 1925, and costs of suit.

LUM, TAMBLYN & COLYER,
Attorneys for Plaintiff.

Exhibit F.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

SOUTHERN SURETY CO. OF DES MOINES, IOWA, *Plaintiff,* *vs.* COMMERCIAL CASUALTY INSURANCE CO., a New Jersey Corporation, *Defendant.*	*Action at Law.* *Answer.*

The Answer of the defendant, Commercial Casualty Insurance Company, a corporation of the State of New Jersey, with its principal place of business in the City of Newark, Essex County, New Jersey, shows:

1. As to the allegations of the first paragraph of the complaint, this defendant has not

sufficient knowledge or information to form a belief as to whether the plaintiff is authorized to engage in and is engaged in the business of becoming surety upon depository and other forms of bond and of writing and issuing other forms of insurance, and is now and was at all times mentioned in said complaint duly authorized to transact such business. This defendant denies that on the 25th day of February, 1924, plaintiff was authorized to make the contract sued upon.

2. As to the allegations of the second paragraph of the complaint, this defendant admits that it is a corporation organized under the laws of the State of New Jersey, with its principal office at Newark, and is and was authorized to become surety upon depository and other forms of bond. This defendant denies that part of the allegations of the second paragraph to the effect that it, the defendant, was authorized to reinsure the risk mentioned in the plaintiff's complaint.

3. As to the allegations of the third and fourth paragraphs of the complaint, this defendant has not sufficient knowledge or information to form a belief.

4. As to the allegations of the first paragraph numbered 5, this defendant admits the execution of a certain contract, a true copy of which is annexed to and made a part of the complaint marked Schedule "B." As to the terms of said contract, the nature and extent of this defendant's obligation thereunder and the legal effect of said contract, this defendant refers to the original contract for greater certainty.

5. As to the allegations of the second paragraph numbered 5, this defendant admits the accuracy of the quotation from said contract therein contained.

6. As to the allegations of the sixth, seventh, eighth, ninth, tenth and eleventh paragraphs of the complaint, this defendant has not sufficient knowledge or information to form a belief.

7. This defendant denies the allegations of the twelfth paragraph of the complaint.

8. As to the allegations of the thirteenth paragraph of the complaint, this defendant has not sufficient knowledge or information to form a belief.

9. This defendant denies the allegations of the fourteenth and fifteenth paragraphs of the complaint.

This defendant denies that the plaintiff is entitled to damages in the sum of $49,915.66, or any other sum, as against this defendant.

AFFIRMATIVE DEFENSES.

1. This defendant by way of affirmative defenses to the plaintiff's complaint, says:

1. That the contract annexed to the plaintiff's complaint and made a part thereof marked schedule "B," and upon which the plaintiff bases its right of action against this defendant was void as of its inception for the reason that at the time it was made the plaintiff was under the statute of the State of Iowa prohibited from making such a contract with a corporation not licensed to transact its business in the State of Iowa; that this defendant was not then, never had been and is not now licensed to transact its

business in said State. That by reason of the legal disability of the plaintiff so to contract with this defendant, said contract was void as of its inception and so remained and is not now enforcible as against this defendant.

2. This defendant by way of further affirmative defense to the plaintiff's complaint avers that the plaintiff should not have or maintain its action against the defendant because it has failed to comply with the covenant made by it with this defendant in paragraph 3 of said contract, in which as a part of the inducement and consideration for the making of said contract by this defendant, plaintiff did agree to retain at its own risk on principal while said contract remained in force and in any event not less than One hundred Fifty Thousand Dollars of the risk covered by said contract, whereas this defendant verily believes and avers the fact to be that said plaintiff has not at any time retained at its own risk the amount of insurance or surety so agreed upon by it with this defendant.

3. This defendant further avers by way of affirmative defense that plaintiff has failed to comply with the provisions of said contract respecting notice and proof of loss and the presentation of essential documents supporting said proof, and has not given to this defendant any notice of loss nor any proofs of loss, nor exhibited any essential documents supporting a claim of loss or its payment by the plaintiff.

That the matters and things pleaded under the second and third affirmative defenses of this defendant constituted breaches by the plaintiff of covenants by it made in the acceptance of the contract sued upon, were and are prejudicial

to the rights and interests of this defendant and bar a recovery by the plaintiff under said contract.

WHEREFORE, defendant prays that this suit may be hence dismissed with costs as against the plaintiff.

Attorney of Defendant.

Exhibit G.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

SOUTHERN SURETY CO. OF DES MOINES, IOWA, *Plaintiff,* *vs.* NEW JERSEY FIDELITY & PLATE GLASS INSURANCE COMPANY, a New Jersey Corporation, *Defendant.*	*Action at Law.* *Answer.*

The answer of New Jersey Fidelity & Plate Glass Insurance Company, a corporation organized under the laws of the State of New Jersey, with its principal place of business in the City of Newark, for answer to the plaintiff's complaint says:

1. As to the allegations of the first paragraph of the complaint, this defendant has not sufficient knowledge or information to form a belief

as to whether the plaintiff is authorized to engage in and is engaged in the business of becoming surety upon depository and other forms of bond and of writing and issuing other forms of insurance, and was at all times, and is now, authorized to transact such business. This defendant denies that the plaintiff was at the time mentioned in said complaint, and is now, authorized to make a reinsurance contract with this defendant in the form mentioned in said complaint, or any other form.

2. As to the allegations of the second paragraph of the complaint, this defendant admits that it is and was at all times mentioned in the complaint, authorized to become surety upon depository and other forms of bonds and to reinsure the risks of other surety companies authorized by law to accept such reinsurance from this defendant. This defendant denies that the plaintiff was at the time of the making of the contract sued upon, authorized to make a reinsurance contract with this defendant.

3. As to the allegations of the third and fourth paragraphs of the complaint, this defendant has not sufficient knowledge or information to form a belief.

4. This defendant denies the allegations of the first paragraph numbered 5 in the complaint.

5. This defendant denies the allegations of the second paragraph numbered five in the complaint.

6. As to the allegations of paragraphs 6, 7, 8, 9, 10 and 11 of the complaint, this defendant has not sufficient knowledge or information to form a belief.

7. This defendant denies the allegations contained in paragraph 12 of the complaint.

8. As to the allegations of paragraph 13 of the complaint, this defendant has not sufficient knowledge or information to form a belief.

9. This defendant denies the allegations contained in paragraphs 14 and 15 of the complaint.

This defendant denies that the plaintiff is entitled to damages in the sum of $49,915.66, or any other sum as against this defendant.

AFFIRMATIVE DEFENSES.

This defendant by way of affirmative defenses to the plaintiff's complaint avers:

1. That the plaintiff never had, and has not now, a contract with this defendant, either in the form pleaded by the plaintiff or in any other form.

2. This defendant by way of further affirmative defense avers: That if the contract annexed to the plaintiff's complaint, and made a part thereof, marked Schedule B, and upon which plaintiff bases the right of action against this defendant, was made between this defendant and the plaintiff, then and in that event said contract was void as of its inception, for the reason that at the time it was made plaintiff was under the statutes of the State of Iowa prohibited from making such a contract with a corporation not licensed to transact its business in the State of Iowa and that this defendant was not then, never had been, and is not now, licensed to transact its business in the State of Iowa.

That by reason of the legal disability of the plaintiff so to contract with this defendant the contract sued upon was void as of its inception and so remained and is not now enforcible by either party as against the other.

3. This defendant further avers by way of affirmative defense that if the contract sued upon be the contract of this defendant, that plaintiff has failed to comply with the covenant and agreement made to and with this defendant in paragraph 3 of said contract, in which as a part of the inducement for the making of said contract by this defendant plaintiff agreed that in no event while said contract remained in force should the liability retained by the plaintiff at its own risk on principal be less than $150,000; whereas, this defendant verily believes and avers the fact to be that said plaintiff has not at any time retained at its own risk on principal the amount of said insurance or surety so agreed upon by it with this defendant.

4. The defendant further avers by way of affirmative defense to the plaintiff's complaint, that if the contract sued upon be the contract of this defendant that plaintiff has failed to comply with the provisions of said contract respecting notice and proof of loss under said contract and the presentation of the essential documents supporting said proof of loss, and has not given to this defendant any notice of loss, nor any proofs of loss, nor exhibited any essential documents supporting a claim of loss, or its payment by the defendant.

That the matters and things pleaded under the third and fourth affirmative defenses of this defendant constitute breaches by the plaintiff of

New Jersey State Library

covenants by it made to this defendant, if the contract be a contract of this defendant. That said breaches were, and are, prejudicial to the rights and interests of the defendant and bar a recovery by the plaintiff under said contract.

WHEREFORE, defendant prays that this suit may be hence dismissed with costs as against the plaintiff.

HENRY G. PILCH,
Attorney of Defendant.

Exhibit H.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

SOUTHERN SURETY COMPANY, OF DES MOINES, IOWA, *Plaintiff,* vs. NEW JERSEY FIDELITY & PLATE GLASS INSURANCE COMPANY, a New Jersey corporation, *Defendant.*	*Action at Law.* *Supplemental Answer.*

The defendant, New Jersey Fidelity & Plate Glass Insurance Company, by way of Supplemental Answer to the plaintiff's complaint shows as affirmative defenses.

1. That on or before the 27th. day of February, 1924 the date when the contract sued on and annexed to plaintiff's complaint was

made by defendant, one W. J. Zwingi was employed as the manager of the Pittsburgh Branch office of Southern Surety Company, that the authority of said Zwingi was general and included authority to negotiate on behalf of said Southern Surety Company for re-insurance contracts with other Surety Companies.

2. That immediately prior to the writing of defendant's contract, said W. J. Zwingi at the instance and with the knowledge and assent of said Southern Surety Company came to Newark and requested one Short, Depository underwriter for the Commercial Casualty Insurance Company of Newark, N. J. to procure from this defendant the re-insurance contract sued upon. That at the time of said request said Swingi represented to said Short, to be communicated to this defendant and which was communicated by said Short to this defendant, that the Carnegie Trust Company of Pittsburgh, Pennsylvania, principal on the bond, which this defendant was asked to re-insure was in a sound financial condition, and in support of said representations presented to said Short a financial statement indicating such fact, and which statement was read by said Short to Harold S. Vreeland, Manager of Defendant's Surety and Fidelity Bond Department. That said Zwingi also represented to said Short to be communicated to this defendant, and which was so communicated by said Short to this defendant, that Southern Surety Company was indemnified in the writing of the bond, re-insurance for which was sought of this defendant, by the indemnity contract of one Bell, President of said Carnegie Trust Company, and said indemnity would inure to the benefit of this defendant if defendant would enter

into the re-insurance contract requested by Southern Surety Company. That said Zwingi also represented to said Short to be communicated to this defendant and which was so communicated that said Bell was a person of high financial standing and great wealth, and presented in corroboration of said representation a financial statement indicating such to be the fact, which statement was read to said Vreeland, Manager of defendant's Surety and Fidelity Bond Department.

3. That the representations as to the financial condition of Carnegie Trust Company as to indemnity held by said Southern Surety Company for the benefit of re-insurance and as to the value of such indemnity were made by said Zwingi with the knowledge, assent and acquiescence and at the instance of said Southern Surety Company, and in order to induce defendant to make said re-insurance contract.

4. That such representations were not true and were known to be untrue by said Zwingi at the time they were made and said Zwingi knew that they would be relied upon and were relied upon by this defendant in the making of its re-insurance contract.

5. That the bond under which re-insurance was requested by the plaintiff of this defendant was not an original bond, but was a renewal of a bond previously existing made by plaintiff to the Carnegie Trust Company in a like or substantially similar amount, upon which original bond the plaintiff also had re-insurance agreements with various Surety Companies.

6. That at the time of the negotiations by said Zwingi with this defendant for the re-

insurance contract sued upon said Zwingi knew that one or more of the Companies formerly re-insuring the plaintiff upon the original bond had refused to continue re-insurance upon the renewal of said bond, and further knew that the reason for such refusal was based upon knowledge as to the poor financial condition of Carnegie Trust Company, and the careless, unbusinesslike, unlawful and illegal methods pursued by said Carnegie Trust Company in its banking business.

7. That it was the duty of said Zwingi and plaintiff in pursuance of the universal custom among sureties in the writing of reinsurance contracts to disclose to this defendant the knowledge possessed of the refusal of prior re-insurance to continue this risk, that had they done so this defendant would have been given an opportunity to investigate and decide whether or not to make the re-insurance contract requested by plaintiff and thereafter made by the defendant, and that his failure to do so constituted a fraud upon this defendant, in that it deprived this defendant of making such inquiry and investigation as would have put it in possession of the facts.

8. That by reason of said omission this defendant was misled into the making of the contract sued upon, and that the misrepresentations above enumerated and failure to disclose knowledge above stated constituted a fraud upon this defendant, by reason of which its contract of re-insurance was void from its beginning.

HENRY G. PILCH,
Attorney of Defendant.

Exhibit I.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

SOUTHERN SURETY COMPANY OF DES MOINES, IOWA, *Plaintiff,* *vs.* COMMERCIAL CASUALTY INSURANCE COMPANY, a New Jersey corporation, *Defendant.*	*Action at Law.* *Supplemental Answer.*

The defendant, Commercial Casualty Insurance Company, by way of Supplemental answer to the plaintiff's complaint, shows as affirmative defenses:

1. That on or before the 25th day of February, 1924, the date when this defendant's contract with the plaintiff was made, the plaintiff, Southern Surety Company employed as the Manager of its Pittsburgh Branch office, one, W. J. Zwinggi; that the authority of said Zwinggi was general and included the authority to negotiate on behalf of the plaintiff company for re-insurance contracts with other Surety Companies.

2. That immediately prior to the writing of this defendant's contract with the plaintiff, plaintiff by its said Manager, Zwinggi, at the instance and with the knowledge and assent of the plaintiff, offered to this defendant the re-insurance contract sued upon. That at the time of said

offer, plaintiff, by said Zwinggi, represented to this defendant that Carnegie Trust Company of Pittsburgh, Pa., principal in the Bond, which this defendant was asked to re-insure, was in sound financial condition. That in addition, plaintiff, by said Zwinggi, represented to this defendant that plaintiff, Southern Surety Company, was indemnified in the writing of the Bond, reinsurance for which was sought of this defendant, by the indemnity contract of one, Bell, President of said Carnegie Trust Company, and that said indemnity would inure to the benefit of this defendant if this defendant would give the reinsurance requested by the plaintiff. That in addition, plaintiff by said Zwinggi, represented to this defendant that Bell was a person of great wealth.

3. That the representations as to the financial condition of Carnegie Trust Company, as to indemnity held by Southern Surety Company for the benefit of reinsurers and as to the value of such indemnity, were, by said Zwinggi, made with the knowledge, assent and acquiescence and at the instance of the plaintiff and in order to induce this defendant to make its reinsurance contract.

4. That such representations were false and were known to be false by said plaintiff at the time they were made, and plaintiff knew that they would be and were relied upon by said defendant, and they were so relied upon by this defendant in the making of its reinsurance contract.

5. That the bond, for which reinsurance was requested by the plaintiff of this defendant, was not an original, but was, in fact, a renewal of a

bond previously existing made by plaintiff to the Carnegie Trust Company in a like or substantially similar amount, upon which original bond the plaintiff had reinsurance agreements from various surety companies.

6. That at the time of the negotiations by said plaintiff with this defendant for the reinsurance contract sued upon, plaintiff knew that one or more of the Companies formerly reinsuring plaintiff upon the original bond had refused to continue reinsurance upon the renewal of said bond, and further knew that the reason for such refusal was based upon information indicating the insecure financial condition of Carnegie Trust Company, and the careless, unbusinesslike, unlawful and illegal methods pursued by Carnegie Trust Company in the conduct of its banking business.

7. That upon applying to this defendant for said reinsurance it became and was the duty of plaintiff to disclose to this defendant that said reinsurance was upon a renewal and not an original bond, and the knowledge plaintiff possessed of the refusal of prior reinsurers to continue on this risk; that had it done so this defendant would have had opportunity to investigate and decide whether or not to make the reinsurance contract requested by the plaintiff, and that its failure to do so constituted a fraud upon this defendant, in that it deprived this defendant of making such inquiry and investigation as would have put it in possession of the facts, and further deprived this defendant of the exercise of its judgment upon such facts as would have been disclosed by such inquiry and investigation.

8. That by reason of said concealment, this defendant was caused to make a contract which it would not have made had it been in possession of the facts, and that the misrepresentations above enumerated and the failure to disclose above mentioned, constituted a fraud upon this defendant, by reason of which its contract of reinsurance was void as of its inception, as against the plaintiff.

That for the reasons above stated, the plaintiff's complaint should be hence dismissed.

(Sgd) SAMUEL D. WILLIAMS,
Attorney for Defendant.

Exhibit J.

NEW JERSEY SUPREME COURT.

(Essex County.)

Southern Surety Company, a corporation, *Plaintiff,* *vs.* New Jersey Fidelity & Plate Glass Insurance Company, a corporation, *Defendant.*	*Action at Law.* *Order on Motion to Strike Out, &c.*

Plaintiff having given the Defendant notice of a motion to strike out Defendant's answer and the several defenses therein alleged, upon the ground that the same is sham and frivolous and to enter summary judgment; and the Defendant

after receipt of said notice having given the Plaintiff notice of a motion for leave to file a supplemental answer in the form appended to its said notice; and said motions having been brought on for argument together and the Court having read and considered the pleadings and the affidavits of the respective parties appended to their said respective notices and the argument of counsel having been heard; and the Attorney for the Defendant consenting thereto:

IT IS on this day of February, 1926, ORDERED that the paragraphs numbered 2 of the affirmative defenses set forth in Defendant's answer and the last sentence of the first paragraph of said answer and the last sentence of the second paragraph of said answer be and the same hereby are stricken out, and that as to the other defenses alleged in Defendant's answer Plaintiff's said motion to strike out be and the same hereby is denied.

AND it is further ORDERED that Defendant's motion for leave to file supplemental answer be and the same hereby is denied without prejudice, however, to the Defendant to renew said application upon the filing of affidavits or other proofs showing such facts as may be deemed by the Court sufficient to entitle Defendant to file such supplemental answer.

I hereby consent to the entry of the foregoing order.

HENRY G. PILCH,
Atty deft.

Exhibit K.

NEW JERSEY SUPREME COURT.

(Essex County.)

Southern Surety Company, a corporation, *Plaintiff,* *vs.* Commercial Casualty Insurance Company, a corporation, *Defendant.*	*Action at Law.* *Reply.*

Plaintiff, Southern Surety Company, replying to the answer of the Defendant, Commercial Casualty Insurance Company, says:

1. As to the second separate and affirmative defense it denies that it has failed to comply with the covenant and agreement made to and with the Defendant in paragraph 3 of said contract, and denies that the amount of liability retained by it at its own risk on Principal was at any time while said agreement remained in force less than $150,000.

2. As to the third separate and affirmative defense it denies that it has failed to comply with the provisions of said contract respecting notice and proof of loss under said contract and the presentation of essential documents, and denies that it has not given Defendant notice of loss and proof of loss, and denies that it has not exhibited essential documents supporting a claim of loss and payment of loss by Plaintiff, and denies that it has not in all respects complied

with the requirements, provisions and conditions of said contract.

LUM, TAMBLYN & COLYER,
Attorneys for Plaintiff.

Exhibit L.

NEW JERSEY SUPREME COURT.

(Essex County.)

Southern Surety Company, a corporation, *Plaintiff,* *vs.* New Jersey Fidelity & Plate Glass Insurance Company, a corporation, *Defendant.*	*Action at Law.* *Reply.*

Plaintiff, Southern Surety Company, replying to the answer of the Defendant, New Jersey Fidelity & Plate Glass Insurance Company, says:

1. As to the third separate and affirmative defense it denies that it has failed to comply with the covenant and agreement made to and with the Defendant in paragraph 3 of said contract, and denies that the amount of liability retained by it at its own risk on Principal was at any time while said agreement remained in force less than $150,000.

2. As to the fourth separate and affirmative defense it denies that it has failed to comply

with the provisions of said contract respecting notice and proof of loss under said contract and the presentation of essential documents, and denies that it has not given Defendant notice of loss and proof of loss, and denies that it has not exhibited essential documents supporting a claim of loss and payment of loss by Plaintiff, and denies that it has not in all respects complied with the requirements, provisions, and conditions of said contract.

LUM, TAMBLYN & COLYER,
Attorneys for Plaintiff.

Exhibit M.

NEW JERSEY SUPREME COURT.

(Essex County.)

Southern Surety Company, a corporation, *Plaintiff,* *vs.* Commercial Casualty Insurance Company, a corporation, *Defendant.*	*Action at Law.* *Amended Reply.*

Plaintiff, Southern Surety Company, replying to the answer of Defendant, Commercial Casualty Insurance Company, says:

1. As to the second separate and affirmative defense Plaintiff denies that it has failed to comply with the covenant and agreement made by it to and with the Defendant in paragraph 3 of

said reinsurance contract, but on the contrary alleges that the amount of liability retained by Plaintiff at its own risk on Principal, to wit, on said Carnegie Trust Company of Carnegie, Pennsylvania, was at no time while said reinsurance agreement remained in force less than $150,000, the amount of said liability so retained by Plaintiff being as follows:

(a) The amount of liability retained by Plaintiff at its own risk under the bond (a copy of which is attached to the complaint) while said reinsurance agreement remained in force was at no time less than $100,000, which amount of liability under said bond was not reinsured.

(b) Prior to the execution of the bond and reinsurance contract (copies of which are attached to the complaint) Plaintiff executed as Surety for said Carnegie Trust Company of Carnegie, Pennsylvania, as Principal, a certain depository bond (of like character to the depository bond a copy of which is attached to the complaint) in favor of Allegheny County Home of Pittsburg, Pennsylvania, in the sum of $125,000 guarantying the repayment to the said Allegheny County Home of any deposits made by said Home with the said Carnegie Trust Company. Plaintiff reinsured said $125,000 bond to the extent of $40,000 and no more. Said $125,000 bond was and at all times remained in full force and effect from a date prior to the execution of said bond and the reinsurance contract (copies whereof are annexed to the complaint) until January 9, 1925, on which date a new bond of like character was executed by Plaintiff as Surety for said Carnegie Trust Company as Principal in favor of said Allegheny County Home of Pittsburg, Pennsylvania in the sum of $75,000, which

said new $75,000 bond was executed in lieu of and was substituted for the aforesaid $125,000 bond, and thereupon said $125,000 bond was cancelled. At all times while said reinsurance agreement (a copy whereof is attached to the complaint) remained in force from and after January 9, 1925, said new $75,000 bond was and remained in full force and effect, and no part thereof was reinsured.

2. As to the third separate and affirmative defense Plaintiff denies that it has failed to comply with the provisions of said reinsurance contract respecting notice and proof of loss under said contract and the presentation of essential documents, and denies that it has not given the Defendant notice of loss and proof of loss, and denies that it has not exhibited essential documents supporting a claim of loss and payment of loss by Plaintiff, and denies that it has not in all respects complied with the requirements, provisions and conditions of said contract.

LUM, TAMBLYN & COLYER,
Attorneys for Plaintiff.

Exhibit N—Notice of Second Motion for Leave to File Supplemental Answer.

Exhibit N.

NEW JERSEY SUPREME COURT.

(Essex County.)

Southern Surety Company of Des Moines, Iowa, *Plaintiff,* *vs.* New Jersey Fidelity and Plate Glass Insurance Company, a New Jersey Corporation, *Defendant.*	*Action at Law.* *Notice.*

TO MESSRS. LUM, TAMBLYN & COLYER,
Attorneys of Plaintiff.

TAKE NOTICE, that on Saturday, the twenty-third day of October, 1926, at ten o'clock in the forenoon, or as soon thereafter as counsel may be heard, at the Court House in Newark, before the Honorable William S. Gummere, Justice of the Supreme Court, or such other Justice as shall then and there be sitting to hear motions, I shall apply for an Order for leave to file a Supplemental Answer in the above entitled cause, a copy of which is annexed to this Notice.

AND FURTHER TAKE NOTICE, that at the time and place aforesaid I shall use in support of said application the affidavits, copies of which are also annexed to this Notice.

Dated October 19, 1926.

(Sgd) HENRY G. PILCH,
Attorney for Defendant.

Exhibit N—Affidavit of Daniel J. Tompkins.

UNITED STATES GUARANTEE COMPANY.

3 South William Street, New York.

I, Daniel J. Tompkins, President of the United States Guarantee Company, New York City, New York, hereby make the following affidavit and state:

That on June 6, 1922, I wrote the following letter to Mr. C. S. Cobb, President of the Southern Surety Company, Des Moines, Iowa, in connection with reinsurance on the Carnegie Trust Company, Carnegie, Pennsylvania, on which Trust Company we were reinsuring the Southern Company to the extent of $25,000 on their depository bond. The original of this letter is not now in my possession, being in evidence in a certain litigation in Des Moines, Iowa, between the Southern Surety Company and its various reinsurers. Exact copy of this letter is as follows:

June 6, 1922.

"Mr. C. S. Cobb, President
Southern Surety Co.
Des Moines, Iowa.

Dear Sir:—

This Company is reinsuring your Company under its number 703665 for $25,000. on your Company's Depository Bond to the County of Alleghany, Pa. for $1,400,000 on behalf of the Carnegie Trust Company of Carnegie, Pa. since August 16, 1920.

From certain newspaper reports within the last two months, but which came to our knowledge only some ten days ago, it appears that for two or three years past it has been the practice

for the Alleghany County Treasurer to draw certain checks to the order of the State Treasurer, who would endorse same with a rubber stamp and pass them over to Mr. Bell, President of the Carnegie Trust Company, which he could at once deposit in his institution; Mr. Bell thereupon signing and delivering to the State Treasurer a check for like amount drawn on the Carnegie Trust Company, but which would be withheld by the State Treasurer from deposit to credit of the State until several months or a year or more later. Thus in effect the Carnegie Trust Company were having the use of state fund which were withheld from deposit to credit of the State for considerable periods. There appear to have been a good many irregularities of this kind as developed through a recent investigation of Main & Co. Public Accountants, who are said to have made a lengthy and detailed report of these occurrences, which report has recently been filed with the Auditor General of the State at Harrisburg, Pa.

We are informed that the 'North American' newspaper of Philadelphia has from time to time, commencing with April 26, 1922 published quite a complete record of the alleged facts, with editorial comments from time to time.

We do not know sufficiently of the facts to have any present opinion as to whether these occurrences affect the financial standing of the Carnegie Trust Company or not; but, at any rate, these occurrences were highly irregular, and while Mr. Bell President of the Carnegie Trust Company is said to be a man of considerable wealth, yet his connections heretofore have been largely political, and it all induces in us a

feeling of strong distrust of the management of the Carnegie Trust Company.

For these reasons we wish to obtain as prompt termination as possible of our reinsurance to your Company. And if you will view the matter anything like as we do, you will probably desire to terminate your depository bond on behalf of the Carnegie Trust Company.

I think your Company is licensed in Pennsylvania and has an agent in Philadelphia. If such agent will consult the files of the 'North American' newspaper for two or three months past, he will be able to send you copies of such paper affording material information if he has not already done so.

Will you please promptly send to me a complete copy of your Company's depository bond to the County of Alleghany on behalf of the Carnegie Trust Company. This so that we may consider with you the most practicable and prompt course for obtaining release from further liability thereunder.

Yours very truly,

(Signed) D. J. Tompkins
President''

As a result and reply to this letter I received the following letter from Mr. C. S. Cobb, the President of the Southern Surety Company, under date of June 9th, the original of which is not now in my possession, but is also in evidence in the aforementioned litigation in Des Moines, Iowa. The exact copy of this letter is as follows:

"June 9th, 1922.

Mr. D. Thompkins, President
United States Guaranty Company.
111 Broadway, New York

Dear Sir:—

I beg to acknowledge receipt of yours of June 6th as President of the Guaranty Company of North America and also as President of the United States Guaranty Company, with regard to our depository bond #703665 Carnegie Trust Company and bond #612364 Carnegie Trust Company.

As requested, I hand you herewith a copy of the form of bond used. I have referred this matter to our attorneys to investigate and report as to the steps necessary to get released. In the meantime, if you have any suggestions on that subject to make, I shall be glad to receive them.

Yours respectfully,

(Signed) C. S. Cobb,
President."

C.S.C.G.B. Enc.

As a result of these letters, and as a result of the information which came to my knowledge through various newspaper articles which are referred to in my letter of June 6th this Company was relieved of its reinsurance on the bond then current.

And when a new and subsequent depository bond on behalf of the Carnegie Trust Company (the one in force and effect at the time of the failure of the Carnegie Trust Company) was issued by the Southern Surety Company, and they requested our reinsurance for a part of

such new bond, I decline to entertain such request.

Dated, New York, October 18, 1926.

DANIEL J. TOMPKINS,
President of United States Guaranty Company.

HARRY GORDEN,
(Not. Seal) Notary Public Kings County.
No. 166, N. Y. Co. Clks. No. 464, Reg. No. 8360.
Commission expires March 30, 1928.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

SOUTHERN SURETY COMPANY OF DES MOINES, IOWA, *Plaintiff,* *vs.* NEW JERSEY FIDELITY & PLATE GLASS INSURANCE COMPANY, a New Jersey corporation, *Defendant.*	*Action at Law.* *Affidavit.*

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

WARREN D. WARD, of full age, being duly sworn according to law, on his oath deposes and says: That he is Treasurer of New Jersey Fidelity and Plate Glass Insurance Company; that he has charge of the case since claim was originally made by said Southern Surety Company, and has received and read all the corre-

spondence between Southern Surety Company and New Jersey Fidelity and Plate Glass Insurance Company, and has attended all conferences held with Southern Surety Company with reference to the demand of the Southern Surety Company that reinsurers pay under their reinsurance contracts.

That New Jersey Fidelity and Plate Glass Insurance Company is not now and was not licensed to transact in the State of Iowa any of the business it was authorized to do, at the time of the making of the reinsurance contract sued upon.

That New Jersey Fidelity and Plate Glass Insurance Company has never received from Southern Surety Company a proof of loss and costs of the Southern Surety Company under its $1,100,000 bond, nor has it received proof of the payment of losses by Southern Surety Company under its $1,100,000 bond, that all it has ever received in the way of evidence that there was a loss, or that a loss had been paid had been letters and telegrams, copies of which are annexed to and made part of the affidavit of J. H. Huckleberry, together with a copy of receipt purporting to have been made by the County Commissioners of the County of Allegheny dated July 14, 1925.

That soon after the notice of an alleged loss under the $1,100,000 bond, New Jersey Fidelity and Plate Glass Insurance Company indicated to Southern Surety Company by telegram and by word of mouth at a conference in the City of New York, that it was not satisfied with the validity of the claim made by the county authorities of the County of Allegheny under the bond of the Southern Surety Company, and

that it would and did demand formal proof of the indebtedness of the Carnegie Trust Company to the County of Allegheny, including the particulars of the items of said loss, and when they occurred, and New Jersey Fidelity and Plate Glass Insurance Company did at that time, or soon thereafter, to wit, on June 2, 1925, by telegram make demand upon Southern Surety Company for an audit of the accounts of Carnegie Trust Company to determine both the character and extent of the indebtedness of the Carnegie Trust Company to the County of Allegheny under the $1,100,000 bond, before it, Southern Surety Company, determined that it was obligated to the County of Allegheny. That a copy of said telegram is annexed hereto and made a part of this affidavit, that Southern Surety Company had agreed to furnish said audit, but that said Southern Surety Company has refused to furnish said audit, and that it is being obtained by the reinsurers at their own expense, and is not yet completed.

That New Jersey Fidelity and Plate Glass Insurance Company believes that the audit of Carnegie Trust Company is essential because it has reinsured a portion of the liability under a bond of Commercial Casualty Insurance Company covering the same accounts, and said audit is necessary to show whether or not these funds were correctly allocated and charged to the $1,100,000 bond.

That on July 16, 1925, at 2 P. M., this deponent in response to an invitation from the President of the Southern Surety Company to New Jersey Fidelity and Plate Glass Insurance Company attended a conference at the Pennsylvania Hotel, New York City, respecting the alleged loss

under the Carnegie Trust Company bond. That at said conference there was present W. J. Zwinggi, Manager of the Pittsburgh Branch of the Southern Surety Company, that in the course of said conference said Zwinggi disclosed that the bond claimed by Southern Surety Company to have been reinsured by New Jersey Fidelity and Plate Glass Insurance Company, was not an original bond, but was a renewal of a bond formerly given by Southern Surety Company to the County of Allegheny for $1,400,000 and that in renewing said bond it was reduced and that one or more of the reinsurers upon the original bond had been requested to, but had refused to continue as reinsurers on the renewal bond, and said Zwinggi disclosed that this fact was not brought to the attention of the New Jersey Fidelity and Plate Glass Insurance Company when it executed the reinsurance contract annexed to plaintiff's complaint, and on which contract plaintiff bases its suit.

WARREN D. WARD.

Subscribed and sworn to this 24th
day of November, 1925.

JOHN J. DEGNAN,
(L. S.) Notrary Public of New Jersey.

June 2, 1925.

Southern Surety Company,
Des Moines, Iowa.

Replying to your wire of the first instant re Carnegie Trust Company STOP. On May fifteenth 1925 your Mr. Huckleberry agreed to obtain a complete audit of the Carnegie Trust Company.

You have not kept your agreement Pending an investigation including a complete audit of the Carnegie Trust Company we protest against any admission of liability by your Company hereby reserving any and all rights and defenses we may now or hereafter have.

NEW JERSEY FIDELITY AND
PLATE GLASS INSURANCE COMPANY.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

SOUTHERN SURETY COMPANY OF DES MOINES, IOWA, *Plaintiff,* *vs.* NEW JERSEY FIDELITY & PLATE GLASS INSURANCE COMPANY, a New Jersey corporation, *Defendant.*	*Affidavit.*

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

HAROLD S. VREELAND, of full age, being duly sworn according to law, on his oath deposes and says; that he is the Superintendent of the Fidelity and Surety Bond Department of the New Jersey Fidelity & Plate Glass Insurance Company, and has been such Superintendent since January 21, 1924, and as such Superintendent has charge of obtaining reinsurance contracts for said New Jersey Fidelity & Plate Glass

Insurance Company, and passing upon reinsurance contracts offered to said Company; that on or about the 16th day of February, 1924, Harlan W. Short, Jr., whom defendant knew to be the superintendent of the Fidelity and Depository Division of the Fidelity and Surety Bond Department of the Commercial Casualty Insurance Company of Newark, stated to deponent that one W. J. Zwinggi, Manager of the Pittsburgh branch office of the Southern Surety Company had negotiated with the said Short for the purpose of obtaining from Commercial Casualty Insurance Company a reinsurance contract with Southern Surety Company on a certain bond in the sum of $1,100,000 given by Carnegie Trust Company as principal with Southern Surety Company as surety and to the County of Alleghany as obligee securing the County for the deposit of County funds in said Carnegie Trust Company.

