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Notice of Appeal and Grounds.

New Jersey Supreme Court 10
PASSAIC COUNTY.

PASSAIC-BERGEN LUMBER COM-
PANY, a corporation,
Plaintiff,

v.

UNITED STATES TRUST COMPANY OF
NEWARK, N. J., a corporation,
Defendant.

Action at Law.

20

To

HARRY LOEB,
Passaic, New Jersey,
Attorney of Plaintiff
Passaic-Bergen Lumber Company,
a corporation.

30

SIR:

PLEASE TAKE NOTICE that the defendant in the above entitled cause, appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in this cause, on the following grounds, to wit:

1. The trial court erred in refusing to grant defendant's motion of non-suit as against the plaintiff.

40

Amended Complaint.

2. The trial court erred in directing a verdict against the defendant and in favor of the plaintiff.

Respectfully yours,

10

SAUL and JOSEPH E. COHN,
Attorneys for the Defendant.

Service acknowledged of a copy of the within Notice of Appeal this 8th day of Jan. 1932.

HARRY LOEB,
Attorney of Plaintiff.

Amended Complaint.

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(Filed Sept. 17, 1930.)

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

PASSAIC BERGEN LUMBER COMPANY
a Corporation of New Jersey,
Plaintiff,

v.

30

UNITED STATES TRUST COMPANY, a
Corporation of New Jersey,
Defendant.

} Action at Law.

Plaintiff, a corporation of the State of New Jersey, having its principal office in the City of Clifton, County of Passaic, and State of New Jersey, for its amended Complaint, says that:

40

Amended Complaint.

FIRST COUNT.

1. The plaintiff is a corporation of the State of New Jersey, engaged in the business of buying and selling lumber, millwork and other kinds of building materials. 10

2. The defendant is a banking corporation of the State of New Jersey, and conducts its business in the City of Newark, County of Essex, and State of New Jersey.

3. That on August 8th, 1928, one Mario Alagno, became indebted to the plaintiff for materials supplied, and said Mario Alagno, in part payment of said debt, delivered to one John R. Schick a check for \$4000. bearing date last above referred to, made by Lintott, Kahrs & Young and signed by Joseph Kahrs, to the order of Passaic-Bergen Lumber Company, which check bears No. 1115, and is drawn on the National State Bank of Newark, N. J. That this plaintiff did not endorse the said check, but an endorsement appears in the name of the plaintiff by means of a rubber stamp, and following the aforesaid endorsement appears the name of "Fidelity Home Building Inc." 20

4. That on or about the 13th day of August, 1928, the said Fidelity Home Builder Inc. tendered the said check to the defendant, and the said defendant cashed the said check for Fidelity Home Builder Inc. or credited the same to its account. That the plaintiff, at no time authorized the transfer or delivery or the negotiation of said check to Fidelity Home Builder Inc. 30

5. That the said check was in due course collected by the defendant from the National State 40

Amended Complaint.

Bank of Newark, N. J., upon which bank the said check was drawn, and the said National State Bank of Newark, N. J. charged the account of the makers of said check with the amount thereof, and returned the said voucher to them.

10

6. That the plaintiff has not received the proceeds or the moneys on said check, nor has it received any credit thereon, value or consideration, although the said check was the property of this plaintiff.

20

7. That when the defendant received the check payable to the order of the plaintiff, which check purported to bear an endorsement of the plaintiff corporation, the bank was chargeable with notice so as to put it upon inquiry to determine whether the endorsement of the corporation was genuine and authorized, and it became and it was the duty of the defendant before cashing the said check or entering or allowing the said Fidelity Home Builder Inc. any credit thereon or guaranteeing the said endorsement, to advise and assure itself as to the genuineness and validity of the endorsements prior to the Fidelity Home Builder, Inc. and as to whether the parties purporting to be and appear as endorsees on the said check had authorized their endorsements and consented to the negotiation and delivery of the said check; and the failure or neglect on the part of the defendant to inform, assure and advise itself as to whether the endorsement prior to the endorsement of Fidelity Home Builder Inc. was genuine and authorized, constituted a breach of duty on its part to the plaintiff, and as a result thereof in crediting the proceeds of plaintiff's check to Fidelity Home Builder, Inc., the defendant became and is liable

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Amended Complaint.

to the plaintiff in the amount thereof, to wit, the sum of \$4000.00.

Plaintiff demands judgment on this count in the sum of \$4000.00 together with interest thereon from August 8th, 1928.

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SECOND COUNT.

1. All of the allegations contained in paragraphs One and Two of the First Count, are made part of this Count, as though repeated in full and at length verbatim.

2. That on September 29th, 1928, Alexander Maryanski became indebted to the plaintiff for materials supplied, and said Alexander Maryanski delivered in part payment of said debt to one John R. Schick, his check bearing date as above referred to, to the order of the Passaic-Bergen Lumber Company, which check was drawn for \$5700.00 on the Bloomfield Savings Institution of Bloomfield, N. J. That this plaintiff did not endorse the said check, but written on the reverse side of said is the endorsement of the Fidelity Home Builders, as follows "Fidelity Home Builders, for deposit."

20

3. That on or about October 15th, 1928, the said Fidelity Home Builders tendered the said check to the defendant, and the said defendant cashed the said check for Fidelity Home Builders or credited the same to its account. That the plaintiff at no time authorized the transfer, delivery or the negotiation of said check to Fidelity Home Builders. That the said check was credited to the account of Fidelity Home Builders notwithstanding that the said check was not endorsed by the Passaic-Bergen Lumber Company, the payee of said check.

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Amended Complaint.

10 4. That the said check was in due course collected by the defendant from the Bloomfield Savings Institution of Bloomfield, New Jersey, upon which bank the said check was drawn, and the said Bloomfield Savings Institution charged the account of the maker of said check with the amount thereof, and returned the said voucher to him.

5. That the plaintiff has not received the proceeds or the moneys on said check, nor has it received any credit thereon, value or consideration, although the said check was the property of this plaintiff.

20 6. That when the defendant received the check payable to the order of the plaintiff, which check failed to bear any endorsement of the plaintiff, the bank was chargeable with notice so as to put it upon inquiry to determine whether the plaintiff had authorized or consented to the delivery of the check to the Fidelity Home Builders; and it became and it was the duty of the defendant before entering or allowing the said Fidelity Home Builders any credit thereon to advise and assure itself as to the title of Fidelity Home Builders to the said check, and also to inquiry as to the reason for the failure of the plaintiff herein to endorse the said check, and the failure or neglect on the part of the defendant to inform, assure and advise itself as to whether the plaintiff had parted with title to the said check, or as to whether in fact the Fidelity Home Builders had any title or ownership in said check, and whether the endorsement of Fidelity Home Builders was with the knowledge or authority of the plaintiff, constituted a breach of the duty on its part to the plaintiff, and as a re-

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Amended Complaint.

sult of its act in crediting the proceeds of the plaintiff's check to the Fidelity Home Builders, the defendant became and is liable to the plaintiff in the amount thereof, to wit, the sum of \$5700.00.

Plaintiff demands judgment on this Count in the sum of \$5700.00 together with interest thereon from September 29th, 1928. 10

THIRD COUNT

1. That on or about the 8th day of August, 1928, the defendant became and was indebted to the plaintiff in the sum of \$4000.00, and that on or about the 29th day of September, 1928, defendant became indebted to the plaintiff in the sum of \$5700.00, for the price and value of goods sold and delivered by the plaintiff to the defendant at its request; and in the like sums of money for the price and value of goods bargained and sold by the plaintiff to the defendant at its request; and in the like sums of money for the price and value of work done and materials for the same provided by the plaintiff for the defendant at its request; and in the like sums of money for moneys lent by the plaintiff to the defendant, at its request; and in the like sums of money received by the defendant for the use of the plaintiff; and in the like sums of money for moneys paid by the plaintiff for the use of the defendant, at its request; and in the like sums of money for interest due from the defendant to the plaintiff for the plaintiff having forborn moneys due from the defendant to the plaintiff, at the defendant's request for a long time then elapsed; and in the sums of money for moneys found to be due from the defendant to the plaintiff on an account then and 20 30 40

*Bill of Particulars Annexed to Amended
Complaint.*

there stated between them; and the defendant afterwards, to wit, on the respective days and year last aforesaid, in the County aforesaid, in consideration of the premises, promised to pay the said
10 last mentioned moneys to the plaintiff on request, yet the defendant disregarded its promises, and has not paid any of the said moneys, or any part thereof, to the plaintiff's damage.

The plaintiff demands judgment on this Count in the sum of \$9700.00 together with interest on the sum of \$4000.00 from August 8th, 1928, and interest on the sum of \$5700. from September 29th, 1928.

20

HARRY LOEB.

Attorney for Plaintiff.

Bill of Particulars.

The following is a bill of particulars of plaintiff's demand, to wit: The said demand is predicated upon two checks and drafts collected by defendant as follows:

1. The first check bearing date August 8th, 1928,
30 made by Lintott, Kahrs & Young to the order of Passaic-Bergen Lumber Company, drawn on the National State Bank of Newark, N. J., and endorsed on the reverse side of said check in the name of the plaintiff herein by means of a rubber stamp, and thereafter endorsed by Fidelity Home Builder Inc. The endorsement of the plaintiff on said check was forged and unauthorized, and the said check was collected by defendant and paid
40 to the said Fidelity Home Builder Inc. without the said check being negotiated, endorsed and delivered by the plaintiff or authorized by it.

*Bill of Particulars Annexed to Amended
Complaint.*

Principal amount of said check.. \$4,000.00
Interest thereon from August 8th, 1928.

2. The second check bearing date September 29th, 1928, made by Alexander Maryanski to the order of Passaic-Bergen Lumber Company, drawn on the Bloomfield Savings Institution of Bloomfield, N. J., which check was not endorsed in any wise or manner by the Plaintiff. On the reverse side of said check appears the name of "Fidelity Home Builders, for deposit." The said check was collected by the defendant and paid to the said Fidelity Home Builders without the said check being negotiated, endorsed and delivered by the plaintiff or authorized by it.

Principal amount of said check.. \$5,700.00
Interest thereon from September 29, 1928.

HARRY LOEB,
Attorney of Plaintiff.

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Answer to Amended Complaint.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

10

PASSAIC BERGEN LUMBER COMPANY,
a corporation of New Jersey,
Plaintiff,

v.

UNITED STATES TRUST COMPANY, a
corporation of New Jersey,
Defendant.

Action at Law.

20

The defendant, a banking corporation of the State of New Jersey, having its principal office in the City of Newark, County of Essex and State of New Jersey, answering the plaintiff's amended complaint, says that:

ANSWER TO FIRST COUNT.

30

1. Defendant has no information or knowledge sufficient to form a belief as to the allegations contained in paragraph 1 of the first count of the amended complaint herein, and therefore neither admits nor denies same, but leaves the plaintiff to its proof thereof.

2. Defendant admits the allegations contained in paragraph 2 of the first count of the amended complaint herein.

40

3. Defendant has no information or knowledge sufficient to form a belief as to the statements made in paragraph 3 concerning the several transfers or endorsements of the check designated

Answer to Amended Complaint.

therein; and specifically denies that the plaintiff did not endorse said check.

4. Defendant admits the statement as to the tender of said check by Fidelity Home Builder, Inc., and the credit of the same to its account; and denies the remaining statements in paragraph 4 of the first count of the amended complaint herein. 10

5. Defendant admits that said check was in due course collected by the defendant from the National State Bank of Newark, N. J., for and in behalf of Fidelity Home Builder, Inc., but has no information or knowledge sufficient to form a belief as to the balance of the statements contained in paragraph 5 of the first count of the amended complaint, and therefore neither admits nor denies same, but leaves the plaintiff to its proof thereof. 20

6. The defendant denies the statements contained in paragraph 6 of the first count of the amended complaint herein.

7. The defendant denies the statements contained in paragraph 7 of the first count of the amended complaint herein as alleged, and affirmatively says that it was not careless nor negligent in crediting the proceeds of said check to Fidelity Home Builder, Inc. Defendant further answering said paragraph, states that it was under no obligation nor did it owe any duty whatsoever to plaintiff as is alleged in said paragraph. 30

ANSWER TO SECOND COUNT.

1. All of the answers to the allegations contained in paragraphs 1 and 2 of the first count are 40

Answer to Amended Complaint.

made part of the answer to this count as though repeated in full and at length verbatim.

10 2. Defendant has no information or knowledge sufficient to form a belief as to the statements made in paragraph 2 of the second count, concerning the several transfers or endorsements of the check designated therein, and therefore neither admits nor denies same, but leaves the plaintiff to its proof thereof; but this defendant specifically denies that the plaintiff did not endorse the said check.

20 3. The defendant admits the statements as to the tender of said check by Fidelity Home Builder, Inc., to the defendant and the credit of the same to its account; but denies the remaining statements in said paragraph 3 of the second count herein, and affirmatively states that said check did bear the authorized endorsement of the plaintiff.

30 4. The defendant admits that the said check referred to in paragraph 4 of the second count, was in due course collected by the defendant from the Bloomfield Savings Institution of Bloomfield, New Jersey, for and in behalf of the Fidelity Home Builder, Inc., but defendant has no information or knowledge sufficient to form a belief as to the rest of the allegations contained in said paragraph, and therefore neither admits nor denies same, but leaves the plaintiff to its proof thereof.

5. Defendant denies the allegations contained in paragraph 5 of the second count.

40 6. Defendant denies the statements contained in paragraph 6 of the second count as alleged, and affirmatively says that it was not careless nor neg-

Answer to Amended Complaint.

ligent in crediting the proceeds of said check to Fidelity Home Builder, Inc. Defendant further answering said paragraph, states that it was under no obligation, nor did it owe any duty whatsoever to plaintiff as alleged in said paragraph.

10

ANSWER TO THIRD COUNT.

1. Defendant denies the statements made in paragraph 1 of the third count of the amended complaint herein, and affirmatively states that it is not indebted to the plaintiff in any sum whatsoever.

SEPARATE SPECIAL DEFENSES TO FIRST, SECOND
AND THIRD COUNTS.

20

1. The respective checks in each instance were endorsed by the plaintiff, through one of its officers or agents, duly authorized so to do.

2. The transfer and negotiation of said checks and the delivery thereof to Fidelity Home Builder, Inc., were authorized by the plaintiff.

3. The plaintiff has received value for the full amount of both of said checks.

30

4. Defendant received both of the checks set forth in the amended complaint as a holder in due course.

5. Plaintiff is estopped from denying the authority of John R. Schick to endorse the checks set forth in the complaint, in that the said plaintiff held out to this defendant and to the public in general, that the said John R. Schick was its manager and executive in charge of the actual operation of the business and generally held out to the

40

Answer to Amended Complaint.

10 defendant and others that the said John R. Schick, such executive and manager aforesaid, was empowered to completely and fully conduct the business of the plaintiff, including the sale of merchandise, fixing of the terms and prices on the said sales, collection of debts due, compromising of disputes and endorsing collecting and cashing of checks and notes for many years, prior to the acts complained of in the amended complaint herein, all of which were ratified by the plaintiff. Defendant relied upon such holding out and representations in the negotiation of the checks referred to in the amended complaint herein.

20 6. Said John R. Schick was in fact actually authorized to endorse the checks referred to in the amended complaint herein in the manner therein described, by the plaintiff.