That said Short stated to deponent that Zwinggi had represented to him that the Carnegie Trust Company was solvent and in sound financial condition, and that in addition to the security afforded by the solvency and sound financial condition of Carnegie Trust Company that Southern Surety Company had as indemnity for the giving of said $1,100,000 bond the indemnity agreement or contract of one Bell, who according to the statements and representations of Zwinggi was at that time President of Carnegie Trust Company and a man worth between ten and eleven million dollars.

That said Short stated to deponent that Zwinggi had asked Short if he knew of any other Company that Zwinggi might be able to get reinsurance from, and that Short had stated to

Zwinggi that the New Jersey Fidelity & Plate Glass Company were now writing surety binds, and Zwinggi then asked Short if he would call up the New Jersey Fidelity & Plate Glass Insurance Company, and give them all the information that Zwinggi had given Short inasmuch as he Zwinggi had to return to Pittsburgh immediately and did not have time to personally visit the office of New Jersey Fidelity & Plate Glass Insurance Company to offer them reinsurance on the bond.

That said Short also stated to deponent at that time that the Commercial Casualty Insurance Company were accepting $50,000 on the principal of $1,100,000 bond of Carnegie Trust Company to County of Alleghany, and that Zwinggi had stated that Southern Surety Company would carry $150,000 on this bond.

Deponent further says that he relied on the statements made by Short to him and relying on such statements directed that reinsurance contract be entered into by New Jersey Fidelity & Plate Glass Insurance Company with Southern Surety Company.

HAROLD S. VREELAND.

Subscribed and sworn to this 2nd day of December, 1925, before me.

ELLA M. WARD,
A Notary Public of New Jersey.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

SOUTHERN SURETY COMPANY OF DES MOINES, IOWA,
Plaintiff,

vs.

COMMERCIAL CASUALTY INSURANCE COMPANY, a New Jersey corporation,
Defendant.

Action at Law.

SOUTHERN SURETY COMPANY OF DES MOINES, IOWA,
Plaintiff,

vs.

NEW JERSEY FIDELITY & PLATE GLASS INSURANCE COMPANY, a New Jersey corporation,
Defendant.

Affidavit.

STATE OF
COUNTY OF } *ss.*

HARLAN SHORT, of full age, being duly sworn according to law, on his oath deposes and says that on the 25th day of February, 1924, and for some time prior thereto, and until the fifth day of January, 1925, he was employed by Commercial Casualty Insurance Company, at its home office in the City of Newark, Essex County, New Jersey, that he was the person who during his employment by said company, had charge of obtaining reinsurance contracts for the Commercial Casualty Insurance Company and passed upon

reinsurance contracts offered to Commercial Casualty Insurance Company.

That within a week prior to February 25, 1924, one W. J. Zwinggi, who represented himself to be and whom this deponent knew to be, the manager of the Pittsburgh Branch office of the Southern Surety Company, came to the office of the Commercial Casualty Insurance Company in Newark and there and in the City of New York negotiated with this deponent, on behalf of Commercial Casualty Insurance Company for the purpose of obtaining Commercial Casualty Insurance Company's reinsurance contract to Southern Surety Company on a certain bond in the sum of $1,100,000 given by Carnegie Trust Company as principal, with Southern Surety Company, as surety, with the County of Allegheny, in the Commonwealth of Pennsylvania securing the County for the deposit of County funds in said Carnegie Trust Company.

That Zwinggi represented to this deponent in his effort to place said reinsurance contract that Carnegie Trust Company was solvent and in sound financial condition and that in addition to the security afforded by the solvency and sound financial condition of Carnegie Trust Company, Southern Surety Company, had as indemnity for the giving of said $1,100,000 bond, the indemnity agreement or contract of one Bell, who according to the statements and representations of said Zwinggi was at that time president of Carnegie Trust Company, and a man of large financial means and worth considerably more than the penal sum of the bond; that the indemnity afforded by said Bell would inure to the benefit of any reinsurer of Southern Surety Company.

That Zwinggi did not disclose to this deponent that the $1,100,000 bond in question was a

renewal of a pre-existing bond to the County of Allegheny by Carnegie Trust Company on which Southern Surety Company was surety, but on the contrary led this deponent to believe that it was an original bond and that said Zwinggi did not disclose to this deponent that one or more Surety Companies, who had reinsured the original bond refused to reinsure the renewal or bond in question.

That this deponent was influenced in the making of said contract of reinsurance by Commercial Casualty Insurance Company by the statements made to him by said Zwinggi and that said Zwinggi knew that he would be so influenced and made them for that purpose and that the failure of said Zwinggi to disclose to this deponent that said bond was not an original bond, but was on the contrary, a renewal bond, and that one or more of the reinsurers on the original bond had refused to reinsure the renewal bond deprived this deponent, on behalf of Commercial Casualty Insurance Company of the opportunity of investigating and finding out why the Surety Companies formerly reinsuring were refusing to continue their reinsurance on the renewal bond.

That Zwinggi in the course of his negotiations with this deponent at the time aforesaid, asked this deponent if he knew of any other companies writing reinsurance in this district, whereupon this deponent mentioned New Jersey Fidelity & Plate Glass Insurance Company, and said Zwinggi requested this deponent to communicate with the New Jersey Fidelity & Plate Glass Insurance Company for the purpose of having said company participate in the reinsurance on said $1,100,000 bond, and requested this deponent to communicate to said New Jersey

Fidelity & Plate Glass Insurance Company, the representations and statements made by him, Zwinggi, to this deponent. That this deponent thereupon did communicate with one, Vreeland, who was and is employed by the New Jersey Fidelity & Plate Glass Insurance Co. in the same capacity as was this deponent with the Commercial Casualty Insurance Company, and transmitted to him all his information and the statements made to him by said Zwinggi respecting said bond and the financial standing of Carnegie Trust Company and Bell and respecting the Indemnity agreement of Bell and requesting said Vreeland to communicate to said Zwinggi whether or not, it, the said New Jersey Fidelity & Plate Glass Insurance Company, desired to take any of the reinsurance on said bond.

That the said Zwinggi further stated to the said deponent that on principal of $1,100,000 the penalty of the bond of Carnegie Trust Company to the said County of Allegheny that the said Southern Surety Company would carry $150,000 that it was relying on this statement that the said Commercial Casulty Insurance Company consented to carry a portion of this risk, namely, the amount of $50,000.00.

HARLAN SHORT.

Sworn and subscribed to before me a Notary Public in and for the County of Dade, State of Florida, this 23rd day of November, A. D. 1925. Ellen O. Anderson a Notary Public of the County of Dade in the State of Florida State of Florida at large. Commission expires 2/7/27. County Clerk's certificate attached.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

SOUTHERN SURETY COMPANY OF DES MOINES, IOWA, *Plaintiff,* *vs.* NEN JERSEY FIDELITY & PLATE GLASS INSURANCE COMPANY, a New Jersey corporation, *Defendant.*	*Action at Law.* *Supplemental Answer.*

The defendant, New Jersey Fidelity & Plate Glass Insurance Company, by way of supplemental answer to the plaintiff's complaint, shows as affirmative defenses:

1. That on or before the 27th day of February, 1924, the date when the contract sued on and annexed to plaintiff's complaint was made by defendant, one W. J. Zwinggi, was employed as the manager of the Pittsburgh Branch office of Southern Surety Company, that the authority of said Zwinggi was general and included authority to negotiate on behalf of said Southern Surety Company for reinsurance contracts with other Surety Companies.

2. That immediately prior to the writing of defendant's contract, said W. J. Zwinggi, at the instance of and with the knowledge and assent of said Southern Surety Company came to Newark and requested one Short, depository underwriter for the Commercial Casualty Insurance Company, of Newark, N. J., to procure from this defendant the reinsurance contract

sued upon. That at the time of said request said Zwinggi represented to said Short, to be communicated to this defendant, and which was communicated by said Short to this defendant, that the Carnegie Trust Company of Pittsburgh, Pennsylvania, principal on the bond which this defendant was asked to reinsure was in a sound financial condition. That said Zwinggi also represented to said Short to be communicated to this defendant, and which was so communicated by said Short, that Southern Surety Company was indemnified in the writing of the bond, reinsurance for which was sought of this defendant, by the indemnity contract of one Bell, President of said Carnegie Trust Company, and that said indemnity would inure to the benefit of this defendant, if defendant would enter into the reinsurance contract requested by Southern Surety Company. That said plaintiff, by said Zwinggi, represented to said Short to be communicated to this defendant, and which was so communicated, that said Bell was a person of great wealth.

3. That the representations as to the financial condition of Carnegie Trust Company, as to indemnity held by Southern Surety Company for the benefit of reinsurers and as to the value of such indemnity, were, by said Zwinggi, made with the knowledge, assent and acquiescence, and at the instance of the plaintiff and in order to induce this defendant to make its reinsurance contract.

4. That such representations were false and were known to be false by said plaintiff at the time they were made, and plaintiff knew that they would be and were relied upon by said de-

fendant, and they were so relied upon by this defendant in the making of its reinsurance contract.

5. That the bond, for which reinsurance was requested by the plaintiff of this defendant, was not an original bond, but was in fact, a renewal of a bond previously existing made by plaintiff to the Carnegie Trust Company in a like or substantially similar amount upon which original bond the plaintiff had reinsurance agreements from various surety companies.

6. That at the time of the negotiations by said plaintiff with this defendant for the reinsurance contract sued upon plaintiff knew that one or more of the companies formerly reinsuring plaintiff upon the original bond had refused to continue reinsurance upon the renewal of said bond, and further knew that the reason for such refusal was based upon information indicating the insecure financial condition of Carnegie Trust Company, and the careless, unbusinesslike, unlawful and illegal methods pursued by Carnegie Trust Company in the conduct of its banking business.

7. That upon applying to this defendant for said reinsurance, it became and was the duty of plaintiff to disclose to this defendant that said reinsurance was upon a renewal and not an original bond, and it became and was the duty of the plaintiff to disclose to this defendant the knowledge plaintiff possessed of the refusal of prior reinsurers to continue on this risk; that had it done so this defendant would have had an opportunity to investigate and decide whether or not to make the reinsurance requested by plaintiff, and that its failure to do so constituted a fraud upon this defendant, in that it deprived this defendant of making such inquiry and investigation as would have put it in possession of the facts, and further deprived this defendant of the exercise of its judgment upon such facts as would have been disclosed by such inquiry and investigation.

8. That by reason of said concealment, this defendant was caused to make a contract which it would not have made had it been in possession of the facts, and that the misrepresentations above enumerated and the failure to disclose above mentioned, constituted a fraud upon this defendant, by reason of which its contract of reinsurance was void as of its inception, as against the plaintiff.

That for the reasons above stated, the plaintiff's complaint should be hence dismissed.

(Sgd) HENRY G. PILCH,
Attorney for Defendant.

ORDER TO SHOW CAUSE.

Filed November 8, 1926.

IN CHANCERY OF NEW JERSEY.

Between COMMERCIAL CASUALTY INSURANCE COMPANY and NEW JERSEY FIDELITY AND PLATE GLASS INSURANCE COMPANY, *Complainants,* *and* SOUTHERN SURETY COMPANY OF DES MOINES, IOWA, *Defendant.*	*On Bill, &c.* *Order to Show Cause.*

Upon reading and filing the duly verified bill of complaint in the above-entitled cause, and upon good cause shown, it is now, on this 8th day of November, 1926, on motion of McCarter & English and Henry G. Pilch, solicitors of the respective complainants, ORDERED that the defendant, Southern Surety Company of Des Moines, Iowa, show cause before the Court on Tuesday, the 16th day of November, at 11 o'clock in the forenoon, at the Chancery Chambers, in the City of Newark, why an injunction should not issue against it as prayed for in the bill of complaint, and in the meantime, and until otherwise directed,

AND IT IS FURTHER ORDERED that a true copy of this order, together with a true copy of the bill of complaint herein and of the exhibits and affidavits thereto annexed, which copies need not

be certified, be within three days from the date hereof served upon the defendant or upon Messrs. Lum, Tamblyn & Colyer, attorneys of said Southern Surety Company of Des Moines, Iowa, in the said suits at law.

E. R. WALKER,
C.

Respectfully advised,

JOHN H. BACKES,
V.-C.

Order for Restraint.

ORDER FOR RESTRAINT.

Filed November 9, 1926.

IN CHANCERY OF NEW JERSEY.

Between

COMMERCIAL CASUALTY INSURANCE COMPANY and NEW JERSEY FIDELITY AND PLATE GLASS INSURANCE COMPANY, *Complainants,*

and

SOUTHERN SURETY COMPANY OF DES MOINES, IOWA, *Defendant.*

On Bill, &c.

Order for Restraint.

An order having been heretofore made in this cause requiring the defendant to show cause on the 16th day of November, 1926, why an injunction should not issue against it as prayed for in the bill of complaint, which order to show cause contained no *ad interim* restraint, and the Court being of opinion that the complainants are entitled to the *ad interim* restraint hereinafter ordered,

It is, on this 9th day of November, 1926, on motion of McCarter & English, solicitors of the complainants, ORDERED that until the return day of said order to show cause, Southern Surety Company of Des Moines, Iowa, the defendant herein, its officers, agents and attorneys, be and they hereby are restrained from taking any further proceeding in the actions commenced by it and now pending in the New Jersey Supreme

Order for Restraint.

Court against the complainants herein to recover the amounts claimed to be due on the contracts of reinsurance referred to in the bill of complaint herein.

E. R. WALKER,
C.

Respectfully advised,

JOHN H. BACKES,
V.-C.

DEFENDANT'S ANSWERING AFFIDAVITS.

Filed November 23, 1926.

IN THE COURT OF CHANCERY
OF NEW JERSEY.

Between

COMMERCIAL CASUALTY INSURANCE COMPANY and NEW JERSEY FIDELITY AND PLATE GLASS INSURANCE COMPANY, *Complainants,*

and

SOUTHERN SURETY COMPANY OF DES MOINES, IOWA, *Defendant.*

Affidavit.

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF ALLEGHENY. } *ss.*

Personally appeared before me, a Notary Public in and for the said County and State, W. J. Zwinggi, the affiant, who, being duly sworn according to law, deposes and says:

That he is and for many years has been a resident of the City of Pittsburgh in Allegheny County, Pennsylvania, and is and has for more than four years last past been District Manager of the Southern Surety Company of Des Moines, Iowa, for the western portion of the State of Pennsylvania, including the County of Allegheny and the City of Pittsburgh in said State. That in the fore part of the month of February, 1924, affiant received from the Carnegie Trust Company, Carnegie, Penna., an application to

the Southern Surety Company requesting the Southern Surety Company to become Surety upon a Depository Bond to be executed by the Carnegie Trust Company in favor of the County of Allegheny in the State of Pennsylvania, in the penal sum of $1,400,000.00, to secure deposits made by the County of Allegheny in the said Carnegie Trust Company. That a copy of said application is attached to this affidavit marked Exhibit "A" and made a part hereof.

That accompanying said application was a general contract of indemnity executed by John A. Bell, the president of the Carnegie Trust Company, indemnifying the Southern Surety Company against loss by reason of becoming Surety upon any depository bond of the Carnegie Trust Company, including the proposed depository bond hereinbefore referred to. That a copy of said general contract of indemnity is attached hereto and made a part hereof, and marked Exhibit "A-1."

That upon receiving said application for said depository bond affiant procured from the commercial agency at Pittsburgh of the R. G. Dun Company a report with respect to the financial standing of the said John A. Bell. That a copy of said report is attached to this affidavit and marked Exhibit "B" and made a part hereof.

That at or about the same time affiant obtained from the D. P. Jones Mercantile Agency of Pittsburgh, Pa., a report of the financial standing of the said John A. Bell. That a copy of said report is attached to this affidavit marked Exhibit "C" and made a part hereof.

That at or about the same time affiant procured the latest edition of a book published by Bankers Service Corporation of Pennsylvania

and entitled "Directory of Directors and Trade Index of the Pittsburgh District" and from said book compiled a list of the banks and trust companies in Pittsburgh and vicinity with which John A. Bell had official connection, and of other corporations in Pittsburgh and vicinity with which said John A. Bell had official connection. That affiant included in said compilation a statement of the capital and surplus of each of said banks and trust companies, which information be obtained from a book published by Rand McNally and entitled "Bankers Directory and The Bankers Register." That affiant included in said compilation the ratings of the corporations (other than banks and trust companies) with which John A. Bell was officially connected, which ratings he obtained from the current volume of ratings published by R. G. Dun & Company. That he also included in said compilation the public institutions with which John A. Bell was connected so far as he knew of them. That a copy of said compilation is attached to this affidavit marked Exhibit "D" and made a part hereof.

That at about the same time affiant procured the last published statement of the Carnegie Trust Company showing its assets and liabilities. That a copy of said published statement is attached hereto marked Exhibit "E" and made a part hereof.

That it is and was in the year 1924 the common and ordinary practice among surety companies to not assume a liability upon depository bond or bonds for any one principal in excess of 10% of the capital stock and surplus of the surety company, or if a greater risk is proposed then to reinsure the same with other surety companies to such an extent as that the surety upon the depository bond shall after deducting the amount of reinsurance retain a sum not in excess of approximately 10% of its capital stock and surplus. That in February, 1924, the capital stock and surplus of the Southern Surety Company was approximately $1,600,000.00.

That by reason of the amount of the penalty upon the proposed depository bond the affiant on behalf of the Southern Surety Company undertook to procure from other surety companies reinsurance so as to bring itself substantially within the custom as above outlined, and for this purpose affiant on or about the 14th day of February, 1924, visited the City of New York.

That affiant is and has been for some years prior to February, 1924, well acquainted with one H. H. Campbell, a resident of Pittsburgh or vicinity, who was in February, 1924, doing an insurance business in the City of Pittsburgh under the name of the Hagey H. Campbell Company. That in February, 1924, as this affiant was informed and believes, the said H. H. Campbell or Hagey H. Campbell Company, of which the said H. H. Campbell was president, was the general agent of the defendant the Commercial Casualty Insurance Company in the City of Pittsburgh.

That while affiant was in the City of New York as aforesaid, and on the 14th or 15th day of February, 1924, affiant met on the streets of said City the said H. H. Campbell, and upon the said H. H. Campbell inquiring of the affiant the business which brought him to the said City of New York, affiant replied in substance, that he was there for the purpose of securing reinsurance upon a large depository bond which the Southern

Surety Company had been requested to execute as Surety for the Carnegie Trust Company of Carnegie, Pa., in favor of Allegheny County, upon which risk he had the personal indemnity of John A. Bell whereupon the said Campbell suggested that he the said Campbell be permitted to submit said reinsurance to the defendant the Commercial Casualty Insurance Company of which he the said Campbell was agent, to which affiant acquiesced, and the affiant then and there delivered to the said Campbell a copy of Exhibits "A" to "E," both inclusive, hereto attached, and an appointment was then made for affiant to meet the said Campbell at the Waldorf Astoria Hotel on the same evening.

That in the evening of the same day he met the said Campbell at the said hotel. That said Campbell was accompanied by a person whom the said Campbell introduced to affiant as Harlan Short, and as the person in charge of underwriting depository bonds by the Commercial Casualty Insurance Company. That in connection with said introduction said Campbell said to affiant that Mr. Short would tell him what had been concluded with reference to said reinsurance, and thereupon Mr. Short stated that his company, the Commercial Casualty Insurance Company, would be glad to accept a reinsurance liability of $50,000.00 upon said depository bond. Whereupon affiant thanked him and remarked that he, affiant, thought it was a good risk. That thereupon the said Short said to affiant in substance, that there was a new company writing depository bonds in the City of Newark, in the State of New Jersey, known as the New Jersey Fidelity & Plate Glass Insurance Company, which company he thought would be glad to accept

some reinsurance upon the proposed depository bond and suggested that if affiant was willing that he, the said Short, would present the matter to said New Jersey Fidelity & Plate Glass Insurance Company. Thereupon the affiant gave to the said Short an additional copy of Exhibits "A" to "E," both inclusive, attached hereto, to be used by the said Short in presenting the matter to the said New Jersey Fidelity & Plate Glass Insurance Company.

That at no time did affiant make any representations to the said Short with respect to the financial standing of John A. Bell of the Carnegie Trust Company other than the representations contained in the documents delivered to him and hereinbefore referred to, and the single remark that he, affiant, thought the risk a good one, which was made after the said Short had stated that his company would accept reinsurance in the sum of $50,000.00. However, the affiant believed at the time that the said Carnegie Trust Company was solvent and well managed, and that John A. Bell was a man of high character and had a net worth of ten or twelve million dollars, and that said belief was based upon the investigation he had made with respect to said subject and the high standing which Mr. Bell had in the City of Pittsburgh, both financially and personally. That affiant at the time was thirty-four years of age, was born in Pittsburgh and had lived there all his life, and during all his mature years had known of the high standing of the said Bell in said City.

Affiant further states that he has read what purports to be a copy of an affidavit of one, W. Clyde Grubbs, a lawyer practicing in the City of Pittsburgh, and with respect thereto says that

he was present in the office of the said Grubbs on or about May 14, 1925, at a conference at which were present Mr. Grubbs, Mr. M. H. Cohen, Mr. Morris G. Levy and affiant. That said conference was held with the said Grubbs as the attorney for the Southern Surety Company as well as the attorney for the reinsurers, and at said conference the question of liability arose and was discussed. That no inducements of any kind were made to the said Grubbs to procure from him any admission or opinion whatever. That at said conference the question of whether Mr. Grubbs should continue to represent the Southern Surety Company arose, and Mr. Grubbs stated he wanted to consult Mr. Freeman about it and thereupon left the office. That later the said Grubbs returned to his office where affiant had remained. That neither at said time or at any other time did Mr. Grubbs say to affiant that he could no longer represent the Southern Surety Company or take any action in its behalf. On the contrary he advised the affiant in substance that there was no reason why he could not continue to represent the Southern Surety Company and the reinsurors. That thereafter and prior to the 27th day of June, 1925, at which time the said Grubbs ceased to represent the Southern Surety Company in said matter, affiant on different occasions as representing the Southern Surety Company consulted with the said Grubbs as attorney for the Southern Surety Company with respect to the liability of the Southern Surety Company upon the said bond.

W. J. ZWINGGI.

Sworn to and subscribed before me
a Notary Public, in and for the
County of Allegheny, and the
Commonwealth of Pennsylvania,
this 12th day of November, 1926.

C. M. JOHNSON,
(SEAL) Notary Public.

Exhibit A.

SOUTHERN SURETY COMPANY
Home Office—Des Moines, Io.

APPLICATION FOR DEPOSITORY BOND

Southern Surety Company:

Application is hereby made by the undersigned for a bond, the amount and tenor of which are herein set forth.

1. Name of Bank or Trust Company. (Give correct corporate title.) Carnegie Trust Co.
2. When incorporated 1901 In what State Penna
3. If private Bank give name of firm and when established
4. Principal Office Carnegie Pa
5. Amount of Bond $1,400,000
6. Amount of deposit to be covered $1,400,000 (varies at times)
7. To whom given County of Allegheny
8. To cover what funds County funds
9. What interest, if any, will you pay on this deposit 4.05%
10. Date bond is to begin 1/7/24 Date to terminate 1st Monday of Jany 1928.

11. Is stockholders' liability double or single? double

12. The following is a true statement showing exact financial condition of the institution applying for this bond at the close of business on the 9 day of February, 1924, and attached hereto is a copy of the last published financial statement of such institution. Capital authorized, $225,000 Subscribed, $225,000 Paid in, $225,000

ASSETS

Total loans and discounts (see question 13)		3419023.64
Overdrafts—secured	$	213.20
Unsecured	$ 213.20	
U. S. Bonds to secure circulation		———
U. S. Bonds to secure deposits		———
U. S. Bonds on hand		41400.00
Other Bonds and stocks,	$818416.22	
Mortgages,	$333536.67	1151952.89
Real Estate	$ 57383.43	
Furniture and Fixtures,	$ 7780.58	65164.01
Interest paid		528.32
Current expenses and taxes paid		4775.03
Due from National Banks	422365.44	
Due from approved Reserve Agents other than National Banks	217963.05	
Due from other Banks and Bankers	66.70	
Cash in office	———	
Checks and other Cash Items	116587.36	
U. S. Certificates of Deposit	———	

Redemption Fund with U. S. Treasurer	———	
Due from U. S. Treasurer	———	
Total Cash Reserve		756982.55
Total Assets		5440039.64

LIABILITIES

Capital Stock divided into 2250 Shares of $100.00 each		225000.00
Surplus, $.....Profits, $ 66078.53		466078.53
Dividends Unpaid		696.00
Bank Notes outstanding—National		———
Bank Notes Outstanding—State		———
Notes and Bills Re-discounted		———
Bills Payable, including Certificates of Deposit for Money Borrowed		———
Due National Banks, State and Private Banks	14170.18	
Certificates of Deposit, (not for money borrowed)	83040.40	
United States Deposits	———	
County Deposits	1405491.76	
All other Public Deposits	60632.88	
State Deposits	157419.93	
Savings Deposits	1783991.13	
Individual Deposits	1215167.77	4719914.05
Treas. & cert. checks		5890.13
Int. and Disc		22182.60
Safe dep. box rent		278.33
Total deposits		———
Total Liabilities		5440039.64

New Jersey State Library

13. Give amount of loans and discounts made as follows:

To Directors	155398.58
To Officers, not Directors	200.00
On one-name Paper	952593.82
On two-name Paper as of 12/31/23	1281455.30
On Real Estate	373767.32
The Manufacturing Corporations	———
On Growing Crops	———
On Cotton	———
On other Securities	1031121.67

14. Give full names, addresses, and stock owned by officers.

Officers	Names	Addresses	No. Shares
President	Jno. A. Bell	Carnegie Pa	589
Vice-President	Jno. A. Bell, Jr.	" "	5
2nd Vice-President			
Cashier or Treasurer	Jos. H. Walker	" "	10
Asst. Cash. or Asst. Treas.	Frank D. McCully	" "	none

15. What depository bonds other than that herein applied for have you in force at the present time?

School Dist.—Robinson Twp. Pa.	Sinking Fund #2	$ 4,000	7-12-14	Nat'l
" " " " "	Bldg. Fund	125,000	"	"
" " " " "	Sinking Fund #3	10,000	"	"
State of Penna.	State Funds	50,000	2-19-24	"
" " "	" "	50,000	2- 4-24	"
County of Alle. Pa.	County funds	200,000	2-10-24	"
State of Penna.	State funds	50,000		Am. Surety
Alle. Co. Pension Board	Pension funds	23,000	12-31-24	Southern
Alle. Co. Home	Poor funds	125,000	8-20-24	Southern

All other clerks (six) each bonded in Nat'l for $5,000.00

17. What burglary insurance do you carry?

Amount	Date of Expiration	Name of Company
$100,000.00	4-30-25	American Surety
100,000.00	1-16-26	Traverlers

18. Give name of correspondents.

Names	Addresses
Colonial Tr. Co.	Pgh. Pa.
Columbia Nt'l Bank	" "
Chase Nat'l	N. Y. City

19. When was the last examination made by the National or State Examiner? 2/13/23

20. By whom are the loans of the Bank or Trust Company directly authorized? Board of directors

21. How long has the bank been paying dividends? 6/30/02 At what rate In 1923 paid 22%

22. What rate of interest is paid on check accounts? 2% Certificates of deposit? 4% Savings accounts 4%

23. (a) State what assets of the bank, if any, have been pledged as security for public deposits None

(b) What assets have been pledged for money borrowed, or to secure deposits in other banks None

24. Does the charter of your bank empower you to execute bonds or insurance policies of any kind whatsoever? No

13. Give amount of loans and discounts made as follows:

To Directors	155398.58
To Officers, not Directors	200.00
On one-name Paper	952593.82
On two-name Paper as of 12/31/23	1281455.30
On Real Estate	373767.32
The Manufacturing Corporation	———
On Growing Crops	———
On Cotton	———
On other Securities	1031121.67

14. Give full names, addresses, and stock owned by officers.

Officers	Names	Addresses	No. Shares
President	Jno. A. Bell	Carnegie Pa	589
Vice-President	Jno. A. Bell, Jr.	" "	5
2nd Vice-President			
Cashier or Treasurer	Jos. H. Walker	" "	10
Asst. Cash. or Asst. Treas.	Frank D. McCully	" "	none

15. What depository bonds other than that herein applied for have you in force at the present time?

To Whom Given	Funds Covered	Amount	Date of Expiration	Bonding Company

16. What officers and employes are bonded?

Name	Position	Amount	Date of Expiration	Bonding Company
Joseph H. Walker	Treas.	10000	1-1-24	Nat'l
Frank D. McCully	Asst. Treas.	10000	"	"

All other clerks (six) each bonded in Nat'l for $5,000.00

17. What burglary insurance do you carry?

Amount	Date of Expiration	Name of Company
$100,000.00	4-30-25	American Surety
100,000.00	1-16-26	Traverlers

18. Give name of correspondents.

Names	Addresses
Colonial Tr. Co.	Pgh. Pa.
Columbia Nt'l Bank	" "
Chase Nat'l	N. Y. City

19. When was the last examination made by the National or State Examiner? 2/13/23

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22. What rate of interest is paid on check accounts? 2% Certificates of deposit? 4% Savings accounts 4%

23. (a) State what assets of the bank, if any, have been pledged as security for public deposits None

(b) What assets have been pledged for money borrowed, or to secure deposits in other banks None

24. Does the charter of your bank empower you to execute bonds or insurance policies of any kind whatsoever? No

1. The undersigned, hereinafter called the Depository, hereby affirms that the declarations made and answers given herein are the truth, without reservation, and are made for the purpose of inducing the Southern Surety Company to become surety or co-surety, or both, on a certain bond or bonds herein applied for, and hereby appoints said Southern Surety Company agent for the procurement of such surety and co-surety. The Depository in consideration of said Southern Surety Company, or any Company or Companies, co-partnership or individual, which it may procure in substitution, or as co-surety, jointly with it (all hereinafter called the Surety), executing or consenting to execute the bond herein applied for, hereby represents, covenants and agrees with the Surety, its successors and assigns as follows:

2. The Depository will immediately pay to the Surety at its offices in the City of Des Moines, Iowa, $7000.00, premium, and $7000.00, premium annually thereafter in advance until there is served upon the Surety at its Office in the City of Des Moines, Iowa, evidence satisfactory to the Surety of its discharge from such bond and all liability thereunder.

3. That the Depository will, at all times, indemnify and keep indemnified the Surety, and save it harmless from and against all claims, demands, liabilities, costs, charges and expenses, of every kind and nature which it shall at any time sustain or incur and as well from and against all orders, judgments, and adjudications whatever by reason or in consequence of having executed said Bond, and will pay over, reimburse and make good to the Surety, its successors and assigns, all sums and amounts of money to meet every claim, demand, liability, cost, charge, expense, suit, judgment or adjudication against it by reason of the execution of the Bond applied for, and before the Surety shall be required to pay thereunder.

4. That the Depository will immediately notify the Surety at its offices in the City of Des Moines, Iowa, of the making of any demand or the giving of any notice or commencement of any suit or proceeding or the fixing of any liability which the Surety may be called upon to discharge, by reason of the execution of said Bond.

5. That the Depository will, on request of the Surety, procure the Surety's discharge from liability under the said Bond, and the Surety shall, at its option, have the right to use the Depository's name, and to all the rights and privileges of the Depository, and at any time shall have the right to be discharged from liability for the further default of the Depository, and to require the Depository to account and give new surety or sureties.

6. That the vouchers or other evidence of payment by the Surety in discharge of any liability under said Bond shall be prima facie evidence against the Depository of the face and amount of the Depository's liability to the Surety.

7. That the Surety shall have the right to look to and rely upon the property of the Depository and its income and earnings and to follow and recover out of the Depository's property now belonging to it, or which may hereafter belong to it, and the income and earnings thereof for anything due or to become due the Surety under this Agreement, the execution of the said Bond by the Surety being for the Depository's special benefit and the special benefit and protection of the Depository's property, its income and earnings.

8. The Surety shall have the right at any time, and until its discharge as surety on any and all bonds executed in behalf of the Depository, to make an examination of the books and affairs of the Depository.

9. That the acceptance of this Agreement, and of the Depository's agreement to pay premiums for the execution of said Bond, or the acceptance at any time by the Surety of securities, indemnity, or collateral, shall not in any way abridge or limit the right of the Surety to be subrogated to any right or remedy, or limit any right or remedy which the Surety might otherwise have, acquire, exercise, or enforce, and the Surety shall have every right and remedy which an individual surety acting without compensation would have.

IN WITNESS WHEREOF, the Depository, by authority of its Board of Directors, or Trustees, has caused this agreement to be duly signed by its President, and Cashier or Secretary, and its corporate seal to be hereto affixed this 11 day of Feb. 1924.

Carnegie Trust Co.
Name of Bank

By Jno. A. Bell
President

Jos. H. Walters
Cashier or Secretary

Signed and sealed in the presence of

STATEMENT OF COMPANY'S REPRESENTATIVE

I, ..., Agent of said Company, know the officers and management of the above bank to be responsible and representative men, and recommend the issuance of the bond applied for above. I further state that replies to the following inquiries are correct to the best of my knowledge:

1. Does the Bank control or manage any other Bank?
2. Is the Bank controlled or managed by any other Bank?
3. Is this Bank controlled by interests which control other Banks? If so give names and locations of other Banks

.....
Agent

Exhibit A. 1.

SOUTHERN SURETY COMPANY

Home Office—Des Moines, Iowa

GENERAL INDEMNITY

KNOW ALL MEN BY THESE PRESENTS:

WHEREAS, Carnegie Trust Company of
(Full name and address of Principal, not the Indemnitors)
Carnegie Pa. (hereinafter called the Applicant) has requested, or may hereafter request, the SOUTHERN SURETY COMPANY, a corporation organized under the laws of Iowa (hereinafter called the Company), to make and execute, as surety, various and sundry bonds or undertakings or renewals of bonds heretofore executed; and,

WHEREAS, the Company may, by making and executing such bonds, undertakings or renewals, as surety, become liable to pay and may pay various and sundry sums or amounts of money under said bonds and may be obliged to employ counsel and other assistants from time to time in its behalf and may be put to expense in inquiring into various matters relative to liability assumed under such bonds.

NOW THEREFORE, in consideration of the premises, we, the undersigned, hereby covenant with the Company, its successors and assigns, in manner following—that is to say:

FIRST. That we will at all times indemnify and keep indemnified the Company, and hold and save it harmless from and against any and all demands, liabilities and expenses of whatsoever kind or nature, including counsel and attorney's fees, which it may at any time sustain or incur

by reason of or in consequence of having executed such bonds, undertakings or renewals, or in connection with the enforcement of this bond of indemnity, and that we will pay over, reimburse and make good to the Company, its successors or assigns, all sums and amounts of money which the Company or its representatives shall pay or cause to be paid or become liable to pay, under its obligation upon such instruments, or as charges and expenses of whatsoever kind or nature, including counsel and attorney's fees, by reason of the execution thereof, or in connection therewith, or in connection with the enforcement of this bond of indemnity, such payment to be made to the Company as soon as it shall have become liable therefor, whether it shall have paid out said sum or any part thereof or not.

That in any settlement between us and the Company the vouchers or other proper evidence showing payment by the Company of any such loss, damage or expense shall be prima facie evidence against us of the fact and amount of our liability to the Company, provided that such payment shall have been made by the Company in good faith, believing that it was liable therefor.

SECOND. That the covenants contained herein shall at all times be operative as continuing guarantees and indemnification to the Company, its representatives, successors and assigns, and until it or they shall have duly released us, by competent acquittance from all liability hereunder.

THIRD. That the Company may at any time take such steps as it may deem necessary or proper to obtain its release from any and all

liability under any of the said instruments, and to secure and further indemnify itself against loss, and all damages and expenses which the Company may sustain or incur or be put to in obtaining such release, or in further securing itself against loss, shall be borne and paid by us.

FOURTH. That no act of the Company in modifying, amending, limiting or extending any bonds or undertakings so executed by the Company shall in any way affect our liability hereunder, nor shall we or any of us be released from any obligation hereunder by reason thereof; and we agree that the Company may alter, change, modify, amend, limit or extend any such bonds or undertakings, and may execute renewals thereof, or other and new obligations in their place or in lieu thereof, and without notice to us, notice being expressly waived; and in such case, we and each of us shall be liable to the Company as fully and to the same extent on account of any such altered, changed, modified, limited or extended bonds or undertakings, or such renewals thereof or other new obligations in their place or in lieu thereof, as fully as if such other or new instruments were described at length herein.

FIFTH. That it shall not be necessary for the Company to give us, or any of us, notice of any act, fact or information coming to the notice or knowledge of the Company concerning or affecting its liability or rights under such instruments by it so executed, or any rights or liabilities hereunder, notice of any such being hereby expressly waived.

SIXTH. That we will pay, or cause to be paid, promptly as they become due, any and all premiums upon the bond or bonds mentioned in

this agreement or executed in accordance with the terms thereof.

SEVENTH. That this agreement shall bind not only the undersigned, jointly and severally, but also our respective heirs, executors, administrators, successors and assigns, as the case may be; and that nothing contained in any other instruments of writing shall prejudicially affect the efficacy of any of the covenants herein contained.

IN TESTIMONY WHEREOF, we have hereunto set our hands and affixed our seals, this 11th day of February, 1924.

John A. Bell
P. O. Carnegie Pa

STATE OF PENNA.
COUNTY OF ALLEGHENY. } *ss.*

Before me, a Notary Public in and for the County and State above named, on this 11th day of February, A. D. 1924, personally appeared John A. Bell, to me personally known to be the person who executed the above and foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

WILLIAM J. LAMB,
Notary Public.

My commission expires March 7th, 1925.

NOTE.—This bond should be acknowledged before a Notary Public and the financial statement of each indemnitor taken on Form 555 (old SD55), and attached hereto.

Exhibit B.

R. G. DUN MERCANTILE REPORT

SOUTHERN SURETY COMPANY
Home Office—Des Moines, Ia.

Bell, John A. Sr.
Pittsburgh, Pa., Allegheny Co., 1518 Oliver Building, (Sixth Ave. & Smithfield St.)

August 2nd, 1923.

He is about 63 years of age and married, a resident of Carnegie, Pa., where he began his business career in a moderate way in connection with coal mining, etc. Later he became active in local politics and was Treasu*ere* of Allegheny County being named also by the late C. L. Magee as one of the trustees of his estate. He has extensive business interests and has been a director in the Colonial Trust Company of this city, later becoming President of that institution; also he is a director in the Vurgettstown National Bank, Carnegie Trust Company, Freehold Bank, etc and an officer in the Carnegie Coal Company.

In addition to the connections mentioned, he has been backing his son-in-law in the Interstate Pope & Cardage Company, investing all told, about $200,000 and he also is financially at the back of the Phianna Motors Company of Newark, N. J. investing in this direction close to $250,000.

He has been a heavy investor in coal lands, and real estate in both Washington and Allegheny Counties, Pa. In addition to his former holdings of about 1200 acres of coal in Washington County he acquired in May 1917 about 886

acres of coal and 724 acres of surface in Smith, Jefferson and Hanover Townships, Washington County, Pa. The consideration in all instances was not published, but other deeds indicated the purchase price from $100 per acre to $170, per acre the average being around $150, per acre, which would make the total expenditure around $1,250,000. Also he is the owner of real estate at Carnegie, Pa. assessed at $55,000 and in Allegheny County Pa., the following deeds have been recorded.

Deed dated January 8th, 1917 recorded Finley Township 323 acres Harry L. Craig to John A. Bell, consideration $45,000. also May 9th, 1917, 135 acres, Findlay Township, James E. McCutcheon to John A. Bell, consideration $1, May 10th, 1917 Moon Township 179 acres Henry A. Aten to John A. Bell, consideration $44,800. April 23, 1917 251 acres, Moon Township, Archbald J. Marshall and Elmira H. Marshall to John A. Bell consideration $1. Real estate transfer May 9th, 1917 Findley Township, 187 acres William W. Linton to John A. Bell, consideration nominally $1.

Also he has been investing heavily in Washington County Coal, purchase all told several thousand acres, As of May 1918, 27 tracts were conveyed to him by R. W. Bailey, consideration $342,271, and Bell executed a mortgage for part of the purchases money in the amount of $256,696.

His coal investments have been considerable, including the Burgettstown Coal Company, Verner Coal & Coal Company, Hermon Creek Coal Company, Selkald Coal Company, Carnegie Coal Company, etc. and on May 1st, 1923, the merger became effective of these different interests under the style Carnegie Coal Company, which

is stated to have a net capital investment of $9,000,000 and over and Bell is largely at interest. He is also a half partner in the Glen Coal Company, which took over one of the mines of the Burgettstown Coal Company.

His real estate holdings include the property at Carnegie, Pa. assessed on the county records at $114,250 and in Moon Township assessed at $171,370. Also he holds an acreage in Cresson Township, adjoining Moon Township, this property being known as the Bell Farm using as a summer home and raising fancy blooded cattle and other live stock. He is mentioned as a millionaire, several times over reported to handle his financial and business affairs in a capable manner, regarded with confidence, and reported prompt in his settlements.

FIRE RECORD:

No record of any fire loss.

AMP 5718 N. Q.

Exhibit C.

SOUTHERN SURETY COMPANY
Home Office—Des Moines, Ia.

D. P. Jones Mercantile Report.

Bell, John 836 Washington Ave. Carnegie
Wife's Name (Mathilda Foster Bell)
President

Antecedents:

He is about 65 years of age, his wife prior to her marriage was a Miss Mathilda Foster, family of grown children who are all married, has been a resident of the borough of Carnegie for

many years. He is fairly well known in this section and bears an excellent reputation.

Resources:

He is president and director of the Colonial Trust Co., also president and director of the Carnegie Trust Co., of Carnegie also of the First National Bank of Carnegie, president and director of the Freehold Bank, Grove City, National Bank, Burgettstown Coal Co., Burgettstown National Bank, Carnegie Coal Co., and Carnegie Dock & Fuel Co. treasurer and trustee of the Elizabeth Steel Magee Hospital also vice president and director of the Harmon Creek Coal Co., director of the Interstate Pipe Co., director of the Potter Gas Co., and also of the Sinclair Oil & Refining Corporation. He has large coal interests in the Burgettstown district, is in receipt of a liberal income and is the owner of the residence property which has an assessed valuation of $91,000. and is considered one of the wealthiest men of this section. His net worth is estimated between $1,000,000.00 to $2,000,000.00.

Trade Experience:

1—Retail Grocer: Reports selling to him without limit, he is absolutely reliable and worthy of any credit he might seek.

2— Among the other merchants he is reported an A1 risk for credit.

3—Dept. Store: Since June 1921 high credit $6.23 pays in 60 days.

4—Dept. Store: Since 1916 high credit $80,000 pays 30 days.

526 Jan. 25, 1924 a. m. 400

SOUTHERN SECURITY COMPANY.

Exhibit D.

INTERESTS OF JOHN A. BELL, SR.

MERCANTILE

Company	Connection	Dun Rating
Burgettstown Coal Co.	Pres-Dir.	$100,000 to 150,000—1st
Bulger Supply Co.	Pres-Dir.	35,000 to 50,000—1st
Carnegie Coal Co.	Pres-Dir.	Over one million
Carnegie Dock & Fuel Co.	Dir.	200,000 to 300,000—1st
Clement Merc. & Land Co.	Pres-Dir.	5,000 to 10,000—2nd
Frauenheim Coal Co.	Dir.	
Harmon Creek Coal Co.	V. Pres-dir.	400,000 to 500,000—1st
Interstate Pipe Co.	Dir.	—1st
Leonard Oil Delm't Co.	Dir.	
Salkeld Coal Co.	Pres-Dir.	200,000 to 500,000—1st
Verner Coal & Coke Co.	Pres-Dir.	Over one million

BANKING

		Capital & Surplus
Colonial Trust Co.	Pres-Dir.	$7,000,000.
Burgettstown Nat. Bank	Pres-Dir.	300,000.
Carnegie Trust Co.	Pres-Dir.	700,000.
1st National Bank, Carnegie	Pres-Dir.	300,000.
Freehold Bank, Pgh.	Pres-Dir.	1,000,000.
Grove City Nat. Bank	Pres-Dir.	300,000.

HONORARY

Allegheny County Workhouse	President Board of Directors
Magee Maternity Hospital	President Board of Directors

Exhibit E.

SOUTHERN SECURITY COMPANY
Home Office—Des Moines, Ia.

BANK STATEMENT.

REPORT of the condition of the Carnegie Trust Company, 10 West Main Street, Carnegie, Allegheny County, Pennsylvania, at the close of business December 31, 1923.

RESOURCES

Reserve Fund:		
Cash, Specie and Notes.	215,880.35	
Due from approved reserve agents	490,902.34	
Legal reserve securities at par	24,150.00	750,932.69
Nickles and cents		529.82
Checks and cash items		1,470.11
Due from Banks and Trust Companies excluding reserve		153,855.96
Commercial paper purchased upon one name		952,593.82
Commercial paper purchased upon two or more names		1,281,455.30
Time Loans with Collateral		228,231.68
Call loans with Collateral		802,889.99
Loans secured by Bonds and Mortgages		38,691.23
Bonds		563,100.00
Stocks		266,416.22
Mortgages and judgments of record.		335,076.09
Office building and lot		55,000.00
Other Real Estate		2,383.43
Furniture and Fixtures		7,780.58
Overdrafts		1,401.61
		5,421,808.53

LIABILITIES

Capital Stock paid in		225,000.00
Surplus Fund		400,000.00
Undivided Profits, less expenses and taxes paid		66,078.53
Demand Deposits: (exclusive of trust funds)		
Individual deposits subject to check	2,626,894.30	
Deposits, Commonwealth of Pa.	150,000.00	
Certified checks	145.38	
Treas. Checks	2,560.20	2,779,599.88
Time Deposits (exclusive of trust funds)		
Time certificates of deposit	83,040.40	
Time saving fund deposits	1,844,784.85	1,927,825.25
Due to Banks and Trust Cos. etc. excluding reserve		14,170.18
Dividends Unpaid		9,091.00
Other liabilities not included in above		43.69
		5,421,808.53

TRUST FUNDS

Mortgages	53,100.00
Other investments etc.	18,855.48
Cash Balance	6,866.02
	78,821.50

State of Pennsylvania } *ss*:
County of Allegheny, }

I, Joseph Walker, Treasurer of the above named Company, do solemnly swear the above statement is true to the best of my knowledge and belief.

Joseph H. Walker, Treasurer.

Subscribed and sworn before me this 8th day of January 1924.

(Signed) C. B. Haudenshield.
My commission expires March 6, 1927.

Correct—Attest:

John A. Bell
George T. Kirkbride Directors.
C. A. Foster

IN THE
COURT OF CHANCERY OF NEW JERSEY.

Between

COMMERCIAL CASUALTY INSURANCE COMPANY and NEW JERSEY FIDELITY & PLATE GLASS INSURANCE COMPANY, *Complainants,*

and

SOUTHERN SURETY COMPANY OF DES MOINES, IOWA, *Defendant.*

Affidavit.

STATE OF IOWA, } *ss.*
POLK COUNTY. }

I, PAUL BROWN, being first duly sworn, on oath say:

That I reside at Des Moines, Iowa, and I am, and have for more than six years last past been, Assistant Secretary of the Southern Surety Company of Des Moines, Iowa, and in charge of the Depository Bond Department of said Company.

That I have read what purports to be a copy of an affidavit made by W. Clyde Grubbs in the above-entitled cause on the 4th day of November, 1926.

That I was in the City of New York on the 6th day of May, 1925, for the purpose of attending a meeting of the Depository Bond Committee of the Surety Association of America; that on said date I attended a meeting of some of the representatives of certain companies who had ex-

ecuted depository bonds for the Carnegie Trust Company and representatives of some of the reinsurers of said surety companies, held at the office of the American Surety Company in said City.

That after a conference with the representatives of some of the companies reinsuring the Southern Surety Company, I called a meeting of the reinsurers of the Southern Surety Company to be held on the 8th day of May, 1925, at the William-Penn Hotel in Pittsburgh, Pennsylvania.

That on the 8th day of May, 1925, the meeting last above referred to was held at Pittsburgh, Pennsylvania, at which meeting I acted as chairman. That there was present at said meeting representatives of ten of the surety companies reinsuring the Southern Surety Company upon its certain depository bond executed by the Southern Surety Company as surety for the Carnegie Trust Company in favor of Allegheny County for the penal sum of one million one hundred thousand dollars ($1,100,000). That among said representatives was E. V. Roth representing the Columbia Casualty Company and The Ocean Accident and Guaranty Company, both of New York. That the purpose of calling said meeting, and the principal subject discussed at said meeting, was the securing from John A. Bell as indemnitor of the Southern Surety Company upon said one million one hundred thousand dollars ($1,100,000) bond, either by negotiation or legal proceeding, security for the liability of the said surety companies on said one million one hundred thousand dollar ($1,-100,000) bond.

That during the progress of the meeting, E. V. Roth above referred to, suggested the employ-

ment of a local lawyer at Pittsburgh for the purpose of securing indemnity from the said Bell, and recommended one W. Clyde Grubbs, stating that the said Grubbs was the regular attorney for the companies represented by him, the said Roth, in the City of Pittsburgh. Other local attorneys were suggested, and after some discussion I called the roll of those present, and the majority were in favor of employing W. Clyde Grubbs. Thereupon Mr. Grubbs was sent for.

That soon after Mr. Grubbs entered the meeting, he inquired by whom he was employed, and I told him that he was employed by the Southern Surety Company and by the reinsurers, and for the purpose of attempting to recover of John A. Bell anything possible to recover to indemnify the Southern Surety Company and the reinsurers, and incidentally to take such steps as were necessary to ascertain the amount which Allegheny County had on deposit in the Carnegie Trust Company.

That the statement made by Mr. Grubbs in his affidavit, as follows: "Your affiant was further advised that he, W. Clyde Grubbs, had been selected as counsel by the representatives of the reinsuring companies present to ascertain the facts and secure such information as was necessary to enable him to give an opinion as to whether or not the reinsuring companies of the Southern Surety Company were liable on the said bond. After being advised of this fact one Paul Brown, representing himself to be an officer of the Southern Surety Company, requested the affiant to advise the Southern Surety Company whether or not, in his opinion, the Southern Surety Company was liable on the said bond to

the said County of Allegheny. Affiant immediately advised the said Brown that if it should develop that the interests of the reinsurers were antagonistic to the interests of the Southern Surety Company that the affiant would not represent the Southern Surety Company. Whereupon said Brown assured the affiant that there would be no conflict of interests and that the interests of the reinsurers and the Southern were identical,'' is untrue in every particular.

Affiant does not pretend to say that the said Grubbs may not have been requested by the representatives of some of the reinsuring companies present to give them an opinion as to whether said companies were liable to the Southern Surety Company, but affiant says that if said conversation occurred, it was a private conversation between the said Grubbs and said representatives, and was not in the open meeting and that this affiant knew nothing of it.

At the time, I told Mr. Grubbs by whom he was employed, I told him that the Southern Surety Company would pay his fee and that in due time the reinsurers would contribute, in accordance with the terms of their reinsurance contracts.

That on the 1st day of June, 1926, I personally mailed to the Commercial Casualty Insurance Company and to the New Jersey Fidelity and Plate Glass Insurance Company of Newark, New Jersey, and to the other reinsurers of the Southern Surety Company, copies of an audit made by Main and Company entitled ''Special Report in re Samuel D. Foster, Treasurer of Allegheny County, Accounts with Carnegie Trust Company, Carnegie, Pennsylvania, January 1, 1924 to April 25, 1925,'' a copy of the opinion of

Honorable Henry G. Wasson with respect to the liability of the Southern Surety Company upon its one million one hundred thousand dollar ($1,100,000) depository bond, and other documents relating to said matter.

PAUL BROWN.

Sworn to and subscribed before me,
a notary public in and for the
County of Polk in the State of
Iowa, this 16th day of November,
1926.

S. L. HUBBARD,
(SEAL) Notary Public in and for
Polk County, Iowa.
My commission expires July 4, 1927.

IN THE
COURT OF CHANCERY OF NEW JERSEY.

Between

COMMERCIAL CASUALTY INSURANCE COMPANY, and NEW JERSEY FIDELITY & PLATE GLASS INSURANCE COMPANY,
Complainants,

and

SOUTHERN SURETY COMPANY OF DES MOINES, IOWA,
Defendant.

Affidavit.

STATE OF IOWA, }
POLK COUNTY. } *ss.*

I, J. L. PARRISH, being first duly sworn, on oath say:

That I am a resident of the City of Des Moines, Iowa, and am a lawyer by profession; that I am a member of the firm of Parrish, Cohen, Guthrie, Watters and Halloran; that I have been engaged in the practise of law in the City of Des Moines for more than thirty-five years.

That I first became connected with the matters growing out of the failure of the Carnegie Trust Company of Carnegie, Pennsylvania, on the afternoon of Saturday, May 23, 1925, when I was requested by Mr. C. S. Cobb, President of the Southern Surety Company of Des Moines, Iowa, to accompany him to New York to attend a meeting of the reinsurers of the Southern Surety Company upon a depository bond executed by

the Southern Surety Company as surety for the Carnegie Trust Company in favor of Allegheny County in the State of Pennsylvania, in the penal sum of one million one hundred thousand dollars ($1,100,000).

That Mr. Cobb and I attended said meeting in New York on Monday and Tuesday, May 25th and 26th, 1925. At said meeting the question of the liability of the Southern Surety Company upon its one million one hundred thousand dollar ($1,100,000) bond and what, if any, defense it had thereon, were discussed. During said meeting I was advised that Main and Company, a firm of accountants at Pittsburgh, Pennsylvania, were making and had either completed or were about to complete, an audit of the account of Allegheny County in the Carnegie Trust Company, although no copy of the audit had been received by any of the persons present at said meeting.

That at said meeting it was requested by some of the reinsurers that a general audit of the books of the Carnegie Trust Company from January 1, 1924, to the date of the closing of the Trust Company be secured. Others were of the opinion that such an audit was entirely unnecessary.

In discussing the purpose of such an audit, some of those desiring the same stated, in substance, that it was hoped that such an audit would disclose the fact that the Carnegie Trust Company was insolvent at the time of the execution of the depository bond and that this fact was known to the officers of Allegheny County whose duty it was to designate the depository, and that deposits were made by Allegheny County in the Carnegie Trust Company so as

to make it possible for the Trust Company to loan funds to the officers of the County, or their friends, which facts they thought, if sustained, would constitute a defense upon the one million one hundred thousand dollar ($1,100,000) bond.

On behalf of the Southern Surety Company, I stated in substance that while, offhand, I could not see how those facts, if shown, would constitute a defense upon the bond, yet I had no objection to such an audit if the same could be obtained, though it was stated at the meeting that a request for such an audit had been made to the Banking Department of the State of Pennsylvania and refused. I advised those present that when I arrived in Pittsburgh, where I intended to go immediately upon leaving New York, I would make a request for such an audit.

That I arrived in Pittsburgh on Wednesday morning, May 27, 1925, where I was furnished with a copy of an audit of the account of Allegheny County in the Carnegie Trust Company, the original of which was afterwards delivered to me by W. Clyde Grubbs and Mr. Freeman; that a copy of said audit is attached hereto marked Exhibit A and made a part of this affidavit.

That soon after arriving in Pittsburgh, I submitted to the Honorable Henry G. Wasson, a lawyer of high standing in the City of Pittsburgh, Pennsylvania, the question of the liability of the Southern Surety Company upon its depository bond of one million one hundred thousand dollars ($1,100,000), and received from him a written opinion, a copy of which is attached hereto marked Exhibit B and made a part of this affidavit.

That on Thursday, May 28, 1925, I attended a conference at the office of Mr. Freeman at which were present: Mr. W. Clyde Grubbs, Mr. M. C. Conick, Mr. A. M. Birdsall, Assistant General Counsel for the National Surety Company (which company was surety upon another depository bond of the Carnegie Trust Company to Allegheny County), Mr. Freeman and one or two others whose names I have forgotten. Mr. Conick advised us that he was a member of the firm of Main and Company and had personally made the audit above referred to. In answer to questions propounded to him by Mr. Birdsall, he stated to us that he had made a careful audit of the books and records of both the County of Allegheny and the Carnegie Trust Company in so far as they related to the account of Allegheny County in the Trust Company, and that in making the audit he had in mind possible fraudulent entries in said records, and that he had made a careful investigation of the same and was satisfied that the account, as shown by the audit, was correct and that the amount, as shown by said audit, on deposit was correct.

I have read what purports to be a copy of an affidavit signed by W. Clyde Grubbs on the 4th day of November, 1926, in this cause.

That prior to my arrival in Pittsburgh I was advised that W. Clyde Grubbs had been employed by the Southern Surety Company and by the reinsurers jointly for the purpose of securing from Mr. John A. Bell (who had given to the Southern Surety Company a contract of indemnity indemnifying the Southern against any loss it might suffer on account of the execution, as surety, of the said one million one hundred thousand dollar ($1,100,000) bond, either by negotiation or

legal proceedings, such security or property as he was able, to reimburse the Southern Surety Company and its reinsurers on account of its possible loss upon said bond, and also to take such steps as were necessary to verify the correctness of the account of Allegheny County in the said Trust Company.

That on Wednesday, May 27, 1925, I, representing the Southern Surety Company, had at least one conference with Mr. Grubbs as attorney for the Southern Surety Company, and on Thursday, May 28th, I, representing the Southern Surety Company, had at least three conferences with Mr. Grubbs as attorney for the Southern Surety Company, the second one of which was in the office of Mr. Freeman. At no time did Mr. Grubbs suggest to me that there was any conflict between the interests of the Southern Surety Company and those of the reinsurers, or that there was any impropriety in his representing the Southern Surety Company and the reinsurers, or that he had advised any representative of the Southern Surety Company of such conflict or impropriety, until during the last conference which was held in his office on the afternoon of Thursday, May 28th, and then only in response to a suggestion of mine that he withdraw from his employment by the Southern Surety Company, which suggestion of mine was the result of facts which I had learned subsequent to my arrival in Pittsburgh.

On or about the first day of February, 1926, I took the deposition of W. Clyde Grubbs at Pittsburgh, Pennsylvania in the case of Southern Surety Company of Des Moines against The General Reinsurance Corporation of New York and other cases pending in the district court of

the United States for the Southern District of Iowa. The testimony of Mr. Grubbs, in so far as it related to his employment by the Southern Surety Company, was as follows:

"W. CLYDE GRUBBS,

of the city of Pittsburgh, county of Allegheny, and commonwealth of Pennsylvania, called as a witness on behalf of the plaintiff herein but not sworn, examined in chief by J. L. Parrish, Esquire, deposes as follows:

"Q1 Mr. Grubbs, I don't care to have you sworn. In ordering this audit which was made by Mr. Conick as representative of Main and Company, who were you representing?

"A. I was representing all of the reinsuring companies for the Southern Surety on the $1,100,000 bond, as well as the Southern Surety Company, and that dual relation existed until you, Mr. Parrish, and I felt that there would be a conflict of interest, whereby I directed that Main and Company turn over to you the data that they had then made. Prior to your visit to my office—Mr. Cohen was first to see me. The exact date I don't know. Mr. Zwinggi told me not to take any action in connection with the Southern Surety Company except in the presence of either Mr. Cohen or Mr. Levy."

That on or about the 23rd day of February, 1926, I took the deposition of E. V. Roth in the City of New York in the cases pending in the district court of the United States for the Southern District of Iowa, above referred to. The testimony of Mr. Roth, so far as it related to the employment of Mr. Grubbs, was as follows:

"E. V. ROTH

of the city of New York and State of New York, a witness called on behalf of the plain-

tliff herein, having been first duly sworn by the Commissioner, examined in chief by J. L. Parrish, Esquire, deposes as follows:

"Q1 Mr. Roth, what position do you occupy with the Columbia Casualty Company and the Ocean Accident & Guarantee Company?

"A. I am superintendent of their bonding claims department.

"Q2 Of both companies?

"A. Both companies.

"Q3 And were such in the month of May, 1925?

"A. No. I was not at that time.

"Q4 What was your relation with the company?

"A. I was just employed here handling their claims.

"Q5 Did you attend a meeting of the representatives of the Southern Surety Company and some of the reinsurers upon this Carnegie Trust Company bond of 1100 thousand dollars which has been referred to in the testimony here today, held at Pittsburgh on the 8th day of May, 1925, at the William Penn Hotel?

"A. I judge that date is right. I attended a meeting there.

"Q6 Do you remember that as a result of that meeting that Mr. W. Clyde Grubbs, lawyer of Pittsburgh, Pennsylvania, was employed by the Southern Surety Company and the reinsurers in connection with the matter of that bond?

"A. I do.

"Q7 You attended that meeting as a representative of the Columbia Casualty Company and the Ocean Accident & Guaranty Company, did you not?

"A. I did.

"Q8 And as a result of that meeting Mr. Grubbs was employed by all of them, as I have stated.

"A. He was."

Affiant further states that on Wednesday, May 27, 1925, while in Pittsburgh, I made a request of counsel for the Secretary of Banking for the State of Pennsylvania (which officer, under the statutes, had charge of the liquidation of the Carnegie Trust Company) for leave to have made a general audit of the books of the Carnegie Trust Company from January 1, 1924, to the date of the closing of the Trust Company, which request was preemptorily refused by counsel for the Secretary of Banking, who advised me that the same request had been formerly made and refused.

J. L. PARRISH.

Sworn to and subscribed before me,
a Notary Public in and for the
County of Polk and State of Iowa,
this 16th day of November, 1926.

L. E. MAYER,
(SEAL) Notary Public in and for
Polk County, Iowa.
My commission expires July 4, 1927.

Exhibit A.

May Twenty-second, Nineteen Hundred Twenty-five

SPECIAL REPORT

In Re: Samuel D. Foster
Treasurer of Allegheny County
Accounts with Carnegie Trust Company
Carnegie, Pennsylvania
January 1, 1924 to April 25, 1925

MAIN AND COMPANY
Accountants and Auditors
Farmers Bank Building
PITTSBURGH, PA.

MAIN AND COMPANY
Accountants and Auditors
Pittsburgh, Pa. U. S. A.

May 22, 1925.

W. Clyde Grubbs, Esquire,
Watson and Freeman, Esquires,
Pittsburgh, Pennsylvania.

Gentlemen:

In Re: Samuel D. Foster, Treasurer of Allegheny County, Accounts with Carnegie Trust Company, Carnegie, Pennsylvania

Pursuant to your request, we examined certain records of the Carnegie Trust Company, Carnegie, Pennsylvania, and of the Treasurer of Allegheny County, insofar as the treasurer's records relate to the funds deposited in said bank, as hereinafter referred to.

The balances so held on deposit at the close of business April 25, 1925, are as follows:

(A)—Samuel D. Foster, Treasurer of Allegheny County "General Fund," $1,309,442.12.

(B)—Samuel D. Foster, Treasurer of Allegheny County "Sinking Fund," $15,988.58.

(C)—Samuel D. Foster, Treasurer of Allegheny County "State Account," $38.02 (County Treasurer's books show no balance in this account).

The present treasurer of Allegheny County, Samuel D. Foster, assumed office in January, 1924.

The Carnegie Trust Company was closed by the Secretary of Banking of Pennsylvania as at the commencing of business on April 27, 1925.

Transcripts of the foregoing accounts from January, 1924, to the close of business April 25, 1925 (April 26th was Sunday) together with explanatory data in connection with them, will be found in the following schedules which are made a part of this report:

SCHEDULE "A"	Transcript of Deposits, Withdrawals and Balances to the Account of Samuel D. Foster, Treasurer of Allegheny County, "General Fund," per records of the Carnegie Trust Company, Carnegie, Pennsylvania, from January 8, 1924, to April 25, 1925.
SCHEDULE "B"	Transcript of Account with the Carnegie Trust Company, titled "General Fund," per records of the Treasurer of Allegheny County,

from January 7, 1924, to April 25, 1925, together with other explanatory notes obtained from his subsidiary records.

SCHEDULE "C" Transcript of Deposits, Withdrawals and Balances to the Account of Samuel D. Foster, Treasurer of Allegheny County "Sinking Fund," per the records of the Carnegie Trust Company, Carnegie, Pennsylvania, from January 8, 1924, to April 25, 1925.

SCHEDULE "D" Transcript of account of the Carnegie Trust Company, titled "Sinking Fund," per records of the Treasurer of Allegheny County, from January 7, 1924, to April 25, 1925.

SCHEDULE "E" Transcript of Deposits, Withdrawals and Balances to the Account of Samuel D. Foster, County Treasurer, "State Account," as per the records of the Carnegie Trust Company, Carnegie, Pennsylvania, from January 8, 1924, to April 25, 1925.

During the course of our examination at the Carnegie Trust Company, we also noted that other funds (such as the County Home and the Pension Board Funds), of which Samuel D. Foster was Treasurer, were on deposit. Should you desire the data we obtained in connection with these accounts, we can furnish them at your request. Our examination was conducted as follows:

GENERAL FUND

The transcript set out in Schedule "A" was taken from the records of the Carnegie Trust Company.

In Schedule "B" we set out the entries to the "General Fund" account as they appear on the books of the county treasurer. The opening balance, deposits and the withdrawals in this account, as shown on the books of the county treasurer, are in agreement with those shown on the books of the Carnegie Trust Company, with the exception of the items marked "#" in Schedule "A." It will be noted that the items so marked among the withdrawals aggregated $107,273.93 and that the deposits so marked equalled the same amount. These items represent errors on the books of the Carnegie Trust Company as between the "State Account," later referred to, and the "General Fund" account.

We inspected the cancelled checks, on hand at the county treasurer's office, supporting the withdrawals from this account and have traced the entries on the books of both the county treasurer and the bank. The withdrawals represent current and usual transfers made between the several bank accounts maintained by the county treasurer for county funds. Ten banks are selected as depositaries for county funds: three are active and seven inactive. During the early part of the year transfers were made from the inactive accounts to the active accounts until

the heavy collection of taxes commenced, some time in May or June. Thereafter transfers appear to have been made from the active to the inactive accounts, and were there kept until they were required for current purposes.

During 1924 two transfers were made from the "Sinking Fund" account at the Carnegie Trust Company to the "General Fund" account. As will be noted in Schedule "B," the first, of $100,000.00, was on September 22, 1924, and the second, of $300,000.00, on November 28, 1924. In September and November, of 1924, the county authorities invested "Sinking Fund" cash in county bonds. In each case the amounts paid for the bonds were transferred from the "Sinking Fund" cash accounts to the "General Fund" cash accounts, to be later used for purposes provided by the respective bond issues. So far as the Carnegie Trust Company accounts were concerned, two transfers, aggregating $400,000.00, were made from the "Sinking Fund" to the "General Fund," the first on September 22, 1924, and the second on November 28, 1924. From these transfers made to the "General Fund," only two expenditures or transfers were made, viz., $90,000.00 and $10,000.00, on February 19th and April 11th, 1925, respectively, as shown in Schedule "B."

It will also be noted that interest has been credited to the "General Fund" account by the bank up to March 1, 1925. Interest, at the rate of 4.05%, on the balance in this account, from April 1 to April 25, 1925, will amount to approximately $4,000.00.

SINKING FUND

In Schedule "C" a transcript of the "Sinking Fund" account, as carried on the books of the bank, is shown, while in Schedule "D," a transcript according to the books of the county treasurer is given. This account started on January 7, 1924, by the transfer of $236,304.54 from the former county treasurer's account. There was transferred thereto from other banks, $168,000.00. Interest on daily balances to March 31, 1925, aggregated $11,684.04. There was transferred to the "General Fund," on September 22 and November 28, 1924, a total of $400,000.00, leaving a balance of $15,988.58 in this account on April 25, 1925. These transfers were explained under the preceding caption. To this should be added the interest for the twenty-five days of April not yet credited by the bank.

STATE ACCOUNT

In Schedule "E" we submit a transcript of the deposits, withdrawals and balance in the "State Account," as taken from the books of the bank. We endeavored to check this account, in detail, with the records of the county treasurer, but checked only the deposits, disclosing erroneous postings on the books of the bank to the "General Fund" account, which should have been made to the "State Account." These errors were adjusted on the bank's books as soon as found, thereby bringing the deposits into agreement with the county treasurer's records. We did not check the disbursements from the "State Account" with the cancelled checks on hand in the county treasurer's office. The clerk in charge of these records in the county treasurer's office denied us further investigation

into the "State Account" because he did not believe the same represented county funds and stated they were not within the scope of our examination. Should you desire, we can refer the matter to the county treasurer for his permission to further examine his records of the "State Account."

The clerk in charge of these records in the county treasurer's office, referred to us two checks that were drawn against the "State Account" by which the funds on deposit with the Carnegie Trust Company were withdrawn as follows:

Check No. 697, dated April 24, 1925, for $7,000 and
Check No. 699, dated April 25, 1925, for $4,144.18.

These checks were cashed before the close of business April 25, 1925, and closed out the balance on deposit except $38.02. The bank was closed by the Secretary of Banking, as previously stated, on the morning of April 27, 1925.

While the records of the bank show a balance of $38.02 in the "State Account," the records of the county treasurer show the account to be closed out. There are two outstanding checks, aggregating $38.12, that have not yet been presented to the bank for payment, and there was an error of ten cents in drawing check No. 699.

SURETIES AND SECURITY

During the course of our examination at the Carnegie Trust Company our Mr. M. C. Conick made inquiry of the treasurer of the bank, Joseph H. Walker, as to the record kept by the bank of sureties and security issued or pledged to secure the deposits of the county treasurer.