30 7. Said Fidelity Home Builder, Inc., the endorsee of the checks referred to in the amended complaint herein, was a corporation owned and controlled by plaintiff corporation, and the proceeds of the checks referred to in the amended complaint herein, were actually disbursed and used by the plaintiff corporation in the payment of debts of the Fidelity Home Builder, Inc., at the direction of the plaintiff corporation, said plaintiff corporation being vitally and financially interested in and in control of the operations of said Fidelity Home Builder, Inc.

SAUL & JOSEPH E. COHN,
Attorneys of Defendant.

Reply to Answer to Amended Complaint.

NEW JERSEY SUPREME COURT,
PASSAIC COUNTY.

PASSAIC-BERGEN LUMBER COMPANY,
a Corporation of New Jersey,
Plaintiff,

v.

UNITED STATES TRUST COMPANY, a
Corporation of New Jersey,
Defendant.

10

Action at Law.

The plaintiff for its reply to the answer to the amended complaint, says:

20

1. It denies every allegation in the Answer to the First Count, the Answer to the Second Count, and the Answer to the Third Count.

2. It denies every allegation in the Separate Special Defenses to the First, Second and Third Counts.

3. It reserves the right at or before the trial to move to strike out the said answer to the amended complaint upon the ground that it does not set forth facts sufficient to constitute a legal defense to the cause of action set forth in the amended complaint herein.

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HARRY LOEB,
Attorney of Plaintiff.

40

Postea.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

10

PASSAIC-BERGEN LUMBER COMPANY,
a corporation of New Jersey,
Plaintiff,

v.

UNITED STATES TRUST COMPANY, a
banking corporation of New
Jersey,

Defendant.

} Action at Law.

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This case was tried before Honorable William B. Harley, Common Pleas Judge, assigned by the Supreme Court to hear Circuit Court causes, with a jury at the Passaic Circuit on December 18th, 1931, December 21st, 1931, and December 22nd, 1931.

30

The said Judge directed the jury to return a verdict against the defendant and in favor of the plaintiff on the first count in the sum of \$4,000.00, together with interest thereon from August 8th, 1928, making a total sum of \$811.33, and on the second count to return a verdict against the defendant in favor of the plaintiff in the sum of \$5,700.00, together with interest thereon from September 29th, 1928, making a total of \$1,106.75, and the jury did accordingly return a verdict against the defendant and in favor of the plaintiff for the said sum of \$4,811.33, on the first count, and the said sum of \$6,806.75, on the second count, mak-

40

Rule for Judgment.

ing a total in the sum of \$11,618.08 on the first count and the second count.

WILLIAM B. HARLEY,
Judge.

On motion of 10
HARRY LOEB,
Attorney of Plaintiff.

Rule for Judgment.

NEW JERSEY SUPREME COURT.

PASSAIC-BERGEN LUMBER COMPANY, a corporation of New Jersey, <i>Plaintiff,</i>		20
<i>v.</i>		
UNITED STATES TRUST COMPANY, a banking corporation of New Jersey, <i>Defendant.</i>	}	Action at Law. On Postea.
\$11,618.08 87.34 <hr style="width: 20%; margin-left: 0;"/> \$11,705.42		30

It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendant for the sum of eleven thousand, six hundred and eighteen dollars and eight cents, besides costs to be taxed *nisi*.

Entered December 26, 1931. 40
On motion of HARRY LOEB, Atty.

Case.

NEW JERSEY SUPREME COURT,

PASSAIC CIRCUIT.

10

PASSAIC-BERGEN LUMBER COMPANY,
a Corporation of New Jersey,
Plaintiff,

v.

UNITED STATES TRUST COMPANY, a
Banking Corporation of New
Jersey,

Defendant.

Action at Law.

20

Paterson, N. J., Dec. 18, 1931.

2:00 P. M.

Tried Before—Hon. WM. B. HARLEY, Judge, and a
Jury.

APPEARANCES:

HARRY LOEB, Esq., Counsel for Plaintiff.
Messrs. SAUL and JOSEPH COHN (by JOSEPH
COHN, Esq.), Counsel for Defendant.

30

A Jury was duly empaneled and sworn.
Counsel for the respective parties opened
the case to the Jury.

PLAINTIFF'S CASE.

GEORGE B. WEBER sworn.

Direct examination by Mr. Loeb:

Q. Mr. Weber, are you employed by the National
State Bank of Newark? A. Yes, sir.

40

Q. In what capacity? A. Head bookkeeper.

George B. Weber, direct.

Q. Are you in charge of their records? A. Yes, sir; I am.

Q. Were you served with a *subpoena duces tecum* to produce the account of Lintott, Kahrs & Young, Trustees? A. Yes, sir.

Q. You have the records with you? A. Yes, sir. 10

Q. Will you produce them, please? A. (Witness produces papers.)

Q. Is this the original account of Lintott, Kahrs & Young? A. Original accounts; yes, sir.

Q. Have you, with you, a checks for \$4,000.00? A. Yes, sir.

Q. Will you produce that check? A. (Witness produces paper.)

Mr. Loeb: (Handing paper to Mr. Cohn.) 20

Mr. Cohn: If you will prove this is Lintott, Kahrs & Young's signature.

Q. Do you know Mr. Kahrs' signature? A. Yes, sir.

Q. To whom is that check made payable? A. To the Passaic-Bergen Lumber Company.

Q. And that check was made by Joseph Kahrs? A. Yes, sir.

Mr. Loeb: I offer the check in evidence. 30

Mr. Cohn: No objection.

(The same was marked Plaintiff's Exhibit P-1 in Evidence.)

Mr. Loeb: I will read the check to the jury.

The Court: All right.

Mr. Loeb (reading): It is a check on the account of Lintott, Kahrs & Young, Newark, N. J., dated August 8, 1928, No. 1115, "Pay to the Order of Passaic-Bergen Lumber Company, Four Thousand Dollars Exactly, 40

George B. Weber, direct.

10 \$4,000.00; Lintott, Kahrs & Young, Trustee Account, (Signed) Joseph Kahrs," on the National State Bank of Newark, New Jersey. On the reverse side appears a rubber stamp, "Passaic-Bergen Lumber Company," "Fidelity Home Builders, Inc.," and then it is stamped, "Received Payment" by this bank, then cleared in the Newark Clearing House, "prior endorsements guaranteed, August 13, 1928, United States Trust Company," perforated "8-14-28, N. S. B."

Q. Was Mr. Kahrs' or the account of Lintott, Kahrs & Young, charged with the amount of \$4,000.00? A. Yes, sir.

20 Q. And does that appear upon the record that you have there? A. Yes, sir.

Q. Is that the original record? A. Original record; yes, sir.

Mr. Loeb: I offer it in evidence. By consent, your Honor, we will mark the carbon copy, so that the original can go back to the bank.

The Court: All right.

30 (The same was marked Plaintiff's Exhibit P-2 in Evidence.)

Q. Mr. Weber, did the United States Trust Company receive the proceeds of this check from the National State Bank of Newark? A. Yes, sir.

Q. And the National State Bank of Newark debited the Trustee Account of Lintott, Kahrs & Young with the amount of \$4,000.00? A. Yes, sir.

40 Q. As far as your records show, the Passaic-Bergen Lumber Company received no credit on this check? A. No, sir.

Mr. Loeb: That is all.

George B. Weber, cross.

Cross examination by Mr. Cohn:

Q. Mr. Weber, just a moment. You say that you are the head bookkeeper of the National State Bank? A. Yes, sir.

Q. Are these records written up under your personal direction? A. Why, I have authority—not personally, no. 10

Q. How do you know they are accurate? A. Why, proven there, by having this check to check up, to prove it.

Q. Will you designate on that sheet where there is a charge of \$4,000 made, corresponding with the check that is in evidence? A. August, the 14th (indicating).

Q. You are sure that that is the identity of the amount with the check? A. Yes, sir. 20

Q. When you say that the United States Trust Company received the proceeds of this check, what do you mean, that it received the proceeds? A. By their bank stamp, guarantee of endorsements.

Q. That is not how they received the proceeds—? A. Well, that is, through the Clearing House.

Q. How does that work? A. Well, through the Bank's Clearing House, they send the check to us, and we, in turn, pay them. 30

Q. Just a minute. You say, "They send the check to us, and we send the check to them"; what do you mean by "we" and "they"? A. The United States Trust Company send the check to us, to be cleared.

Q. To whom? A. To the National State Bank, to be cleared.

Q. Then, what does the National State Bank do? A. Pay them, for the checks.

Q. Paid whom? A. United States Trust Company. 40

John Edgerley, direct.

Q. That is the way the United States Trust Company gets the \$4,000.00? A. Yes, sir.

Q. That is not a cash transaction, is it? A. Well, no.

10 Q. It is purely a bookkeeping transaction? A. Yes, sir.

Q. You do not actually know that the United States Trust Company got that \$4,000.00, do you?

A. I am not supposed to know that; it is just a banking arrangement, that is all.

Q. You, merely, are following the usual custom, and it is for that reason that you believe the United States Trust Company got that \$4,000.00? A. Yes, sir.

20 Q. Is that correct? A. Yes.

Mr. Cohn: All right.

JOHN EDGERLEY, sworn.

Direct examination by Mr. Loeb:

Q. Mr. Edgerley, are you connected with the Bloomfield Savings Institution, of Bloomfield? A. I am.

30 Q. In what capacity? A. Secretary-treasurer.

Q. Are you in charge of the records or of the books? A. I am.

Q. Have you with you the account of Alexander Maryanski? A. I have.

Q. Will you produce that account, please? A. (Witness produces paper.)

Q. Well, now, what is this card that you show me? A. That card is the ledger card of Alexander—or Alec—Maryanski.

40 Q. What is this? A. That is a page from our

John Edgerley, direct.

Certified Check Register, because an item of \$5,700.00 of that account was certified by us.

Q. It does appear upon this card an item, October 13, 1928, \$5,700.00— A. Right.

Q. —is that right? A. Yes, sir.

Q. Is this the ledger card? A. That is the ledger card. 10

Q. Does this ledger card indicate that Alexander Maryanski was debited with \$5,700.00? A. It does.

Q. On what date? A. October 13th.

Mr. Cohn: What year.

Q. 1928? A. 1928.

Mr. Loeb: I would like to get the check.

Mr. Keller, you have the check? 20

(A paper was produced in court.)

Q. That ledger card indicates the account of Alexander Maryanski; is that right? A. Yes, sir.

Q. I show you a check of Alexander Maryanski, on your bank. Do you know Mr. Maryanski's signature? A. I do.

Q. Is that his signature? A. It is.

Mr. Loeb: I offer this check in evidence.

(The same was marked Plaintiff's Exhibit P-3 in evidence.) 30

Q. To whom does this check indicate that that amount was credited? Can you tell me?

Mr. Loeb: Of course, the check speaks for itself.

A. Well, I only could recite the endorsements on the back of the check.

Q. All right. 40

John Edgerley, direct.

10 Mr. Loeb (reading): Bloomfield, N. J.,
September 29, 1928, to the Bloomfield Sav-
ings Institution, Accounts subject to check,
"Pay to the order of PASSAIC-BERGEN LUM-
BER COMPANY, FIFTY SEVEN HUNDRED DOL-
LARS," and in figures, written out, \$5700.00",
" (signed) Alexander Maryanski," "payment
in full to date for No. 1 and No. 2, labor
done on job on Fairview avenue, job milled
by Passaic-Bergen Lumber Company," then
in writing, "Fidelity Home Builders, Inc."
"for deposit", and then is the stamp of the
20 United States Trust Company, "Pay to the
order of any Reserve Bank of New York
prior endorsements guaranteed," "October
15, 1928," and the "United States Trust Com-
pany"; then is the stamp of the Bloomfield
Savings Institution.

Q. Now, Mr. Edgerley, who was debited with
this amount for \$5,700.00, as it appears in your
records? A. Alexander Maryanski.

Q. Did you remit the proceeds of this check to
the United States Trust Company? A. I don't
know that.

30 Q. Well, look at the back of that. Would that
indicate anything to you? A. No; we remitted to
the Bloomfield National Bank—

Q. Yes? A. —they, in turn, would remit to
the—

Mr. Cohn: I object to that.

The Witness: Beg pardon?

Mr. Cohn: I object to that.

40 The Court: If he knows, of his own
knowledge, he can state.

John Edgerley, direct.

Q. You remitted to the Bloomfield National Bank. Now, from your banking experience, what would then be the course of the check?

Mr. Cohn: I object to that.

Mr. Loeb: I think, your Honor, the witness is qualified to answer, if he is an expert, if he knows. 10

The Court: Well, I know, what might happen might not be the important thing; it is what is done that is important.

Q. Well, what was done—

Mr. Loeb: After he reads the check, by his own examination of this check.

The Court: If he can tell what was done, if that check will help him, all right. 20

Q. Looking at the back of that check, tell us, from your experience, your expert knowledge, what was done, after the Bloomfield National Bank passed it? A. I cannot tell you what was done, but—I don't know what was done—I only know what we did.

Q. What did you do? A. We paid the bank that we got the check from. 30

Mr. Loeb: All right. I do not think the point is material, your Honor, because it just occurs to me my learned friend admitted it in the answer, so we won't spend any more time on it.

The Court: Don't waste any time.

Mr. Loeb: Yes, it just came to my mind. Now, I wish to offer in evidence these two records.

Mr. Cohn: I have no objections, your Honor please, to the introduction of this 40

John Edgerley, direct.

sheet, with the exception, that it is only a partial record, and I would like to ask the witness as to whether I am correct in that or not.

10 *By Mr. Cohn:*

Q. Mr. Edgerley, this sheet does not represent the entire history of Mr. Maryanski's banking transactions with your institution?

The Court: You mean, from the beginning to the end?

20 Q. From the beginning to the end? A. Well, I might misunderstand you—that sheet there, that check that you had, that I had in my hand, a moment ago, was certified—that was certified in advance, and we charge the account—when we certify a check, we charge the account right away, and set it up in our Certified Check Register; then, when the check comes through the exchanges, we charge our Certified Check Register for the money; that page is only part of your Certified Check Register, which is a loose leaf book.

30 Q. This ledger account of Mr. Maryanski, also, indicates only a portion of Mr. Maryanski's banking transactions with the Bloomfield Savings Institution? A. Yes, sir; that is right.

40 Q. Have you any other ledger cards with you of this account? A. Well, I have other cards, but I haven't got all of the cards with me on that account, because the papers they subpoenaed me, recited to bring the card between specified dates, and that is the reason I did not bring them all. I have other cards—other ledger cards here,—covering Mr. Maryanski's account, but not all of them,

John Edgerley, cross.

because my subpoena only requested certain portion—

Q. Have you the card of 1929? A. There is part of 1929.

Q. Let's have the next one to this. A. What is the last date on that card? 10

Q. You tell me; this looks— A. All right.

Q. No.

Mr. Cohn: This card, designated as No. 1, is satisfactory, as far as I am concerned. If you will admit both of these sheets, as the ledger account of Mr. Maryanski, I have no objection.

Mr. Loeb: No objection, Mr. Cohn.

Mr. Cohn: Very well; they can both go in. 20
(The same were marked Plaintiff's Exhibits P-4 and P-5 in Evidence.)

Mr. Loeb: That is all, Mr. Edgerley.

Cross examination by Mr. Cohn:

Q. For the benefit of the Jury, Mr. Edgerley, so that they may understand, as well as for my own benefit, so that I may understand of what these cards consist, the figures under the heading "Checks" indicate checks with the debits as issued and which have been cashed by your institution; is that correct? A. That is right. 30

Q. Just look at that, and be sure that you are right. A. That is right.

Q. That is, all of these items under the term, "Checks"? A. Checks.

Q. This second column from the left— A. —are items—

Q. —are items which have been charged against the depositor? A. That is correct. 40

Q. These two cards would indicate all of the

John Edgerley, redirect.

items that were charged against the depositor for the period designated on these cards? A. That is right.

10 Mr. Cohn: These cards are to be left here, Your Honor please, or duplicates, if they so desire?

The Witness: I would like to make duplicates. They are our original cards. They are original cards; I can make true copies of them.

The Court: All right. Can you do it today?

Mr. Cohn: It is important to us because—we are perfectly satisfied to have duplicates.

20 Q. Just one moment, Mr. Edgerley. This check of \$5,700.00 has been certified; is that correct? A. That is right.

Q. And by whom? A. By me.

Q. For whom? A. For the Passaic-Bergen Lumber Company.

Mr. Cohn: That is all.

Redirect examination by Mr. Loeb:

30 Q. How do you know the check was certified for the Passaic-Bergen Lumber Company? A. May I have the check?

Mr. Loeb: Where is the check?
(The exhibit was produced.)

Q. (Exhibiting Exhibit P-3 to witness.) A. (After examining exhibit.) I spoke out of turn there, I will admit it.

40 Q. Well, will you correct your statement? A. The check was certified, but I do not know whom we were certifying it for.

Mr. Loeb: That is all.

Einer A. Pettersen, direct.

Recross examination by Mr. Cohn:

Q. Mr. Edgerley, do you keep a record in your bank from whom you certify checks? A. No, only the register that I have before me, the page, or loose leaf page.

10

Q. And that register does not indicate who presented the check for certification? A. No, it does not.

Q. What caused you to make that statement, first, that you certified it for the Passaic-Bergen Lumber Company? A. Well, I did not think fast enough to tell you the—I did not think far enough; that is all.

Q. Well, you won't say that you certified it for Maryanski, or that Maryanski came to you, and asked you to certify it? A. No, I cannot say it, because I do not know who.

20

Q. You don't remember, you mean? A. I don't remember, no.

Q. Still, this is your signature on the certification? A. It is.

Mr. Cohn: All right; that is all.

EINER A. PETTERSEN sworn.

30

Direct examination by Mr. Loeb:

Q. Mr. Pettersen, what is your connection with the Passaic-Bergen Lumber Company, the plaintiff in this suit? A. I am president, treasurer, and general manager of the corporation.

Q. Where is your office located? A. In the Delawana Section of Passaic—or Clifton.

Mr. Cohn: Just a minute; talk up a little louder. I did not hear that last answer.

40

(Answer repeated by stenographer.)

Einer A. Pettersen, direct.

Q. What kind of business does your company do? A. Retail lumber and building materials.

Q. Has your company any branch offices and yards? A. We have six branches.

10 Q. And is one of them located in East Orange—
A. Yes, sir.

Q. —where you sell material? A. Yes, sir.

Q. Did you have, on your books, in the year 1928, a customer—or customers—by the name of Mario Alguno and Alexander Maryanski? A. Yes, sir.

Q. Do you know whether they were indebted to the plaintiff any sums of money?

Mr. Cohn: I object to that.

20 Mr. Loeb: If he knows.

Mr. Cohn: I think the books are the best evidence of that, unless Mr. Loeb is going to connect that up with the production of the books.

Mr. Loeb: I say, irrespective of whether I could connect it with the books, if he knows whether a person owes him money, or his concern—

The Court: I will allow—

30 Mr. Loeb (continuing): —he can say so.

The Court: I will allow it.

A. Yes, sir.

40 Q. I show you two checks, marked P-1 and P-3, —one in the sum of \$4,000.00, and the other in the sum of \$5,700.00,—both made payable to the order of the Passaic-Bergen Lumber Company, and I ask you if you know whether the Passaic-Bergen Lumber Company received any credit or received the proceeds of these checks? A. No; they never did.

Einer A. Pettersen, direct.

Q. They never received the proceeds? A. No, sir.

Q. What are the duties of the local manager, Mr. Pettersen? A. Collection and selling and general—and management of the local plant.

Mr. Cohn: Will you repeat that?

(Answer repeated by stenographer.)

10

By Mr. Cohn:

Q. That is, collecting and selling? A. Yes—

Mr. Loeb: Yes.

Mr. Cohn: I thought he said “settling”.

By Mr. Loeb:

Q. And when he received checks, what is the duty of the local manager?

20

Mr. Cohn: I object to that. I do not think it makes any difference as to what Mr. Pettersen tells the local manager; the matter is what is being held out for the public.

The Court: It is some evidence.

Mr. Cohn: The private affairs that Mr. Pettersen notified the manager to do are not in issue in this case.

30

Mr. Loeb: All right, excepting as to Mr. Pettersen’s answer, with the organization, with the corporate action of the company—certainly, the managers cannot go any further in their duties than the corporation permits them to go, as evidenced by the corporate actions of this organization.

The Court: I would not say that statement is absolutely correct. Of course, it is some evidence, but a representative of the corporation can go to some extent in his

40

Einer A. Pettersen, direct.

actions. I will allow the question, for what it is worth.

Mr. Loeb: Will you repeat the question?

10 Q. (As repeated by stenographer.) When he receives checks, what is the duty of the local manager? A. The local manager receives the checks, and credits the customer, and then has them deposited in the depositaries designated by the company.

Q. Have you resolutions on file with the banks where the Passaic-Bergen Lumber Company deposits money? A. Yes, sir.

20 Q. Are those resolutions embodied in your records—records of the Passaic-Bergen Lumber Company? A. Yes, sir.

Q. Will you please turn to those resolutions, and produce them? A. (Witness produces papers.)

Q. Now, you have produced here resolutions and minutes of meetings, with reference to the manner—or, with reference to the manner in which checks shall be signed; is that correct? A. (Examining papers.)

30 Q. Now, just look them over and see if I have got that right. I am trying to summarize it.

Mr. Cohn: Just a minute—

Mr. Loeb: I will withdraw that, and if you object to my question, I will reframe it.

Mr. Cohn: It is not a matter of reframing it. It is the matter of whether Mr. Pettersen is the proper man to testify as to that.

(After brief discussion, the witness was withdrawn.)

40 (Witness withdrawn.)

Richard J. Post, direct.

RICHARD J. POST, sworn.

Direct examination by Mr. Loeb:

Q. Will you please look at these records and tell me what they are? Look them over.

Mr. Loeb: I will withdraw that question. 10

Q. Were you secretary of the Passaic-Bergen Lumber Company in 1927? A. Yes, sir.

Q. Is that your signature? A. Yes, sir.

Q. And were you secretary of the plaintiff in 1928? A. Yes, sir.

Q. And is that your signature? A. Yes, sir.

Q. Is that the signature of Mr. Pettersen? A. Yes, sir.

Q. And is that your signature on these minutes, in 1929? A. Yes, sir. 20

Q. Is this your signature, as secretary, in the year 1926? A. Yes, sir.

Q. Is this your signature, in the year,—November, 1929? A. No, sir.

Q. Is that your signature? A. No, sir.

Q. Is this your signature? A. Yes, sir.

Mr. Loeb: That is the year 1930.

Q. Now, I show you resolutions in 1930, signed Richard J. Post, Secretary; is that your signature? A. Yes, sir. 30

Mr. Loeb: All right. That is all. I will offer these papers in evidence.

Mr. Cohn: If your Honor please, I object to the introduction of all of the documents that are dated subsequent to September, 1928, as irrelevant and having no bearing upon this issue.

Mr. Loeb: Well, I think it is relevant to show the manner in which this corporation 40

Richard J. Post, direct.

did business with the banks and the manner by which checks may be properly signed and countersigned.

The Court: What are those?

10

Mr. Loeb: These are minutes, resolutions, copies of which have been filed with the various banks with which the plaintiff did business.

Mr. Cohn: That is no testimony of that, your Honor.

Mr. Loeb: The Court asked me what they were, and I gave him an answer.

The Court: I mean, have they different resolutions for each banking company with whom the company did business?

20

Mr. Loeb: Well, they had a number of banks with which they did business, and these are resolutions filed with the banking houses, showing who may sign checks on behalf of the plaintiff.

Mr. Cohn: But they are all, I presume, subsequent to the date of the—

30

The Court: Only those prior to the date which is at issue would be evidential. Of course, it is very obvious, that there might have been a change in the procedure. Anyway, it would not do you any good,—if the jury had what your conduct was before—even one of them would be enough.

Mr. Loeb: Yes.

The Court: Make your offer to put them in, prior, not subsequent.

Mr. Loeb: Here, use these two then.

Mr. Cohn: Let me see the two.

40

Mr. Loeb (handing papers to counsel): I want to introduce them.

Richard J. Post, direct.

Mr. Cohn: May I examine him on these minutes, your Honor?

The Court: Yes.

By Mr. Cohn:

Q. Mr. Post, have you any recollection of the meetings at which these minutes were adopted? 10

Mr. Loeb: I object, your Honor; I do not think it is material. I am asking Mr. Post, as secretary, whether these are the authentic minutes of the company. Whether he has any recollection is irrelevant.

Mr. Cohn: Well, I will withdraw the question now, and cross examine him when the time comes. 20

Mr. Loeb: All right.

Mr. Cohn: When you are through with the witness. I thought you were through with him.

Mr. Loeb: No; I wanted to prove these—there is no objection to the introduction of these?

Mr. Cohn: There is no objection to the introduction of these.

Mr. Loeb: Please mark them. 30

(The same were marked Plaintiff's Exhibits P-6 and P-7 in Evidence.)

Q. I call your attention, Mr. Post, to the minutes of the Board of Directors of the Passaic-Bergen Lumber Company, held on March 9, 1926, and I ask you to read the provision with respect as to what officers are authorized to sign checks. I do not want you to read the— A. On motion duly made and seconded, Catherine M. Pettersen was elected Director, Richard J. Post—further- 40

Richard J. Post, cross.

more, on motion duly made and seconded, it was authorized by the directors present that in the future all checks drawn by the company must be signed by E. A. Pettersen, Treasurer, and counter-

10 Q. All right. I call your attention to the minutes of the meeting held February 28, 1927, by the Board of Directors of the Passaic-Bergen Lumber Company, and I ask you to read resolution with respect as to who were authorized to sign checks on behalf of the company. A. Furthermore, on motion duly
20 made and seconded, it was ordered—authorized by the Directors present that in the future all checks drawn by the company must be signed by E. A. Pettersen, Treasurer, and counter-signed by Richard J. Post, Second Vice-President.

Mr. Loeb: That is all.

Cross examination by Mr. Cohn:

Q. Mr. Post, how many directors were there at that time? A. At that time? Three.

Q. Have you any minutes of this company which indicate the method of depositing checks? A. Just what do you mean by that?

30 Q. Well, how are checks to be signed, when they are to be deposited for the company?

Mr. Loeb: If your Honor please, I wish to enter objection to this testimony, because I deem it to be irrelevant. I merely put Mr. Post on the stand to prove these records and nothing else. Now, to go into the entire methods of the business of the company is not proper cross examination.

40 The Court: No, but you did bring out specifically who was to sign checks.

Mr. Loeb: Yes.

Richard J. Post, cross.

The Court: I don't know whether you mean any signed paper, but that is a very important part of this case.

Mr. Cohn: I think it is relevant. Mr. Loeb has opened up the field, and I think I can walk in on it. 10

The Court: Limit it just to them.

Mr. Loeb: All right. Let's proceed.

Mr. Cohn: Will you repeat the question.

Q. (Repeated by stenographer.) Well, how are checks to be signed when they are to be deposited for the company? A. Just by using a stamp which states for deposit only in the bank that is named depository for that yard.

Q. Do you mean to say, that each of the yards had a separate bank account? A. Yes, sir. 20

Q. And you provided each yard with a rubber stamp— A. Yes, sir.

Q. —which indicated the depository? A. A rubber stamp was provided by our general office in Passaic to each yard.

Q. Well, did that rubber stamp indicate the name of the bank which the particular yard was to use? A. Well, I am not positive of that.

Q. Well, now, think of that, Mr. Post, because I am going to follow it with another question. You want us to believe that each yard was given a certain bank to use as a depository; is that correct? A. That is true. 30

Q. And that the manager of each bank, of each yard, upon receiving checks, deposited those checks in that depository? A. Yes, sir.

Q. Did the manager of that particular yard then have power to sign checks on that depository? A. No, sir. 40

Q. Well, how did you get the money out of the

Richard J. Post, cross.

local bank, we will call it, into that depository upon which you signed checks, as designated in these resolutions? A. Let me understand you more clearly.

10 The Court: How did the treasurer get it from the control of the other bank, that is what we want to know. You had four or five banks.

Q. You had at least six banks—Mr. Pettersen has testified you had six branches—does that mean that you had six local depositories, exclusive of the main depository? A. Yes, sir.

20 Q. And you also testified that the checks received by the branch yards were deposited in the local banks, with which the local yard did business? A. Yes.

Q. And you also stated that the managers did not sign checks on those banks? A. That is true.

Q. So that it became necessary to move the funds from local banks into some central depository, wherein you signed checks in accordance with the resolutions?

30 Mr. Loeb: I object. This witness has not testified it was necessary to move the funds from local banks into some central depository wherein they signed checks in accordance with the resolutions. That question would tend to mislead the witness.

Mr. Cohn: I think my questions are perfectly plain.

Mr. Loeb: Go ahead.

40 A. Through signed checks by the treasurer and countersigned by myself.

Q. So that you would periodically withdraw

Richard J. Post, cross.

from the local banks into your central depository funds which were deposited in the local banks?

Mr. Loeb: I object, your Honor. The witness has not testified anything about a central depository.

10

The Court: It would not make any difference.

Mr. Loeb: But, if he said, "Yes," it would be misleading. I, myself, do not know if there was a central depository. I want to get the facts.

The Court: It doesn't make any difference,—the president of the company, or the treasurer, and this gentleman, had these resolutions filed in all of the banks, they said.

20

Mr. Loeb: Yes.

Q. I call your attention to Plaintiff's Exhibit 6, and ask you whether that resolution covers only the Bogota National Bank? A. Yes—Bogota National Bank.

Q. So that you desire to change your testimony, and now you say that this meeting held on the 28th day of February, 1927, refers to one bank only; is that correct? A. Well, that is what the—this resolution calls for.

30

Q. I call your attention to Plaintiff's Exhibit 8, and I ask you whether resolutions passed at this meeting on the 9th day of March, 1926, refer to all banks, or did it refer only to a particular bank? A. It referred to all banks.

Q. Did you lodge with the various depositories copies of this resolution? A. Yes, sir.

Q. Do you know what your depositories were at that time? A. I can't recall offhand.

40

Richard J. Post, cross.

Q. Do you know whether that resolution was still in force in September, 1928? A. No, I can't remember about this particular resolution, whether it was in force at that time.

10

Mr. Cohn: Well, if your Honor please, I move that this be stricken from the minutes—testimony, concerning the resolution marked P-6, or the Exhibit P-8, your Honor, rather, unless this witness will testify that that resolution was in force at the time the checks in question were issued.

Mr. Loeb: Before your Honor passes upon that, may I ask the witness a question?