Mr. Walker informed Mr. Conick that no record of this character was kept, except memorandums either by himself or the general bookkeeper. He also stated that matters of this kind were sometimes authorized through the minutes of the bank or handled through the Pittsburgh office of Mr. John A. Bell. He exhibited to Mr. Conick a pencil memorandum from which it appeared that the county treasurer was secured by a surety bond of the Southern Surety Company, in amount of $1,100,000.00 on the "General Fund" deposits, by a $200,000.00 surety bond of the National Surety Company, and another bond in amount of $80,000.00 of the Commercial Casualty Company, the latter two apparently securing deposits in both the "Sinking Fund" and the "General Fund." This memorandum also showed that the deposits in the "State Account" of the county treasurer were secured by Carnegie Coal Company bonds of $250,000.00. Mr. Walker further stated that these bonds were returned to the bank three or four weeks before (May 15, 1925) but was not sure as to the exact date. On May 18, 1925, Mr. Conick was informed again by Mr. Walker that instead of all of these bonds being Carnegie Coal Company bonds, $50,000.00 thereof represented Harmon Creek Coal Company bonds. The pencil memorandum exhibited to Mr. Conick by Mr. Walker, above referred to, indicated that these bonds secured the "State Account." To verify this memorandum, Mr. Conick requested the minute book from Mr. Walker, who, in turn, obtained same from an assistant bank examiner named Wirth. The minute book, after January 1, 1924, provides as follows:

Under date of February 18, 1924, page 45 of the minute book, the action of the president and secretary in making application for depository bond in the sum of $1,400,000.00 with the Southern Surety Company, for deposits of the county funds of Allegheny County, was approved.

On page 76, September 20, 1924, the following minute appears:

"On motion made by Mr. Robb, seconded by Mr. Love, the following resolution was adopted:

RESOLVED that the proper officers * * * deposit Two Hundred Fifty Thousand (250,000.00) dollars first mortgage sinking fund 6% gold bonds of the Carnegie Coal Company with Samuel D. Foster, Treasurer of Allegheny County, as additional security for deposits made by the County of Allegheny with the Carnegie Trust Company."

It will be noted that the above minute refers to additional security for deposits made by the County of Allegheny. The memorandum refers to this security as applying to the "State Account." On May 20, 1925, Mr. Conick conferred with the treasurer of Allegheny County with respect to this matter, especially as to the difference between the funds deposited in each of the accounts therein referred to. He informed him that all funds collected by him and deposited with the Carnegie Trust Company in the "State Account" were collected by him as agent for the Commonwealth of Pennsylvania, and to secure the Commonwealth against the loss of such funds he personally deposited with the Commonwealth a surety bond in the amount of

$100,000.00. He further informed us that such funds do not belong to the county nor are they county funds in any manner whatsoever; that the "State Account" is not covered by any of the surety bonds given to the county to secure its deposits and in order to secure him against possible loss through this account, in the event the bank did not pay, securities were pledged with him by the bank from time to time. Inasmuch as Mr. Foster believed the matter did not concern this inquiry, he did not go into any further explanation as to the amount of security or its disposition except to state that by April 25, 1925, the "State Account" with the Carnegie Trust Company was closed, so far as his records were concerned.

From our examination of the books of the county treasurer, we found that separate sets of books were kept for the "State Account" receipts and disbursements and that they were in no way reported to the county controller's office. Separate sets of records were maintained for the receipts and disbursements of the regular county funds which were reported monthly to the county controller's office and there recorded in controlling accounts.

We were advised by the clerk in charge at the county controller's office, Mr. Lowry, that he had no knowledge of the "State Fund" account or of any securities that may have been deposited to secure the same with the county treasurer and that he has never considered the "State Account" as county funds.

The records in the county controller's office with respect to the sureties for county funds on deposit at the Carnegie Trust Company showed the following:

SOUTHERN SURETY COMPANY

Southern Surety Company of Des Moines, Ia. Surety Bond in the amount of $1,100,000.00 dated February 25, 1924.

This bond secures the County of Allegheny for the above amount. While the bond does not indicate specifically the character of funds secured, it does state, however, in part, the following:

> "WHEREAS Said Carnegie Trust Company has been selected and designated as a depository of the county funds of said county for the term of the present county treasurer of said county * * *."

COMMERCIAL CASUALTY COMPANY

The second bond is that of the Commercial Casualty Company, of Newark, N. J., in amount of $80,000.00, dated November 12, 1924, securing the County of Allegheny, of Pennsylvania. While not specifically designating the character of funds, it states in part the following:

> "WHEREAS the bank has been designated as a depository for certain money belonging to the obligee * * *"

which may be construed to secure the county in the same manner as the preceding bond.

Further comment regarding this bond is made later in this report.

NATIONAL SURETY COMPANY

The third bond is that of the National Surety Company, in amount of $150,000.00, dated February 12, 1925. A clause similar to that referred to in the preceding paragraphs, appears therein, namely:

> "WHEREAS said Carnegie Trust Company has been selected and designated as a depository of the county funds of said county of Allegheny for the term of said County Treasurer * * *"

It appears that the National Surety Company originally secured the county in amount of $200,000.00, the bond being dated February 10, 1921. This appears to be continued under a certificate, No. 8644, for the period from February 10, 1924, to February 10, 1925. The bond was thereafter reduced to $150,000.00

We call your attention to the first paragraph of the surety bond of the Commercial Casualty Company, which provides as follows:

> "That if at any time during the currency of this bond the obligee shall hold any other security on account of the monies deposited with the Bank, such security shall not be released without notice to, and the consent of the Surety hereon. And if the obligee shall, without the knowledge or consent of the said surety, release such security, this bond shall thereupon become null and void."

Mr. Lowry, the clerk in the County Controller's office in charge of the surety records, informed our Mr. Conick that he did not know of any consent being obtained from other sureties when the National Surety Company bond was reduced.

What effect this reduction may have upon the Commercial Casualty Company bond, we are not prepared to state.

Respectfully submitted,

MAIN AND COMPANY,
Accountants and Auditors.

SCHEDULE "A"

TRANSCRIPT OF DEPOSITS, WITHDRAWALS AND BALANCES TO THE ACCOUNT OF SAMUEL D. FOSTER, TREASURER OF ALLEGHENY COUNTY (GENERAL FUND)

PER RECORDS OF THE CARNEGIE TRUST CO., CARNEGIE, PENNA.
FROM JAN. 8, 1924, to APRIL 25, 1925

Old Balance	Date	Checks in Detail		Deposits	Date	New Balance
				1,058,052.90	1- 8-24	1,058,052.90
1,058,552.90	1-19-24	100,000.00			1-19-24	958,052.90
958,052.90	3- 5-24	100,000.00			3- 5-24	858,052.90
858,052.90	3-20-24	50,000.00	3,434.50			
		2,358.19			3-20-24	802,260.21
802,260.21	3-26-24	50,000.00			3-26-24	752,260.21
752,260.21				9,505.35	3-31-24	761,765.56
761,765.56	4- 2-24	100,000.00			4- 2-24	661,765.56
661,765.56	4-15-24	100,000.00			4-15-24	561,765.56
561,765.56	4-22-24	50,000.00			4-22-24	511,765.56
511,765.56	4-29-24	100,000.00			4-29-24	411,765.56
411,765.56	5- 5-24			100,000.00	5- 5-24	511,765.56
511,765.56	5-12-24	10,000.00			5-12-24	501,765.56
501,765.56	6- 5-24	50,000.00			6- 5-24	451,765.56
451,765.56	6-11-24	50,000.00			6-11-24	401,765.56
401,765.56				51,411.63	6-16-24	453,177.19
453,177.19				27,992.00	6-17-24	481,169.19
481,169.19	6-25-24	25,000.00			6-25-24	456,169.19
456,169.19	6-28-24	75,000.00			6-28-24	381,169.19
381,169.19				5,265.61	6-30-24	386,434.80
386,434.80				50,000.00	7-12-24	436,434.80
436,434.80	7-15-24			50,000.00	7-15-24	486,434.80
486,434.80				55,527.72	7-18-24	541,962.52
541,962.52				50,000.00	7-30-24	591,962.52
591,962.52	8- 2-24	958.30#		415.00#		
				45,158.95#	8- 2-24	636,578.17
636,578.17	8-12-24	208.33#	208.33#			
		104.17#		14,506.45#	8-12-24	650,563.79
650,563.79	8-13-24	520.84#			8-13-24	650,042.95
650,042.95				31,967.10#	8-22-24	682,010.05
682,010.05				50,000.00	8-30-24	732,010.05
732,010.05				6,142.13	9- 4-24	738,152.18
738,152.18	9- 8-24	92,047.50#		1,999.97#	9- 8-24	648,104.65
648,104.65				100,000.00	9-23-24	748,104.65
748,104.65				55,056.40	9-27-24	803,161.05
803,161.05				6,030.45	9-30-24	809,191.50
809,191.50				175,000.00	10-17-24	984,191.50
984,191.50	11- 7-24	708.31#		6,001.85#		
				5.00#	11- 7-24	989,490.04

Old Balance	Date	Checks in Detail		Deposits	Date	New Balance
989,490.04				100,000.00	11-17-24	1,089,490.04
1,089,490.04				300,000.00	12- 1-24	1,389,490.04
1,389,490.04	12-18-24	6,001.85#	5.00#		12-18-24	1,383,483.19
1,383,483.19				708.31#	12-29-24	1,384,191.50
1,384,191.50				11,524.16	12-31-24	1,395,715.66
1,395,715.66	2-16-25	1,576.40#		4,934.90#	2-16-25	1,399,074.16
1,399,074.16	2-16-25	4,934.90#		1,576.40#	2-16-25	1,395,715.66
1,395,715.66	2-20-25	90,000.00			2-20-25	1,305,715.66
1,305,715.66				13,726.46	3-31-25	1,319,442.12
1,319,442.12	4-17-25	10,000.00			4-17-25	1,309,442.12

SCHEDULE "B"

TRANSCRIPT OF ACCOUNT WITH THE CARNEGIE TRUST COMPANY TITLED "GENERAL FUND" PER RECORDS OF THE TREASURER OF ALLEGHENY COUNTY, FROM JANUARY 7, 1924, TO APRIL 25, 1925, TOGETHER WITH OTHER EXPLANATORY NOTES OBTAINED FROM HIS SUBSIDIARY RECORDS

1924		Debits
Jan. 7	Opening of account (from Jos. G. Armstrong)	$1,058,052.90
Mar. 31	Interest on daily balances	9,505.35
May 3	Transferred from Colonial Trust Co. "General Fund"	100,000.00
June 14	Receipts from Delinquent Tax Collector	51,411.63
June 17	State Appropriation for County Home	27,992.00
June 30	Interest on daily balances	5,265.61
July 12	Transferred from Union Savings Bank "General Fund"	50,000.00
July 14	Transferred from Union Savings Bank	50,000.00
July 16	Recepits from Delinquent Tax Collector	55,527.72
July 29	Transferred from Union Savings Bank "General Fund"	50,000.00
Aug. 29	Transferred from Mellon National Bank "General Fund"	50,000.00
Sept. 3	Bond Interest—Poor Home	6,142.13
Sept. 22	Transferred from Carnegie Trust Co. "Sinking Fund"	100,000.00
Sept. 26	Receipts from Delinquent Tax Collector	55,056.40
Sept. 30	Interest on daily balances	6,030.45
Oct. 16	Transferred from Union Trust Co. "General Fund"	175,000.00
Nov. 13	Transferred from Union Trust Co. "General Fund"	100,000.00
Nov. 28	Transferred from Carnegie Trust Co. "Sinking Fund"	300,000.00
Dec. 31	Interest on daily balances	11,524.16
		$2,261,508.35
1925		
Jan. 1	Balance	$1,395,715.66
Mar. 31	Interest on daily balances	13,726.46
		$1,409,442.12
Apr. 25	Balance	$1,309,442.12

SCHEDULE "B"

TRANSCRIPT OF ACCOUNT WITH THE CARNEGIE TRUST COMPANY TITLED "GENERAL FUND" PER RECORDS OF THE TREASURER OF ALLEGHENY COUNTY, FROM JANUARY 7, 1924, TO APRIL 25, 1925, TOGETHER WITH OTHER EXPLANATORY NOTES OBTAINED FROM HIS SUBSIDIARY RECORDS

1924		Credits
Jan. 18	Transferred to Union Savings Bank "General Fund"	$ 100,000.00
Mar. 4	Transferred to Union Savings Bank "General Fund"	100,000.00
Mar. 18	Payment to Poor Home	55,792.69
Mar. 25	Transferred to Union Savings Bank "General Fund"	50,000.00
Apr. 1	Transferred to Washington Trust Co. "General Fund"	100,000.00
Apr. 14	Transferred to Washington Trust Co. "General Fund"	100,000.00
Apr. 21	Transferred to Union Savings Bank "General Fund"	50,000.00
Apr. 28	Transferred to Union Savings Bank "General Fund"	100,000.00
May 10	Transferred to Carnegie Trust Co. "Sinking Fund"	10,000.00
June 4	Transferred to Union Savings Bank "General Fund"	50,000.00
June 10	Payment to Poor Home	50,000.00
June 24	Payment to Poor Home	25,000.00
June 27	Transferred to Carnegie Trust Co. "Sinking Fund"	75,000.00
Dec. 31	Balance	1,395,715.66
		$2,261,508.35
1925		
Feb. 19	Transferred to Washington Trust Co. "General Fund"	90,000.00
Apr. 11	Transferred to Mellon National Bank "General Fund"	10,000.00
Apr. 25	Balance	1,309,442.12
		$1,409,442.12

SCHEDULE "C"

TRANSCRIPT OF DEPOSITS, WITHDRAWALS AND BALANCES TO THE ACCOUNT OF SAMUEL D. FOSTER, TREASURER ALLEGHENY COUNTY (SINKING FUND)

PER THE RECORDS OF THE CARNEGIE TRUST CO., CARNEGIE, PENNA., FROM JANUARY 8, 1924, TO APRIL 25, 1925

Old Balance	Date	Checks in Detail	Deposits	Date	New Balance
			236,304.54	1- 8-24	236,304.54
236,304.54			50,000.00	3-26-24	286,304.54
286,304.54			2,432.37	3-31-24	288,736.91
288,736.91			10,000.00	5-12-24	298,736.91
298,736.91			75,000.00	6-28-24	373,736.91
373,736.91			3,039.36	6-30-24	376,776.27
376,776.27			33,000.00	9- 4-24	409,776.27
409,776.27	9-23-24	100,000.00		9-23-25	309,776.27
309,776.27			3,920.33	9-30-24	313,696.60
313,696.60	12-12-24	300,000.00		12- 1-24	13,696.60
13,696.60			2,132.00	12-31-24	15,828.60
15,828.60			159.98	3-31-25	15,988.58

SCHEDULE "D"

TRANSCRIPT OF ACCOUNT OF THE CARNEGIE TRUST COMPANY TITLED "SINKING FUND"

PER RECORDS OF THE TREASURER OF ALLEGHENY COUNTY FROM JANUARY 7, 1924, TO APRIL 25, 1925

1924		Debit	1924		Credit
Jan. 7	Deposit	236,304.54	Sept. 22	Check to General Fund	100,000.00
Mar. 25	Deposit	50,000.00	Nov. 28	Check to General Fund	300,000.00
Mar. 31	Interest	2,432.37	Dec. 31	Balance	15,828.60
May 10	Deposit	10,000.00			
June 27	Deposit	75,000.00			
June 30	Interest	3,039.36			
Sept. 3	Deposit	33,000.00			
Sept. 30	Interest	3,920.33			
Dec. 31	Interest	2,132.00			
		415,828.60			415,828.60
1925					
Jan. 1	Balance	15,828.60			
Mar. 31	Interest	159.98			
Apr. 25	Balance	15,988.58			

SCHEDULE "E"

TRANSCRIPT OF DEPOSITS, WITHDRAWALS AND BALANCES TO THE ACCOUNT OF SAMUEL D. FOSTER, COUNTY TREASURER (STATE ACCOUNT)

AS PER THE RECORDS OF THE CARNEGIE TRUST COMPANY CARNEGIE, PENNSYLVANIA, FROM JANUARY 8, 1924, TO APRIL 25, 1925

Old Balance	Date	Checks in Detail			Deposits	Date	New Balance
					5,393.05	1-15-24	5,393.05
5,393.05	1-17-24	1,954.18				1-17-24	3,438.87
3,438.87	1-18-24	104.17	104.17	208.33		1-18-24	3,022.20
3,022.20	1-19-24					1-19-24	3,022.20
3,022.20	1-24-24	125.00				1-24-24	2,897.20
2,897.20					3,735.50	1-25-24	6,632.70
6,632.70	1-31-24	208.33				1-31-24	6,424.37
6,424.37	2- 1-24	1,537.45			85.00	2- 1-24	4,971.92
4,971.92	2- 2-24	437.48			3,204.65	2- 2-24	7,739.09
7,739.09	2- 5-24	104.16	215.00			2- 5-24	7,419.93
7,419.93	2-13-24	208.33			3,375.31		
					10,025.20	2-13-24	20,612.11
20,612.11	2-15-24	1,638.45				2-15-24	18,973.66
18,973.66	2-16-24	1,245.85			4,323.80	2-16-24	22,051.61
22,051.61	2-18-24	104.17	208.33			2-18-24	21,739.11
21,739.11	2-19-24	16,321.68				2-19-24	5,417.43
5,417.43	2-20-24	104.17	208.33			2-20-24	5,104.93
5,104.93					3,796.50	2-26-24	8,901.43
5,901.43					6,049.15		
					200.00		
					110.00	2-28-24	15,260.58
15,260.58	2-29-24	208.33				2-29-24	15,052.25
15,052.25	3- 1-24	1,433.28				3- 1-24	13,618.97
13,618.97	3- 3-24	208.33	208.33			3- 3-24	13,202.31
13,202.31	3- 4-24	104.16	104.16			3- 4-24	12,993.99
12,993.99	3- 5-24	104.16			2,635.69	3- 5-24	15,525.52
15,525.52	3- 6-24	125.00	104.16		3,789.75	3- 6-24	19,086.11
19,086.11	3-11-24	593.54				3-11-24	18,492.57
18,492.57	3-13-24	100.00	3,877.57	5,796.75		3-13-24	8,718.25
8,718.25	3-14-24	208.33				3-14-24	8,509.92
8,509.92	3-15-24	1,558.35			4,560.25	3-15-24	11,511.82
11,511.82	3-17-24	208.33	104.17	104.17		3-17-24	11,095.15
11,095.15	3-19-24	208.33	104.17	104.17		3-19-24	10,678.48
10,678.48	3-20-24					3-20-24	10,678.48
10,678.48	3-26-24					3-26-24	10,678.48
10,678.48	3-29-24	208.33	97.75	208.33		3-29-24	10,164.07
10,164.07	3-31-24	1,016.63				3-31-24	9,147.44
9,147.44	4- 1-24	208.33				4- 1-24	8,939.11

SCHEDULE "E"— Continued.

Old Balance	Date	Checks in Detail			Deposits	Date	New Balance
8,939.11	4- 2-24	958.29				4- 2-24	7,980.82
7,980.82					6,441.50	4- 2-24	14,422.32
14,422.32					3,010.67	4- 7-24	17,432.99
17,432.99					3,976.35		
					440.00		
					105.00	4- 8-24	21,954.34
21,954.34	4-15-24	208.33	104.17	430.79	4,540.95	4-15-24	25,752.00
25,752.00	4-16-24	1,729.18				4-16-24	24,022.82
24,022.82	4-17-24	729.17				4-17-24	23,293.65
23,293.65	4-19-24	8,727.05	3,779.25	104.17		4-19-24	10,683.18
10,683.18					194.00		
					190.00	4-21-24	11,067.18
11,067.18	4-28-24	96.00				4-28-24	10,971.18
10,971,18	4-29-24	400.50	125.00		85.00		
					1,646.30	4-29-24	12,176.98
12,176.98	5- 1-24	1,849.93			416.70	5- 1-24	10,743.75
10,743.75	5- 2-24	541.65			12,972.45	5- 2-24	23,174.55
23,174.55	5- 3-24	208.33			33,879.00	5- 3-24	56,845.22
56,845.22	5- 5-24					5- 5-24	56,845.22
56,845.22					1,650.00		
					2,553.60	5- 6-24	61,048.82
61,048.82	5- 7-24	420.64			69,913.00	5- 7-24	130,541.18
130,541.18	5-10-24	2,629.00	6,564.73	1,500.00	44,845.30	5-10-24	164,692.75
164,692.75	5-14-24	208.33				5-14-24	164,484.42
164,484.42	5-15-24	1,691.67			43,449.05	5-15-24	206,241.80
206,241.80	5-16-24	418.17				5-16-24	205 823.63
205,823.63	5-17-24	104.17				5-17-24	205,719.46
205,719.46					27,417.60	5-17-24	233,137.06
233,137.06	5-19-24	104.17				5-19-24	233,032.89
233,032.89	5-20-24	104.17				5-20-24	232,928.72
232,928.72					13,549.30	5-23-24	246,478.02
246,478.02	5-24-24	154.50				5-24-24	246,323.52
246,323.52					19,545.90	5-27-24	265,869.42
265,869.42					150.00		
					72.00		
					1,937.95	5-28-24	268,029.37
268,029.37	5-29-24	150.00	208.33	208.33	990.00		
					2,578.00	5-29-24	271,030.71
271,030.71	5-31-24	2,005.55			14,707.20	5-31-24	283,732.36
283,732.36	6- 2-24	208.33	208.33			6- 2-24	283,315.70
283,315.70	6- 3-24	208.33			1,250.02	6- 3-24	284,357.39
284,357.39	6- 5-24					6- 5-24	284,357.39
284,357.39	6- 6-24	72.00			23,843.25	6- 6-24	308,128.64

SCHEDULE "E"— Continued.

Old Balance	Date	Checks in Detail			Deposits	Date	New Balance
308,128.64	6-10-24	40,962.52	2,528.00	900.00		6-10-24	263,738.12
263,738.12					10,574.95	6-11-24	274,313.07
274,313.07	6-14-24	208.33			11,059.25	6-14-24	285,163.99
285,163.99	6-16-24	1,625.01				6-16-24	283,538.98
283,538.98	6-17-24	104.17	208.33	104.17		6-17-24	283,122.31
283,122.31	6-18-24	150.00				6-18-24	292,972.31
282,972.31	6-20-24	104.17	125.00			6-20-24	282,743.14
282,743.14					10,470.55	6-24-24	293,213.69
293,213.69	6-25-24					6-25-24	293,213.69
293,213.69					28,281.05	6-26-24	321,494.74
321,494.74	6-28-24	208.33				6-28-24	321,286.41
321,286.41	6-30-24	1,462.47				6-30-24	319,823.94
319,823.94	7- 1-24	541.64				7- 1-24	319,282.30
319,282.30	7- 2-24	104.16			16,729.10		
					3,674.35		
					26,761.50	7- 2-24	366,343.09
366,343.09	7- 5-24	104.16	104.16	104.16	45,134.50		
					333.36		
					3,220.60		
					2,750.00		
					700.00	7- 5-24	418,169.07
						7- 9-24	416,735.86
418,169.07	7- 9-24	1,433.21					
416,735.86	7-11-24	3,671.00	2,500.00		10,821.20	7-11-24	421,386.06
421,386.06	7-12-24	179,603.31				7-12-24	241,782.75
241,782.75	7-16-24	1,879.17				7-16-24	239,903.58
239,903.58	7-17-24	104.17	104.17	104.17	12,125.15	7-17-24	251,716.22
251,716.22	7-18-24	125.00				7-18-24	251,591.22
251,591.22	7-21-24	208.33				7-21-24	251,382.89
251,382.89					7,216.40	7-22-24	258,599.29
258,599.29	7-31-24	566.65				7-31-24	258,032.64
258,032.64	7-31-24	583.31				8- 1-24	257,449.33
257,449.33					2,577.75		
					2,420.00		
					333.36	8- 4-24	262,780.44
						8- 5-24	261,907.06
262,780.44	8- 5-24	873.38					
261,907.06					26,187.30	8- 8-24	288,094.36
288,094.36	8-14-24	1,059.18				8-14-24	287,035.18
287,035.18	8-15-24	62.50	125.00	104.17	25,818.75	8-15-24	312,562.26
312,562.26	8-18-24	2,793.25	2,200.00	84,911.15		8-18-24	222,657.86
222,657.86	8-19-24	833.32			18,226.90	8-19-24	240,051.44
240,051.44					18,101.25	8-26-24	258,152.69
258,152.69					28,291.00	8-29-24	286,443.69
286,443.69					44,786.75	9- 3-24	331,230.44

SCHEDULE "E"— Continued.

Old Balance	Date	Checks in Detail			Deposits	Date	New Balance
331,230.44	9- 4-24	1,974.93			1,100.00		
					985.00		
					2,903.15	9- 4-24	334,243.66
334,243.66	9- 5-24	133.33	208.33	104.16		9- 5-24	333,797.84
333,797.84	9- 8-24	1,999.97			92,047.50		
					.20		
					40,900.00		
					333.36	9- 8-24	465,078.93
465,078.93	9- 9-24	208.33			11,507.25	9- 9-24	476,377.85
476,377.85	9-10-24	1,075.99	12.50			9-10-24	475,289.36
475,289.36					22,055.30	9-12-24	497,344.66
497,344.66	9-15-24	937.49				9-15-24	496,407.17
496,407.17	9-16-24	153,736.18			6,977.35	9-16-24	349,648.34
349,648.34	9-17-24	208.33				9-17-24	349,440.01
349,440.01	9-18-24	104.17				9-18-24	349,335.84
349,335.84	9-19-24	104.17				9-19-24	349,231.67
349,231.67	9-23-24	11,626.00				9-23-24	337,605.67
337,605.67					11,626.00		
					11,626.00	9-23-24	360,857.67
360,857.67	9-30-24	104.16	208.33			9-30-24	360,545.18
360,545.18	10- 1-24	1,358.29				10- 1-24	359,186.89
359,186.89	10- 2-24	208.33			7,155.85	10- 2-24	366,134.41
366,134.41					440.00		
					2,623.75		
					1,364.20	10- 3-24	370,562.36
370,562.36	10- 7-24	125.00	104.16	104.16	7,486.40		
					390.00		
					333.36	10- 7-24	378,438.80
378,438.80	10-15-24	937.49				10-15-24	377,501.31
377,501.31	10-16-24	1,820.82				10-16-24	375,680.49
375,680.49	10-18-24	400.00	2,413.85	1,655.50		10-18-24	371,211.14
371,211.14	10-18-24	120,688.49				10-18-24	250,522.65
250,522.65	10-21-24	854.18			9,482.20	10-21-24	259,150.67
259,150.67	10-23-24	104.16	104.16	208.33	5,889.80	10-23-24	264,623.82
264,623.82					399.25	10-29-24	265,023.07
265,023.07	10-30-24	104.16	75.00			10-30-24	264,843.91
264,843.91	10-31-24	908.30				10-31-24	263,935.61
263,935.61	11- 1-24	104.16	208.33	208.33		11- 1-24	263,414.79
263,414.79	11- 3-24	104.16				11- 3-24	263,310.63
263,310.63	11- 5-24	208.33			6,741.25		
					1,260.60	11- 5-24	271,104.15
271,104.15	11-12-24	1,271.46				11-12-24	269,832.69
269,832.69	11-15-24	122,209.34				11-15-24	147,623.35

SCHEDULE "E"— Continued.

Old Balance	Date	Checks in Detail		Deposits	Date	New Balance
147,623.35	11-17-24	941.67			11-17-24	146,681.68
146,681.68	11-18-24	104.17	104.17		11-18-24	146,473.34
146,473.34	11-28-24	208.33				146,265.01
146,265.01	11-29-24	629.15				145,635.86
145,635.86	12- 1-24	75.00	208.33			145,352.53
145,352.53	12- 3-24	2,391.62		333.36		
				7,225.70		
				333.36		150,853.33
150,853.33	12- 4-24	104.16		18,785.00		169,534.17
169,534.17	12- 5-24	208.33				169,325.84
169,325.84				63.25	12- 6-24	169,389.09
169,389.09	12- 8-24	1,904.67	208.33			167,276.09
167,276.09	12-15-24	17,282.20	73,727.88			76,266.01
76,266.01				5,061.60		81,327.61
81,327.61				5.00		
				6,001.85	12-18-24	87,334.46
87,334.46				101,078.96		188,413.42
188,413.42	12-19-24	2,208.70				186,204.72
186,204.72	12-22-24	1,758.59				184,446.13
184,446.13				.36	12-27-24	184,446.49
184,446.49	12-29-24	708.31				183,738.18
183,738.18	12-30-24	1,855.98		270.55)		
				177.10)		
				26.50)	12-30-24	
				30.60)		
				345.00)		
				1,776.77)		184,508.72
184,508.72				450.00		
				11,607.50	12-31-24	196,566.22
196,566.22	1- 2-25	208.37				196,357.85
196,357.85	1- 3-25	15,458.50	1,957.58			178,941.77
178,941.77	1- 5-25	4.60				178,937.17
178,937.17				4,302.65		
				333.36	2- 9-25	183,573.18
183,573.18	1-10-25	100,523.92				83,049.26
83,049.26	1-13-25	78,621.58				4,427.68
4,427.68	1-14-25	1,295.83				3,131.85
3,131.85	1-15-25	520.85				2,611.00
2,611.00	1-16-25	208.33				2,402.67
2,402.67	1-17-25	395.84		2,500.80	1-17-25	4,507.63
4,507.63	1-27-25			2,966.40	1-27-25	7,474.03
7,474.03	1-28-25	126.45				7,347.58
7,347.58	1-29-25	120.37	38.57			7,188.64
7,188.64	1-30-25	601.58				6,587.06

Defendant's Answering Affidavits—J. L. Parrish —Exhibit A.

SCHEDULE "E"— Continued.

Old Balance	Date	Checks in Detail			Deposits	Date	New Balance
6,587.06	1-31-25	1,474.96					5,112.10
5,112.10	2- 2-25	104.16	104.16				4,903.78
4,903.78	2- 3-25	104.16			275.00	2- 3-25	
					5,087.80	2- 3-25	10,162.42
					333.36	2- 3-25	10,495.78
10,162.42					3,443.65	2- 4-25	13,287.69
10,495.78	2- 4-25	651.74					13,177.00
13,287.69	2- 6-25	6.53	104.16				13,141.12
13,177.00	2- 9-25	29.10	6.78				13,114.24
13,141.12	2-10-25	13.40	13.48				12,451.75
13,114.24	2-13-25	662.49					12,168.42
12,451.75	2-14-25	75.00	208.33				15,526.92
12,168.42	2-16-25	1,576.40			4,934.90	2-16-25	15,422.75
15,526.92	2-17-25	104.17					14,901.90
15,422.75	2-18-25	520.85					6,606.78
14,901.90	2-21-25	4,963.00	3,184.12	148.00			6,584.14
6,606.78	2-26-25	22.64					9,515.18
6,584.14	2-27-25	336.06			3,267.10	2-27-25	8,523.55
9,515.18	2-28-25	991.63					8,200.03
8,523.55	3- 2-25	208.33	104.16	11.03			6,922.42
8,200.03	3- 3-25	104.16	208.33	965.12			
6,922.42	3- 4-25	104.16			333.36	3- 4-25	
					11,557.15	3- 4-25	18,708.77
18,708.77	3- 6-25	187.00	150.00		15.00	3- 6-25	18,386.77
18,386.77					4,280.25	3- 7-25	22,667.02
22,667.02	3- 9-25	573.62					22,093.40
22,093.40	3-10-25	275.25					21,818.15
21,818.15	3-14-25	13,705.22					8,112.93
8,112.93	3-16-25	125.00	104.17	104.17	3,000.40	3-16-25	10,779.99
10,779.99	3-17-25	1,591.66					9,188.33
9,188.33	3-18-25	104.17	104.17				8,979.99
8,979.99	3-20-25	20.00	22.50				8,937.49
8,937.49	3-21-25	15.20					8,922.29
8,922.29	3-24-25	16.95	38.25				8,867.09
8,867.09	3-26-25	458.98			3,609.50	3-26-25	12,017.61
12,017.61	3-28-25	38.84					11,978.77
11,978.77	3-30-25	833.31					11,145.46
11,145.46	3-31-25	1,149.96					9,995.50
9,995.50	4- 1-25	208.33					9,787.17
9,787.17	4- 2-25	104.16			1,318.90	4- 2-25	
					1,010.00	4- 2-25	
					13,173.60	4- 2-25	
					333.36	4- 2-25	25,518.87

Defendant's Answering Affidavits—J. L. Parrish —Exhibit A.

SCHEDULE "E"— Continued.

Old Balance	Date	Checks in Detail			Deposits	Date	New Balance
25,518.87	4- 4-25	104.16	125.00	104.16	2,628.15	4- 4-25	27,813.70
27,813.70	4- 9-25	1,183.75					26,629.95
26,629.95	4-14-25	1,041.67					25,588.28
25,588.28	4-15-25	1,150.01			890.00	4-15-25	25,328.27
25,328.27	4-17-25	104.17					25,224.10
25,224.10	4-20-25	240.00	22.50	125.00	2,345.70	4-20-25	27,182.30
27,182.30	4-21-25	15,847.83					11,334.47
11,334.47	4-22-25	35.98	63.33				11,235.16
11,235.16	4-23-25	52.96					11,182.20
11,182.20	4-24-25	7,000.00					4,182.20
4,182.20	4-25-25	4,144.18					38.02

Exhibit B.

Pittsburgh, May 28, 1925

My dear Mr. Parish:—

In compliance with the request for an opinion on the several questions which you have submitted touching the liability of your client, the Southern Surety Company, as surety on the bond given by the Carnegie Trust Company to the County of Allegheny conditioned for the faithful payment over of all County moneys deposited during the term in office of the present Treasurer, Samuel D. Foster, and the payments of certain interest arising on daily balances, I beg to say:—

(a) Question: Is the warrant of attorney to confess judgment contained in the bond sufficient authorization to enable the immediate entry of a judgment in this jurisdiction against the surety?

Predicated on the fact that there has been a default to the extent of more than the amount of the bond, the due execution and delivery whereof are not in question, undoubtedly the warrant of attorney is sufficient to enable any attorney of this Bar to forthwith appear and confess judgment against both obligors for the full amount of the bond and attorneys fees therein provided. Instruments containing warrants of attorney to confess judgment like notes, bonds accompanying mortgages, etc. are in common use in Pennsylvania and have often been before the Court. There can be no question of the validity of such authorizations or of judgments confessed in exercise of the same. In a case which went to the Supreme Court where a judgment was confessed against the principal and surety on a warrant of attorney contained in a bond given to secure the payment of taxes the Court struck down the judgment against the principal but suffered it to stand as against the surety. Numerous cases could be cited wherein judgments confessed on warrants of attorney have been sustained but this is hardly necessary.

After a judgment has been confessed any defense available would have to be made, if at all, by way of a petition presented to Court to open the judgment. Upon proper showing a rule would then be granted, depositions would be taken and at the argument if the Court were satisfied of the probable existence of a valid defense the judgment would be opened and the parties relegated to a trial by jury, unless, of course, the defense set up involved only questions of law. So far as concerns attorneys fees included in any confession of judgment, this is always a matter to be controlled and regulated by the Court.

Mr. Parish 2 May 28, 1925

Attorneys fees are intended to cover compensation for services rendered in the matter of a collection. I would think that in your case there would be little likelihood of a judgment being entered until after you had signified an unwillingness to make good the deposit to the extent of the amount of the bond and if your liability is admitted I should rather imagine you will not have any particular difficulty in obtaining from the County Commissioners enough indulgence to permit of you calling upon the parties with whom you have reinsured the risk for their respective contributions.