20

By Mr. Loeb:

Q. Mr. Post, is it a fact that there was deposited at all banks resolutions similar in form to the ones before you? A. Yes, sir.

30

Q. And I call your attention to another minute in February, 1924, and I ask you to read the resolution with respect to the authorization of signatures on checks. A. Furthermore, on motion duly made and seconded, it was ordered—authorized by the directors present that in the future all checks drawn by the company must be signed by E. A. Pettersen, Treasurer, and countersigned by Frank J. Sherman, First Vice-President, or Richard J. Post, Second Vice-President.

Q. Does that resolution limit its application to any one bank or to all banks of the Passaic-Bergen Lumber Company?

40

Mr. Cohn: I object to that. I think the resolution should talk for itself.

The Court: It should and it does.

Richard J. Post, cross.

Mr. Loeb: All right. I think that is all. I wish to offer this in evidence.

Mr. Cohn: I object to it on the ground, that it is relevant. There is no testimony that these resolutions were in force and effect at the time that the checks in question were issued.

10

The Court: I will allow them; allow you an exception.

Mr. Loeb: That is all.

(The paper offered in evidence by counsel for the plaintiff was not marked by the stenographer at this time.)

By Mr. Cohn (continuing):

Q. Now, Mr. Post, you have been in business a long time, haven't you, and attended to the financial affairs of this company? A. I have been in business a long time, but the financial affairs were taken care of by Mr. Pettersen.

20

Q. But you had direct contact with the banking institutions in connection with these resolution, didn't you? A. With Mr. Pettersen.

Q. Well, didn't you, yourself, submit—or supply—the banking institutions with resolutions indicating the authority of the officers to sign checks for the Passaic-Bergen Lumber Company? A. Not all of the banks.

30

Q. Well, the banks didn't honor your checks unless they had resolutions, did they? A. That is true.

Q. You don't mean to tell us now that you delivered to the respective depositaries of the Passaic-Bergen Lumber Company resolutions of the type that is expressed and set forth in these minutes? A. I did not deliver them personally.

40

Richard J. Post, cross.

Q. Well, these are not copies of the resolutions, in so far as you personally know, which were delivered to the banks? A. Some of the banks I know, where I happened to deliver them personally.

10 Q. Well, now, look at these resolutions and just recollect. This is not, I repeat, the form of resolution which you supplied the banks, the general statement that the banks, that all checks be signed by these two officers? A. (No answer.)

Q. If that is not clear to you, let me ask you the further question: Weren't you supplied by each individual bank with a particular form of resolution?

20 The Court: On a card of heavy paper?

Mr. Cohn: Well, they do not come on cards; as a rule, they come on a long sheet.

A. Do you mean, the signature card?

Q. I do not mean the signature card at all; I mean the form of resolution which the bank requires. A. We signed and delivered our own resolutions.

30 Q. You mean to tell us, that this is the form of resolution that you delivered? A. Individual form; yes, sir.

Q. And did, for instance, the Bogota Bank or the Chase National Bank, accept a resolution of this type? A. The Bogota Bank did; yes, sir.

Q. Well, the Bogota Bank, you have a specific name, "The Bogota National Bank," inserted in the resolution? A. Yes, sir.

40 Q. But in these other two exhibits, you did not insert the names of the banks, and were these minutes the authority for the bank,—and did the banks accept these minutes, P-8 and P-9, as their

Richard J. Post, cross.

authority for honoring checks signed by these two men? A. As far as I know, they did.

Q. Well, now, just recollect back. You know perfectly well that those banks have a long form of resolution, with the individual names in the resolution, and that they will not accept a blank resolution of this type? A. They will accept them. 10

Q. Did you give the United States Trust Company of Newark, at any time, a copy of these resolutions? A. Not that I know of.

Mr. Cohn: All right.

Mr. Loeb: That is all, as far as we are concerned.

(Recess to Monday, December 21, 1931.)

20

December 21, 1931; 10:00 A. M.

Court reconvened pursuant to recess adjournment.

Counsel present as before.

Mr. Loeb: If the Court please, I understand the defendant's answer denies any knowledge of the fact that the defendant is a New Jersey corporation. Do you deny that that is true? 30

Mr. Cohn: No, sir.

The Court: All right, it is admitted.

Mr. Loeb: I wish, at this time, to introduce the by-laws of the plaintiff corporation, and I will ask Mr. Pettersen to take the stand.

40

Einer A. Pettersen, direct.

EINER A. PETTERSEN recalled.

Direct examination by Mr. Loeb:

Q. Mr. Pettersen, you testified at the last session that you were the president— A. Yes—

10 Q. —and the general manager— A. Yes—

Q. —of the plaintiff? A. —and treasurer.

Q. Yes. Now, what are these records that I show you? A. By-laws of the corporation, of the company.

Q. Yes. Now, will you read—or rather, these are the by-laws of the Passaic-Bergen Lumber Company? A. Yes.

20 Mr. Loeb: Is there any objection to their being admitted?

Mr. Cohn: Very much so. For what purpose are the by-laws to be introduced?

Mr. Loeb: To indicate the duties of the president and the treasurer and the secretary, and such other officers as the corporation may have.

30 Mr. Cohn: If your Honor please, I object to the introduction of the evidence, on the ground that it is incompetent and irrelevant. The by-laws of this plaintiff corporation cannot bind this defendant company with whom the plaintiff corporation has had no business and has no business—there is no relationship between the two parties,—and the by-laws have never been brought to the attention of the defendant company.

40 Mr. Loeb: If your Honor please, there have been before the courts a number of cases of similar import as the case that we are trying now, and in every one of those cases by-laws have been introduced to show

Einer A. Pettersen, direct.

the power and the authority of the officers of the corporation.

The Court: I will allow them—

Mr. Cohn: Will your Honor allow me an exception?

The Court: —there is some evidence as to what the actual status of this whole outfit was; it is not absolutely but some evidence of it. You may note your exception. 10

Mr. Loeb: I offer the—

(The same was marked Plaintiff's Exhibit P-10 in Evidence.)

Mr. Cohn: Are you going to offer the whole thing in, in case there is a record to an upper court?

Mr. Loeb: That is it, we do not want such parts that are not relevant here. I want Sections 12, 13, 15—that is all—and 20. I wish to call special attention to, and introduce in evidence, Section 12, referring to the powers of the directors,—14, continuation of 13, subdivision,—officers; 15, duties of president; 16, duties of vice-president; 17, duties of secretary; and, 20, duties of treasurer; 21, continuation of duties of the treasurer. All right. 20 30

(The same were marked Plaintiff's Exhibit P-10 in Evidence.)

Q. Now, Mr. Pettersen, will you please read to the jury Section 12? A. "Power of Directors: The Board of Directors shall have the management of the business of the company,—"

Mr. Loeb: I think it would expedite matters, your Honor, if I would read the sections 40

Einer A. Pettersen, cross.

in that I want, to the jury. There is no objection to that, is there, Mr. Cohn?

Mr. Cohn: Except the general objection, that I consider them incompetent—

The Court: All right, that is noted.

10

(Mr. Loeb then read to the jury the portions of by-laws in evidence, P-10.)

Q. Mr. Pettersen, has the local manager of any branch of the plaintiff company the right or the power to endorse and negotiate checks— A. No.

Q. —of other persons or corporations? A. No.

Mr. Cohn: I object to the question, your Honor, please.

The Court: On what ground?

20

Mr. Cohn: I do not think that is binding on this defendant.

Mr. Loeb: If your Honor please, the issue in this case and the defense interposed by the defendant is that Mr. Schick had the authority and power to do the acts which he did. Now, I think,—I may be anticipatory in presenting this—it may be, properly, rebuttal,—but I thought we would get the issue squarely before the jury, as to whether he, Schick, had the authority to negotiate the checks in question.

30

The Court: I will allow it; allow you an exception.

Mr. Loeb: That is all.

Cross examination by Mr. Cohn:

Q. Mr. Pettersen, what other office did you hold besides that of president? A. Treasurer and general manager.

40

Einer A. Pettersen, cross.

Q. In the Passaic-Bergen Lumber Company, you hold the greater majority of the stock? A. Yes.

Q. More than 90%, as a matter of fact? A. I hold 90%.

Q. And the other 10% is under your control; is that correct? A. Yes. 10

Q. So that you are, practically, the Passaic-Bergen Lumber Company; is that right?

Mr. Loeb: I object to that, your Honor,—and I object, further, on the ground that it is not proper cross examination. I have not brought anything out about the control of Mr. Pettersen in the company. I have simply examined him on the by-laws.

The Court: I can anticipate where the sole owner of the corporation may do something—the sole owner of the corporation may do something. I am going to allow it. Of course, your objection, as far as cross examination is concerned, is met by numerous cases, that where a party to litigation is on the witness stand, he may be cross examined as to anything material to the issue, whether it is brought out or not on the direct examination. I will allow it, and will allow you an exception. 20 30

Mr. Loeb: Exception.

By Mr. Cohn:

Q. Mr. Pettersen, in the prosecution of your business, you took an active interest in its management? A. Yes.

Q. You were the one who established the system of so-called local branches? A. Yes.

Q. You were the one who designated Mr. Shick 40

Einer A. Pettersen, cross.

as the manager of the East Orange branch? A. Yes.

Q. Did you, in connection with your business, supervise the East Orange branch? A. Yes.

10 Q. You did not permit Mr. Shick to do whatever he pleased in conducting that branch? A. No.

Q. So that whatever he did was known to you, in connection with his activities, at that East Orange yard; isn't that right? A. In a general way.

Q. How often did you visit this East Orange yard? A. Well, sometimes twice a month, sometimes once a month, sometimes twice a week.

20 Q. When you visited this branch in East Orange, did you go over the books? A. Occasionally.

Q. Did you know much of the transactions which Mr. Shick had been carrying on? A. I do not understand your question.

Q. Well, now, if Mr. Schick sold \$5,000.00 or \$10,000.00 worth of lumber, to a customer, did you know about it? A. No—a certain amount of authority was delegated to all of the managers, in extending credits.

30 Q. That is not the question. I was going to ask you—you have answered one question without my asking it—but my question is: Did you know what Mr. Schick was doing, when he sold a customer \$5,000.00 or \$10,000.00 worth of material?

Mr. Loeb: Just a minute—

A. (Interrupting.) No.

Mr. Cohn: He has answered, "No."

Mr. Loeb: The witness has answered it?

40 The Witness: Yes.

The Court: Yes.

Einer A. Pettersen, cross.

Q. So you want the jury to believe that transactions involving \$5,000.00 or \$10,000.00 were unknown to you, such transactions having been made by Mr. Schick?

Mr. Loeb: I object to the form of the question, your Honor. 10

The Court: The form of the question is objectionable, "Do you want the jury to believe."

Q. How did Mr. Schick get the material in the East Orange yard that he sold to his customers?

A. It was shipped in by the company.

Q. By whom? A. Passaic-Bergen Lumber Company.

Q. You mean, the Passaic-Bergen Lumber Company shipped the material to each branch yard, you say? A. Yes. 20

Q. Did you know when such shipments were made? A. Yes.

Q. So that you knew when large quantities of material left the Passaic-Bergen Lumber Company yard and were sent to the East Orange branch? Did you know that, or not? A. Lumber was shipped in from the various mills to each of our branch yards—they were not shipped from the one yard; they were shipped from various mills into our branches in carload loads. Sometimes they came into the general concentration yard at Passaic. 30

Q. At whose order was that lumber shipped to the East Orange yard? A. My orders.

Q. So that you know of large quantities of material that went to the East Orange yard? A. Yes. 40

Q. Didn't you ever follow up the matter of pay-

Einer A. Pettersen, cross.

ment for those materials? A. We had the general manager or the credit manager who followed that up.

10 Q. That is not the question. You say that you knew that, yourself, that large amounts of material were shipped to the East Orange yard. You followed that up, didn't you? A. I ordered all of that material that was sent to the various yards.

Q. So that now you say that you knew of all of the material that went to the various local yards; is that correct? A. Wholesale purchases.

Q. That includes this East Orange yard? A. Wholesale purchases.

Q. By whom? A. I did all of the wholesale buying for the various plants.

20 Q. Then, Mr. Schick, who was the manager of the East Orange yard, did not purchase that material? A. Except of local lots, when he was short; that is all.

Q. Did that run into big money, the materials that he purchased? A. It should not, no.

Q. Well, don't you know? A. I know, in a general way.

30 Q. Well, will you say that if the materials required amounted to a thousand dollars, or more, it was ordered by you and not by the local manager? A. No; the local managers were restricted to mainly local purchases.

Q. What does that amount to, in money? A. It should not exceed \$500.00.

Q. So that you are now telling us, that you knew of all of the materials, in wholesale lots, that went to the East Orange yard? A. Yes.

40 Q. Now, weren't you sufficiently interested to know what became of those materials, Mr. Pettersen, to follow them up? A. As general manager,

Einer A. Pettersen, cross.

I had general supervision of the entire operation of the company, and I would be kept advised of the operations. Naturally, I did not know every detail.

Q. Well, it was your company, wasn't it, Mr. Pettersen? A. I was president of the company. 10

Q. Well, you owned the company; you have just told us that you owned the company, is that right or is it wrong? A. I answered your question before.

Q. And you say that you did not know as to what became of those materials that were sold thorough the East Orange yard. Is that right or is it not right? A. I don't understand your question. 20

Mr. Loeb: The witness has not so testified.

Mr. Cohn: Let him tell us. The witness is reluctant to tell us what he does know or what he doesn't know.

Mr. Loeb: I object, your Honor, to such characterization.

The Court: Don't waste time. Make your objections to the Court. I think it can be simplified, Mr. Pettersen. What he wants to know is this: The East Orange yard told you they were short, told you they were going to require next month a thousand dollars' worth of materials, and a few weeks later, he said, we are short and want \$5,000.00 more, would you say to him, "How come? Where did it go?" as an illustration? 30

The Witness: Well—

Mr. Cohn: I want to know whether this man knew that the huge amounts of lumber were being sold by the East Orange yard, 40

Einer A. Pettersen, cross.

as to whether he knew whether they were paid for or not, he being the practical owner of the Passaic-Bergen Lumber Company, and the materials sold by the East Orange yard being practically his.

10

A. The control of the purchasing was through the general office in Passaic, and we had a record of purchases and sales constantly reported to the general office monthly, and I ordered material in accordance with those records of purchases and sales, to keep the flow of materials consistently in each yard.

Q. Didn't you examine the record of the payments?

20

Mr. Loeb: Now, your Honor—

A. (Interrupting.) Occasionally—

30

Mr. Loeb (continuing): —please—just a moment, Mr. Pettersen—at this point, I wish to offer objection to this line of testimony. It was not the duty, on the part of the plaintiff, or its officers, to examine payments, because they owed no duty to this defendant, the United States Trust Company. (Citing authorities, without naming case or citation.) I have, for a precedent, your Honor, a case recently decided by the Court of Appeals in New York, where the same evidence was sought to be introduced, and the Court of Appeals stated that this evidence was illegal and should not be admitted. If your Honor please, may I read the excerpt, because I think there will be quite a good deal of this brought in here?

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Einer A. Pettersen, cross.

The Court: All right. Is that a suit against an insurance company?

Mr. Loeb: No; this is also a suit against a bank by a corporation, where the president of that corporation had diverted checks, and I think, in its essential facts, this case is on all fours with this case that we are trying, and I think that inquiries made as to whether they did not examine their books, why he did not look up payments, etc., are immaterial and irrelevant, because we owed no such duty to the United States Trust Company.

10

Mr. Cohn: If your Honor please, Mr. Loeb has anticipated, as he says, the defense. I think he has opened the avenue and we are entitled to walk in. He has anticipated the defense, on the theory that the defense will be that there was authority. Now, I am trying to prove that there was authority in connection with the transfer of this check, and I think I am entitled to prove that through the plaintiff's general manager and president and treasurer.

20

Mr. Loeb: If your Honor please, they must show authority in the legal form. They can show it by corporate action, they can show it by by-laws, they can show it by direct authorization of the executive officers of the company, but they cannot show it by inference, because we do not think that there is any such inference that is legal and binding on this plaintiff, that can be drawn.

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The Court: They can show it by if he knew about it.

40

Mr. Loeb: Yes.

Einer A. Pettersen, cross.

Mr. Cohn: And we can show it by the manner in which the principal held out its agent to the general public.

The Court: I will allow it.

10

Mr. Loeb: Will your Honor permit me an exception?

The Court: All right.

Mr. Cohn: Will you repeat the question?

Q. (Repeated by stenographer.) Didn't you examine the record of payments? A. (Read by stenographer.) Occasionally—

The Stenographer: Interrupted there by objection of counsel.

20

Q. Did you know that, Mr. Pettersen? A. Did I know what?

Q. Did you know, whether these large amounts of material, sold by the East Orange yard, were paid for or not? A. We had hundreds of accounts, and I would examine them all, from time to time, not a specific account of anything else—

Q. Let's take this specific account of Maryanski, a gentleman whose check is in evidence; did you know anything about that account? A. No.

30

Q. Did you know anything about the account of the Sheridan Construction Company? A. I knew about it two months before Schick was dismissed from our service, yes.

Q. Did you know anything about it at the time that the lumber was delivered? A. I did not.

Q. Did you know, as to whether lumber was ordered for the Sheridan Construction Company? A. Ordered, in what way? What do you mean?

40

Q. Well, you say that the local yard gave the orders to the general office, and then you made the purchases? A. The general—the local man-

Defendant's Motion for Nonsuit.

ager simply sells the material to our customer out of the stocks that he has on hand; I wouldn't know anything about that, except from the record.

Q. Now, if the Sheridan Construction Company had purchased \$35,000.00 worth of material, would the local yard have had that much on hand? A. Certainly; they had \$150,000.00 worth on hand. 10

Q. When you went to the East Orange yard, to look over the books and to supervise it, you say that you had no knowledge whatsoever of the Sheridan Construction Company account? A. I told you, that two months—

Q. Answer the question, yes or no.

Mr. Loeb: He is answering.

The Court: Let him answer. 20

A. I am trying to answer it intelligently—

The Court: Go ahead.

A. —that is all. I learned it then.

Mr. Cohn: That is all.

Mr. Loeb: That is all.

Mr. Loeb: The plaintiff rests.

PLAINTIFF RESTS. 30

DEFENDANT'S MOTION FOR NONSUIT.

Mr. Cohn: Will your Honor hear the motion for a nonsuit at this time?

The Court: Yes.

Mr. Cohn: The defendant moves for a nonsuit of the plaintiff's case, first, upon the theory that there is no privity of contract between the plaintiff and the defendant. If your Honor will look at the check in ques- 40

Defendant's Motion for Nonsuit.

10 tion, or the checks in question, you will find that the plaintiff is the payee and not the maker of the check. If the plaintiff's theory is to hold the defendant as an endorser, it is not at all tantamount, because both parties to this suit are parties to the instrument to such point, but it should be noted that the plaintiff is a party thereto prior to the defendant.

20 Now, under Section 66 of the Negotiable Instruments Law, endorsers are liable only to subsequent holders and not to prior holders, so that if it is upon the theory of endorsement the United States Trust Company is not liable to the Passaic-Bergen Lumber Company.

30 Now, there is no—nor has any evidence been introduced as to any relationship that existed between the Passaic-Bergen Lumber Company and the United States Trust Company. The Passaic-Bergen Lumber Company is not a depositor, and the United States Trust Company owes nothing whatsoever to the Passaic-Bergen Lumber Company. It was not called upon to collect for the Passaic-Bergen Lumber Company. It had no duty. It had not been paid by the Passaic-Bergen Lumber Company. And, consequently, since there is no privity whatsoever, there cannot be any negligence, and this case is not being brought upon the theory of negligence on the part of the United States Trust Company, so the United States Trust Company should not be held by this plaintiff responsible under that theory.
40 The theory upon which anybody in this case

Defendant's Motion for Nonsuit.

might be held, might be upon the relationship of depositor and depository, but, as they say, that relationship did not exist in this particular case.

Now, if the Passaic-Bergen Lumber Company has suffered a loss, they should have sued the bank which actually paid out this money or else have sued Maryanski, and this Maryanski, in turn, might have sued the parties who were shown upon these checks. (Citing American Steel Company case, Economy Auto Supply case, and the "Dennis" case.)

The United States Trust Company had no relationship whatsoever with the Passaic-Bergen Lumber Company, and it was not bound by the Passaic-Bergen Lumber Company to look for the authority of the official or the individual who made that particular endorsement and made that deposit.

The Court: Did the Fidelity Home Builders, Inc., have an account at the United States Trust Company?

Mr. Cohn: They did. The check was not cashed. The check was deposited, as indicated on the check itself, and the United States Trust Company credited the Fidelity Home Builders, Inc., and paid it out through a large number of checks until the whole account was closed, and I submit, your Honor, in view of the fact that there is not this relationship between the parties, that the defendant is entitled to a nonsuit as against this plaintiff.

(Mr. Loeb argued in opposing the motion, at considerable length.)

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Abraham M. Herman, direct.

10 The Court (after argument of counsel):
In passing upon motions for a nonsuit and
the direction of a verdict, the Court cannot
weigh the evidence, but must take as true
all of the evidence which supports the view
of the party against whom the motion is
made, and must give him the benefit of all
legitimate inferences which are to be drawn
therefrom in his favor. The checks, which
are in evidence and which are the subject-
matter on which this suit is brought, show
a stamped endorsement of the Passaic-
Bergen Lumber Company, with no other
endorsement, than the writing on of the
words, "Fidelity Home Builders, Inc." and
20 there has been no proof elicited to show any
authority to transfer title by such endorse-
ment, or from which such inference could be
drawn. I will deny the motion; allow you
an exception.

DEFENDANT'S CASE.

ABRAHAM M. HERMAN sworn.

30 *Direct examination by Mr. Cohn:*

Q. Mr. Herman, you are a member of the Bar
of New Jersey? A. I am.

Q. For how long? A. Seventeen years.

Q. Where is your office? A. 319 Main Street,
Orange, N. J.

Q. Do you know a man by the name of John R.
Schick? A. I do.

40 Q. Do you know him, in what capacity? A. I
met him in the end of 1928 as a representative of
the Passaic-Bergen Lumber Company.

Abraham M. Herman, direct.

Q. In connection with what transaction? A. I represented a creditor, at that time, against a certain building being erected by the K. S. B. Realty Company, I think the name was, who got into difficulties, and a meeting of creditors was called, and I met Mr. Schick at those meetings. It finally developed into a corporation of the creditors who took over all of the assets of the defunct building company. 10

Q. Where did the Passaic-Bergen Lumber Company come in? A. The only one that I met from the Passaic-Bergen Lumber Company was Mr. Schick. As far as I was concerned, he was the Passaic-Bergen Lumber Company.

Mr. Loeb: I object—I ask that be stricken out, “As far as he was concerned, Schick was the Passaic-Bergen Lumber Company,”—obviously conclusion. 20

The Court: All right. As far as he knew, that is the only one he knew. There isn't anything harmful, however.

Mr. Loeb: Yes, but, as a lawyer, he should be more careful.

Q. What was done at that time, Mr. Herman? A. Various meetings were held between—among all of the creditors of the K. S. B. Realty Company, and a plan was evolved, wherein a corporation known as the Rogers Holding Company was formed, composed of the creditors of the K. S. B. Realty Company, and this corporation took over the assets, through the receiver, and John of the K. S. B. Realty Company engaged to complete the houses. There were seventeen houses, I think, that were under construction, part of which were not completed. 30 40

Abraham M. Herman, direct.

Q. Where did Mr. Shick come in? A. Mr. Schick appeared as the Passaic-Bergen Lumber Company, or as its representative.

10 Mr. Loeb: I object, your Honor. This is hearsay, or, if it is not hearsay, it is conclusion.

The Court: Self-serving, cannot prove agency by a statement of the agent, anyway. I will allow the objection.

A. (Continuing.) Mr. Schick appeared, I will say, as the representative of the Passaic-Bergen Lumber Company.

20 Mr. Loeb: I object, your Honor.

Mr. Cohn: I think he can say that.

The Court: What did he do when he was there, that would be better—

Mr. Loeb (interrupting): Yes.

The Court (continuing): —whether he was authorized to do it, or not; what he did.

30 A. (Continuing.) Mr. Schick attended the meetings, presented the claim of the Passaic-Bergen Lumber Company, took part in all the discussion, which finally eventuated into the formation of this holding company; subsequently, Mr. Schick signed the incorporation papers that were drawn up by Mr. Dworkin.

Q. Who was Mr. Dworkin? A. At that time, he represented the attorney for the Passaic-Bergen Lumber Company.

Q. You mean, he was the attorney for the Passaic-Bergen Lumber Company? A. As far as I knew.

40 Q. What happened after that? A. This holding company,—Rogers Holding Company,—bought

Abraham M. Herman, cross.

from the receiver of the K. S. B. Realty Company, through a settlement of the K. S. B. Realty Company, all of its assets, and it then undertook to complete certain houses which were owned by the K. S. B. Realty Company.

Q. Well, were there various meetings held? A. 10
There were very many meetings held.

Q. Was Mr. Dworkin present at those meetings?
A. He was present at several meetings that were held at his office, at least two or three or possibly four meetings, that I recall,—meetings of all of the creditors. Several meetings were held at my office. Mr. Dworkin finally drew up the incorporation papers.

Q. What became of Mr. Schick in connection with that company? A. He was one of the officers and one of the directors. Eventually he resigned, and his stock was assigned to Mr. Garretson, who took his place. 20

Q. Do you know who Mr. Garretson was? A. Mr. Garretson was a representative of the Passaic-Bergen Lumber Company.

Q. What function did he perform for the Passaic-Bergen Lumber Company, if you know? A. That I couldn't say, except that he took the place of Mr. Schick. 30

Q. Did anybody else appear for the Passaic-Bergen Lumber Company outside of Mr. Schick or Mr. Garretson? A. Not that I recall.

Q. In connection with this company? A. I don't recall anybody else.

Mr. Cohn: Cross examine.

Cross examination by Mr. Loeb:

Q. Who else was there besides Mr. Schick at the meetings of these creditors? A. Mr. Ross, of the Orange Sewer and Constr— 40

Abraham M. Herman, cross.

Q. I mean, anybody in connection with the Passaic-Bergen Lumber Company. A. Outside of Mr. Dworkin, I don't recall anybody else.

Q. Well, was Mr. Garretson there? Do you know Mr. Garretson?

10

Mr. Loeb: Mr. Garretson!

A. Yes, I know Mr. Garretson.

Q. Is that the gentleman that you saw there?

A. That is Mr. Garretson.

Q. He was present at all of those conferences where Mr. Schick was present? A. No, he wasn't present at all; I think he was called in subsequently.

Q. He was called in subsequently? A. Yes.

20

Q. When the corporation, known as the Rogers Company was formed, was Mr. Garretson in on that? A. Well, I don't understand your question, Mr. Loeb.

Q. I mean, was Mr. Garretson present when the negotiations for the formation of the Rogers Company were being conducted? A. I think he was.

Q. Mr. Dworkin was present— A. Yes—

Q. —Mr. Dworkin, the attorney? A. —in his office.

30

Q. It was in his office, so besides Mr. Schick, there were two other representatives of the Passaic-Bergen Lumber Company there; isn't that correct? A. Mr. Dworkin was there and Mr. Garretson.

Q. Yes. And the formation of the company then was the result of the combined deliberations of Schick, Garretson and Mr. Dworkin; isn't that right? A. No, the formation of the company was the combined deliberations of all of the creditors,—

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Abraham M. Herman, cross.

Q. Yes? A. —we each represented certain of the creditors—

Q. Yes? A. —and Mr. Dworkin or Mr. Schick happened to represent one of the chief creditors—

Q. Huh-huh? A. —I happened to represent a good-sized creditor, and a Mr. Lorenzo, who represented another good-sized creditor— 10

Q. Yes? A. —and those three men were appointed a committee to discuss and formulate plans to work out of the difficulties; they were all in the same body.

Q. In order to help Mr. Schick in the solution of these difficulties, he had the assistance and the cooperation of Mr. Garretson and Mr. Dworkin, didn't he? A. Mr. Dworkin represented him legally— 20

Q. Yes? A. —I represented my creditor legally, and Mr. Lorenzo was represented by a third attorney.

Q. Of course, as far as you know, whatever Mr. Schick was doing, he was doing under the instructions of the head office, at Passaic, as far as you know? A. As far as I knew, Mr. Schick acted with apparent full authority to make the decisions with us and either to accept the proposition or reject it. 30

Q. I know, but considerable time was going consumed between the instigation of these negotiations and their conclusion? A. Naturally, took several months.

Q. During that period of time, you didn't know, did you, whether Mr. Schick was taking instructions from the head office? A. That, I didn't know.

Q. You didn't know. A. (No audible response.)

Mr. Loeb: That is all. 40

*Abraham M. Herman, redirect.**Redirect examination by Mr. Cohn:*

Q. Mr. Herman, do you know what ultimately became of this property? A. The Rogers Holding?

Q. Yes.

10 Mr. Loeb: I object, your Honor. I do not think that is material to this issue.

A. (Interrupting.) I think it was—

The Court: I will allow it—

Mr. Loeb: Just a minute, Mr. Herman.

The Court: I will allow it. It may have been given to Mr. Pettersen; I don't know.

Mr. Cohn: It may have gone to the Passaic-Bergen Lumber Company.

20 The Court: We will find out.

Mr. Loeb: That would be immaterial.

A. I know it was foreclosed by the mortgagee; who bought it in, I don't know.

Mr. Loeb: Oh!

The Court: All right.

Mr. Cohn: That is all.

30 Mr. Cohn: Your Honor, please, late on Friday afternoon, for the purpose of convenience, the testimony of Samuel B. Lesser was taken, as a witness called by the defendant, and I would like to read his testimony at the present time.

40 Mr. Loeb: Now, if your Honor please, I strenuously object to the reading of this testimony before the jury, because I submit the testimony to be legally inadmissible, and I think, if the testimony is once read, the prejudicial effect of it is here.

Abraham M. Herman, redirect.

The Court: Suppose we go in my chambers and read it to me.

Mr. Loeb: All right.

The Court: The jury can take ten minutes for adjournment, and then we can find that out.

10

Mr. Loeb: All right.

(The Court and counsel for the respective parties retire to the Chambers for argument out of the hearing of the jury.)

(In Chambers.)