(b) Question: Assuming that at the time the bond was tendered and approved the County commissioners of Allegheny County knew that the principal was insolvent and withheld that information from the surety, who was ignorant of the fact, would that be sufficient to relieve the surety of liability?

The Carnegie Trust Company was designated a depository under the provisions of an Act of Assembly which constitutes the three commissioners, each having one vote, the County Treasurer and the County Controller a board to make the selection of depositories for County funds following the election of a County Treasurer. The act provides, inter alia, "That deposits shall be made with them (the depositories selected) as soon as satisfactory bonds approved by the County Commissioners shall be filed with the Controller."

There is a clear distinction between the liability of a surety on an obligation to an individual or private corporation and to a municipal corporation. In the former case a material misrepresentation by the servant or official of the obligee whose duty it is to accept the bond is a fraud upon the surety and avoids it, but it is otherwise in the latter case.

In the case of United States vs. Kirkpatrick, 9 Wheaton 720 (1824) where it was argued that the gross laches of a public officer relieve the surety on an official bond, Mr. Justice Story, who rendered the opinion of the Court, says: "The general principle is that laches on the ground of public policy is not imputable to the government that the utmost vigilance of the government would not save it from losses if the doctrine

of laches can be applied to the financial transactions of its officers."

The case of Lauer Brewing Company vs. Riley, 195 Pa. 449, is authority for the doctrine that a material misrepresentation by the servant or official whose duty it is to accept the bond is a fraud upon the surety and avoids it where the obligation runs to an individual or a private corporation.

Mr. Parish 3 May 28, 1925

In the case of Commonwealth to use vs. Jimison, Appellant, 205 Pa. 367, before our Supreme Court in 1903, the liability of the appellant, one of the sureties on the bond of a tax collector was under consideration. It appears that one Loper was appointed collector of delinquent taxes of Cheltenham Township for the year 1897 and received the tax duplicate, his appointment being made by the County treasurer upon whom the law conferred the authority. A bond in the sum of $9,000, with Jimison and others as sureties, was accepted and approved. The bond after reciting the appointment and delivery of the tax duplicate contained the single condition that the principal should collect the taxes charged and pay them over to the County treasurer, less exonerations, within a specified time. Loper became a defaulter and the commissioners brought suits against the sureties who defended on the ground of fraud and misrepresentation.

The undisputed evidence at the trial was that Loper at the time the bond was executed was in default on the duplicates for the years 1894, 1895 and 1896 when he was also appointed collector, a fact necessarily known to the County treasurer who, notwithstanding the disqualifica-

tion, had appointed him as collector for the year 1897. The surety Jimison was not informed of the previous default when he executed the bond and so far as it appears from the evidence was ignorant of the fact of default. While the treasurer did not notify him that Loper had been a defaulter there is nothing to show that he practiced any intentional concealment from, or made any willful misrepresentations to him. A verdict was rendered and judgment entered against the surety.

Upon appeal Mr. Justice Dean in rendering the opinion of the Court after stating the distinction as has already been noted, says that "It is not based on any difference of moral obligation of the state or municipality and that of the individual, but wholly on the ground of public policy. The public demands from its officers strict performance of their official duties and in a large degree must suffer from their nonperformance; but it is not answerable to third parties for their neglect to perform only their moral duties. Any other rule would bring disaster to the public. Here it was the official duty of the County treasurer to receive the moneys, to keep correct accounts and to pay over to his successor any balance in his hands at the end of his term. Perhaps morally it was his duty to say to Loper's sureties when they were about to go on his bond that he had not yet paid over the amounts on his three previous duplicates but his official duty as County treasurer did not require him to do so, that is to act as neighbor or guardian to third persons. * * * Therefore, we are clearly of the opinion, this being a bond to protect the public, that whatever inference the sureties may reasonably have drawn from the silence of the

officer who accepted and approved it, their liability is fixed by the terms of the bond alone.

Mr. Parish 4 May 28, 1925

In the case of Commonwealth to use appellant vs. American Bonding and Trust Company, 205 Pa. 372, involving the liability of the other surety on the Loper bond, there was a somewhat stronger defense, for in answer to the suit by the County commissioners it was shown that at the time Loper made application for the appointment of collector of delinquent taxes he applied to the American Bonding and Trust Company to become his surety. Before executing the bond, however, the Trust Company applied by letter to the County treasurer for information regarding Loper, enclosing a written schedule of questions with answer blanks to be filled out. The Treasurer, Godschall, received the letter and handed the blanks to his private counsel with direction to answer and the counsel wrote the following answers to certain of the questions submitted:

"15. (a) Is there now to your knowledge any shortage due by the applicant?

No, Sir. He owes part of 1896 1897 duplicates uncollected by him.

(b) Has he ever been short with you?

No, Sir. He has been slow in collecting his taxes but pays as fast as he collects."

The interrogatories and answers were returned to the Surety Company by counsel. Upon the trial the Court instructed the jury that the evidence offered to sustain the defense was sufficient and they must find for the defendant. The jury

so found and the case went to the Supreme Court on appeal by the County commissioners. In the opinion of the Supreme Court reversing the judgment of the Court below Mr. Justice Dean, who also rendered the opinion, says:

"We will not waste time over the quibbling as to whether Place (the counsel) had authority to answer the interrogatories; we think with the court below, that the only fair inference from the evidence is, that he had full authority from the treasurer, and that his act must be taken as that of Godschall, who was the treasurer. The answers quoted, although not altogether false, were certainly not the whole truth. The treasurer was not bound to answer the questions at all, but when Godschall did undertake to answer them, he was bound as a man of veracity to tell the truth; a public officer may not be bound to give information or answer questions, but when as a man he voluntarily does so, the moral obligation on him as a man to tell the truth remains in full force. In his answers to the questions he did not tell the truth; Loper was a defaulter for every year he had been collector. * * * Assume for the sake of argument that the County treasurer was the representative of the County, then comes the question, in what particular does he represent it? Clearly, only in those particulars which

pertain to his office. His morals outside of his official acts may be reprehensible and be the indirect cause of loss to others, but the public who elected or appointed him are not responsible. * * * By appointing Godschall treasurer the public did not constitute him a bureau of information

for the accommodation of all persons who chose to ask questions of him. We are of the opinion that the surety company had no legal right to ask these questions and when it did there was no official duty on the part of the officer to answer them; when he chose to do so, he was the mere agent of the company just as any other person would have been of whom it might have made the same request."

Somewhat to the same effect are the cases of Harrisburg vs. Guiles, 192 Pa., 191, Wayne vs. Commercial National Bank, 52 Pa. 343 and Boreland vs. Washington County, 20 Pa. 150. In the last case there was actual misrepresentation by the county commissioner through his publication that the delinquent tax collector, whose bond was in question, had paid up in full on his previous duplicate. The surety sought to be relieved by reason of the actual misrepresentation.

My conclusion is that the facts assumed if proven would not relieve the surety.

(c) Assuming that some months after the bond had been given and at a time when the amount of moneys on deposit was considerable less than the amount of the bond the deposit was increased to substantially its present amount (approximately $1,300,000.00) in pursuance of an understanding between one or more of the County Commissioners and the principal by which a friend of the former was loaned by the latter a large sum of money which remains unpaid, would that relieve the surety of liability?

The liability of the surety had already been fixed and such an act no matter how corrupt and prejudicial to the surety could not possibly serve to relieve the surety on the bond for exactly the same reasons set forth in United States vs. Kirkpatrick, Commonwealth vs. Jimison, and other cases above noted.

(d) Assuming that after the bond in question had been given the County treasurer took from the principal another obligation conditioned for the faithful payment over of certain State revenues of which the treasurer was made the collector and with the obligation the principal had pledged as collateral security certain shares of stock which he subsequently returned before the principal's insolvency was known to the public but not before the treasurer and the County commissioners had good reason to believe the principal was insolvent, would that be sufficient to relieve the surety of liability?

Mr. Parish 6 May 28, 1925

The giving of the bond in question and the taking of the subsequent obligation with the collateral pledged as security for the faithful payment over of State revenues are transactions in no way interrelated. They did not involve the same parties nor the same subject matter. The county treasurer in collecting State Revenues was not the agent or servant of the County nor was he engaged in the performance of any official duty for the County of Allegheny. When the Carnegie Trust Company had accounted for and

paid over the State revenues in its hands it was presumably entitled to receive back the collateral it had pledged and the County treasurer was not warranted in withholding a return in the absence of a specific stipulation to make such collateral answerable for County moneys on deposit. And even if there had been such a stipulation and the County treasurer knew that the Trust Company was insolvent or if there had been an actual default in the bond in question the return would not in my judgment relieve the surety from its liability for the same reasons advanced in the cases already discussed.

I believe I have considered and answered all the questions which you were good enough to submit for my opinion. I am extremely sorry I could not have answered any of your questions in the affirmative and given you some little hope of making a successful defense on the bond in question. But the cases I have cited and which I think are very much in point would seem to call for negative answers.

Upon the question of subrogation and preference in the matter of distribution of the assets of the Carnegie Trust Co. I should be glad to furnish you with an opinion a little later along.

Very truly yours,

Henry G. Wasson (Signed)

James Parish, Esq.,
Des Moines, Iowa.

NOTICE OF MOTION TO STRIKE OUT ORIGINAL BILL OF COMPLAINT.

Filed November 23, 1926.

IN CHANCERY OF NEW JERSEY.

Between COMMERCIAL CASUALTY INSURANCE COMPANY and NEW JERSEY FIDELITY AND PLATE GLASS INSURANCE COMPANY, *Complainants,* *and* SOUTHERN SURETY COMPANY OF DES MOINES, IOWA, *Defendant.*	*On Bill, &c.* *Notice of Motion to Strike Out Bill of Complaint.*

To Messrs. McCarter & English, solicitors for complainant:

SIRS:

TAKE NOTICE that on Tuesday, November 23, 1926, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard, at the Chancery Chambers in the City of Newark, we shall apply to the Chancellor for an order striking out and dismissing complainants' bill of complaint in the above-entitled cause, upon the following grounds:

1. Because the bill does not allege any ground for equitable relief.

2. Because a court of equity will not restrain the prosecution of an action at law when the defenses to the action can be made in the law court as in the equity court.

3. Because all the alleged defenses to the defendant's actions in the Supreme Court, as set forth in the bill of complaint, could be pleaded in said action at law.

4. Because this Court will not relieve the complainant from the result of their own failure to properly set up their defenses in the actions at law.

5. Because an adequate remedy for the complainants exists in the said law actions.

6. Because the complainants herein are in laches.

Dated November 17, 1926.

Yours, &c.,

LUM, TAMBLYN & COLYER,
Solicitors for and of Counsel with Defendant.

OPINION OF VICE-CHANCELLOR.

Filed December 28, 1926.

IN CHANCERY OF NEW JERSEY.

Between

COMMERCIAL CASUALTY INSURANCE COMPANY and NEW JERSEY FIDELITY AND PLATE GLASS INSURANCE COMPANY, *Complainants,*

and

SOUTHERN SURETY COMPANY OF DES MOINES, IOWA, *Defendant.*

Opinion.

1. Inherently, equity has jurisdiction over all cases of fraud. When the primary right is legal, and the jurisdiction of the law courts is concurrent, and if the remedy at law is adequate, certain and complete equity remains passive. But equity remains inactive only in that class of fraud that are recognized and remediable at law.

2. A false representation without intent to deceive will not sustain an action at law for deceit; while in equity a misrepresentation of a material fact, though there be no moral delinquency, is deemed to be fraudulent.

For complainants, McCarter & English (George W. C. McCarter).

For defendant, Lum, Tamblyn & Colyer (Ralph Lum).

BACKES, *V.-C.*

On February 25, 1924, the Southern Surety Company, of Iowa, entered into a bond for $1,100,000 to the County of Allegheny, Pa., to secure the county's deposit in the Carnegie Trust Company during the term of the then county treasurer. The complainants, Commercial Casualty Insurance Company and New Jersey Fidelity and Plate Glass Company, reinsured the Southern Company against loss on its bond, each to the extent of $50,000. The Carnegie Trust Company failed in 1925 owing the county more than the sum of the bond and the Southern Company paid its loss and called upon the reinsurers to contribute, and upon refusal brought an action against each in the Supreme Court in September, 1925. They severally answered setting up certain affirmative defenses, with which we are not now concerned. Upon motion to strike the answers, and a counter-motion for leave to file supplemental answers setting up additional defenses, out of time, an order was entered in February, 1926, striking out part of the answers, and the counter-motion was denied with leave to renew upon affidavits supporting some of the additional defenses. In October following, and on the eve of the trial at law, the application was renewed, and was denied by the Chief Justice on the ground, as alleged in the bill, "that the defendants in said action were in laches in presenting the matter to the court so near the time when the trials were to come on." It appears that the information supporting the defenses had been in the possession of the defendants' attorney since the previous June. Thereupon this bill was filed to cancel the policies of reinsurance and to stay the actions at

law, and a restraint was granted until the return day of the order to show cause why an injunction should not issue *pendente lite* restraining the suits. The matter is now up on the order to show cause, and also on motion to strike the bill for want of equity, on the ground that the law court has complete jurisdiction to entertain the defenses there proposed and now set up in the bill for equitable relief, and further, that the refusal of the law court, in the exercise of its discretion, to entertain the defenses out of time and because they came too late, furnishes no ground for equitable interference.

The allegations of fraud in the procurement of the policies of reinsurance alleged in the bill, and which were rejected by the law court, are, that to induce the reinsurance, a duly authorized agent of the insured represented to one of the complainants that his company was about to enter into a bond to the Carnegie Trust Company for $1,400,000; "that the president of Carnegie Trust Company was one John A. Bell who was a man of large financial means, worth at least $1,400,000, and known by him to be worth far in excess of that amount and a sum not less than ten or eleven million dollars; that said Carnegie Trust Company was a solvent and well-managed institution, and that the fact of the solvency of the Trust Company and wealth of said Bell, who was an indemnitor of the Southern Company, would, of course, lessen the risk of the proposed reinsurers," and that relying on the representations the contract of reinsurance was entered into. (It is not alleged, but it will be assumed as pleaded, that these representations were carried to the other insurer by direction of the insured.) It is further alleged

that the bond of the Southern Company to the Trust Company was a renewal and not an original bond (and it will be assumed as pleaded, that it was represented to be an original bond) and that the insured concealed from the complainants that the several insurers on the previous bond had refused to reinsure the previous bond, and that they refused because of irregularities of the Carnegie Trust Company and John A. Bell, its president, disclosed during an investigation known as the Kephart investigation conducted by the Auditor General of Pennsylvania, which resulted in the indictment and conviction of Kephart, the State Treasurer, of making false reports of his accounts (with the Carnegie Trust Company) and the compulsory payment by the Carnegie Trust Company to the State of the sum of $15,000 for interest on moneys of which the Trust Company had the unlawful use as a result of the irregularities between Bell and Kephart; and that had the complainants known the bond was a renewal and that the previous reinsurers had refused to reinsure they would have learned that these reinsurers had refused because the Carnegie Trust Company was insolvent and had been improperly managed, and that they, the complainants, would not have undertaken to reinsure. The further allegations are that at the time of the representations the said John A. Bell was insolvent and that the Carnegie Trust Company was insolvent, and instead of being well managed was carelessly and corruptly conducted by the said John A. Bell. That all the representations were false to the knowledge of the agent of the insured who made them, except the one as to the financial condition of Bell. Two additional

allegations, that it was represented that the bond was to be $1,400,000 whereas it was for $1,100,000, and that the assured would itself carry $150,000 of the liability, are not traversed, and for the reasons that the bond was in fact for $1,100,000 to the knowledge of the reinsurers, and that it was stipulated in the bond that the assured would carry a risk of $150,000 on the principal; that is, it would bond the Carnegie Trust Company by separate bond for that amount without reinsurance. The false representations alleged in the proposed supplemental answers in the lawsuits are not precisely in the language of the allegations of the bill, nor are the allegations of concealment identical, but they are of the same significance.

If the fraud upon which appeal is made to equity is cognizable at law, the rejection of the defenses, tendered out of time, because of laches, does not, of course, invite interposition by this Court. Disciplinary measures of the law courts denying defenses are not grounds for entertaining the same defenses in equity. And it is not understood that the complainants rest their claim to be heard in equity because the law court, for that reason, refused to hear them. The bill is presented on the theory that although the complainants may have a remedy at law, they are at liberty to come into equity, because of its original jurisdiction over all matters of fraud; and because their defense of fraudulent procurement rests in proof which is sufficient in equity only to overthrow the contracts sued on at law, viz: that the representation as to the financial worth of John A. Bell was untruthful but not deceitful.

Inherently, equity has jurisdiction in all cases of fraud. Eggers *v.* Anderson, 63 N. J. E. 264. But its doors have not been as freely open to all manner of fraud since the law courts have taken upon themselves to grant relief in some cases of fraud. When the primary right is legal, as it is here, and the jurisdiction of the law courts is concurrent, and if the remedy at law is adequate, certain and complete equity remains passive. Equity remains inactive only in that class of fraud that are recognized and remediable at law. A misrepresentation without intent to deceive will not sustain an action at law for deceit, while in equity an untruthful representation of a material fact, though there be no moral delinquency, is deemed to be fraudulent. Eibel *v.* Von Fell, 55 N. J. Eq. 670; Straus *v.* Norris, 77 N. J. Eq. 33; Cowley *v.* Smyth, 46 N. J. L. 380. The law courts not having as yet taken upon themselves to relieve against wrongs resulting from misrepresentations fraudulent in conscience only courts of equity continue to perform that function.

The charge that the false representations complained of, save the one as to Bell's financial wealth, were knowingly false and deceitfully made, is a defense cognizable in the law courts. Cowley *v.* Smyth, 46 N. J. L. 380. And so the concealment of the fact that the bond of the Southern Company was a renewal and not an original bond, if it constitutes a meritorious defense, is as available at law as in equity. Insurance Co. *v.* Woodruff, 26 N. J. L. 541; Joyce on Ins., Sec. 1844, *et seq.;* Carter *v.* Boehm, 13 Eng. Rul. Cas. 501. The claim to equitable relief is founded by the bill upon the misrepresentation by the agent of the Southern Com-

pany that, "John A. Bell, who was a man of large financial worth, worth at least $1,400,000 *and known by him* to be worth far in excess of that amount and a sum not less than ten or eleven million dollars." As to this it is alleged, "That the complainants do not claim that the said representations were untrue to the knowledge of the said Zwinggi (the agent). The misrepresentations in this respect, it will be noted, are two-fold. So much as representation that Bell was a man worth at least $1,400,000 was an affirmation of a fact, not of opinion, and if untrue, though ingenuously made, would be condemned in equity only; the added representation that Bell was *known by him* (the agent) to be worth far in excess of that amount and not less than ten or eleven million dollars, was an affirmation of a fact, that is, that the fact was known to him, and if untrue was a deceit and redressible at law. If, at law, the complainants should establish the first and not the second their defense would fail, whereas in equity if they proved the first and not the second they would prevail. In this respect the jurisdiction of the law courts is obviously not equal to the occasion; not on par with equity's remedy.

But the complainants are not reduced to the single and narrow ground assigned in their bill in maintaining their suit in this Court. The concurrent jurisdiction of the law courts to relieve against deceitful representations does not abridge equity's jurisdiction to grant relief on that score, and, even though it be, as contended, that the bill discloses that all the misrepresentations were deceitfully made, it may be that the complainants would not be able to prove that the misrepresentations were knowingly false, but

could only prove that they were material and untrue—a defense in equity only. The complainants are not to be put to the hazard at law when the requirements in equity are less exacting. In Schoenfield *v.* Winter, 76 N. J. Eq. 511, on demurrer to a bill to rescind a contract on the ground of deceitful misrepresentation and to restrain an action at law *in assumpsit* arising out of the contract (78 N. J. L. 92) Vice-Chancellor Howell overruled the demurrer, holding that "While the bill sets out a common law action for deceit, this does not interfere with the jurisdiction of equity. In order to set aside a contract founded in fraud, it is only necessary in equity to prove that the representation upon which the action is founded is false, that it is material, and that damage has ensued; while at the common law the proof must go to the extent of satisfying the jury that the defendant knew that the statement relied upon was false. It will therefore be seen at a glance that the remedy in equity is much broader and much more efficient than the remedy at law could be. It was held in Morse *v.* Nicholson, 55 N. J. Eq. (10 Dick.) 705, that in a case where the jurisdiction of the courts of law and equity for the redress of frauds was concurrent, the court of equity should entertain the cause and determine it upon its merits, provided that adequate relief could not be obtained at law; and this, I take it, is a general rule which ought to be applied in the discretion of the Court to cases of fraud where there are concurrent remedies." See also Straus *v.* Norris, *supra.*

Nor is the remedy certain in the suits at law. The plaintiffs there may before or at the trial suffer non-suits and subject the complainants to

other and vexatious suits here or in other jurisdictions. They are entitled to the more nearly certain remedy afforded in equity by decree to surrender the policies of insurance for cancellation upon proof of fraud, whether the fraud be unconscionable or deceitful. In Metler Admrs. *v.* Metler, 18 N. J. Eq. 270, on a bill to restrain an action at law on a negotiable promissory note and to have it delivered up for cancellation, a demurrer on the ground that there was no adequate remedy at law was overruled principally upon the ground that the note was negotiable, but also upon the consideration that the suit might be discontinued and the note held until the evidence to prove its invalidity could not be had. And it was also observed that the weight of authority is in favor of equity's jurisdiction to order the cancellation even though an instrument was at law void on its face. The Chancellor's opinion was affirmed by the Court of Appeals (19 N. J. Eq. 457) which approved and emphasized the Chancellor's reason, that the action at law could be discontinued and suit brought later and perhaps in a foreign jurisdiction when the proof to defeat it might not be available. Vice-Chancellor Howell, in Schoenfield *v.* Winter, *supra,* in concluding that the remedy at law was not as complete as in equity considered that the complainant, upon establishing the fraud was entitled to a cancellation of the contract and to be relieved of any obligation under it, and discharged from its performance. And in Sweeny *v.* Williams, 36 N. J. Eq. 627, a bill to restrain an action at law to recover on a non-negotiable bond on the ground that it was given without consideration, Mr. Justice Magie, speaking for the Court of Appeals, said, in holding that chancery

had jurisdiction of the merits "The complainant was entitled if at all, to a relief broader than could be afforded him in the action at law. He asked, and if his contention is correct, was entitled to a perpetual injunction against the bond. At law, his relief as to the bond could be obtained only in case the plaintiff brought his action to trial. If he discontinued or submitted to a non-suit, the relief could not be obtained there."

The motion to dismiss the bill is denied, and as the affidavits support the allegations of the bill an injunction *pendente lite* will issue. To deny a stay would be to destroy the subject matter of the suit, and would at this time deny relief which the complainants might be entitled to on final hearing. To insure the good faith of the complainants to abide the judgment of this Court they will, if the defendant moves for that purpose, be directed to pay the amount of the insurance into court.

ORDER.

Filed February 15, 1927.

IN CHANCERY OF NEW JERSEY.

Between

COMMERCIAL CASUALTY INSURANCE COMPANY and NEW JERSEY FIDELITY AND PLATE GLASS INSURANCE COMPANY,
Complainants,

and

SOUTHERN SURETY COMPANY OF DES MOINES, IOWA,
Defendant.

On Bill, &c.
Order.

Due notice of this motion having been given,

It is, on this 15th day of February, 1927, on motion of Messrs. McCarter & English, solicitors of the complainants, ORDERED AS FOLLOWS:

1. The complainants have leave to file an amended bill of complaint, and the defendant do answer the same within twenty days after service upon its solicitors of a copy of such amended bill of complaint and of this order, both of which copies may be certified to be true copies by the complainants' solicitors.

2. The defendant's motion to dismiss the bill of complaint be and it hereby is denied.

3. The defendant, its agents and attorneys, be and they hereby are enjoined and restrained from further prosecuting until the final decree

in this cause and until this Court shall make order to the contrary, the actions mentioned in the bill of complaint heretofore commenced and now pending in the Supreme Court of New Jersey against the complainants.

E. R. WALKER,
C.

Respectfully advised,

JOHN H. BACKES,
V.-C.

AMENDED BILL OF COMPLAINT.

Filed February 15, 1927.

IN CHANCERY OF NEW JERSEY.

Between

COMMERCIAL CASUALTY INSURANCE COMPANY and NEW JERSEY FIDELITY AND PLATE GLASS INSURANCE COMPANY,
Complainants,

and

SOUTHERN SURETY COMPANY OF DES MOINES, IOWA,
Defendant.

On Bill, &c.

Amended Bill of Complaint.

The amended bill of complaint of Commercial Casualty Insurance Company, a corporation of the State of New Jersey, and New Jersey Fidelity and Plate Glass Insurance Company, likewise a corporation of the State of New Jersey, respectfully shows:

1. That the complainants above-named are each incorporated and carry on business in the State of New Jersey, and are authorized to, and actually transacting the business of general insurance, including reinsurance of risks already assumed by other companies, and the writing of surety bonds. The principal offices of both of the complainants are in the City of Newark, in said State.

2. That on the twenty-fifth day of February, 1924, the complainant, Commercial Casualty Insurance Company, made and entered into a con-

tract of reinsurance for $50,000.00 with the Southern Surety Company, of Des Moines, Iowa. A true copy of said reinsurance agreement is annexed to the original bill of complaint herein, made a part hereof, and marked Exhibit A. On the twenty-seventh day of February, 1924, the complainant, New Jersey Fidelity and Plate Glass Insurance Company, entered into a similar contract for a like amount, a true copy of which, also made a part hereof, is annexed to the original bill of complaint herein, and marked Exhibit B. Attached to each of said reinsurance contracts was a copy of the bond dated the twenty-fifth day of February, 1924, made by Southern Surety Company to Carnegie Trust Company, a true copy of which is annexed to the original bill, marked Exhibit C, and made a part hereof.

3. Southern Surety Company of Des Moines, Iowa, hereinafter sometimes called the defendant, is a corporation organized and existing under the laws of the State of Iowa and is, and, at the date of the making of the contracts hereinabove referred to, was duly authorized to issue surety bonds, and then was and now is licensed to do such business in the Commonwealth of Pennsylvania. The defendant was then represented in the so-called Pittsburgh District of Pennsylvania by one W. J. Zwinggi, who was then and there its agent with very broad powers. In the month of February, 1924, the defendant desired to secure reinsurance for a surety bond that it was about to execute with the Carnegie Trust Company, an institution situated within the said Pittsburgh District and within the district covered by Zwinggi, as principal, to the County of Allegheny, as obligee.

4. The said Zwinggi then represented to the complainant, Commercial Casualty Insurance Company, by representations made to its agent in such matters, Harlan Short, that:

(a) The defendant was about to execute a bond as surety for Carnegie Trust Company to the County of Allegheny, in the sum of $1,400,000.00 to secure the deposit of funds of that County in the said Trust Company;

(b) The defendant would itself retain at its own risk a liability on the said bond of at least $150,000.00;

(c) The said bond was an original bond and not the renewal of a prior bond;

(d) The said Carnegie Trust Company was then a solvent and well-managed institution;

(e) John A. Bell, the defendant's indemnitor with respect to the said surety bond, was then worth at least $1,400,000.00;

(f) The said John A. Bell was known by the said Zwinggi to be a man worth far in excess of $1,400,000.00 and not less than $10,000,000.00 or $11,000,000.00;

(g) The fact of the solvency and good management of the Carnegie Trust Company and the wealth of the indemnitor, Bell, would lessen the risk of the proposed reinsurers.

5. The defendant, by the said Zwinggi, then and there requested the said Short to communicate to the complainant, New Jersey Fidelity and Plate Glass Insurance Company, the representations hereinabove alleged to have been made by Zwinggi to Short, and to suggest to that company that it participate in the said reinsurance.

6. The said Short did thereupon repeat all of the representations in paragraph 4 hereof alleged to Harold S. Vreeland then the duly authorized agent of the complainant, New Jersey Fidelity and Plate Glass Insurance Company, and did suggest that that company participate in the said reinsurance.

7. All of the said representations in paragraph 4 hereof alleged, except subdivision "g" thereof, were then untrue in fact, and all of those untrue in fact, except subdivision "d" and "e" were then untrue to the knowledge of the said Zwinggi.

8. All of the representations in paragraph 4 hereof alleged were made by the defendant with intent to induce the complainants to enter into the aforesaid contracts of reinsurance, were material to the risk assumed by the complainants, and were relied upon by the complainants in entering into the said contracts of reinsurance.

9. At the time of the making by the complainants of the aforesaid contracts of reinsurance, the defendant, by its officers and agents, and, among others, in particular by its agent Zwinggi, knew the following facts:

(a) The said surety bond entered into by the complainants and Carnegie Trust Company was not an original bond, but was a renewal;

(b) Several of the reinsurers on the bond of which the said surety bond was a renewal had refused to participate in the reinsurance on the said surety bond, and demanded a release of their liability from the prior reinsurance;

(c) At least one of such reinsurers had theretofore stated to the defendant that Carnegie

Trust Company was improperly and irregularly managed;

(d) The defendant did not intend to carry more than $100,000.00 liability at its own risk on the said surety bond;

(e) There had been an investigation conducted by the Auditor General of the Commonwealth of Pennsylvania, commonly called the Kephart Investigation, which disclosed irregularities in the management of The Carnegie Trust Company and which resulted in the indictment of Harmon M. Kephart, State Treasurer of Pennsylvania, for making false reports of his accounts, and his conviction thereof upon a plea of *nolo contendere,* and also the payment under compulsion by Carnegie Trust Company in December, 1922, to the Commonwealth of Pennsylvania of $15,049.24, as interest on money of the Commonwealth, of which Carnegie Trust Company wrongfully had the use as a result of the irregularities between the said Bell and Kephart;

(f) The reason the said surety bond was reduced from $1,400,000.00 to $1,100,000.00 was because some of the proposed reinsurers refused to participate in reinsurance on account of irregularities in the management of Carnegie Trust Company.

10. None of the facts alleged in paragraph 9 hereof was known to either complainant until after the making of the said contracts of reinsurance.

11. Had either complainant known any of the facts alleged in paragraph 9 hereof, it would not have entered into the contract of reinsurance it made with the defendant.

12. The defendant wilfully, fraudulently and maliciously concealed from each of the complainants knowledge of the facts alleged in paragraph 9 hereof.

13. The complainants further allege that at the same time the said Trust Company, instead of being highly solvent was, in fact, insolvent, and, instead of being well managed, was so carelessly and corruptly conducted by the said John A. Bell, its president, that he has since been convicted of a crime or crimes in connection with such management.

14. On or about the twenty-fifth day of April, 1925, the said Carnegie Trust Company, of Carnegie, Pennsylvania, was adjudged to be insolvent and suspended business, and its affairs were taken charge of by the Commissioner of Banking of the State of Pennsylvania, in pursuance of the statutes of the said State. This fact, in connection with the disclosures shortly thereafter following with reference to the management of the said Trust Company by the said Bell, immediately created grave suspicion on the part of the complainants and the other reinsurers on said bond, with reference to the liability of the Southern Company upon its bond to the Carnegie Trust Company. The reinsuring companies, including the complainants, demanded that a full and complete audit of the Carnegie Trust Company be made before its liability upon the said bond to the said Carnegie Trust Company be admitted, in accordance with clause 5 of said insurance contract. While the said Southern Company at first agreed to have a complete audit, they later declined to do so, and, upon a specious, partial and incomplete audit,

on or about the fifteenth day of June, 1925, admitted its full liability to Allegheny County upon its said bond, notwithstanding the fact that, prior thereto, each of the complainants had sent the Southern Company a telegram protesting against such admission.

15. The complainants charge that such conduct on the part of the Southern Company evinces a desire on its part to conceal the real facts with regard to the representations made by Zwinggi to the agents and officers of the complainants, and also to conceal the facts with regard to the true condition, with reference to the solvency, of Carnegie Trust Company and John A. Bell, its indemnitor, hereinabove referred to. As a further evidence of such desire in execution of the fraud and deceit by the Southern Company, in procuring the underwriting agreements hereinabove referred to, the Southern Company gives out and pretends that it has paid the full amount of said bonds, namely, $1,100,000 to Allegheny County, but the said County has refused to surrender the said bonds, and the complainants charge that there is doubt as to whether such payment of that amount was, in fact, made, and, if made, properly done, and, until the true facts with reference thereto can be ascertained, it is premature to hypothecate a liability upon the reinsuring contracts.

16. Shortly after the complainants and the other reinsuring companies heard of the insolvency of the Carnegie Trust Company, meetings were held by their representatives in the City of New York, with the result that an effort was made, on the part of the companies, to secure a complete audit of the finances of Carnegie

Trust Company, but without success. In the meantime, Mr. W. Clyde Grubbs, a lawyer of Pittsburgh, Pennsylvania, was retained and has since been employed for the purpose of investigating the matter, and he was empowered to have such an audit made at the expense of the reinsuring companies. He was greatly delayed in securing this by failure to obtain the consent of the Banking Department, which was necessary, and the result was that the audit was not completed until about the first of the year, 1926. From this report, it appears that Carnegie Trust Company was, at the time the reinsuring contracts above referred to were made, grossly insolvent, and had been improperly managed. In the meantime, depositions of witnesses in Pittsburgh, including John A. Bell, Joseph H. Walker, Treasurer of Carnegie Trust Company, and others, were taken in another suit against the Southern Company, from which much of the information hereinabove disclosed was obtained. Those depositions cover over nine hundred typewritten pages, and a copy thereof only came into the possession of the said Grubbs about the middle of April, 1926.

17. On the fifteenth day of September, 1925, the Southern Company commenced a suit in the New Jersey Supreme Court against each of the complainants herein to recover the amount claimed to be due on account of the said reinsuring contracts. The complaints in the two suits are identical, except for the name of the party defendant. The answers vary slightly, and copies thereof, as well as of the other pleadings, actual and proposed, are attached to the original bill of complaint, marked Exhibits D to N. The answers were filed in due course, and

later, by reason of the discovery of some of the allegations of fraud hereinabove alleged, an application was made to the Honorable William S. Gummere, Chief Justice, presiding in the Essex County Circuit, for leave to file a supplemental answer, setting up such facts. Upon the insistence of the attorneys of the Southern Company, this application was denied by an order included in said papers, the exhibits last referred to, without prejudice, for the reason, among others, as expressed by the Chief Justice, that it was not made to appear that the refusal of the reinsurers on the original bond, who refused to go on the present bond, was due to their fears about the financial situation existing at the time the renewal was made, either with respect to the financial stability of Carnegie Trust Company or knowledge or suspicion on their part, or on the part of anyone of them, of facts which would tend to make the renewal a greater risk than the original bond.

18. In the month of June, 1926, full information was given to the New Jersey attorney of the complainants (the defendants in said suits at law) covering the points desired by the Chief Justice, with instructions for him to take the necessary steps to enable the fraud to be properly pleaded. The complainants have, within a few days before the filing of this bill, discovered that the said attorney in New Jersey, although said facts were sent to his office and by mistake placed in the file, never personally knew thereof, and hence made no effort whatever, until the 16th day of October, 1926, when application was made to file a supplemental answer, copy whereof is also included in the said exhibits, and refused by the Chief Justice on the ground

that the defendants in said action were in laches in presenting the matter to the Court so near the time when the trials were to come on. The complainants' said attorney omitted to disclose to the Court at that time the fact that this information had been in his possession since June last. The result of all this is that the complainants herein have no opportunity in the suits at law to set up the matters of fraud hereinabove alleged, and capable of being relied on in that court.