Mr. Loeb: If your Honor please, I object to all of the questions which Mr. Lesser answered with respect to any communications received from Mr. Schick. As I understand their contention, it is this, that Schick was the authorized agent of the plaintiff to do the acts that he is charged with, viz., endorsing these checks. Now, before they can introduce any testimony of a third person as to what Schick said, they must first lay a foundation that Schick was the agent, and what the extent and the scope of his authority was. This they can only do by the testimony of the agent. (Citing

20

v. , 152 Atl. 713; also 78 N. J. Law, 281.) I submit that all of this testimony of Mr. Lesser is not evidential, unless it is supported, in the first instance, by testimony by Schick and properly connected.

30

The Court (after extended discussion): I am going to allow the defendant all of the leeway possible, except that part on page 9, I would just eliminate that.

40

Samuel B. Lesser, direct.

(The jury was recalled to the jury box, and court reconvened.)

10 Mr. Cohn: For the purpose of convenience, ladies and gentlemen, the testimony of one witness, produced on the part of the defendant, was taken after four o'clock on Friday. I will now read to you his testimony, in the form that I will first begin "Question," then comes the answer, together with the objections of Mr. Loeb to the questions as they were made, and Mr. Loeb, in turn, will read that part of the testimony wherein he began the questions and the witness gave the answers.

20 (Reading by Mr. Cohn.)

"SAMUEL B. LESSER, produced as a witness on behalf of the Defendant, was first duly sworn by the Examiner, and testified as follows:

"Direct examination by Mr. Cohn:

"Q. Mr. Lesser, you are a member of the Bar of New Jersey? A. I am.

"Q. For how long? A. Since 1923.

"Q. Do you know a Mr. John R. Schick? A. I do.

30 "Q. How long have you known him? A. Oh, possibly six or seven years.

"Q. On what occasion did you ever come in contact with Mr. Schick? A. As a manager or person representing the Passaic-Bergen Lumber Company.

"Q. In what other capacity did you ever have occasion to meet him? A. I met him socially.

40 "Q. But in his connection with the Passaic-Bergen Lumber Company, what do you know about him? A. Whenever, in the granting of loans and mortgages, in my office, that it became necessary the seeking of postponements of mechanics' liens

Samuel B. Lesser, direct.

by reason of the furnishing of materials by the Passaic-Bergen Lumber Company to the people I was financing, he appeared at my office to seek postponement and cancellation of the mechanics' liens that were granted.

"Q. Now, will you please explain, what you mean by 'postponement of mechanics' liens', so that the jury clearly understands the procedure of a document of that nature? A. When a material house sells materials to a builder, they, by reason of the sale and the delivery of that material, are entitled, under our statutes, to a lien against the property. A mortgagee, in placing a mortgage, and paying out thereunder, is very particular that his mortgage become a first lien and prior to all other liens, so that in order to secure the priority, he procures from a material house, who has a statutory prior lien, a postponement necessary to make a mortgagee's lien prior to that of the material house, so that in order to secure ourselves properly we had to secure a postponement of lien.

"Q. Does the material man, or the house that sells the material, surrender any rights when such a postponement is executed in favor of the mortgagee? A. They surrender, to my mind, all of their rights in favor of the mortgagee.

"Q. You had occasion to advance moneys in behalf of the mortgagee in connection with buildings erected on which the Passaic-Bergen Lumber Company supplied material? A. At least a hundred times.

"Q. A hundred times? A. At least a hundred times.

"Q. And in connection with all of those buildings, you had occasion to receive postponements,

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or demand postponements of liens from the Passaic-Bergen Lumber Company? A. I did.

“Q. And over how long a period of time will you say these one hundred occasions occurred? A. Four or five years.

10 “Q. And whose signature did you receive in connection with such postponements? A. On deliveries from the East Orange yard, we received and accepted the signature of John R. Schick. We received the signature of a man by the name of Garretson for material delivered from other yards, to Bloomfield, Silver Lake, Belleville.

“Q. Was the seal of the company attached to the signature? A. No, not in all cases.

20 “Q. In any case? A. I think, in some they were sealed, as far as my memory will recollect.

“Q. When you say the signature of John R. Schick, will you tell us just how the signature was made on postponements of liens? By that, I mean: Was it merely the signature of John R. Schick, or was it in connection with the Passaic-Bergen Lumber Company designation? A. It was always signed ‘Passaic-Bergen Lumber Company’, in many cases—in most cases by rubber stamp, and ‘John R. Schick’ under it, or ‘Garretson’ under it, as the case might have been.

30 “Q. In connection with any of the occasions when you received and accepted these postponements of liens, were the signatures ever refuted by the Passaic-Bergen Lumber Company? A. Never.

“Q. Did you have occasion to make out any checks to the Passaic-Bergen Lumber Company? A. Yes.

40 “Q. On numerous occasions? A. A great many.

“Q. To whom did you deliver the checks? A.

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To John R. Schick or to Garretson, those were the two gentlemen with whom I dealt, entirely.

“Q. Were you ever requested to issue a check in substitution of any such checks that you had given to Mr. Schick, to the order of the Passaic-Bergen Lumber Company? A. I was not. 10

“Q. Were you— A. Let me qualify that. There may have been a check made in a lesser amount, and I was asked to change it, which may have happened in so many deals,—I don’t remember as clearly—

“Q. But, so far as you know, the checks which you delivered to Mr. Schick, to the order of the Passaic-Bergen Lumber Company, were accepted by the Passaic-Bergen Lumber Company, in connection with the materials sold by the Passaic-Bergen Lumber Company, to the various individuals whom you were financing? A. Yes. 20

“Q. Now, Mr. Lesser, are you familiar with the Sheridan Construction Company? A. I organized the company.

“Q. Who were the principal stockholders or officers of the Sheridan Construction Company? A. Well, there were three brothers, as well as I can remember,—Sam Wexler, being president, Charles Wexler, being secretary, and one other Wexler—I don’t remember his name. 30

“Q. Did Mr. Schick have any interest in that company, at the time it was organized? A. None.

“Q. Did the Sheridan Construction Company purchase materials from the Passaic-Bergen Lumber Company? A. I believe they did. I mean, I cannot testify that they did, but I know—”

Mr. Cohn (interrupting reading): Now, your Honor, pursuant to the ruling in chambers, I will read the questions, eliminating 40

Samuel B. Lesser, direct.

the objections and discussions, and read the answers?

The Court: Yes.

Mr. Loeb: May I ask for an exception, your Honor, to the Court's ruling?

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The Court: Yes, an exception will be noted.

(Mr. Cohn continues reading.)

"Q. Do you know of what the activities of the Sheridan Construction Company consisted? A. Yes.

"Q. Please tell us. A. They built four houses on the easterly side of Alden Road, Glen Ridge.

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"Q. Did they construct houses anywhere else? A. They built eleven houses, dug three foundations in addition, on the westerly side of Roosevelt Avenue, Chatham, and they built a big garage and ball room in Roselle.

"Q. Did you have occasion to finance the eleven houses—or fourteen houses in Chatham? A. I did.

"Q. Well, then, you knew who was supplying the materials? A. Yes.

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"Q. Well, now, who was supplying the material in connection with the erection of those houses? A. I know that I had to procure postponements of mechanics' liens from the Passaic-Bergen Lumber Company, because they were the supposed supply house, and when I called up—well, I know, in fact, I know that they were, because the preliminary agreements for the material were drawn up in my office.

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"Q. In pursuance of those preliminary agreements, the Passaic-Bergen Lumber Company proceeded to supply the building material for those houses? A. That is right.

"Q. With whom were the arrangements made

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by the Sheridan Construction Company? Can you answer that? A. Yes.

“Q. With whom? A. With me and Mr. Schick.

“Q. When you say, ‘with me,’ referring to yourself, what particular function did you have to perform, that the arrangements were made with you? 10

A. There was a demand made by Mr. Schick, on a preliminary agreement as to certain demands to be made at certain times. I was granting the construction loans, and being familiar with the method of construction, I decided that those demands could not be met, because I would not pay as much money as they called for, so Mr. Schick and I, in my office, went over the possible demand that I would make and the possible amount that he could get out of such demand, and that was done in our own office in Newark. 20

“Q. Was that the first time that you had dealt with the Passaic-Bergen Lumber Company, through Mr. Schick? A. No.

“Q. You had already had a course of conduct with the Passaic-Bergen Lumber Company? A. Yes.

“Q. Was it necessary, if you know, for Mr. Schick to get the approval of anyone else in making these arrangements? A. On the Sheridan Construction Company, that I remember, that he had to interview no one, because the entire transaction was taken in my office. 30

“Q. Well, the Sheridan Construction Company, you say, proceeded with the erection of these fourteen houses— A. Eleven houses.

“Q. —eleven houses? Did they finish the eleven houses? A. No, they did not.

“Q. Why not? A. They became financially embarrassed. 40

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“Q. What did the Sheridan Construction Company do after they became financially embarrassed? A. I cannot answer that, because they did so many things.

10 “Q. Well, you had better tell us what they did, in so far as you recollect, so that we can get a true story out of this. A. Well, they stopped building these houses. They gave up, and subsequently delivered a deed to a company by the name of the Fidelity Homes Builders, organized by my office, in which the stockholders, I believe, were John R. Schick, and two secretaries in my office, one by the name of Seymour Hirsch, I believe, and possibly Miss Mary Corbett.

20 “Mr. Loeb: Miss Mary A. Corbett?

“The Witness: I mean, that is a matter of conjecture.

“Q. Do you recollect that one of the Wexlers was also an incorporator? A. Yes—Sam Wexler.

“Q. Was Hirsch—anybody by the name of Hirsch in your office? A. Yes, he was employed by me as a clerk.

30 “Q. Refreshing your recollection, will you say that Mr. Schick, Mr. Hirsch and Mr. Sam Wexler were the incorporators of this company? A. I won't say that Mr. Hirsch was, because I don't remember, but I distinctly remember that Sam Wexler and John R. Schick were.

“Q. Do you know why a deed for these properties was given to this Fidelity Home Builders Company? A. In order to save the cost of foreclosure, Mr. Schick came to our office, and asked us what else we could do, and I told him that no
40 one—

“Q. Let me ask you this: Was Mr. Wexler, or

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any of the officers of the Sheridan Construction Company, present at the time when Mr. Schick was speaking to you? A. Yes.

“Q. Which one of the Wexlers? A. Sam.

“Q. Was present? A. Sam Wexler.

“Q. Did they come to you? A. Yes, they were my clients. 10

“Q. Both Wexler and Mr. Schick? A. Mr. Schick subsequently became my client, subsequent to the transaction.

“Q. Well, now then, tell us why that deed was given? A. In order to save foreclosure costs.

“Q. Let me call your attention to the technical term that you are using: Do you mean foreclosure costs of a mortgage? A. No.

“Q. Or a lien? A. Foreclosure of his mechanics’ lien rights and the institution of suit on the mechanics’ lien. 20

“Q. You are not using the word ‘foreclosure’ in connection with a mortgage? A. No, although there was a threatened mortgage foreclosure by the companies we represented, and, of necessity, Mr. Schick, in order to protect his interest, or the interest that he represented, would have had to buy in, subject to our mortgage. In order to save this cost, he asked us what we could do for him, and we told him— 30

“Q. Never mind what you told him. What did you do? A. We organized the Fidelity Home Builders, at his suggestion, and the Fidelity Home Builders took title from the Sheridan Construction Company by deed, which we drew.

“Q. I show you a certified copy of the deed from the Sheridan Construction Company to the Fidelity Home Builders, Inc., dated May 17, 1928, recorded May 21, 1928, in Book E-31 of Deeds, in 40

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Pages 9, etc., and ask you whether you know whether it is a copy of the deed which you have just referred to? A. I don't know whether it is a copy or not. It is signed by Lionel M.—Maurice M. Bradner,—but I wouldn't say it is a copy of the deed we drew.

“Q. Does that cover the property, owned by the Sheridan Construction Company, in Chatham, which you have just been referring to? A. Yes, this covers property that they owned.”

Mr. Cohn (interrupting reading): I will offer that as the first exhibit for the defendant.

(The same was marked Defendant's Exhibit D-1 for Identification at time of taking of deposition, later marked Defendant's Exhibit D-1 in Evidence.)

“Q. Now, Mr. Lesser, was a deed for this property taken in satisfaction of the obligation of the Sheridan Construction Company to the Passaic-Bergen Lumber Company? A. There was a release—signed release of Sheridan Construction Company from obligations to the Passaic-Bergen Lumber Company. The release was signed by John R. Schick and the deed was delivered at the time.

“Q. In this entire transaction, on the Sheridan Construction Company, do you know for whom Mr. Schick was acting? A. No.

“Q. Well, whom had he been representing up to that time? A. The Passaic-Bergen Lumber Company.

“Q. Did he continue to represent the Passaic-Bergen Lumber Company when he took the property over in the name of the Fidelity Homes Com-

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pany? A. He was still employed by the Passaic-Bergen Lumber Company.

“Q. And he delivered, you say, a release of the Passaic-Bergen Lumber Company to the Sheridan Construction Company, when the deed was delivered to him? A. That is right. 10

“Q. Do you know of any other cases in which Mr. Schick, representing the Passaic-Bergen Lumber Company, made any adjustments with a customer of the Passaic-Bergen Lumber Company? A. I do.

“Q. Will you tell us, in which instances, if you recollect? A. On the bill of Frank Giacano, a builder, whose address is in Union. Frank Giacano was employed by his mother, Nellie, to build a house for her in Union. He purchased the lumber from the Passaic-Bergen Lumber Company, through Mr. Schick, from the East Orange yard, and he owed the Passaic-Bergen Lumber Company for it. Nellie Giacano happened to have sold a house on Jackson Street, in Newark, took back a mortgage as part of the purchase price. This mortgage was in the hands of Nellie Giacano, and Frank Giacano became indebted to the Passaic-Bergen Lumber Company for lumber on her new job, and Mr. Schick was pressing him for payment. Frank told me that he could procure from his mother this mortgage, and if I could arrange with the Passaic-Bergen Lumber Company to take this mortgage in satisfaction of that debt, or in partial satisfaction, I should make the attempt. I called Mr. Schick about it, and told him that I would like to straighten out the Giacano account with him. He came to my office, and I made the proposition to him, and we closed the proposition at my 20 30 40

Samuel B. Lesser, direct.

office, by an assignment of this mortgage from Nellie Giacano to—funny, I don't remember who took the assignment, in whose name it was made. I knew I drew the assignment, acknowledged and delivered it.

10 “Q. Did Mr. Schick get the approval of anyone else in connection with this transaction, if you know? A. He did not get the approval of anyone on that transaction, I know, because it was done in my office, within half an hour.

 “Q. And he did it solely upon his own volition? A. I don't know.

 “Q. As far as you know? A. As far as I know, yes.

20 “Q. Do you know of any other cases in which Mr. Schick made any settlement in behalf of the Passaic-Bergen Lumber Company? A. Yes. There was a fellow by the name of Pampalone. Pampalone owed the Passaic-Bergen Lumber Company some money, when—at the same time that Schick took deeds to the Fidelity Home Builders from the Sheridan Construction Company, they also took a deed to the property on Alden Road, in Glen Ridge, and he employed Pampalone to do the finish work.

30 “Mr. Loeb: Were you there?

 “The Witness: Yes, that was done in my office.

 “A. (Continuing.) He employed Pampalone to do the work on Alden Road, and in order to—and the payments to Pampalone, on the date for completion, he cancelled the obligations of Pampalone on those jobs.

40 “Q. Was that done on behalf of the Passaic-Bergen Lumber Company? A. Well, Pampalone owed the Passaic-Bergen Lumber Company

Samuel B. Lesser, cross.

money; subsequent to this business, he did not owe them money, so I don't know anything further about that.

"Q. Do you recollect any further transaction in which Mr. Schick settled with a customer of the Passaic-Bergen Lumber Company? A. Off-hand, I do not. 10

"Q. Do you recollect the transaction with a customer of the Passaic-Bergen Lumber Company, by the name of Maryanski? Will you answer the question? A. I do not remember."

Mr. Cohn: At this point, your Honor, Mr. Loeb started his cross.

(Reading by Mr. Loeb.)

"Cross examination by Mr. Loeb: 20

"Q. Mr. Lesser, how long have you known Mr. Schick? A. Over six years.

"Q. In connection with what had you come in contact with him? A. Only by reason of telephonic conversations with him, in the beginning, asking him what the situation was, and who he was supplying lumber to, and on the lumber, how much we owed him, etc.

"Q. You met him socially, you said? A. Yes, went out with him. 30

"Q. How did you go out with him? Play golf with him? A. Yes.

"Q. Go out with him a number of times? A. No.

"Q. How many times? A. I would say, three times.

"Q. Well, then, you say, if you go out with a man three times, you would go out socially with him? A. Yes.

"Q. Very friendly with him, were you? A. Not particularly. 40

Samuel B. Lesser, cross.

“Q. You have a friendly interest in Mr. Schick?

A. No.

“Q. Well, you would not want to see him get into any difficulties, would you? A. No.

10 “Q. Mr. Schick held the stock in this company, the Fidelity Home Builders, didn't he? A. I don't know.

“Q. You said he did, didn't you? A. He took it.

“Q. Took it out in his own name, didn't he? A. Yes.

“Q. And he took the major interest of the stock in his own name, didn't he? A. He did.

“Q. So that he had the entire control—legal control of this company, hadn't he? A. Well, yes, I believe he did.

20 “Q. Now, with reference to the postponement of liens, that you say that Mr. Schick gave to you, you are not swearing as to whether Mr. Schick had instructions from his company with respect to those postponements? A. I am not.

“Q. So that with respect to all of those postponements, as far as your knowledge is concerned, he may have been acting under instructions from his superior? A. That is right.

30 “Q. And, as far as you know, with respect to those matters that you have testified, he may have been acting—I mean, now, the postponements of the liens—he may have been acting within the scope of his authority? A. As far as I know, he may have been acting within the scope of his authority.

“Q. The Fidelity Home Builders had an account with the defendant, United States Trust Company; is that correct? A. Yes.”

40 Mr. Loeb: Mr. Cohn, you continue your examination at this point.

(Reading resumed by Mr. Cohn.)

Samuel B. Lesser, redirect-cross.

“Redirect examination by Mr. Cohn:

“Q. Mr. Lesser, you had the corporation books of the Fidelity Home? A. Yes.

“Q. Do you know what became of them? A. I don’t remember whether—

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“Q. Have you the books in your possession, at the present time? A. I have not.

“Q. Have you searched for them? A. Yes.

“Q. Well, don’t you know as to whether you delivered them to anybody? Do you know that? A. They were delivered to someone. I was visited by two people relative to the books, and they were delivered to someone; to which one of those two people I gave them, I do not know.

“Q. Well, who are the two people? A. Mr. John R. Schick was in, and he may have gotten the books. I was visited by Mr. Dworkin, and I don’t know whether he got the books, or not.

20

“Q. Can you tell us the time at which those visits were made in reference to this transaction of the Sheridan Construction Company and the Fidelity Home Company? A. Well, I cannot tell you that—with this—but in this way: Some time subsequent to December, 1929, I was visited by Mr. Dworkin.

“Q. When was that? A. Some time subsequent to December, 1929; Mr. Schick was in my office, possibly, once a week, during the transaction and after the transaction, so that he may have gotten them on one of those occasions.”

30

(Reading resumed by Mr. Loeb.)

“Cross examination by Mr. Loeb (continued):

“Q. You do remember that you delivered the Fidelity Home Builders’ records to some person,

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Samuel B. Lesser, direct.

but you do not remember who; is that correct? A. That is right.

“Q. Did you take a receipt for the records? A. I did not.

10 “Q. Well, now, do you think that was proper, on your part, not to take the receipt? Being important records? A. I don’t know whether it was proper, or not; that is the way I practice with people that I represent.”

Mr. Loeb (interrupting reading): I now make the witness my own, for the purpose of a few questions.

(The witness was examined on behalf of the plaintiff, as follows:)

20 “*Direct examination by Mr. Loeb:*

“Q. Mr. Lesser, you knew that the Fidelity Home Builders maintained an account with the United States Trust Company, the defendant in this suit? A. I did.

“Q. And you know, or, tell me, whether you know where the vouchers were returned? A. To my office.

“Q. 60 Park Place, Newark? A. That is right.

30 “Q. Do you know whose signature was to honor checks of the Fidelity Home Builders? A. I do not.

“Q. You do not. You had nothing to do with the opening of the account? A. I do not think I did.

“Q. But do you know that the returned vouchers were mailed to your office by the defendant bank? Is that right? A. That is right.

40 “*By Mr. Cohn:*

“Q. What did you do with them, Mr. Lesser, after they were sent to your office?

Samuel B. Lesser, direct.

“Mr. Loeb: Now, the witness has already testified.

“Mr. Cohn: No, sir; he has not testified as to what he did with them. He has testified that they were mailed to his office.

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“Q. What became of them? A. They were put in an envelope addressed to the Passaic-Bergen Lumber Company, attention of John R. Schick, mailed to East Orange.

“Q. Your office did not retain the checks? A. No.

“Q. Did they examine them? A. No.

“Q. You had no interest in them? A. No.

“Q. Now, Mr. Lesser, were you still interested in the financing of these eleven houses after the Fidelity Home Builders Company took possession of those premises?”

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Mr. Cohn (interrupting reading): He comes back to my witness now.

“Q. Will you answer the question? A. May I hear it?

“Q. (Repeated by stenographer.) A. We had mortgages on each one of the buildings, approximating \$3,500.00, I believe, which had not yet been paid off, and we were to get our money out of first mortgages to be granted on these buildings, as I remember, five of them by the United States Mortgage Company and six by the Tall Cedars Building and Loan Association. It was subsequent to the taking over of these houses by the Fidelity Home Builders that I received my money.

30

“Q. Did you have occasion to visit the premises between the time that the Fidelity Home Building Company took title and the time you received your money? A. I passed by the premises on one or

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Samuel B. Lesser, direct.

two occasions, on a Sunday afternoon, to see how the buildings were proceeding, whether they were being completed.

10 "Q. Were you present at the time that the mortgagees whom you represented received their moneys? A. I received the money for the mortgagees.

"Q. At the office of the United States Mortgage Company? A. Yes.

"Q. And at the offices of the attorney for the Tall Cedars? A. Well, the attorney for the Tall Cedars was represented by the Mortgage Company in the transaction.

20 "Q. So that the entire transaction of the repayment of the moneys to the mortgagees whom you represented took place at the offices of the United States Mortgage Company? A. That is right.

"Q. Were there sufficient moneys out of those first mortgages to pay you? A. Yes.

"Q. Do you know whether the Passaic-Bergen Lumber Company advanced moneys in connection with those first mortgages? A. I don't know what you mean.

30 "Q. Well, my question is based upon the assumption that the amounts obtained from the payment of the new first mortgages was insufficient to liquidate the liens on the property at the time your first payment was made, and my question is, whether you know that the Passaic-Bergen Lumber Company made up any deficiencies? A. I don't know."

Mr. Cohn: That is all.

40 Mr. Cohn: We have asked for the production of the books of the company. Have you them here?

Mr. Loeb: Yes, sir.

Phyllis Saville, direct.

PHYLLIS SAVILLE sworn.

Direct examination by Mr. Cohn:

Q. Miss Saville, what is your occupation? A. Bookkeeper, East Orange yard.

Q. What was the last? A. Bookkeeper, East Orange yard, of the Passaic-Bergen Lumber Company. 10

Q. I show you what purports to be a ledger of the Passaic-Bergen Lumber Company? A. Right.

Q. And ask you whether this book in front of you is the ledger of the Passaic-Bergen Lumber Company? A. Yes, sir; it is.

Q. Did you keep the records of this ledger? A. Yes, sir; I do.

Q. Will you keep— A. (Interrupting.) At what time? 20

Q. —you voice loud enough to— A. (Interrupting.) At what time?

Q. In the years 1928, 1929? A. Yes, sir; I did.

Q. Will you talk loud enough so the jury can hear you? A. All right.

Q. Will you turn to the account of Alexander Maryanski? A. I have it in front of me.

Q. Do you find a credit for \$5,700.00? A. Yes.

Q. Of what date? A. May 9, 1929. 30

Q. What does that mean, so that the jury can understand you? A. Why, this is a credit allowed to Alexander Maryanski.

Q. Does it mean that he paid the Passaic-Bergen Lumber Company \$5,700.00? A. Yes.

Q. That is a cash payment? A. I do not know.

Q. What else could it have been? A. It could have been a check.

Q. Well, if it had been a check, and the check had been returned, would there be a corresponding 40

Phyllis Saville, direct.

debit on the other side of the ledger? A. I don't understand what you mean.

10 Q. Well, when I say a cash account, I mean, a payment that ultimately went to the Passaic-Bergen Lumber Company, whether it was cash or check, or any form of payment, that indicates that the Passaic-Bergen Lumber Company received \$5,700.00, at that time, from Alexander Maryanski? A. That is what it means, received \$5,700.00.

Q. If it had been a check for \$5,700.00, which had been returned as N. G., or no good, would there have been an entry made on the debit side of the ledger? A. Yes, if it had been returned.

Q. Do you find such an entry? A. No.

20 Q. Do you know what you did with that check of \$5,700.00? A. I do not remember seeing the check.

Q. Who would have seen that check? A. Anybody in the office is allowed to receive checks.

Q. Did you make deposits of the checks received by the Passaic-Bergen Lumber Company at the East Orange branch? A. I do, sometimes, yes.

Q. Do you know where that particular check was deposited? A. Why, New York—N. Y.

30 Q. What was the answer to that? A. New York—New York bank.

Q. Do you find any other credit of \$5,700.00 on the account of Alexander Maryanski? A. No.

Q. Do you know whether these books were ever audited by outside accountants or auditors? A. Yes.

Q. Who sent them? A. I don't know who sent them, sir.

40 Q. Do you know whether this particular account of Maryanski was subjected to examination by outside auditors? A. I don't know.

Phyllis Saville, direct.

Q. The question is simple. Was there any exception made of this Maryanski account as against all of the other accounts, when the auditors came to go over the books? A. I don't remember, any more so, than any other account.

Q. Now, turn to the account of the Sheridan Construction Company. A. What year? 10

Q. 1929. A. All right (witness does as directed).

Q. I ask you to look on the credit side of the ledger. How much did the Sheridan Construction Company owe the Passaic-Bergen Lumber Company at the end of May, 1928? A. \$35,051.98.

Q. Are there any further charges as against the Sheridan Construction Company after May, 1928? A. Yes.

Q. Do you know what those charges consisted of? A. No; it is probably for lumber. 20

Q. Do you know whether any of those charges consisted of cash payments to the Sheridan Construction Company? A. There would not be a cash payment.

Q. Well, if you gave a check to the Sheridan Construction Company? A. Oh, I see what you mean.

Q. Wouldn't you make a charge against the Sheridan Construction Company? A. Yes. 30

Q. Well, now, don't you remember that some of these charges on the Sheridan Construction Company, after May, 1928, were checks given to the Sheridan Construction Company? A. Yes.

Q. Is that right? A. Yes.

Q. So that you now say that the charges against the Sheridan Construction Company were not all for lumber? A. No.

Q. That all of those charges, on the other hand, were for cash? A. Not all of them, some of them. 40

Phyllis Saville, direct.

Q. Well, most of them were for checks or money that was given to the Sheridan Construction Company? A. I wouldn't say all of them, no.

Q. Well, how many? A. I do not know.

10 Q. Were there a dozen? A. There was one charge, I think. I have to look at the tickets to find out what they were.

Q. Well, have you the tickets? A. (*Sotto voce.*) No, I was told it wasn't necessary to bring them by Mr. Heller.

Q. (*Sotto voce.*) Turn to September 18, 1928, or September 22, 1928, cash \$470.00? A. (*Sotto voce.*) September what?

Q. (*Sotto voce.*) September 22, 1928. A. (*Sotto voce.*) September 22nd?

20 Q. (*Sotto voce.*) Yes. A. (*Sotto voce.*) No such item there for September, 1928.

Q. (*Sotto voce.*) There is no such item? A. (*Sotto voce.*) Not here.

Q. (*Sotto voce.*) What about an item of September 29, 1928, for \$6,500.00? A. (*Sotto voce.*) September 29, 1928? No item like that—1928. Are you sure you have got the right year?

30 Q. (*Sotto voce.*) In the check book, you charge this account—

Mr. Loeb: Speak louder so I can hear you over here.

The Witness: All right.

Q. I show you a charge on December 28th—

Mr. Loeb: What year, Mr. Cohn?

40 Q. —1928, for \$10,496.60. Do you know whether or not that was for money, or whether or not that was for cash, or a check advanced to the Sheridan Construction Company? A. That was for checks advanced to the Sheridan Construction Company.

Phyllis Saville, direct.

Q. At one time? A. I beg pardon. That was not advanced to the Sheridan Construction Company. That was for checks advanced to the order of the Sheridan Construction Company.

Q. I don't get that. A. It was for cash paid out; I do not know whom it was paid to. 10

Q. It was for cash paid out and charged to the Sheridan Construction Company's account? A. Yes, it was.

Q. Is that right? A. Yes.

Q. But what you want to say is that you do not know whether the checks were made directly to the Sheridan Construction Company? A. That is right.

Q. Although the books show that that large amount was charged to this Sheridan Construction Company? A. Well, I was told to charge it to them by Mr. Schick. 20

Q. You do not know whether that was one check or a number of checks? A. It was a number of checks.

Q. Well, now, do you know who signs checks? A. Yes.

Q. Who does? A. Mr. Pettersen and the first vice-president, Mr. Post. 30

Q. Did Mr. Schick sign checks? A. No.

Q. Never did? A. No.

Q. So far as you know? A. So far as I know, he never signed checks; he has not the authority.

The Court: Strike that last out about authority.

Q. So that you now state that all of the cash represented by this item of December 28, 1928, to the amount of \$10,496.60, was represented by 40

Phyllis Saville, direct.

checks signed by Mr. Pettersen and by Mr. Post, and none of them by Mr. Schick? A. Right.

Q. Do you know what those checks were used for? A. No, I do not.

10 Q. Do you know what any of the other charges against the Sheridan Construction Company represents, outside of the mere fact that they are items on the books? A. Well, lumber delivered.

Q. To whom? A. To the Sheridan Construction Company.

Q. Was there ever any conversation in the office at East Orange that you overheard between Mr. Pettersen and Mr. Schick, referring to the Sheridan Construction Company? A. None.

20 Q. You never overheard any? A. No.

Q. Now, I call your attention to the item on the credit side of the ledger, February 14, 1929, of \$127.89, and ask you whether you know what that is. Do you know? A. No, I do not know what that is for, no.