19. The said actions at law are pending and set for trial on the 15th day of November, 1926, and if permitted to proceed the defendants therein (the complainants herein) will be unable to introduce so much of the evidence of fraud hereinabove set out as is competent in that court, and a great injustice and irreparable damage will thereby result.

The complainants, by reason of inadequacy of relief in any other court, hereby pray:

A. That the defendant, Southern Surety Company of Des Moines, Iowa, may without oath, answer under oath being hereby waived, specifically answer each of the allegations herein contained.

B. That the said defendant and its agents and attorneys may be enjoined and restrained from further prosecuting the suits pending in the Supreme Court of New Jersey against Commercial Casualty Insurance Company and New Jersey Fidelity and Plate Glass Insurance Company, to recover the amounts claimed to be due on the reinsurance contracts; that it may be decreed that the said contracts were fraudu-

lently induced, and that the complainants herein were fraudulently induced to sign said reinsurance contracts; and that the same may be decreed to be cancelled upon the terms set out above and delivered up to the complainants.

C. That the complainants may have such other and further relief as may be equitable and just.

D. That a writ of subpoena may issue commanding the defendant to answer this bill of complaint and abide by such decree as this Court may make in the premises.

McCARTER & ENGLISH,
Solicitors of Complainants.

GEORGE W. C. McCARTER,
Of Counsel.

ORDER DENYING MOTION TO DISMISS AMENDED BILL.

Filed February 23, 1927.

IN CHANCERY OF NEW JERSEY.

Between	
COMMERCIAL CASUALTY INSURANCE COMPANY and NEW JERSEY FIDELITY AND PLATE GLASS INSURANCE COMPANY, *Complainants,*	*On Bill, &c.*
and	*Order Denying Motion to Dismiss Amended Bill, &c.*
SOUTHERN SURETY COMPANY OF DES MOINES, IOWA, *Defendant.*	

It appearing to the Court that, pursuant to the order made herein on February 15, 1927, the complainants have filed and served an amended bill of complaint herein, and the defendant now making application to strike out the said amended bill upon the same grounds upon which application was made to strike out the bill as originally filed, and the Court having heard Chester W. Fairlie, Esq., of counsel with the said defendant, and George W. C. McCarter, Esq., of counsel with complainants, and it now appearing to the Court that the application of said defendant should be denied for the reasons heretofore filed by the Court herein on the application to strike out the original bill:

It is, on this 23rd day of February, 1927, on motion of Messrs. McCarter & English, of coun-

Order Appealed From.

sel with the complainants, ORDERED that the defendant's application to strike out the amended bill of complaint be and the same is hereby denied.

And it is further ORDERED that the restraining order made by this Court on the 15th day of February, 1927, be and the same is hereby continued in force pursuant to the terms thereof.

E. R. WALKER,
C.

Respectfully advised,

JOHN H. BACKES,
V.-C.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Between COMMERCIAL CASUALTY INSURANCE COMPANY and NEW JERSEY FIDELITY & PLATE GLASS INSURANCE COMPANY, *Complainants-Respondents,* *and* SOUTHERN SURETY COMPANY OF DES MOINES, IOWA, *Defendant-Appellant.*	*On Bill, etc.* *On Appeal from Chancery.*

BRIEF FOR APPELLANT.

Statement of the Case.

The complainants, Commercial Casualty Insurance Company and New Jersey Fidelity & Plate Glass Insurance Company, filed their bill of complaint wherein they prayed that the Southern Surety Company, the defendant, may be enjoined and restrained from prosecuting certain suits pending in the New Jersey Supreme Court against the said complainants to recover the amounts claimed to be due on certain reinsurance contracts and that the said contracts may be decreed to have been fraudulently induced and to be cancelled and delivered up to the complainants.

Pursuant to leave granted by the court the complainants filed an amended bill of complaint, which is found on page 230 of the printed case.

In said amended bill it is alleged that the complainant, Commercial Casualty Insurance Company, entered into a contract for reinsur-

ance for $50,000.00 with the defendant company and that a copy of such agreement is annexed to the original bill of complaint and marked "Exhibit A" (Case, pp. 63 to 70).

On February 27, 1924, the complainant, New Jersey Fidelity & Plate Glass Insurance Company, entered into a similar contract for a like amount, copy of which is annexed to the original bill and marked "Exhibit B" (Case, pp. 70 to 77).

Attached to each of said reinsurance contracts was a copy of the bond dated February 25, 1924, made by Southern Surety Company to Carnegie Trust Company, copy of which is annexed to the original bill and marked "Exhibit C" (Case, pp. 77 to 79).

It is further alleged that the Southern Surety Company is a corporation organized and existing under the laws of the State of Iowa and was duly authorized to issue surety bonds and then was and now is licensed to do business in Pennsylvania; that said defendant was then represented in Pittsburg by one W. J. Zwinggi, who was then and there its agent, with very broad powers, and that in the month of February, 1924, the defendant desired to secure reinsurance for a surety bond it was about to execute with the Carnegie Trust Company (an institution within the Pittsburg district covered by Zwinggi) as principal to the County of Allegheny as obligee (Case, p. 231, ll. 20 to 40).

In the fourth paragraph of the amended bill (Case, p. 232) it is alleged that the said Zwinggi made certain representations to the agent of the Commercial Casualty Insurance Company, which are in said paragraph particularly set forth under subdivisions "a" to "g" inclusive.

It is further alleged that the defendant, by said Zwinggi, requested the agent of the Commercial Casualty Insurance Company to communicate to the complainant, New Jersey Fidelity & Plate Glass Insurance Company, representations alleged to have been made by Zwinggi to the agent of the Commercial Casualty Insurance Company and to suggest to that company that it participate in said reinsurance; that Short, said agent, did repeat all the representations in paragraph 4 to Harold S. Vreeland, then the authorized agent of New Jersey Fidelity & Plate Glass Insurance Company, and did suggest that that company participate in the reinsurance (Case, pp. 232-233).

In the seventh paragraph of the amended bill it is alleged that all of said representations in paragraph 4, except subdivision "g," were then untrue in fact, and all of those untrue in fact, except subdivisions "d" and "e" were then untrue to the knowledge of the said Zwinggi (Case, p. 233, ll. 10 to 16).

It is thereupon alleged that all the representations in paragraph 4 were made by the defendant to induce complainants to enter into the contracts of reinsurance, were material to the risk assumed by the complainants and were relied upon by the complainants in entering into said contracts (Case, p. 233, ll. 17 to 24).

In paragraph 9 of said bill it is stated that at the time of the making by complainants of the aforesaid contracts the defendant, by its officers and agents, and among others, in particular its agent Zwinggi, knew certain facts which in said paragraph are set forth under certain subdivisions from "a" to "f," both inclusive (case, pp. 233 to 234, l. 30).

Thereupon it is stated that none of the facts alleged in paragraph 9 were known to either complainant until after the making of said contracts and that had either complainant known of the facts alleged in paragraph 9 it would not have entered into the contract of reinsurance it made with the defendant (Case, p. 234, ll. 32 to 40).

It is further alleged that the defendant wilfully, fraudulently and maliciously concealed from each of the complainants knowledge of the facts alleged in paragraph 9 (Case, p. 235, ll. 1 to 4).

Complainants further allege that at the same time said Trust Company, instead of being highly solvent, was, in fact, insolvent, and, instead of being well managed, was so carelessly and corruptly conducted by the said Bell, its president, that he has since been convicted of a crime or crimes in connection with the management (p. 235, ll. 8 to 15).

It is further stated that on or about April 25, 1925, said Carnegie Trust Company was adjudged insolvent and suspended its business and its affairs were taken in charge by the Commissioner of Banking of the State of Pennsylvania; that this fact immediately created suspicion on the part of the complainants and other reinsurers on said bond with reference to the liability of the Southern Company upon its bond of the Carnegie Trust Company; that the reinsuring companies, including complainants, demanded that a full audit of the Carnegie Trust Company be made before its liability on the bond be admitted, in accordance with Clause 5 of the insurance contract; that while said Southern Company at first agreed to have a complete

audit, they later declined to do so, and upon a partial and incomplete audit on or about June 15, 1925, admitted its full liability to Allegheny County upon its bond, notwithstanding the fact that prior thereto each of the complainants had sent the Southern Company a telegram protesting against such admission (Case, p. 235, l. 15, to p. 236, l. 10).

In the fifteenth paragraph of their bill complainants charge that such conduct on the part of the Southern Company evinces a desire on its part to conceal the real facts with regard to the representations made by Zwinggi to the agents and officers of complainants and also to conceal the facts with regard to the true condition with reference to the solvency of Carnegie Trust Company and Bell, its indemnitor, and complainants further allege as a further evidence of such desire in execution of the fraud and deceit by the Southern Company in procuring the underwriting agreements, that the Southern Company gives out and pretends that it has paid the full amount of said bond, viz., $1,100,000.00 to Allegheny County, but said County has refused to surrender said bond, and complainants charge that there is doubt as to whether such payment of that amount was in fact made, and if made, properly done, and, until the true facts can be ascertained, it is premature to hypothecate a liability upon the reinsurance contracts. (Case, p. 236, ll. 10 to 32).

It is further stated that after the complainants and other reinsuring companies heard of the insolvency of the Trust Company, meetings were held by their representatives in New York City, with the result that an effort was made on the part of the companies to secure a complete audit of the finances of the Carnegie Trust Company,

New Jersey State Library

but without success; that in the meantime one Mr. Grubbs, a lawyer of Pittsburg, was retained and has been employed for the purpose of investigating the matter and was empowered to have such audit made at the expense of the reinsuring companies; that he was delayed in securing this by failure to obtain the consent of the Banking Department and the result was that the audit was not completed until about the first of the year 1926; that from this report it appears that the Carnegie Trust Company was at the time the reinsuring contracts were made, grossly insolvent and had been improperly managed; that in the meantime depositions of witnesses, including John A. Bell, Joseph H. Walker, Treasurer of the Carnegie Trust Company, and others, were taken in another suit against the Southern Company, from which much of the information herein disclosed was obtained; that a copy of these depositions came into the possession of Grubb in the middle of April, 1926. (Case, p. 236, l. 33 to p. 237, l. 28.)

It is thereupon alleged that on September 15, 1925, the Southern Company commenced suit in the New Jersey Supreme Court against each of the complainants to recover the amount claimed to be due on account of the reinsurance contracts; that the complaints in the two suits are identical, except for the name of the party defendant, and that the answers vary slightly, and copies thereof, as well as of the other pleadings, actual and proposed, are attached to the original bill of complaint, marked Exhibits D to N; that answers were filed in due course and later, by reason of discovery of some of the allegations of fraud alleged, application was made to the Chief Justice presiding in the Essex Circuit for leave to file a supplemental answer setting up such facts. It

is further stated that upon the insistence of the attorneys for the Southern Company this application was denied by an order included in said papers, the exhibits referred to, without prejudice, for the reason, among others, as expressed by the Chief Justice, that it was not made to appear that the refusal of the reinsurers on the original bond, who refused to go on the present bond, was due to their fears about the financial situation existing at the time the renewal was made, either with respect to the financial stability of Carnegie Trust Company or knowledge or suspicion on their part of facts which would tend to make the renewal a greater risk than the original bond. (Case, p. 237, l. 30 to p. 238, l. 23.)

In the eighteenth paragraph of the amended bill it is alleged that in the month of June, 1926, full information was given to the New Jersey attorney of the complainants (the defendants in the lawsuits) covering the points desired by the Chief Justice, with instructions for him to take the necessary steps to enable the fraud to be properly pleaded; that complainants have, within a few days before filing this bill, discovered that said attorney in New Jersey, although said facts were sent to his office and by mistake placed in the file, never personally knew thereof and hence made no effort whatever until October 16, 1926, when application was made to file a supplemental answer, copy whereof is also included in said exhibits, and refused by the Chief Justice on the ground that the defendants were in laches in presenting the matter to the court so near the time when the trials were to come up. It is further stated that complainants' said attorney omitted to disclose to the court at that time the fact that this information has been in his pos-

session since June, last, and that the result of all this is that the complainants have no opportunity in the suits at law to set up the matters of fraud hereinabove alleged and capable of being relied on in that court. (Case, p. 238, l. 24 to p. 239, l. 14.)

In the concluding paragraph of the bill it is alleged that the said actions at law are pending and set for trial on November 15, 1926, and if permitted to proceed the defendants therein (the complainants in this suit) will be unable to introduce so much of the evidence of fraud hereinabove set out as is competent in that court.

The complainants pray that the defendant and its agents and attorneys may be enjoined and restrained from prosecuting the suits in the Supreme Court against them to recover the amounts claimed to be due on the reinsurance contracts; that it may be decreed that the said contracts were fraudulently induced and that the complainants were fraudulently induced to sign said reinsurance contracts and that the same may be decreed to be cancelled and delivered up to the complainants. (Case, p. 239, l. 30, p. 240, l. 8.)

The exhibits referred to in the amended bill are attached to the original bill and are set forth at length on pages 63 to 135, both inclusive, of the printed case.

Upon filing of the bill of complaint an order was made requiring the defendant to show cause why an injunction should not issue as prayed for in the bill. (Case, p. 136.)

On the following day an ad interim restraint was made. (Case, p. 138.)

Prior to the argument on the rule to show cause granted as aforesaid the defendant gave

notice of a motion to strike out the bill of complaint upon certain grounds therein alleged. (Case, pp. 216 and 217.)

Upon the argument on the return of the order to show cause the affidavits attached to the original bill of complaint were read and also the answering affidavits of the defendant, with exhibits thereunto annexed, which are set forth at length at pages 140 to 215, inclusive, of the printed case.

The argument having been had before Vice-Chancellor Backes, his opinion was filed on December 28, 1926, and is set forth in full on pages 218 to 227 of the printed case.

Thereafter an order was advised by the Vice-Chancellor granting the complainants leave to file an amended bill of complaint and said order also denied defendant's motion to dismiss the bill and directed that the defendant and its agents and attorneys be enjoined from further prosecuting the actions commenced in the Supreme Court against the complainants until the final decree in this cause and until the Court of Chancery shall make order to the contrary. (Case, pp. 228 and 229.)

Thereafter and on February 15, 1927, the complainants filed an amended bill of complaint, to the allegations of which we have above referred. (Case, pp. 230 to 240 inclusive.)

After the filing of the amended bill the Vice-Chancellor advised an order on February 23, 1927, denying the defendant's application to strike out the amended bill of complaint and further directing that the restraining order made on the fifteenth day of February, 1927, be continued in force pursuant to the terms thereof. (Case, p. 241.)

The defendant appealed from the said order of February 23, 1927, and duly filed notice of appeal. (Case, p. 1.)

Petition of appeal was duly filed in this court on February 20, 1927, and is set forth in the printed case. (Case, pp. 3 to 5.)

Formal answer to petition of appeal was filed by the respondents. (Case, p. 6.)

GROUNDS OF APPEAL.

The appellant herein assigns and alleges as grounds of appeal that the order made by the Court of Chancery is erroneous, in that the court should have stricken out and dismissed the amended bill of complaint because said bill does not allege any equitable ground for relief, because a court of equity will not restrain the prosecution of an action at law when the defenses to the action can be made in the law court as in the equity court, and because the alleged defenses to the defendant's actions in the Supreme Court could be pleaded in said actions at law, and because a court of equity will not relieve the complainants from their failure to properly set up their defenses in the law actions, and because an adequate remedy for the complainants exists at law, and because the complainants are in laches.

The appellants further allege that the order made by the Court of Chancery is erroneous, in that it continues the restraint of the defendant's said actions at law pending in the Supreme Court, which restraint should not have been continued, because the allegations of the amended bill are not supported by the affidavits appended, and because said bill and affidavits read in connection with the defendant's answering affidavits

are not sufficient to justify said court in continuing said restraint (Case, pp. 4 and 5).

The alleged misrepresentations could have been pleaded in the actions at law.

In the course of the opinion of the Vice-Chancellor he says at the bottom of page 223 of the printed case that:

> "The charge that the false representations complained of, save the one as to Bell's financial wealth, were knowingly false and deceitfully made, is a defense cognizable in the law courts. Cowley *v.* Smyth, 46 N. J. L. 380. And so the concealment of the fact that the bond of the Southern Company was a renewal and not an original bond, if it constitutes a meritorious defense, is as available at law as in equity. (Cases cited.) The claim to equitable relief is founded by the bill upon the misrepresentation by the agent of the Southern Company that, 'John A. Bell, who was a man of large financial worth, worth at least $1,400,000, and known by him to be worth far in excess of that amount and a sum not less than ten or eleven million dollars.' As to this it is alleged, 'That the complainants do not claim that the said representations were untrue to the knowledge of the said Zwinggi (the agent)'."

The court there further proceeding analyzes these representations in this way:

> "The misrepresentations in this respect, it will be noted, are two-fold. So much as representation that Bell was a man worth at least $1,400,000 was an affirmation of a fact, not of opinion, and if untrue, though ingenuously made, would be condemned in equity only; the added representation that Bell was known by him (the agent) to be worth far in excess of that amount and not less than ten or eleven million dollars, was an affirmation of a fact, that is, that the fact

was known to him, and if untrue was a deceit and redressible at law. If, at law, the complainants should establish the first and not the second their defense would fail, whereas in equity if they proved the first and not the second they would prevail. In this respect the jurisdiction of the law courts is obviously not equal to the occasion; not on par with equity's remedy."

Apparently, then, the court below retained the bill of complaint upon the ground that the alleged representation with respect to Bell was not untrue to the knowledge of the said Zwinggi. In fact, as above stated, this was the ground upon which the complainants filed their bill and upon which they claim they are entitled to the relief for which they pray.

In the course of the opinion the court refers to the observations of Vice-Chancellor Howell in *Schoenfield* v. *Winter*, 76 N. J. Eq. 511, wherein he says that in order to set aside a contract founded in fraud, it is only necessary in equity to prove that the representation upon which the action is founded is false, that it is material, and that damage has ensued; while at the common law the proof must go to the extent of satisfying the jury that the defendant knew that the statement relied upon was false.

We respectfully submit that there are exceptions to the rule as stated by the court below and to which we would now refer. The effect of misrepresentation without fraud at law is considered in 13 C. J. p. 331, at Sec. 272. We quote therefrom as follows:

"As a general rule a naked misrepresentation of fact, that is, an innocent misrepresentation or non-disclosure of fact, does not affect the validity of an agreement, unless it belongs to a special class of agreements in which the utmost good faith and accuracy

of statement is required, or is between persons in fiduciary or confidential relations, or unless the misrepresentation is a condition in the contract or amounts to a warranty. Except in these cases a misrepresentation has no effect at common law, unless it is made with knowledge that it is false or recklessly and without belief in its truth, so as to render it fraudulent."

It is stated in Section 273 that:

"Innocent misrepresentations, however, may be ground for relief in a court of equity."

Again proceeding with respect to the particular contracts which are excepted from the general rule at law, it is stated in Section 274 as follows:

"To the general rule that innocent misrepresentations do not affect the validity of an agreement, there are exceptions in the case of certain special contracts, sometimes said to be *uberrimae fidei,* which are of such a character that one of the parties must rely on the other for his knowledge of facts, and in which, therefore, the most perfect good faith is required, so that they may be avoided for any material misstatement or non-disclosure of facts, even though innocent." Citing *Anson on Contracts,* p. 157; *Holden* v. *Putnam F. I. & S. Co.,* 46 N. Y. 1, 7 Am. R., 287.

Again on the subject of misrepresentation in the inducement of contract, we would refer to *Page on Contracts,* Vol. 1, Sec. 372, from which we quote as follows:

"The original common law rule was that an innocent misrepresentation was no ground for repudiating liability on an executory contract, nor for informally rescinding a contract during performance or after performance."

The exceptions to the common law rule are referred to in Section 373, at page 596, as follows:

> "Even where the rule that innocent misrepresentation does not avoid a contract was most rigidly adhered to at common law, there were two great classes of exceptions thereto: One class of contracts being an exception to this rule on account of the peculiar nature of the subject matter; the other being an exception on account of the peculiar relation between the parties thereto. Of the first class of contracts insurance was the most conspicuous example. It was said to be a contract *uberrimae fidei,* of superabundant good faith, and one which would be avoided by a material misrepresentation even if innocent. This rule originally applied to marine insurance, but it seems now to be applicable to insurance of all kinds, such as guaranty insurance, fire insurance and life insurance."

In support of this doctrine the text refers among others to the following cases:

Seaton v. *Heath,* (1899) 1 Q. B., 782;
Anderson v. *Fitzgerald,* 4 H. L. Cas., 484;
Security Trust Co. v. *Tarpey,* 182 Ill., 52, 54 N. E. 1041;
Hayward v. *Ins. Co.,* 64 Mass. 444;
Campbell v. *Ins. Co.,* 98 Mass. 381;
Ring v. *Assurance Co.,* 145 Mass. 426;
Dolan v. *Life Association,* 173 Mass. 197;
Armour v. *Ins. Co.,* 90 N. Y. 450;
See also *Glidden* v. *U. S. Fidelity & Guaranty Co.,* 198 Mass. 109, 84 N. E. 143.

In *Glidden* v. *U. S. Fidelity & Guaranty Co.,* 198 Mass. 109, the defendant by the bond sued upon undertook to make good to plaintiff such pecuniary loss as he might sustain from any dishonesty of S who had been for more than a year employed by plaintiff as a clerk. There had been a breach of the bond's condition.

Defendant had issued the bond upon the faith of a written statement signed by the plaintiff and containing certain statements material to defendant's undertaking, and the auditor found these statements were untrue. Plaintiff had stated that he had examined S's accounts a week before and found them in all respects correct. The court said as to this statement:

> "It bore directly upon the nature and extent of the risk which the defendant agreed to bear and if, in fact, this representation was false, whether intentional or from honest mistake on the part of the plaintiff, it plainly increased the risk and plaintiff could not hold the defendant to this agreement. *Ranger* v. *Boston Mutual Life Association,* 167 Mass. 109, 44 N. E. 1088; *Cobb* v. *Covenant Mutual Benefit,* 153 Mass. 176, 26 N. E. 230; *McCoy* v. *Metropolitan,* 133 Mass. 82; *Campbell* v. *New England,* 98 Mass. 381; *Towne* v. *Fitchburg,* 7 Allen 57. See also 116 Ky. 38, 74 S. W. 1111, 116 Fed. 449."

In *Ring* v. *Phoenix Assurance Co.,* 145 Mass. 426, it appears that an application was made for fire insurance on goods in a certain building. The building was described as having no houses within 100 feet. The jury were instructed to consider (1) whether the facts stated were matters material to the risk; (2) if material, whether the representations were false; and (3) if false, whether made innocently and by mistake.

On appeal the court held that leaving the last point to the jury was error, for it allowed them to find for the plaintiff if the plaintiff had made misrepresentations on matters which increased the risk of loss, provided plaintiff had not been guilty of fraud. The court conceded the application was not a warranty, but held that the common law rule still prevailed concerning rep-

resentations forming the basis of a policy. Citing *Kimball* v. *Aetna,* 9 Allen 540.

Futhermore, we quote from *Campbell* v. *New England Mutual Life Insurance Co.,* 98 Mass. 381, the following:

> "The instruction 'that an untrue statement innocently made in regard to a latent disease of which the applicant is unconscious would not avoid the policy' as a general statement of law applicable to representations in insurance contracts, was incorrect. The untrue statement or denial of a material fact preceding or contemporaneous with the contract of insurance prevents the policy that it is based on from taking effect as a contract, whether the statement was made ignorantly and in good faith or otherwise. 3 *Kent Com.,* 6th Ed., p. 282."

The case of *Seaton* v. *Heath,* 1 Q. B. (1899), 782, is somewhat similar in its facts to the case before the court. Here the plaintiff loaned money to X, charging 40% interest, and Y guaranteed the payment. Plaintiff thereupon stated to the defendant that Y was a very rich man and thereby secured from the defendant a policy whereby the defendant in consideration of 50 shillings guaranteed Y's solvency to the extent of said bill, no claim to attach to the said policy until Y should have a receiving order in bankruptcy or call a meeting of his creditors. It appears that X defaulted and Y failed to pay. Within three months of the issuance of the policy Y called a meeting of his creditors and thereupon plaintiff sued the defendant on the policy. In the course of the opinion the court intimates that in cases of insurance the person who desires to be insured against a risk states to the insurer the risk against which he desires to be insured and that the only risk that the insurer takes is the risk as presented to him.

The court in this case held that the document involved was a contract of insurance and sent the case back for re-trial with the following questions to be left for the jury: (1) Whether taking into account the statement made to the underwriters (namely that Y was a very rich man) there was not misstatement of a material fact; (2) whether defendants were influenced by the said misstatement in underwriting the risk.

The relief which is primarily sought by this amended bill is a restraint of the actions at law. Therefore, it now appearing that no proper case is presented for the interposition of the Court of Chancery by injunction, the bill should be stricken out.

> "The principle is well established, and is universal in its application, that when a cause belongs to the jurisdiction of the law courts, equity will never interfere to restrain the prosecution of the action, nor to stay proceedings on the judgment or execution, upon any mere legal grounds, although it may be demonstrated that the complainant in equity (generally the defendant at law) had a valid legal defense, which was not available either through the error of the court in determining the law or the facts, or the omissions of himself or his counsel in presenting it, or in obtaining the evidence by which it could have been supported." *Pomeroy's Eq. Jur.,* Sec. 1361.
>
> "That the legal defense was not successful through the ignorance, negligence or mistake of the parties' own attorney or counsel is not ground for interference." *Warner* v. *Conant,* 24 Vt. 351, 58 Am. Dec. 178; *Barton* v. *Wiley,* 26 Vt. 430; *Emerson* v. *Udal,* 13 Vt. 477, 37 Am. Dec. 604; *Powell* v. *Stewart,* 17 Ala. 719; *Jamison* v. *May,* 13 Ark. 600; *Graham* v. *Roberts,* 1 Head 56.

In the present case as in *Savage* v. *Edgar.* 86 N. J. Eq. 205, (Ct. Err. & App.) the com-

plainants "could have availed themselves by a proper plea in the action at law, hence there is no ground for the interference of a court of equity. The motion to strike out the bill for want of equity should prevail."

All the representations and concealments alleged by the complainants, if defenses at all, are legal defenses. Complainants' failure to interpose them in the actions at law gives complainants "no right to have the forum of the litigation changed to a court of equity" and to deprive the defendant of the determination of a jury upon the issues involved. *Headley* v. *Leavitt,* 68 N. J. Eq. 591.

"This court will not restrain the prosecution of an action at law where the defense to the action can as well be made in the court in which the action is pending as in the equity court." Chancellor Walker in *O'Donnell* v. *McCann,* 77 N. J. Eq. 188 at 200, citing *Screw Mower Co.* v. *Mettler,* 26 N. J. Eq. 264.

"The doctrine is settled that the exclusive jurisdiction to grant purely equitable remedies, such as cancellation, will not be exercised, and the concurrent jurisdiction to grant pecuniary recoveries does not exist, in any case where the legal remedy, either affirmative or defensive, which the defrauded party might obtain, would be adequate, certain, and complete." *Pomeroy's Eq. Jur.* Sect. 914, cited and followed in *Kreuger* v. *Armitage,* 58 N. J. Eq. 357, wherein Vice-Chancellor Emery after speaking of the doctrine of some English cases in which bills in equity have been entertained in cases of fraud, says (p. 361) that the doctrine "has not been followed in the American courts, which have regarded the assumption of such jurisdiction as a deprivation

of the right of trial by jury, where such trial affords an adequate and complete remedy."

"A court of equity does not interfere, with judgments at law, (or prosecution of the action), unless the complainant has an equitable defense of which he could not avail himself at law because it did not amount to a legal defense, or had a good defense at law which he was prevented from availing himself of by fraud or accident *unmixed with negligence of himself or his agents."* Mr. Justice Curtis in *Hendrickson* v. *Hinckley,* 17 How. 443.

In the notes to Sect. 1361 of Pomeroy's Eq. Jur. (4th Ed.) authorities are cited in support of the following statement of law, viz:

> "It is immaterial whether the question or matter relied upon by the complainant in equity was considered by the law court or not. Omission to present or to make out a defense at law is not a ground for equitable relief."

"Nor is any error on the part of the law court ground for the interposition of equity." *Vaughn* v. *Johnson,* 9 N. J. Eq. 173; *Clapp* v. *Ely,* 10 N. J. Eq. 178.

The complainants have a certain, complete and adequate remedy in the suits at law.

In the course of the opinion of the Vice-Chancellor at the bottom of page 224, he says:

> "But the complainants are not reduced to the single and narrow ground assigned in their bill in maintaining their suit in this court. The concurrent jurisdiction of the law courts to relieve against deceitful representations does not abridge equity's jurisdiction to grant relief on that score, and, even though it be, as contended, that the bill discloses that all the misrepresentations

were deceitfully made, it may be that the complainants would not be able to prove that the misrepresentations were knowingly false, but could only prove that they were material and untrue—a defense in equity only. The complainants are not to be put to the hazard at law when the requirements in equity are less exacting."

By reference to the original bill on page 12 of the printed case, at the bottom of the page the allegations read as follows:

"It cannot be claimed, and the complainants do not claim that the said representations were untrue to the knowledge of the said Zwinggi; nevertheless, such representations were affirmations of facts, which affirmations were false, and give ground for the complainants to allege in this court, and in no other court, the facts with reference thereto, and upon the fraud arising therefrom, as a basis for relief by the complainants from the said contracts made and entered into upon the faith thereof."

In the amended bill of complaint at page 7 thereof on page 233 of the printed case, the complainants allege that all the representations of paragraph 4 of the amended bill except subdivision "g" thereof, were then untrue in fact, and all those untrue in fact except subdivisions "d" and "e" were then untrue to the knowledge of the said Zwinggi.

By reference to the fourth paragraph of the amended bill, we find that the representations which were not charged to be untrue to the knowledge of the agent were the following:

"(d) The said Carnegie Trust Company was then a solvent and well-managed institution.

"(e) John A. Bell, the defendant's indemnitor with reference to the said surety bond, was then worth at least $1,400,000."

Following the representations it is alleged that the defendant concealed certain facts from the complainants herein. These facts are set out under some seven different headings (Case, pp. 233, 234). Thereupon the allegation is made that the defendant wilfully, fraudulently and maliciously concealed these facts from the complainants. Neither in the bill nor in the amended bill do the complainants claim that there are any matters as to which they need the aid of a court of equity except as to the representations made with regard to the status of Bell. In the amended bill, in addition to this, they have added the alleged representation with respect to the Carnegie Trust Company.

In other words, the complainants allege that they can show what may be termed legal fraud with respect to all these matters with the exception of the reference to Bell and the Trust Company. There is no allegation that the complainants cannot successfully establish these defenses at law with the exception of the two particulars mentioned.

In this connection the Vice-Chancellor refers to *Schoenfeld* v. *Winter,* 76 Eq. 511. In this case Vice-Chancellor Howell admitted that there were limitations upon the rights of a suitor to resort to equity in cases of fraud and refers to the cases of *Krueger* v. *Armitage,* 58 Eq. 357; *Polhemus* v. *Holland Trust Co.,* 59 Eq. 93, 61 Eq. 654. In the course of the opinion Vice-Chancellor Howell says:

"In these two cases it will be observed that there was no ground of equity jurisdiction except the false representation of fact. But in the case in hand the complainant appeals to the court to declare that the contract induced by fraudulent representations should be rescinded and cancelled, and this upon the

ground that the contract being void by reason of fraud, the complainant should not continue to rest under the obligation of any portion of it, but that he should be discharged from its performance in whole and in part. This is an equity to which the complainant is entitled if at the final hearing he is able to substantiate his allegations."

The scope of the contract between the parties in this case is not set forth, but apparently from the opinion of the court the complainant in that case sought to be relieved of every feature of the contract whether it was involved in the law action or not.

In the instant case before the court, the defendant has sought to enforce the insurance policy for the full amount against both the complainants. When this subject is adjudicated upon there will be no part of the insurance contract upon which any other cause of action might be grounded. In other words, the disposition of the insurance policies in the action at law will settle the rights and liabilities of both parties thereto.

Reference is also made to the case of *Morse* v. *Nicholson,* 55 Eq. 705, on the subject of the inadequacy of the relief to be obtained at law. The controversy in this case was between the creditors of one of the defendants as complainants and the said defendant and a certain chattel mortgagee who held a lien upon the said defendant's personal property. The complainants in the Chancery action prior thereto brought replevin in the Monmouth Circuit and the goods sold by them were delivered to them, but the defendants made defense thereto and claimed that the goods belonged to the defendant who originally made the purchase. In the Chancery action complainants prayed that the sale and delivery be decreed void because of fraud, and that

the chattel mortgage be annulled as to the goods sold by the complainants and decreed to be no lien thereon. At the bottom of page 707 the Vice-Chancellor says:

"In this court the complainants seek a decree declaring the sale and chattel mortgage to be void, which is, in effect, the same relief attainable in the suit at law, but their incidental remedies in this court are much more applicable and complete than those which can be afforded in the law court. The complainants, if they establish their case in this court, as to the fraudulent sale and the connivance of the chattel mortgagee, may have the list of goods fraudulently mortgaged stricken from the mortgage, and the record of the fraudulent mortgage adjudged to be a nullity as to those goods. They may have a restraint against the transfer of the mortgage until the decree is obeyed. If they succeed in showing the fraud on the part of the defendant Nicholson, but fail in proving participation or knowledge of the mortgagee Cook, they may still require the mortgagee to make his money in the first place, if possible, from the goods mortgaged to him, other than those which the mortgagor fraudulently obtained from them. * * * The wide reach of these various modes of procedure affords to the complainants in this court opportunities for relief in the premises which the more rigid rules of the courts of law cannot give."

The recitation of the facts of this last mentioned case show very clearly how widely different it is from the case now before the court. In fact the two cases last cited were retained by the Court of Chancery particularly upon the ground that certain equitable remedies were essential in order that full relief might be granted to the complainants.

Again at the bottom of page 225 of the printed case, in the course of the opinion of the court in this case the Vice-Chancellor says:

> "Nor is the remedy certain in the suits at law. The plaintiffs there may before or at the trial suffer non-suits and subject the complainants to other and vexatious suits here or in other jurisdictions. They are entitled to the more nearly certain remedy afforded in equity by decree to surrender the policies of insurance for cancellation upon proof of fraud, whether the fraud be unconscionable or deceitful."

In support of this observation the court refers to two cases, *Metler, Admrs.* v. *Metler,* 18 Eq. 270, 19 Eq. 457, and *Sweeney* v. *Williams,* 36 Eq. 627.

Reference to the Metler case discloses a peculiar situation. Here the intestate gave to one of the defendants, his mother, a promissory note for $1,500. This was given without any consideration. The note was given when the intestate was about to go to the oil regions and with the understanding that if he returned alive it would be given up to him. It was given for the amount for which he had agreed to sell his homestead, being about the value of it, and with a fraudulent intention and purpose by both parties to enable his mother to govern his property and defeat any recovery his wife might obtain against him for alimony and with a view that in case of his death his mother might have the property and that his wife and child should have none. The intestate did return alive but did not require his mother to give up the note, and on December 1, 1865, met death in a railroad accident. The mother and father brought an action in the Supreme Court against the administrators of the intestate grounded on the note. A bill was filed in Chancery praying among other things that a

suit be enjoined and ordering the note to be given up to be cancelled. In the course of the opinion the Chancellor says:

> "The note, being without consideration, is void, and cannot be recovered upon at law. And it is contended that, as the complainants have a complete defense at law, they cannot resort to equity. Such, no doubt, is the general rule, and were the present suit at law the only matter to be relieved against, it might decide this case. But here is a note, not void on its face, which in case of a discontinuance or non-suit, might be held until the evidence of its being without consideration could not be had, and then a suit on it brought against these parties, or against the infant heir, to the amount of assets descended. In such case the jurisdiction of courts of equity to order the security to be given up to be cancelled, is now well established. * * * In cases where the instrument is on its face valid, and especially if negotiable, the jurisdiction of the court is founded upon principle adopted among other cases in bills *quia timet,* and is now settled by authority." (Case cited.)

On appeal of the last mentioned case this court said in its opinion at page 459:

> "Besides, the defendants could, though defeated in the action at law now pending, put the note which is negotiable, in circulation, and compel the complainants to defend themselves against it as best they might. They could also, if they saw fit, discontinue the present suit, and at some time hereafter, when it might be impracticable to establish the facts which render the note invalid, or perhaps in a foreign jurisdiction, bring another action against the heirs or personal representatives of the deceased.
>
> "We have, then, the following facts: A negotiable note, valid upon its face, given without consideration upon an agreement that it shall be given up to the maker upon

a contingency which has happened, and an action at law brought upon such note by the payees, against the personal representatives of the maker. It seems to me apparent upon the statement of these facts, that the only jurisdiction competent to afford full and adequate relief, is a court of equity."

In *Sweeny* v. *Williams* the bill filed prayed for an injunction restraining the respondent as receiver of a bank, and the bank and one John Halliard from bringing or maintaining action against the appellant, who was the complainant upon a certain bond and mortgage. The bond was made by appellant to said Halliard and was secured by a mortgage which was likewise made by appellant to Halliard. The bond and mortgage had been assigned by Halliard to the bank. The appellant alleged that the transaction between Halliard and himself was merely nominal and that no real interest was acquired by him in the lands conveyed to him and no consideration existed for the bond and mortgage. It was also alleged that an action had been brought by the respondent as receiver in the Supreme Court against the appellant upon the bond. An injunction against proceeding in the said action pending suit was also prayed. In the course of the opinion at page 629 delivered by Justice Magie on behalf of the Court of Errors and Appeals, he says:

"But if there exist a concurrent jurisdiction in courts of law and courts of equity, the latter will decline to entertain jurisdiction after the jurisdiction of the courts of law has attached, unless fully obtained in the court of law. (Cases cited.)

"It is this proposition that I understand the learned Vice-Chancellor to have maintained in the opinion below. But I do not think the proposition was applied by him to this case, nor is it, in my judgment, properly

applicable thereto. The complainant was entitled, if at all, to a relief broader than could be afforded him in the action at law. He asked, and if his contention is correct, was entitled to a perpetual injunction against the bond. At law, his relief as to the bond could be obtained only in case the plaintiff brought his action to trial. If he discontinued or submitted to a non suit, the relief could not be obtained there. The complainant was also entitled to relief on the whole transaction, including the mortgage securing the bond, a relief which would only be incidentally rendered by a successful defense at law, and to which Halliard was necessarily to be a party. Adequate relief was therefore not provided in the existing action at law. I think it indisputable that the court below had jurisdiction and a right to adjudicate on the merits of the case, as was done."

It will be observed that in the latter case in addition to the bond there was involved a mortgage and the presence of a third party was necessary in order to adjudicate upon the rights of all the parties in the whole matter then before the court.

By reference to the bill and the amended bill and the exhibits thereunto annexed, it appears that in the action in the Supreme Court the defendant has entered suit against each of the complainants upon the reinsurance contract wherein they claim damages to the extent of the full amount of the indemnity afforded thereby. A determination of the matter in controversy, therefore, will be dispositive of any and all claims that the defendant could make under the reinsurance contracts against either of the complainants.

Furthermore, it appears by the allegations of the bill that the actions brought by the defendant

were set for trial on November 15, 1926. The original bill of complaint was filed November 8, 1926, and the order to show cause issued thereon on the same day, and on the day following the restraining order was issued. In other words, the causes of action were at issue in the Supreme Court, and the defendant was then pressing the cases for trial, which was immediately imminent.

These actions would have settled all matters in controversy between the parties and would be dispositive of all claims made by the defendant on the reinsurance contracts, and of any and all defenses made thereby by the complainants in said actions.

The complainants were not entitled to a preliminary injunction.

Upon the application for the preliminary injunction complainants presented an affidavit of one Harlan Short. This was annexed to the original Bill of Complaint and is set forth on pages 19 to 23 inclusive of the printed case.

By reference thereto, it appears that he was formerly employed by the Commercial Casualty Insurance Company, one of the complainants herein. He states that a short time prior to February 25, 1924, W. J. Zwinggi, who was manager of the Pittsburg office of the defendant company, met him by appointment in New York City for the purpose of negotiating with him a policy of reinsurance for the Southern Surety Company on a bond between Carnegie Trust Company as principal and Southern Surety Company as surety and the County of Allegheny as obligee.

The representations made to Mr. Short by Zwinggi are set forth in his affidavit at the bot-

tom of page 21 and on page 22. There he says that during the negotiations, Zwinggi further represented to him that the Carnegie Trust Company was highly solvent, well managed and in sound financial condition and that in addition to the security offered thereby the Southern Surety Company had as indemnity for the giving of the bond an indemnity agreement or contract of John A. Bell, who was the president of the Carnegie Trust Company, and was stated to be by Zwinggi a man of large financial means, worth more than $1,400,000, that he was an excellent banker and Pennsylvania "coal baron". Short further deposes that the representation with reference to Bell was unequivocal and accompanied by the statements that he knew the facts he averred with reference to him, going so far as to say that his resources were as high as $10,000,000 or $11,000,000.

Reference is made to this same subject in the affidavit of Mr. Bratney, which was filed with the Bill of Complaint. In this affidavit he refers to an audit that had been made, as he alleges, of the Carnegie Trust Company and states that a copy of said audit is in his possession, having been made about the first of the year, 1926. He deposes that this audit discloses that the Carnegie Trust Company was insolvent and had been insolvent in 1923. He further says "I learned later that John A. Bell had upon his own petition been adjudged a bankrupt in August, 1925." (Case, p. 35, ll. 30 to 40.)

Again reference is made to the financial condition of the Carnegie Trust Company in the affidavit of Mr. Conick, which is set forth on page 56 of the printed case. After recounting the results of his investigation, covering some period of time prior to the closing of the doors of this institu-

tion, he says at the conclusion of his affidavit on page 62 "My opinion is that these facts and much other information obtained by me from an audit of the Carnegie Trust Company, demonstrated that the Carnegie Trust Company was insolvent in 1923 and so remained until the closing of said Carnegie Trust Company in 1925."

According to the affidavits filed by the complainants on their application, the representations alleged to have been made by Mr. Zwinggi were the only representations which could have influenced the complainants in accepting the risks that were tendered to them. Accordingly it becomes important to consider the answering affidavit, which was filed by the defendant relative to these particular matters. We refer particularly to affidavit of Mr. Zwinggi, which is found on page 140 of the printed case. In this affidavit is set forth all the transactions between Mr. Zwinggi and the representatives of the complainants relative to reinsurance contracts. We refer particularly to the communications between Mr. Campbell and Mr. Short. Deponent states that for some years prior to February, 1924, he was acquainted with H. H. Campbell, who was the general agent of the Commercial Casualty Insurance Company of Pittsburg; that while in New York City on February 14th and 15th, 1924, he met Mr. Campbell on the street and informed him that he was in New York for the purpose of securing reinsurance upon a large bond which the Southern Surety Company had been requested to execute as surety by the Carnegie Trust Company, upon which he had the personal indemnity of John A. Bell; that Campbell said that he wanted to be permitted to submit said reinsurance to the Commercial Casualty Insurance Company, of which he, Campbell, was the agent, to which Zwinggi acquiesced. Zwinggi

then states that he then and there delivered to Campbell a copy of Exhibits A to E, both inclusive, attached to his affidavit, and an appointment was made for the deponent to meet Campbell at the Waldorf Hotel the same evening. Zwinggi further says that he met Campbell, who was accompanied by a person who he introduced as Harlan Short; that Campbell said to Zwinggi that Mr. Short could tell him what had been concluded with reference to reinsurance and that thereupon Mr. Short stated that his company, the Commercial Casualty Insurance Company would be glad to accept the reinsurance liability upon the said depository bond. Zwinggi further says that he thanked him and remarked that he thought it was a good risk and that Short informed the affiant of the New Jersey Fidelity and Plate Glass Insurance Company, which he thought would be glad to accept some reinsurance upon the proposed bond and suggested that if the affiant was willing he would present the matter to that company; thereupon Zwinggi gave Short an additional copy of Exhibits A to E, both inclusive, to be used in the presentation of the matter.

Zwinggi deposes that at no time did he make any representations to Short with respect to the standing of Bell or the Carnegie Trust Company other than the representations contained in the document delivered to him and the single remark that he thought the risk a good one, which was made after Short had stated that his company would accept the reinsurance offered it.

By reference to the exhibits mentioned in the affidavit of Zwinggi, it appears that he laid before the representatives of the complainants the application of the Carnegie Trust Company for the bond, the indemnity agreement of Bell, the

report of R. D. Dun Mercantile Agency, report of D. B. Jones, statement of the interest of John Bell, Sr., and report of the condition of Carnegie Trust Company at the close of business December 31, 1922, verified by the treasurer of the institution.

By reference then to the affidavit of Zwinggi, it appears that he candidly laid before these representatives of the insurance companies the results of his investigations in Pittsburg and particularly the reports of the mercantile agencies with respect to the standing of Bell in the community, the various interests with which he was connected. With respect to the Carnegie Trust Company he submitted the application made by the company and the official statement rendered by the company with respect to its own business condition. Furthermore, it is to be observed that there was no denial on the part of the complainants herein of the allegations made by Zwinggi with respect to his submission of this application to their representatives. It is very evident that whatever estimate Zwinggi placed upon the Trust Company or Bell was based upon the documents and information that he laid before the representatives of the complainant companies.

Mr. Short's affidavit does nothing more than set forth representations which he claims were made to him—mere generalizations with nothing circumstantial or convincing about them. In Mr. Zwinggi's affidavit in reply thereto, he denies these general allegations made by Mr. Short and sets forth with great particularity what he did with respect to the whole matter and how that he had laid before the complainants' agents the various reports and papers which he had gathered together relative to the risk in general.

In view of the detailed statement of Mr. Zwinggi, it appears clearly that the complainants had abundant opportunity to peruse and consider the documents which were submitted by him and undoubtedly decided upon the basis of documents submitted that they would take part of the reinsurance offered.

We respectfully submit that the material facts in the bill upon which the complainants' equity depends are met by a full, explicit and circumstantial denial by the affidavit of Mr. Zwinggi and that under such circumstances the preliminary injunction should not have been granted.

The conditions under which a preliminary injunction will issue have been settled by this court in the well-known case of *Citizens Coach Company* v. *Camden Horse Railroad Co.*, 29 N. J. Eq. 299. In this case Chief Justice Beasley laid down the following rule:

> "The general rule, subject to but a very few exceptions, is that if the facts constituting the claim of the complainant for the immediate interposition of the court are controverted, under oath, by the defendant, the court will not interfere at the initial stage of the cause."

The doctrine of this case has been followed since its declaration in 1878 and reference to this rule is made in the recent case of *Ye Olde Staten Island Dyers & Cleaners* v. *Barrett, Nephews & Company,* 98 N. J. Eq. 702. At page 703 in the opinion of this court it is stated:

> "Now as we look upon the answer and defendant's affidavits, the material facts in the bill upon which the complainant's equity depends, are met by a full, explicit and circumstantial denial under oath. Such being the case, a preliminary injunction should not have been granted."

Citing *Citizens Coach Co.* v. *Camden Horse Railroad Co.*, 29 N. J. Eq. 299; *Meyer* v. *Somerville Water Co.*, 79 N. J. Eq. 613.

It is apparent, therefore, that the instant case falls plainly within the scope of this general rule and on this ground the injunction order should be dissolved.

At this point it should also be observed that there is absolutely no proof in the affidavits that the representations concerning Bell were false at the time they were made, that is in February, 1924. Mr. Bratney says in his affidavit: "I later learned that John A. Bell had upon his own petition been adjudged a bankrupt in August, 1925." That was a year and a half after the representation was alleged to have been made and constitutes no proof that Bell was insolvent a year and a half prior to August, 1925.

Furthermore, Mr. Bratney's statement that he learned that Mr. Bell had been adjudicated bankrupt, is in no sense proof of the fact that he was adjudicated bankrupt or that it happened in August, 1925. It is a mere hearsay statement of no probative effect.

Likewise, there is no proof that the Carnegie Trust Company was insolvent in February, 1924, when the representation concerning it was alleged to have been made. It was taken over by the Commissioner of Banking in April 25, 1925, a year and two months later. The accountant, Mr. Conick, is the only one who makes an affidavit attempting to show that the Trust Company was insolvent at the time the representation is alleged to have been made in February, 1924. His affidavit does not constitute even prima facie proof of the allegation. It is merely an expression of his opinion and conclusions and

inferences drawn by him from information which he states he had gathered from various sources.

In the affidavit of Mr. Bratney, (case, p. 36) he states that after the original answer was filed by his company, certain facts with reference to the fraud that his company claimed existed at the inception of their relations with the Southern Company were brought to light and an effort was made to file a supplemental answer, a copy of which appears in the pleadings, actual and proposed and that the motion was refused by the Chief Justice.

Annexed to the bill will be found the proposed supplemental answers to which reference has been made. They are Exhibits II and I and are found on pages 102 to 109 inclusive of the printed case. By reference thereto it appears that the complainants set up in their answers the allegations with respect to the Trust Company and Bell that they set up in the bill and amended bill of complaint in this cause.

Mr. Bratney states in his affidavit that the Chief Justice denied their application to file the supplemental answers. The rule of the Supreme Court disposing of this matter is found on page 109 of the case and is Exhibit J. Apparently this rule was made some time during the month of February, 1926. In his affidavit Mr. Bratney attempts to give the reasons why the Chief Justice denied the application. Reference to the order, however, shows that the application was denied without prejudice to the defendant to renew the same upon filing affidavits or other proofs showing such facts as may be deemed by the court sufficient to entitle defendant to file such supplemental answer.

According to the affidavit the application to file the supplemental answer was not renewed until

October 16, 1926 (Case, p. 15). At the time the application was refused by the Chief Justice on the ground that the defendants in said action were in laches in presenting the matter to the court so near the time when the trial was to come on. According to Exhibit M, (Case, p. 116) annexed to the complainants' bill, notice of the second motion for leave to file a supplemental answer was returnable on Saturday, October 23, 1926. To this notice was attached a copy of the supplemental answer proposed to be filed. This is set forth at length on pages 132-5 inclusive, of the printed case. By reference thereto it will be seen that this proposed answer included the same allegations with regard to the condition of the Trust Company and Bell as were contained in the proposed supplemental answer which the complainants sought to file at the time of their application to the Chief Justice in February. From the complainants' bill it appears that the law cases were at issue and that the defendant was pressing the same for trial and that the cases were actually set down for trial on the calendar of the Essex County Circuit Court for November 15, 1926.

Undoubtedly the complainants herein must have known of these alleged representations of Zwinggi at the time of the filing of the orignial answers. Zwinggi communicated not only with Short but with the local agent of the Commercial Casualty Company at Pittsburg. At the latest the complainants must have known of these alleged representations of Zwinggi in February, 1926, when they first made their application to the Chief Justice to file the supplemental answer. A copy of that answer to which we have referred is annexed to their own pleadings and embodies the same allegations that are here considered.

With matters in this plight, they made no further efforts to amend their pleadings or supplement them until the 23rd day of October, 1926, when the cases were in the call and when they had been set down for trial on November 15th following. When the second application was made to the Chief Justice it was denied for the very reason apparently that complainants had procrastinated with respect to this matter until the law cases were at the very threshhold of the court. When it became apparent to the complainants that they would not be allowed to plead these defenses in the Supreme Court, they immediately had recourse to Chancery to relieve them from a situation for which they were wholly responsible.

By reference to the first proposed supplemental answer (Case, p. 104) it appears that the complainants allege therein that the representations with respect to the condition of the Trust Company and as to the indemnity contract held by the Southern Surety Company were not true and were known to be untrue by said Zwinggi at the time they were made. When the complainants made their second application to file supplemental answer in the action at law in the form then submitted, it is there alleged that such representations were false and were known to be false by the plaintiff at the time they were made (see Case, p. 133). When the original bill of complainant is filed, however, it is alleged therein that the complainants do not claim that the allegations with respect to Bell were untrue to the knowledge of said Zwinggi (Case, p. 12, par. 9). In the amended bill of complaint in the seventh paragraph thereof (Case, p. 233) the allegations are to the effect that the alleged representations with regard to the Carnegie Trust Company and

also to Bell were not untrue to the knowledge of the said Zwinggi. After two unsuccessful efforts to amend their pleadings at law and after their application so to do had been denied by the Supreme Court, the complainants herein changed their allegations with respect to these defenses and now claim that they were innocently made for the purpose of conferring jurisdiction on a court of equity.

It is very apparent that on the presentation of the complainants' case that they have slept upon any rights they may have had in the premises and that they are not entitled to the aid of a court of equity.

In *Rabe* v. *Dunlap,* 51 N. J. Eq. 40, Vice-Chancellor Van Fleet quotes the rule laid down by Lord Camden many years ago in these words:

> "Nothing can call forth the activity of a court of equity but conscience, good faith and reasonable diligence. Where these are wanting the court is passive and does nothing. Laches and neglect are always discountenanced and therefore from the beginning of this jurisdiction there was always a limitation to suits in equity."

It is respectfully submitted that for the reasons aforesaid the order appealed from should be reversed and set aside and that the restraint therein contained should be vacated and the complainants' said amended bill of complaint should be stricken out and dismissed.

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New Jersey Court of Errors and Appeals

Between

COMMERCIAL CASUALTY INSURANCE COMPANY, and NEW JERSEY FIDELITY AND PLATE GLASS INSURANCE COMPANY, *Complainants-Respondents,*

and

SOUTHERN SURETY COMPANY OF DES MOINES, IOWA, *Defendant-Appellant.*

On Bill, &c.

On Appeal from Chancery.

BRIEF OF RESPONDENTS.

Statement.

Upon filing the original bill of complaint, with affidavits and exhibits thereunto annexed (Case, 7), an order was made requiring the defendant to show cause (Case, 136) why an injunction, in accordance with the prayer of the bill, should not issue *pendente lite.* The defendant met this with answering affidavits and a motion to strike out the bill of complaint (Case, 216). The order to show cause and motion to strike out the bill of complaint came on for argument at the same time before Vice-Chancellor Backes, who filed an opinion (Case, 218) denying the motion and for the injunction. In the course of his opinion, however, he assumed as pleaded certain facts which appeared in the affidavits. To comply with his suggestion that the bill be amended, a provision for leave to amend was included in the order entered on his opinion (Case, 228) and the amended bill was filed (Case 230). The defendant moved to strike out the amended bill

and on that motion was made the order appealed from, denying it and continuing the restraint (Case, 241). No opinion was filed by the Vice-Chancellor on this second motion. It is, of course, however, the amended bill of complaint and not the original bill which is now before this Court. This is important because the amended bill contains certain strengthening allegations which were not in the original bill.

The bill was filed to enjoin the prosecution of two actions at law separately brought by the defendant against each of the complainants. The actions were brought on certain contracts of reinsurance entered into by the complainants with the defendant, and the basis of equity's intervention is fraudulent representations and concealments by the defendant, inducing the complainants to enter into the contracts of reinsurance. The amended bill (Case, 230) cannot be materially abbreviated. It alleges that in February, 1924, the defendant was about to execute as surety a bond with Carnegie Trust Company, a banking institution organized under the laws of the State of Pennsylvania, as principal, to the County of Allegheny, as obligee; that the defendant then made to the complainants the following representations:

"(a) The defendant was about to execute a bond as surety for Carnegie Trust Company to the County of Allegheny, in the sum of $1,400,000 to secure the deposit of funds of that county in the said Trust Company;

"(b) The defendant would itself retain at its own risk a liability on the said bond of at least $150,000;

"(c) The said bond was an original bond and not the renewal of a prior bond;

"(d) The said Carnegie Trust Company was then a solvent and well-managed institution;

"(e) John A. Bell, the defendant's indemnitor with respect to the said surety bond, was then worth at least $1,400,000;

"(f) The said John A. Bell was known by the said Zwinggi to be a man worth far in excess of $1,400,000 and not less than $10,000,000 or $11,000,000;

"(g) The fact of the solvency and good management of the Carnegie Trust Company and the wealth of the indemnitor, Bell, would lessen the risk of the proposed reinsurers."

All of the said representations, except subdivision (g), were then untrue in fact and all of those untrue in fact, except subdivisions (d) and (e) were then untrue to the knowledge of the defendant's agent making them. They were all made by the defendant with the intent to induce the complainants to enter into contracts of reinsurance, and were material to the risk assumed by the complainants, and were relied upon by the complainants in entering into their contracts of reinsurance. The bond to the County of Allegheny (Case, 77) was for $1,100,000 and recited that Carnegie Trust Company, the principal therein, had been selected as depository of the funds of the County of Allegheny, obligee, and was conditioned that the principal should well, honestly and faithfully keep, pay out and account for all County funds and property that might come into its hands, and pay interest on deposits in accordance with the contract of deposit. Relying on the representations, each complainant entered into a reinsurance agreement with the defendant (Case, 63, 70). At the time of the making of the contract of reinsurance, the defendant knew the following facts:

"(a) The said surety bond entered into by the complainants and Carnegie Trust Company was not an original bond, but was a renewal;

"(b) Several of the reinsurers on the bond of which the said surety bond was a renewal had refused to participate in the reinsurance on the said surety bond, and demanded a release of their liability from the prior reinsurance;

"(c) At least one of such reinsurers had theretofore stated to the defendant that Carnegie Trust Company was improperly and irregularly managed;

"(d) The defendant did not intend to carry more than $100,000 liability at its own risk on the said surety bond;

"(e) There had been an investigation conducted by the Auditor General of the Commonwealth of Pennsylvania, commonly called the Kephart Investigation, which disclosed irregularities in the management of the Carnegie Trust Company and which resulted in the indictment of Harmon M. Kephart, State Treasurer of Pennsylvania, for making false reports of his accounts, and his conviction thereof upon a plea of *nolo contendere,* and also the payment under compulsion by Carnegie Trust Company in December, 1922, to the Commonwealth of Pennsylvania, of $15,049.24, as interest on money of the Commonwealth, of which Carnegie Trust Company wrongfully had the use as a result of the irregularities between the said Bell and Kephart;

"(f) The reason the said surety bond was reduced from $1,400,000 to $1,100,000 was because some of the proposed reinsurers refused to participate in reinsurance on account of irregularities in the management of Carnegie Trust Company."

None of the said facts were known to either complainant until after the making of the contracts of reinsurance, into which neither of them would have entered had they known any of these facts, which facts the defendant wilfully, fraudulently and maliciously concealed from

each of the complainants. At that time Carnegie Trust Company, instead of being highly solvent, was, in fact, insolvent and instead of being well managed, was so carelessly and corruptly conducted by its President, one Bell, that he has since been convicted of crime in connection with such management, and on April 25, 1925, Carnegie Trust Company was adjudged to be insolvent, suspended business and its affairs were taken charge of by the Commissioner of Banking and Insurance of Philadelphia. The various reinsuring companies, including the complainants, demanded that a full and complete audit of Carnegie Trust Company be made before the defendant admit its liability to the County of Allegheny, in accordance with Clause No. 5 of the reinsurance contracts. The defendant declined to do so and upon a specious, partial and incomplete audit admitted its full liability to Allegheny County upon the bond, notwithstanding that prior thereto each complainant protested against such admission.

Notwithstanding the assertion by the defendant that it has paid in full its surety bond of $1,100,000 to Allegheny County, that County has refused to surrender the bond, so that there is doubt as to whether such payment was, in fact, made and if made, properly made. Shortly after the knowledge of the insolvency of Carnegie Trust Company, the complainants and other reinsuring companies met and tried, but unsuccessfully, to secure a complete audit of the finances of Carnegie Trust Company. Meanwhile, W. Clyde Grubbs, a lawyer of Pittsburgh, Pennsylvania, was retained by the reinsuring companies to investigate the matter, and he was empowered to have such an audit made at their expense. He was greatly delayed in securing

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this audit by failure to obtain the necessary consent of the Pennsylvania Banking Department, with the result that the audit was not completed until about the first of the year 1926.

From this report it appeared that Carnegie Trust Company was at the time the reinsuring contracts were made, grossly insolvent and had been improperly managed. Meantime depositions of witnesses in Pittsburgh, including Bell, President, and Walker, Treasurer of Carnegie Trust Company, and others, had been taken in another suit against the defendant, from which much of the information hereinabove disclosed was obtained. These depositions cover over nine hundred pages and a copy thereof only came into the possession of Mr. Grubbs about the middle of April, 1926.

On September 15, 1925, separate actions at law in the Supreme Court of New Jersey were commenced by the defendant against each of the complainants on the reinsuring contracts and upon identical complaints. These complaints were duly answered by answers which did not set up the defense of fraud. Later, by reason of the discovery of some of the allegations of fraud hereinabove alleged, an application was made to the Chief Justice, presiding in the Essex Circuit, for leave to file supplemental answers, setting up such facts. Upon the insistence of attorneys for the present defendant, this application was denied without prejudice for the reason, among others as expressed by the Chief Justice, that it was not made to appear that the refusal of the reinsurers on the original bond to reinsure the company on the present bond was due to their fears about the financial situation existing at the time the renewal was made, either with respect to the financial stability

of Carnegie Trust Company, or knowledge or suspicions on their part of facts which would tend to make the renewal a greater risk than the original bond.

In the month of June, 1926, full information was given to the New Jersey attorney of the complainants covering the points desired by the Chief Justice, with instructions to take necessary steps properly to plead the fraud. By a mistake in that attorney's office, those papers were placed in the file and he never personally knew of them, so that no effort to plead the fraud was made until October 16, 1926, when an application to file a supplemental answer pleading the fraud was made and refused by the Chief Justice on the ground that the defendants in the said actions (the complainants here) were in laches in presenting the matter to the Court so near the time when the trials of the actions were to come on. The actions were set for trial November 15, 1926, and the result of all the facts alleged in the bill is that without the intervention of Chancery, the complainants will have no opportunity to set up the matters of fraud hereinabove alleged against their liability on their reinsuring contracts. The bill of complaint prays an injunction against the actions at law, a decree that the contracts were fradulently induced and that the complainants were fraudulently induced to sign them, and that they may be decreed to be cancelled and delivered up to the complainants.

The foregoing paraphrase of the amended bill of complaint and exhibits is herein inserted for the Court's convenience in reading this brief. It is accurate so far as it goes but is not exhaustive, and the Court's attention is respectfully invited to the amended bill itself (Case, 230).

ARGUMENT.

I.

Even though relief may be given at law, equity has jurisdiction in all cases of fraud, and the only question is as to the exercise of its jurisdiction.

The leading case on this well settled proposition is *Eggers* v. *Anderson,* 63 N. J. Eq. 264 (C. E. A. 1901). In this case, the complainants had contributed to the support of S, an old woman, upon her representations as to her means of living and promise to make a will in the complainants' favor. The representations were false and the will was revoked. A bill was filed for specific performance of S's agreement to make a will and, in the alternative, that S's estate reimburse the complainants for the amounts paid by them to S by reason of her fraudulent misrepresentations. The Court of Errors held that there could be no relief under the contract to make a will, but that the Court would grant the alternative relief. Dixon, *J.,* for the Court, said on page 271:

> "But New Jersey is distinguished from her sister states by her adherence to the standards of the mother country respecting both rights and remedies in equity, and I know of no constitutional or statutory provision or judicial decision in this State which can be regarded as withholding or withdrawing from our court of chancery any jurisdiction possessed by its English prototype. True the jurisdiction of equity, in cases of fraud remediable at law, has not been much invoked, but that may be accounted for, in large degree, by the less expensive, equally efficient and in former times more speedy, remedy secured in the courts of law. When resorted to, however, the jurisdiction of equity has not been doubted. Thus, in

> *Winans* v. *Winans,* 4 C. E. Gr. 220, where the complainant claimed that the defendant, by fraudulent representations concerning the encumbrances on land sold by the complainant to the defendant, had induced the former to refrain from demanding before conveyance a part of the price agreed upon, and the prayer was that the defendant should be decreed to pay the money thus fraudulently retained, the cause was argued by the present chancellor for the complainant and by a former chancellor for the defendant, without question as to the jurisdiction, and a decree for the complainant was put by Chancellor Zabriskie distinctly on the ground of fraud in the non-payment of the price, and was to the effect that the defendant should pay the same. For such a remedy the courts of law would have been equally available."

This case represents the undoubted rule today.

II.

Cases showing when and under what circumstances Chancery will exercise its undoubted jurisdiction in cases of fraud.

Green v. *Morris and Essex Railroad Co.,* 12 N. J. Eq. 165 (Williamson, *C.,* 1858). In this case, Green brought an action at law against the Railroad based on the latter's charter duty to pay for the cost of a bridge over its right of way which crossed Green's farm. In bar of that action, the Railroad pleaded a deed by Green to it. At the time the deed, which was for the right of way in question at a price which had been determined by an award of arbitrators, was presented to Green for his signature, he protested that it would bar his right to require the Railroad to build the bridge. The Railroad's agents represented that the deed would not have

that effect, but the Railroad in the action at law repudiated those representations and relied on the deed. Green then filed his bill to have the deed reformed and to enjoin its being pleaded as a defense to his action. Chancellor Williamson expressed his opinion that the deed was not a legal defense but, nevertheless, held that the complainant was entitled to relief, saying on page 173:

> "If, then, this construction of the deed is the correct one, there is no necessity of reforming it. But the defendants contend for a different construction, and upon their constructions, insist that it is a bar to the complainant's recovery in his suit at law. If their construction is the correct one, then the complainant is entitled to the protection of the court. Under such circumstances, he had a right, when the defendants, by a formal plea at law, contended for such a construction of his deed, to claim the protection of this court. It was not safe for him to risk his case at law. If the court at law should be against him, it would then be too late for him to ask relief in this court. Would it be right, notwithstanding the construction this court has put upon the deed, to dismiss the complainant out of court? The court at law is not bound by the construction this court may put upon the deed. If the complainant's bill should be dismissed, and the court at law should differ from this court, the complainant will be without remedy. It may be asked—how can this court make a decree to reform the deed, when it is of opinion that it needs no reformation? But the court need not adopt any such inconsistency. It can afford to the complainant adequate relief without making a decree to reform the deed. A decree enjoining the defendants from setting up the deed as a bar to the complainant's recovery in the action at law will afford him all the protection that is necessary."

The Chancellor's decree was affirmed by this Court, 15 N. J. Eq. 469.

Smith v. *Krueger,* 71 N. J. Eq. 531 (Emery, *V. C.,* 1906). In this case, the defendant in foreclosure, by a separate suit, prayed the cancellation of the mortgage for fraudulent misrepresentations concerning the value of the stock for which the mortgage was given, and sought money damages against a third person, joined as defendant on allegations that he conspired with the mortgagee in making the false representations. This third person contended that equity was without jurisdiction, but Emery, *V. C.,* following and citing *Eggers* v. *Anderson, supra,* held that the Court had jurisdiction, and that the case was one for its exercise, saying on page 536:

> "One reason for exercising the jurisdiction was stated to be that the exercise of the jurisdiction had not been objected to *in limine* as in *Krueger* v. *Armitage,* and as has been done in the present case. But in the present case the trial, in this court, of the question of fraud was necessary, because it was set up as a defense to the mortgage and as a reason for the equitable remedy of cancellation sought by the cross bill in the mortgage suit. The claim for damages, in addition, was based on the same alleged fraud. This issue of fraud on the part of Armitage in the sale being properly here, the court, in exercising its concurrent jurisdiction, should dispose of the issue of fraud and of damages resulting from it in a single action and for all purposes."

Dawson v. *Leschziner,* 72 N. J. Eq. 1 (Magie, *C.,* 1906). The bill disclosed that the complainant employed the defendants as real estate brokers to procure a purchaser for lands; that the defendants procured a purchaser who was

willing to pay $5,500, but did not disclose to the complainant that the purchaser was willing to pay so much, but stated that $5,062 was the best price they could obtain. The complainant sold and conveyed the land to the purchaser for $5,062. Upon discovering the defendants' concealment, the complainant filed her bill, praying for an accounting, and a decree directing the defendants to pay the complainant $458, less the broker's commission. The defendants demurred on the ground that the complainant had an adequate remedy at law. In overruling the demurrer, Chancellor Magie said at page 3:

> "In the case now before us, the defendants have received from a third party money which in equity ought to go to the complainant. In an action at law to recover that money the complainant would be met with a defense founded upon her written agreement to convey the property for the sum of $5,062, and with the fact that she had afterward executed and delivered a deed for the property to the purchaser at that price. So that without deciding that no action at law would lie, it at least is not clear that that action would be complete and adequate to relieve the complainant. * * * The case here presented discloses a fraud by a fiduciary agent upon his principal, and considering the fact that it may be doubtful whether the principal may be relieved in a court of law, the court of chancery should maintain its jurisdiction to enforce proper relief."

Schoenfeld v. *Winter,* 76 N. J. Eq. 511 (Howell, *V. C.,* 1909). The case and the decision appear from the following quotations from the opinion of Howell, *V. C.:*

> "The bill in this case is filed to procure a decree rescinding a contract alleged to have been made between the defendant, Winter, and two persons as partners, one of whom is dead, the complainant being the survivor. The contract related to the purchase and sale of personal property and a lease. * * * The bill sets out a cause of action which would undoubtedly be triable in the common law courts in an action for deceit. It alleges that the contract was induced by representations which were false, and which the defendant knew were false at the time the contract was made. These allegations are admitted by the demurrer, and while the bill sets out a common law action for deceit, this does not interfere with the jurisdiction of equity. In order to set aside a contract founded in fraud, it is only necessary in equity to prove that the representation upon which the action is founded is false, that it is material, and that damage has ensued; while at the common law the proof must go to the extent of satisfying the jury that the defendant knew that the statement relied upon was false. It will therefore be seen at a glance that the remedy in equity is much broader and much more efficient than the remedy at law could be. It was held in *Morse* v. *Nicholson,* 55 N. J. Eq. (10 Dick.) 705, that in a case where the jurisdiction of the courts of law and equity for the redress of frauds was concurrent, the court of equity should entertain the cause and determine it upon its merits, provided that adequate relief could not be obtained at law; and this, I take it, is a general rule which ought to be applied in the discretion of the court to cases of fraud where there are concurrent remedies. It was so held in *Eggers* v. *Anderson* (Court of Errors and Appeals), 63 N. J. Eq. (18 Dick.) 264. There Mr. Justice Dixon recites the English cases and declares that our State has given her adherence to the doctrines of the English courts."

The defendant relied upon *Krueger* v. *Armitage,* 58 N. J. Eq. 357, and *Polhemus* v. *Holland Trust Co.,* 59 N. J. Eq. 93, affirmed 61 N. J. Eq. 654.

In distinguishing those two cases, the Vice-Chancellor said on page 513:

> "In these two cases it will be observed that there was no ground of equity jurisdiction except the false representation of fact. But in the case in hand the complainant appeals to the court to declare that the contract induced by fraudulent representations should be rescinded and canceled, and this upon the ground that the contract being void by reason of fraud, the complainant should not continue to rest under the obligation of any portion of it, but that he should be discharged from its performance in whole and in part. This is an equity to which the complainant is entitled if at the final hearing he is able to substantiate his allegations."

Strauss v. *Norris,* 77 N. J. Eq. 33 (Stevens, *V. C.*, 1910). The complainant in this case was the purchaser of a tract of land, and he filed his bill to recover so much of the consideration paid as would amount to the difference in value between a tract of eighty-two acres and sixty-nine acres, the bill alleging that the defendant falsely represented, either fradulently or through mistake, that the land contained the larger acreage. The bill was demurred to on the ground that the complainant's remedy was at law. In overruling the demurrer, Stevens, *V. C.*, said on page 35:

> "In the case in hand it appears to me that the administration of justice will be facilitated, if this court takes jurisdiction. In the first place, if the complainant should sue at law and should be able to show that the representation was material and false in fact, but should be unable to show that it was false to the knowledge of the person making it, he would fail; while here he would succeed. It would be an evident hardship to send him to law and then, if he failed, give him a remedy in this court, when

> this court is fully competent to pass upon the whole question. If, as the bill allages in the alternative, there was mutual mistake, this court alone would be competent to deal with it."

Kuntz v. *Tonnele,* 80 N. J. Eq. 373 (Garrison, *V. C.*, 1912). In this case, a vendor made a secret agreement with the purchaser's agent, whereby he added a certain amount to the consideration price and paid that to the agent. This the purchaser discovered after paying part of the purchase price but before the conveyance was made, and he filed his bill to require a conveyance of the property to him upon his paying the balance of the agreed price, less the amount paid and less the amount of his damage. Garrison, *V. C.*, in holding that the Court had and should exercise jurisdiction, said on page 382:

> "The single question left for determination, therefore, is whether the undoubted jurisdiction of this court should be exercised in this case, or whether, in the discretion of the chancellor, the complainant should be left to his remedy at law?"

and again on page 384:

> "In considering the question whether this suit should be retained in this court, or the complainant remitted to an action at law, certain cogent facts should be borne in mind. It should first be remembered that the title to this property is under the control of the defendant, Tonnele; that Kuntz, by a written agreement, has bought the property from him; that he is entitled to the benefit of the bargain free from the fraud which tainted it; that he had a right, upon discovering the fraud, either to rescind and restore the parties to their original position, or to affirm the contract and sue for the damages accruing to him by reason of the fraud—*Conlin* v. *Roemer,* 52 N. J. Law (23 Vr.) 53 (at p. 58);

that he elected to do the latter; and that a necessary part of his relief is a decree requiring Tonnele to convey the property to him. There can be no possible question that if this case be viewed as one in which the complainant was entitled to come into equity to obtain specific performance, this court, as incidental to the relief, could and should award the damages accruing to the complainant."

Metler v. *Metler's Administrators,* 19 N. J. Eq. 457 (C. E. A. 1867). The relief sought by the bill in this case was the enjoining of an action at law on a promissory note alleged to have been given without consideration and for cancellation of the note. The decision of the Court of Errors and Appeals appears from the following quotation from the opinion of Dalrimple, *J.,* at page 458:

"It is objected in the first place, that the complainants are not entitled to the relief sought, because they have a complete defense at law. It is true that the note, having been given without consideration, cannot be recovered upon at law. So far forth as the suit now pending on the note is concerned, the defendants have a defense without the aid of this court. But the note was given on the understanding that in case the deceased returned to this State alive it should be given up. He did return alive. The defendants, in this suit, now refuse to fulfill the agreement on which they became possessed of the note, but on the contrary are, in violation of good faith and fair dealing, endeavoring, by means of the suit at law, to recover of the personal representatives of the deceased, the amount of the note to which they are neither in law nor equity entitled. Besides, the defendants could, though defeated in the action at law now pending, put the note which is negotiable, in circulation, and compel the complainants to defend themselves against it

as best they might. They could also, if they saw fit, discontinue the present suit, and at some time hereafter, when it might be impracticable to establish the facts which render the note invalid, or perhaps in a foreign jurisdiction, bring another action against the heirs or personal representatives of the deceased.

"We have, then, the following facts: A negotiable note, valid upon its face, given without consideration upon an agreement that it shall be given up to the maker upon a contingency, which has happened, and an action at law brought upon such note by the payees, against the personal representatives of the maker. It seems to me apparent upon the statement of these facts, that the only jurisdiction competent to afford full and adequate relief, is a court of equity. The maker or his personal representatives sued upon such note, are entitled not only to a decree perpetually enjoining the plaintiffs at law from proceeding in their action, but further, that the note be delivered up. The complainants would be entitled to such a decree if there were no express agreement that the note should be delivered up on the return of the deceased to this State, alive. Such is the weight of authority, as I think clearly appears by the cases cited by the chancellor in his opinion in this case. It is not now necessary to repeat those citations. The agreement to deliver up the note, strengthens the complainants' equity."

Gallagher v. *Lembeck, &c. Co.,* 86 N. J. Eq. 188 (C. E. A. 1916). This came up on appeal from a denial of the defendant's motion to strike out the bill of complaint which prayed an injunction against the enforcement of a judgment recovered at law on a promissory note. The action at law was on the renewal of what is commonly called a "brewery note." The bill alleged that the note was given pursuant to an

agreement between the parties that it would not be presented for payment or discounted, and no attempt would be made to collect the same, and the complainant would never be called upon to pay it if he sold the products of the defendant in his saloon during the time he continued business therein and if, upon the discontinuance of his business, he returned to the defendant the fixtures and furnishings installed by the defendant in the saloon. The complainant performed his part of this agreement, and, upon vacation of the premises and returning of the furnishings and fixtures to the defendant, he demanded his note back but the defendant refused and brought an action thereon in the Circuit Court. An answer setting up the foregoing facts was struck out by that Court and judgment entered on the ground that the facts constituted no defense at law. In affirming this Court's refusal to strike out the bill, Parker, *J.*, for the Court of Errors and Appeals, said on page 190:

> "The bill, which is duly supported by affidavit, prays a reformation of the note to express the contract between the parties, an injunction against proceeding on the judgment, a discovery, and vacation of the judgment and delivery and cancellation of the note.
>
> "We are of opinion that this bill, the statements of which for present purposes must be taken as true, makes out a complete case for equitable relief. It is very similar to the case of *O'Brien* v. *Paterson Brewing and Malting Co.*, 69 N. J. Eq. 117, in which Vice-Chancellor Pitney awarded an injunction and decreed the delivery of the note for cancellation. Whether the complainant may maintain a defense at law on these facts seems immaterial in view of the decisions. In *Metler* v. *Metler's Administrator*, 19 N. J. Eq. 457, a similar case, it was held that even though the defense was good at law, the complainants were entitled as against the payee to an injunction against enforcement of the note at law, and to a decree that it be delivered up. In *Headley* v. *Leavitt*, 65 N. J. Eq. 748, it was held that if the defense to the note be not good at law, the defendant at law may after judgment and without appeal of the judgment at law invoke the aid of a court of equity."

Sweeny v. *Williams*, 36 N. J. Eq. 627 (C. E. A. 1883). The bill in this case prayed for an injunction against the bringing or maintaining of any action upon a certain bond and mortgage. The bill was dismissed in Chancery on the ground, among others, that the relief claimed was available to the complainant as a defense to the action at law, and that nothing appeared to afford a reason for changing the forum. In disapproving of this ground, Magie, *J.*, for this Court said on page 629:

> "When courts of law have of their own motion extended their jurisdiction over cases theretofore solely cognizable in equity, the jurisdiction of the latter courts has been in no respect abridged, although when the jurisdiction at law has become well established, the equity jurisdiction has been in some cases declined.
>
> * * * * * *
>
> "But if there exists a concurrent jurisdiction in courts of law and courts of equity, the latter will decline to entertain jurisdiction after the jurisdiction of the courts of law has attached, unless the relief that the applying party is entitled to ask cannot be fully obtained in the court of law.
>
> * * * * * *
>
> "It is this proposition that I understand the learned vice-chancellor to have maintained in the opinion below. But I do not think the proposition was applied by him to this case, nor is it, in my judgment, properly

applicable thereto. The complainant was entitled, if at all, to a relief broader than could be afforded him in the action at law. He asked, and if his contention is correct, was entitled to a perpetual injunction against the bond. At law, his relief as to the bond could be obtained only in case the plaintiff brought his action to trial. If he discontinued or submitted to a non-suit, the relief could not be obtained there. The complainant was also entitled to relief on the whole transaction, including the mortgage securing the bond, a relief which would only be incidentally rendered by a successful defense at law, and to which Halliard was necessarily to be a party. Adequate relief was therefore not provided in the existing action at law. I think it indisputable that the court below had jurisdiction and a right to adjudicate on the merits of the case, as was done."

With respect to the New Jersey cases cited by the appellant in opposition to the foregoing authorities we make the following comments:

Krueger v. *Armitage,* 58 Eq 357 (Emery, *V.-C.*). This case was decided before *Eggers* v. *Anderson, supra,* a decision of this Court. Insofar as it may be inconsistent with *Eggers* v. *Anderson,* it must be deemed to have been over ruled by the latter.

Savage v. *Edgar,* 86 Eq. 205, and *Headley* v. *Leavitt,* 68 Eq. 591, are both decisions of this Court but in each of them the defense to the action at law was accord and satisfaction. In *Savage* v. *Edgar,* the Vice-Chancellor found that the accord was unexecuted and that, therefore, it was not a defense at law. This Court found an executed accord and satisfaction and as that has always been a defense at law, and has never, like fraud, been the subject primarily of equity jurisdiction, this Court naturally found that

Chancery had no jurisdiction. *Headley* v. *Leavitt* was also a case of accord and satisfaction.

O'Donnell v. *McCann,* 77 Eq. 188 (Walker, *V.-C.,* 1910). All this case decided was that on the facts, as the estoppel was not made out satisfactorily, equity would not exercise its jurisdiction but would leave the defense to be interposed at law.

The conclusion to be reached from the foregoing cases is plain and is as follows:

Equity will exercise its undoubted jurisdiction, even though there be concurrent rights at law, under the following circumstances:

1. The complainant's right to substantially the same relief he can obtain at law is greater in equity than at law. Paraphrasing this, we say that when in equity a party does not have to establish quite so much to entitle him to the same relief.

Green v. *Morris & Essex R. R. Co.;*
Dawson v. *Leschziner;*
Schoenfeld v. *Winter;*
Straus v. *Norris, supra.*

2. When on the same facts the party is, in equity, entitled to relief which the law cannot give, equity exercises its jurisdiction.

Kuntz v. *Tonnele;*
Schoenfeld v. *Winter;*
Metler v. *Metler's Administrators;*
Gallagher v. *Lembeck, &c. Co.;*
Sweeny v. *Williams, supra.*

III.

This case is one where equity should exercise its jurisdiction.

1.

Certain of the facts alleged in the bill as ground for injunction against the actions are not the basis of defenses at law.

The amended bill sets up that Zwinggi, the defendant's agent, at the time of the negotiations for the reinsurance contract represented to the complainants

> "(d) The said Carnegie Trust Company was then a solvent and well-managed institution;
>
> "(e) John A. Bell, the defendant's indemnitor with respect to the said surety bond, was then worth at least $1,400,000";

(Case, 232). These two representations were untrue in fact but were not then untrue to the knowledge of the defendant. We have, therefore, material misrepresentations which, however, were not known to be untrue when made, and were, therefore, not deceitfully made. It should be noted that subdivision (d), representation concerning Carnegie Trust Company, was not in the original bill of complaint and was, therefore, not considered by Vice-Chancellor Backes. The cases above cited, and for example *Straus* v. *Norris* and *Schoenfeld* v. *Winter,* are authorities for such misrepresentations, are a ground for relief in equity. It is well settled in this State that in the absence of knowledge of the falsity of representation, there is no fraud at law as distinguished from equity. It was so held in *Cowley* v. *Smyth,* 46 Law 380 (Supreme 1884), with respect to an action of deceit, and has been so adjudged with respect to defenses

in many cases, including *Guarraia* v. *Metropolitan Life Insurance Co.,* 90 N. J. L. 682 (C. E. A. 1917), and *Janosik* v. *Metropolitan Life Insurance Company,* 99 N. J. L. 279 (C. E. A. 1923). On the face of the bill, therefore, there are facts alleged which would entitle the complainants to the relief prayed for in equity, but which would not be available by way of defense in the actions at law.

But the complainants' right goes deeper. The other representations alleged in paragraph 4 of the bill of complaint (Case, 232), that is to say, those lettered (a), (b), (c) and (f), are alleged to be false to the knowledge of the defendant, and as alleged, are the subject of all answer to the actions at law. It may be, however, that the complainants will not be able to establish that the defendant knew some or all of these representations were false when they were made. Such a failure in the actions at law would be a failure of the defense. In equity, however, the defenses would still be valid. The Vice-Chancellor very properly held that the complainants were entitled to this additional benefit, available to them only in equity, and that since to relegate them to law would be to deprive them of that right available in Chancery, it is impossible to hold that the remedy at law is as full and adequate as that in equity. In this position the Vice-Chancellor was only following Chancellor Williamson in *Green* v. *Morris & Essex R. Co., supra,* whose decree, it will be recalled, was affirmed by this Court in 15 N. J. Eq. 469.

The amended bill of complaint in paragraph 9 (Case, 233) also alleges the concealment by the defendant of certain facts material to the risk assumed by the complainants in their reinsurance contracts. Is this available to the com-

plainants as a defense at law? That it is a defense in equity cannot be disputed.

Sun Mutual Insurance Co. v. *Ocean Insurance Co.,* 107 U. S. 485. This was an admiralty suit upon a contract of marine reinsurance. The decision of the Court appears from the following quotation from the opinion at page 509:

> "That knowledge of the circumstance was material and important to the underwriter as likely to influence his judgment in accepting the risk, we think, is so manifest to common reason as to need no proof of usage or opinion among those engaged in the business. It was a flagrant case of over-insurance upon its face, and made it the pecuniary interest of the master in charge of the ship to forego and neglect the duty which he owed to all interested in her safety. Had it been known, it is reasonable to believe that a prudent underwriter would not have accepted the proposal as made, and, where the fact of the contract is in dispute, as here, corroborates the denial of the appellants. The concealment, whether intentional or inadvertent, we have no hesitation in saying, avoids the policy, if actually intended to cover the risk for which the claim is made. In respect to the duty of disclosing all material facts, the case of reinsurance does not differ from that of an original insurance. The obligation in both cases is one *uberrimae fidei.* The duty of communication, indeed, is independent of the intention, and is violated by the fact of concealment even where there is no design to deceive."

That concealment of a material fact is a ground for equitable relief against a contract was decided in *Gordon* v. *Schellhorn,* 95 N. J. Eq. 563 (Bentley, *V.-C.,* 1924).

It cannot be maintained, however, that the defense is available at law. It is true that in

marine insurance, concealment is probably a defense at law, but, except in some jurisdictions of which New Jersey is not one, this doctrine has not been applied to other kinds of insurance. The distinction between the doctrine of marine insurance and that applicable to other kinds of insurance is well pointed out by the opinion by the Circuit Court of Appeals for the Sixth Circuit in the case of *Penn Mutual Life Insurance Co.* v. *Mechanics Savings Bank and Trust Co.,* 72 Fed. 413. This case held that the strict rule enforced in cases of marine insurance requiring full disclosure of all material facts and avoiding the policy even in case of suppression through mistake, is not applicable to cases of life insurance. If the applicant for life insurance has fully and truthfully answered all questions put to him, and there is no suppression in bad faith with intent to mislead the insurer, there is no defense to the policy at law.

Collins v. *Iowa Manufacturers Insurance Co.,* 169 N. W. 199 (Iowa 1918). This was a fire insurance case, and the decision was that, in the absence of a wilful intent to defraud, a concealment was not a defense to an action on the policy. The Court held that concealment involves not only the materiality of the fact withheld but also the design and intention of the insured in withholding it.

Mallory v. *Travellers Insurance Co.,* 47 N. Y. 52 (1871). This action was on an accident policy, and the insured did not disclose the fact of his former insanity. The Court of Appeals held that the trial judge was right in charging the jury that if the insured did not conceal any fact which in his own mind was material in making the application the policy was not void.

There is no New Jersey case which directly says that the rule in cases of marine insurance that concealment is a defense at law will be applied in cases of suretyship such as the case at bar. It is true the Vice-Chancellor cites *Insurance Company* v. *Woodruff*, 26 N. J. L. 541 (C. E. A. 1857), as authority for the proposition that concealment in a case such as the case at bar, would be a defense at law. An examination, however, of that report does not support the case as holding any such thing. The case was an action on a lost policy of fire insurance. Chancellor Green for the Court said on page 553:

> "Although these decisions have not been adopted by subsequent authorities to their full extent, in reference to the necessity of a disclosure by the assured as to the particularity of his interest, it is certainly well settled, that when inquiry is made respecting the interest of the proposed assurer, or where he undertakes to make a disclosure of his interest to operate upon the insurer in settling the insurance, his representations must be substantially correct, or the policy will be void. I think it may be laid down as settled, that the mere fact of not disclosing the interest will not avoid the policy, because it is as much the duty of the insurer to inquire as to the interest, as of the assured to disclose it. If that interest is misrepresented, or any artifice is used to conceal it, or to prevent the insurer from inquiry respecting it, then it is a question for the jury to decide whether the misrepresentation or concealment is of a character to have prejudiced the party, and amounts to a fraud."

He also went on to say that the defense was not available because not pleaded. The case, therefore, is far from being an authority that concealment is a defense at law. In the absence of such authoritative declaration of our courts,

this Court cannot say that the complainants have, on the ground of concealment, an adequate remedy at law. At best, the case is like *Green* v. *Morris & Essex Railroad Co., supra,* where the validity of the defense at law not being certain, although the Chancellor himself thought it was valid, relief was given in equity. A very good example of the distinction between defenses in equity and defenses valid at law to policies of insurance is found in *Prudential Assurance Co.* v. *Aetna Life Insurance Co.,* 23 Fed. 438 (Circuit Court, D. Conn. 1885). This case held that the failure of an insurance company that procures reinsurance to comply with an oral promissory representation in regard to its future conduct, which is not made part of the policy, is not a valid defense at law against the reinsurer's liability on the policy.

2.

The complainants are entitled to cancellation of the reinsurance contracts and, of course, cannot obtain that except in equity.

The complainants are not masters of the litigation in the actions at law. They cannot prevent the defendant from discontinuing those actions, or even from suffering voluntary non-suits and suing over again, perhaps, in other jurisdictions. In the case at bar, however, the complainants can force the litigation to a finish, and if they establish the facts set up in the bill of complaint, can and will get a decree which will forever effectively put an end to their liability on the reinsurance contracts. Without the aid of the Court of Chancery, however, this cannot be accomplished. To this right they are entitled, and to relegate them to law is wholly to deprive

them of it. This is another reason, therefore, why equity should exercise its undoubted jurisdiction. That this is a reason for equity exercising its jurisdiction has been held by the Court of Chancery, and by this Court, in

Kuntz v. *Tonnele;*
Schoenfeld v. *Winter;*
Metler v. *Metler's Administrators;*
Gallagher v. *Lembeck, &c. Co.;*
Sweeny v. *Williams.*

The following authorities are in point:

John Hancock Mutual Life Insurance Co. v. *Dick,* 72 N. W. 179 (Mich. 1897). In this case, an action at law was pending upon a life insurance policy, and the defendant brought a bill in equity to compel its cancellation and enjoin the action at law on the ground of false and fraudulent representations by which the reinstatement of the policy which had lapsed was procured. In that case, the Court said at page 179:

> "There is no doubt that the alleged fraud, if proved, should defeat the claim of the plaintiff to any sum beyond the paid-up value of the policy in a court of law. Such court could not, however, have canceled or compelled the surrender of the renewal receipt, though there is force in the suggestion that such cancellation would be of little importance after an adjudication that it was void. It is urged that the case falls within the general rule that equity has no jurisdiction where there is an adequate remedy at law, especially when the latter has been resorted to by the opposite party. Counsel for defendant cites two cases decided by the federal courts, which sustain his contention, under circumstances closely resembling the situation in this case. These decisions are based upon the sixteenth section of the federal judiciary act, which provides that

> 'suits in equity shall not be sustained in the courts of the United States, in any case, where a plain, adequate, and complete remedy may be had at law.' 1 Stat. 82. We have no similar statute, and we are cited to several cases which sustain the jurisdiction of chancery, even after action at law is commenced. These cases will be found collected in the complainant's brief, and they seem to rest upon two grounds: (1) That the jurisdiction is concurrent in cases of fraud; (2) That the equity courts may grant more complete relief, where an instrument is fraudulently obtained, by compelling cancellation or surrender, and by rendering equitable relief."

How similar is the language of the Michigan Court to that of Nixon, *J.*, in *Eggers* v. *Anderson, supra.* There is no doubt that the English Court of Chancery would entertain jurisdiction and decree the cancellation of an insurance policy on the ground of fraud. *Whittingham* v. *Thornburgh,* 2 Vernon 206 (1690); *DeCosta* v. *Scandrel,* 2 Peere Williams 170. In the case last cited, the fraud lay in concealment. These English cases were cited with approval by Chancellor Kent in *Hamilton* v. *Cummings,* 1 Johnson Chancery 517, 522:

> "I am inclined to think, that the weight of authority, and the reason of the thing, are equally in favor of the jurisdiction of the court, whether the instrument is, or is not, void at law, and whether it be void from matter appearing on its face, or from proof taken in the cause, and that these assumed distinctions are not well founded. It is every day's practice, as the counsel observed, in *French* v. *Connelly* (2 Anst. 454), to order instruments to be delivered up, of which a bad use might be attempted to be made at law, *although they could not even there entitle the holders to recover.* It is, indeed, not very apparent, why a doubt could have been

started in some of these modern cases as to the general jurisdiction of the court, when we consider the uniform tenor and language of the more ancient decisions, and which do not appear to have turned upon the distinction, whether the instruments were, or were not, void at law. In *Whittingham* v. *Thornburgh* (2 Vern. 206) and *Goddart* v. *Garrett* (ibid. 269) and *DeCosta* v. *Scandrel* (2 P. Wms. 170), policies of insurance, procured by fraud, were ordered to be delivered up and cancelled, though the fraud was equally a defense at law."

See also *Union Life Insurance Co.* v. *Riggs,* 123 Fed. 312; *Mutual Life Insurance Co.* v. *Pearson,* 114 Fed. 395.

With respect to the authorities cited on pages 14 and 15 of the appellant's brief, we say:

Glidden v. *U. S. F. & G. Co.,* a reading of the report discloses, was simply a case of active, fraudulent misrepresentation, which is admittedly a defense at law within the doctrine of *Cowley* v. *Smyth, supra. Ring* v. *Phenix Assurance Co.* was decided under a Massachusetts statute. *Seaton* v. *Heath* was an English decision, and if it were a decision of this Court, would establish that concealment is a defense at law. We repeat, however, what we have said above as to the absence of New Jersey authority on this point.

IV.

The action of the Supreme Court is no bar to the maintenance of this suit.

The application for leave to plead fraud in the actions at law was first denied without prejudice to its renewal, and when it was renewed it was denied on the ground that the

present complainants were in laches. The merits of the defense were never passed on. The Chief Justice simply decided that he would not permit the then defendants to interpose that defense. He would not permit the amendment to the answer to be filed. An order allowing or refusing an amendment to pleadings is so wholly within the discretion of the trial court that it is not appealable.

Bruch v. *Carter,* 32 N. J. L. 544 (C. E. A. 1867);

Elsberg v. *Honeck,* 76 N. J. L. 181 (Supreme, 1908);

Reed v. *Director General,* 95 N. J. L. 525 (C. E. A. 1920).

Such an unappealable order is not *res adjudicata. Sele* v. *Pressburger,* 49 N. J. L. 396 (Supreme, 1887); *Schilstra* v. *Van Den Heuvel,* 82 N. J. Eq. 155 (Howell, *V.-C.,* 1913); *Jacobson* v. *Gruenberg,* 100 N. J. L. 77 (Supreme, 1924).

On the question of the inconclusiveness of the decision of the Chief Justice the case is very like *Savage* v. *Edgar,* 85 N. J. Eq. 420 (Backes, *V.-C.,* 1915). In that case, an action at law was pending by Edgar against Savage. A settlement agreement was entered into which Edgar afterwards repudiated. Savage then applied to the Supreme Court for a rule staying the action by reason of the settlement. The Supreme Court refused to stay the action because the facts concerning the settlement were disputed and left Savage the right to plead in bar of the further continuance of the action the settlement agreement. An appeal to the Court of Errors from this action of the Supreme Court was dismissed on the ground that the Supreme Court's action was discretionary and unappealable. Savage then filed a bill in equity, asking that the prosecu-

tion of the action by Edgar be enjoined by reason of the unexecuted accord and satisfaction. Backes, *V.-C.*, issued the injunction. In disposing of the contention that the action of the Supreme Court was a bar, he said at page 423:

> "The point the defendant made is that 'having been fully heard and dismissed from that court, the complainant will not be permitted to again litigate the same subject-matter in this court, even though the grounds upon which they seek relief be of an equitable nature,' viz., *res adjudicata*. An examination of the proceedings, and the *per curiam* opinion of the supreme court, disclose that the court did not determine the matter. It is the very thing the court refused to do, and on the ground that because the proofs were conflicting, the issue of fact, whether there was or was not a satisfaction, ought not to be decided upon the depositions, but should (if it was triable at law) be pleaded in defense and submitted to a jury, together with the other issues in the case. The privilege given to the complainants to plead the settlement was not in the nature of an adjudication that the issue could and must be tried at law, and was not intended as a bar to an appeal to chancery. The course directed left the complainants in precisely the same position they were in before they applied to the supreme court to control the proceedings, except that they had the court's permission to set up the defense if it were available to them at law. The complainants conceived that they could not make out a perfect legal defense, so they came here with their equities—not to again litigate matters decided by the supreme court, or to review its findings, but to obtain relief which this court alone can give."

The reversal of the Vice-Chancellor in 86 N. J. Eq. 205 was on the ground that the accord was executed so that Savage had an adequate relief

by pleading the executed accord at law. The reversal did not, therefore, in the slightest, weaken the Vice-Chancellor's decision that the previous action of the Supreme Court was no bar to Savage's pursuing his equity in Chancery. So it is in the case at bar. The complainant's have equities which, as we have seen, the Court in its discretion should protect. The action of the Supreme Court in refusing to entertain such of the complainants' equities as might have been availed of in that Court is no bar to this Court's taking jurisdiction of all the equities.

V.

There is no laches.

We have seen, in the first place, that the decision of the Chief Justice is not conclusive. The Supreme Court cannot say what is or what is not laches so as to bar relief in Chancery. It can go no further than, and purported to go no further than to determine that such laches existed as would prevent the filing of an amendment to the answer. The question of laches, therefore, must be decided as an original question.

Full knowledge of the facts on which the defense of fraud and the complainants' equities as set up in the bill are based, did not, with due diligence, come to the complainants' knowledge until June, 1926. See paragraphs 16, 17 and 18 of the amended bill (Case 236). The greatest delay which can be attributed to the complainants and called negligent delay is from June to October, 1926, between three and four months. Let us consider what our equity judges have said on the subject of laches:

In *Daggers* v. *Van Dyck,* 37 N. J. Eq. 130 (1883) Van Fleet, *V. C.,* said at page 137:

> "The delay of the complainant in seeking redress constitutes no defense. It is only when the complainant has slept over his wrongs so long that if relief be given to him great and serious wrong will be done to the defendant, that laches constitute a complete defense."

In *Le Gendre* v. *Byrnes,* 44 N. J. Eq. 372 (1888), the same learned Judge said on page 378:

> "Great delay is a good bar to a suit in equity, and courts of equity, from the earliest times, have, on principles of their own, and in cases where there was no analogous statutable bar, refused relief to stale demands; but they never adopt this course, at the threshold of a suit, in a case where there is no analogous statutable bar, unless it is clear, on the face of the bill, that the complainant has delayed suing for so long a time, after his cause of action arose, as to deprive the court of the power of ascertaining, with reasonable certainty, what the truth is respecting the matter on which he rests his right to a decree, or that he has by his delay placed himself in a position, where he has gained an unfair advantage over his adversary."

In *Massie* v. *Asbestos Brake Co.,* 95 N. J. Eq. 298, Buchanan, *V.-C.,* said at page 311:

> "Neither do I find laches. True it is that the action which has now been taken by this suit could have been taken equally well at any time during a period of about eight years prior to the filing of the bill. But laches involves something more than mere delay, mere lapse of time. There must be delay for a length of time which, unexplained and unexcused, is unreasonable under the circumstances, and which has been prejudicial to the defendant. CF. *Johnston* v. *McKenna,* 76 N. J. Eq. 217 (at p. 229); affirmed, 77 N. J. Eq. 555; where there was delay of some seven or eight years. Of, also, *Soper* v. *Cisco,* 75 N. J. Eq. 165 (at p. 174).
>
> "In the present case no prejudice is shown, or can be inferred, to have resulted to complainants. There has been no loss of memory, no loss of witnesses, no loss of evidence. Defendants' course of conduct was not induced by complainants' delay or inaction. Defendants have simply continued to act as they acted in the beginning."

The Vice-Chancellor's opinion was adopted by the Court of Errors and Appeals. There is nothing in the case at bar that even approximates laches so authoritatively defined.

VI.

The temporary injunction was right.

Here, for the first time, we consider something in addition to the face of the amended bill of complaint. The allegations of the bill of complaint are fully sustained by the complainants' affidavits and exhibits. This is not disputed by the appellant. Its counsel contends, however, that those affidavits are fully met in point of fact by the affidavits on behalf of the defendant and, therefore, invokes the doctrine of *Citizens Coach Co.* v. *Camden Horse Railroad Co.,* 29 Eq. 299. We reply to this contention on both the facts and law.

The only answering affidavit of any materiality is that of Zwinggi (Case 140). He does deny having made some of the representations which Mr. Short, on behalf of the complainants, swears Zwinggi made to him. Zwinggi does not, however, say that he informed the complainants of any of the facts which are relied on in the bill

of complaint as concealments. Guilty knowledge with respect to some of the facts concealed is clearly brought home to the defendant by the correspondence included in the affidavit of Daniel J. Tompkins, for the complainants (Case 42). The concealment, therefore, must be taken as absolutely undenied and the defendant's affidavits, therefore, do not fully meet the case made by the complainants. The case, however, is not like *Citizens Coach Co.* v. *Camden Horse Railroad Co., supra.* It is one where denial of the relief afforded by the temporary injunction would permit of the destruction of the subject matter of the litigation. In such cases, notwithstanding a dispute on the facts, the preliminary injunction to preserve the subject matter of the suit will go. *Hoagland* v. *Titus,* 14 N. J. Eq. 81 (Green, *C.* 1861); *General Investment Co.* v. *Bethlehem Steel Co.,* 88 N. J. Eq. 237 (Lane, *V.-C.* 1917); *Leigh* v. *Clark,* 11 N. J. Eq. 110 (Williamson, *C.* 1856); *Euster* v. *Mewmeyer,* 91 N. J. Eq. 21 (Leaming, *V.-C.* 1919).

Nor does the case disclosed by the affidavits any more than that shown on the face of the bill, evidence any laches. The affidavit of Mr. Grubbs shows that the complete audit of the affairs of Carnegie Trust Company, which was necessary before the question of liability on the part of the complainants could be determined, was not completed until January, 1926 (Case 55). The first application to the Chief Justice for leave to file amended anwers setting up the fraud was then promptly made and denied without prejudice in February, 1926. The affidavit of Mr. Bratney (Case 32) shows that upon the making of that order by the Chief Justice, he required the presentation of additional facts, and the complainants at once set about gathering those facts; and shows that the complainants did not receive the information until after June 7, 1926 (Case 37-40). On June 15, 1926, that information was sent to the complainants' attorney but by a mistake in his office was filed away and did not come to his personal attention until October, 1926, when an application was speedily made to the Chief Justice, pursuant to the leave reserved in his order of February, 1926, and denied. Following that denial this suit was commenced just as quickly as the affidavits could be prepared. Unfortunately, one of the necessary affiants was in Florida and the other in California.

Surely no part of this time can be said to be negligent delay, except the period from June 15th to October 19, 1926; that is to say, the time during which the information necessary for the renewed application to the Chief Justice lay unused in the office of the complainants' attorney.

In view of the concurrent jurisdiction, it was certainly proper for the complainants to try to set up in the Supreme Court such of the defenses of fraud as could be relied on in that Court. There can, therefore, be no laches except that such time has elapsed after this Court can say that the second application to the Supreme Court should have been made. We have just shown that by reason of lack of information this second application could not possibly have been made until about the middle of June, 1926. As above stated then, the only delay which can possibly be said to be faulty in any degree is that from June 15th say, until October 19th, when notice of the second application was actually given. Here is a delay of only four months at the most, and four months occurring at a time of year including the summer vacation season.

The defendant cites no authority that any such short delay, if it be deemed negligent, constitutes such laches as will disincline a court of equity to give relief. On the other hand, a reference to the cases on the subject of laches, which we have hereinabove cited, will show that laches cannot be found to exist in this case without flatly overruling them. No such short period as four months is even discussed in them as possibly constituting laches. They lay down the rule that there can be no laches unless with the delay there concurs some evidence of prejudice to the defendant. Of course, there is no such evidence in the case at bar. All anyone can say that has happened is that the ultimate conclusion of this litigation has been postponed for about four months. If the defendant should prevail, that delay would be fully compensated for by lawful interest.

After all, the defense of laches is an equitable defense and should never be sustained to permit the working of an inequity. No one reading the affidavits and exhibits in this case can doubt that a most outrageous fraud has been committed upon the complainants. To permit the defendant to get away with that fraud by denying the relief prayed for, or dismissing the bill of complaint on any of the grounds hereinabove discussed, would be highly inequitable.

It is, therefore, respectfully submitted that the order appealed from should be in all things affirmed.

HENRY G. PILCH,
G. W. C. McCARTER,
Of Counsel with the Complainants.

May Term, 1927.