Q. Now, look at the item of October 7, 1929, of \$145.00; do you know what that item is for? A. I do not know offhand, looking at the amount, no; I would have to see the ticket.

30 Q. Have you the ticket book here? A. No, I have not the ticket.

Q. You were asked to bring the ticket book? A. No, I wasn't asked to bring it.

By Mr. Loeb:

Q. Were you told not to? A. Mr. Heller told me not to.

Mr. Loeb: I wish counsel would be careful.

40 Mr. Cohn: I am not questioning counsel's—or the witness' veracity in the

Phyllis Saville, direct.

slightest. I think the witness is telling the truth, what she is stating.

Mr. Loeb: I am referring to the notice to produce, as to whether we brought everything we were asked to bring, and I want—

The Court: Don't waste time. Proceed.

10

By Mr. Cohn:

Q. There are a number of other items, Miss Saville, as credits to the Sheridan Construction Company, such as October 17th, \$39.00; November 8th, \$40.00; November 19th, \$38.97; January 10th, \$400.00; April 17th, \$500.00; October 11th, \$125.79, all in 1929 and 1930, and 1931, you have credits of June 19th, \$200.00; October 15th, \$536.58. Do you know what any of these credits were for? A. I do not know what they were for. They were probably checks credited to the account, but I do not know just what they were for.

20

Q. Do you know by whom they were given? A. No, I do not.

Q. Don't you recollect any of those items, as to what they might be for? A. No, I do not.

Q. Is there any one else here who would know? A. I would have to see the tickets; then I could tell.

30

Q. Well, is there any other person who might know? A. No, I do not think so— I—

Q. Now, Mr. Schick left the employ of the Passaic-Bergen Lumber Company some time in 1929; is that right? A. Yes.

Q. And the credits that are given to the Sheridan Construction Company were all given subsequent to Mr. Schick's leaving the employ of the Passaic-Bergen Lumber Company;— A. Yes,—

40

Phyllis Saville, direct.

Q. —is that correct? A. —it was after that time, yes.

Mr. Loeb: Talk up, please.

The Court: Speak out.

10 A. (Continuing.) He hadn't left until October 29th, I think it was,—I don't remember—latter part of October—but that was before he left, that \$145.00.

Q. Suppose I attempt to refresh your recollection. Did you know that the Sheridan Construction Company was erecting some buildings in Chatham? A. Yes.

Q. Did you know that they were being finished— A. No.

20 Q. —by Mr. Schick? A. (No answer.)

Q. Let's see.

Mr. Loeb: Now, I object. I think the question is decidedly leading. This witness is a witness of the examiner.

Mr. Cohn: If your Honor please, this witness is an employee of the plaintiff,—

Mr. Loeb: Right.

30 Mr. Cohn (continuing): —and I think we are entitled to some latitude, and the question itself is not even leading.

The Court: I think he can ask the question as to whether she knows anything about the situation between her concern and the Construction Company.

40 Q. Do you know anything about the transactions between the Passaic-Bergen Lumber Company and the Sheridan Construction Company? A. I know they came in and got lumber; that is all.

Phyllis Saville, direct.

Q. Do you know that they were building some houses in Chatham? A. Yes.

Q. And you knew that material was delivered to Chatham? A. Yes.

Q. Do you know that the Sheridan Construction Company stopped construction on those houses? 10

Mr. Loeb: I object—

A. (Interrupting.) No.

The Court: She doesn't know.

A. (Continuing. I do not know.

Q. Do you recollect, Miss Saville, as to whether these odd amounts, after October, 1929, were rents paid by tenants, occupying the houses in Chatham, constructed by the Sheridan Construction Com- 20
pany?

Mr. Loeb: Just a minute. I object, your Honor, to the question.

The Court: I will allow it; allow you an exception. If she knows.

Mr. Loeb: Exception.

A. I might say, I do not remember; I would have to look up tickets.

Q. Where are the tickets? A. In East Orange. 30

Q. Can you bring them here? A. Yes, I can get them.

Mr. Loeb: Now, in order that there may not be a misconception or a wrong impression to the jury, we have complied with the notice to produce.

The Court: All right.

Mr. Loeb: We have no desire to leave out anything that you want to have. 40

Phyllis Saville, direct.

Mr. Cohn: I understand that. We will ask that the Court order the witness, or the plaintiff, to produce these tickets, to give us a proper explanation of these items.

10

Mr. Loeb: I am just reminded by Mr. Pettersen that their accountant went (over) all of these tickets; they were asked what they wanted us to bring here in court, and, as I said before, we have complied with their demands. Of course, we are not going to produce anything that they do not ask us for.

20

Mr. Cohn: If your Honor please, when we asked them to produce the books or anything pertaining to this question, that is sufficient, that they bring the books and the explanation of the items entering into the ledger,—the notice calls for that.

The Court: I will give you opportunity to go into the question fully.

Mr. Loeb: Your Honor please, we haven't the notice here—

The Court: That is all right.

30

Mr. Loeb: —but I did not want the wrong impression in the jury's mind.

By Mr. Cohn:

Q. I show you a ticket dated October 8, 1929, and ask you whether you have a ledger entry as of that date,—ticket calling for \$145.00? A. Yes.

40

Q. Now, look at the ticket, and tell us what that ticket says, as comprising the \$145.00. A. Cash account debited, Sheridan Construction Company account credited, rents received to date, of Mrs. Davis, September and October, \$80.00, rents for

Phyllis Saville, direct.

October, \$50.00; Mr. Thompson, \$15.00; total, \$145.00.

Q. And you credited that \$145.00 on the books of the Passaic-Bergen Lumber Company to the credit of the Sheridan Construction Company? A. Right.

10

Q. I show you a ticket dated October 17, 1929; tell us what that says? A. Cash account debited, Sheridan Construction Company account credited,—

Mr. Loeb: Talk up, please.

A. (Continuing.) —by check from C. E. Thompson, rent for October, \$130.00.

Q. I show you a ticket dated November 7, 1929; tell us what that says? A. Cash account debited, Sheridan Construction Company account credited, by cash, rent of Mrs. Davis, 14 Roosevelt Avenue, Chatham, \$40.00.

20

Q. Ticket dated November 19, 1929? A. Cash account debited, Sheridan Construction Company account credited, by cash from C. E. Thompson, for rent for November, 1929, \$38.92.

Q. Ticket dated January 10, 1930? A. By cash, \$40.00, rent from C. E. Thompson, No. 6 Roosevelt Avenue, Chatham.

30

Q. All of those items were credited on the books of the Passaic-Bergen Lumber Company to the Sheridan Construction Company? A. Yes.

Q. Were any of these items that you credited subsequent to the time Mr. Schick left the employ of the Passaic-Bergen Lumber Company? A. Yes.

Q. Which ones? A. All but one—all but two—the first two.

Q. Look at the items after, beginning with Janu-

40

Phyllis Saville, direct.

ary 10, 1930, and subsequent thereto. Were there tickets in connection with those items? A. Yes.

Q. Have you those tickets in court? A. I am not sure; I do not think so.

10 Mr. Cohn: I will ask the plaintiff, whether you have the tickets of the Sheridan Construction Company account, showing the credits after January 10, 1930.

A Voice: No.

Mr. Loeb: Mr. Heller told us he did not need those tickets.

Mr. Cohn: All right. We have asked the plaintiff to produce their check books of November, 1928, particularly the stubs on the check books, which refer to this matter
20 of the Sheridan Construction Company.

The Court: All right.

Mr. Cohn: Let me have for November 22, 1928.

(A person in the audience produces papers.)

Q. Miss Saville, I show you what appears to be a check book— A. Check stubs; yes, sir.

30 Q. —check stubs, and I call your attention to Stub No. 5,925, and ask you to read what is on that stub. A. November 22, 1928, made out for cash, \$640.00, payroll money, advanced to the Sheridan Construction Company, pending receipt of mortgage money from the U. S. Mortgage Company.

Q. And I call your attention to a symbol on the side of the stub, right-hand side, over a check mark, and ask you what that symbol is? A. That
40 is Mr. Pettersen's check mark.

Phyllis Saville, direct.

Q. How does he come to put that check mark on? A. He looks check stubs over—

Q. Is that his method of approving the check?

A. It shows he has seen the check, and he has looked at it.

The Court: Before delivery or after?

The Witness: After.

10

Q. Will you look at Check Stub No. 5915? A. (Examining.) Yes.

Q. And I ask you to read what that stub says?

A. November 14, 1928, cash, \$325.00, payroll money advanced to Sheridan Construction Company, pending receipt of mortgage money from the U. S. Mortgage Company.

Q. Does that contain the symbol of Mr. Pettersen? A. Yes.

20

Q. Look at Check 5880. A. (Examining.) Read it?

Q. Read it. A. November 9, 1928, cash, \$514.00, payroll money advanced to Sheridan Construction Company, pending receipt of mortgage money from the U. S. Mortgage Company.

Q. And is that the signature of Mr. Pettersen as in the other instances? A. Yes.

30

Q. Look at Check 5873; tell us what that says. A. November 2, 1928, cash, \$1,109.25, payroll money advanced to Sheridan Construction Company, pending receipt of mortgage money from the U. S. Mortgage Company.

Q. Look at Check Stub 5873. A. I just read that.

Q. Excuse me. 5,861; what does it show? A. October 26, 1928, cash, \$1,829.00, payroll money advanced to Sheridan Construction Company, pending receipt of mortgage money from the U. S. Mortgage Company.

40

Phyllis Saville, direct.

Q. And is that the notation of Mr. Pettersen, on the stub? A. Yes.

Q. Look at Check 5854. A. (Witness does as directed.)

10 Q. What does that show? A. October 26, 1928, \$1,329.00, advanced payroll money to Sheridan Construction Company, pending receipt of mortgage money from the U. S. Mortgage Company.

Q. Is that the signature of Mr. Pettersen? A. Yes.

Q. Look at Check No. 5811. A. (Witness does as directed.)

20 Q. What does that say? A. October 13, 1928, cash, \$1,435.00, payroll money advanced to Sheridan Construction Company, pending receipt of mortgage money from the U. S. Mortgage Company.

Q. Look at Check 5807. A. (Witness does as directed.)

Q. What does that say? A. October 11, 1928; Public Service Gas & Electric Company, \$259.00, deposit on installation on installing gas for Sheridan Construction Company, will be refunded by the U. S. Mortgage Company.

30 Q. And has that got Mr. Pettersen's signature on it? A. Yes.

Q. Check 5800. A. (Witness examines stub.)

Q. What does that say? A. October 5, 1928, cash, \$1,423.00, payroll money advanced to Sheridan Construction Company, pending receipt of mortgage money from the U. S. Mortgage Company.

40 Q. Check 5791. A. (Witness examines stub.) September 29, 1928, cash \$605.00; there is the notation, received from John R. Schick,—J. R. S.

Phyllis Saville, direct.

Q. Check 5—by the way, has that check of \$605.00 a notation of Mr. Pettersen on it? A. Yes.

Q. All right. Take the next one, 5780. A. September 22, 1928, cash, \$470.00; this has a notation, see, J. R. S.

Q. To whom was it charged? A. To the Sheridan Construction Company. 10

Q. How do you know? A. Because I was told to charge it to them.

Q. You remember that? Do you remember that? A. Not offhand, but I know it is.

Q. There is no notation on the stub, is there? A. No, there isn't.

Q. Check No. 5168. A. Read it?

Q. Yes. A. September 18, 1928, cash, \$325.00, payroll money advanced to—name blank—pending receipt of mortgage money from Lincoln Mortgage Company. 20

Q. You charged that to whom? A. I do not know.

Mr. Cohn: I will ask that the last item of September 18, 1928, be stricken out; the witness cannot testify that it applies to the Sheridan Construction Company account. 30

Q. But all of the other check stubs that you have just read off were charged against the Sheridan Construction Company— A. Yes.

Q. —and the—were all of those checks drawn by you? A. Yes,—I—

Mr. Cohn: I will ask the plaintiff to produce the checks themselves, if they have them here.

Mr. Loeb: Yes, we have them. 40

A. (Continuing.) I can tell when I see the checks, whether they are made out by me, or not.

Phyllis Saville, direct.

Q. I show you a series of checks on the Bloomfield National Bank, made by the Passaic-Bergen Lumber Company, signed by Pettersen, treasurer, and Post, second vice-president, numbered as follows: 5,768, 5,780, 5,791, 5,800, 5,870, 5,811, 5,854, 10 5,861, 5,873, 5,880, 5,915 and 5,925, and ask you whether all of these checks are not the ones we have just been talking about, and ask you whether all of these checks were not charged to the Sheridan Construction Company. A. Yes, these were the checks we were just talking about.

Q. Do you know Mr. Goldberg,—Mr. Samuel Goldberg? A. No, I don't.

Q. To whom were these checks given after you drew them? A. To Mr. Schick.

20 Mr. Cohn: I offer these checks in evidence.

Mr. Loeb: We have no objection.

Mr. Cohn: And we will offer the books in evidence, that is, the ledger sheets between the periods that we have been examining upon.

The Court: All right.

30 Mr. Cohn: I do not care to offer the entire ledger, but just these sheets.

The Court: All right.

Mr. Cohn: Will you mark those now,—sheets of the Maryanski account and the Sheridan Construction Company's account?

(Sheets indicated as Sheridan Construction Company account marked Defendant's Exhibit D-2 in Evidence.)

40 Mr. Loeb: Your Honor please, while I would ordinarily object to the offer of these records in evidence, I want to reserve my right to strike out all of this evidence, unless

Phyllis Saville, direct.

they connect them up, by showing that that endorsement was put on the checks and show you exactly what happened, with respect to the two checks in evidence.

The Court: All right.

Mr. Loeb: So I will reserve my right to move to strike it out later.

10

The Court: All right. Note that on the record.

(Sheets indicated as Maryanski account marked Defendant's Exhibit D-3 in Evidence.)

Mr. Cohn: Mr. Loeb, have you the check book of April, 1929?

Mr. Loeb: If you have asked for it, it is here.

20

Mr. Cohn: Have you also marked these tickets?

Mr. Loeb: I think they ought to be marked for identification.

Mr. Cohn: We will offer them.

Mr. Loeb: Well, all right.

(The same were marked Defendant's Exhibits D-4, D-5, D-6, D-7 and D-8 in Evidence.)

30

Mr. Cohn: And the checks.

(The same were marked as one exhibit, Defendant's Exhibit D-9 in Evidence.)

Q. Miss Saville, will you look at the item of August 29, 1929, and tell us what that is? A. I do not know what that is for; I have to have the ticket to do it, on that.

Q. Is that a charge against the Sheridan Construction Company? A. It is a charge, yes.

Q. Of how much? A. \$2,356.57.

40

Phyllis Saville, direct.

Q. Have you the journal here? A. No.

Q. Would the journal show? A. It would show just exactly that same amount, and the journal number; it would not show what it is for.

10 Q. You would have to go back to the tickets in order to ascertain what the details are? A. Yes.

Q. (*Sotto voce.*) See if you can find the Rogers Holding Company? A. (*Sotto voce.*) Who? No.

Q. (*Sotto voce.*) No account? A. (*Sotto voce.*) No.

Q. (*Sotto voce.*) Why is it? A. (No answer.)

20 Mr. Cohn: If your Honor please, I am going to ask a question, which may not be relevant, and I would like Mr. Loeb to hear it.

The Court: All right. Miss Saville, do not answer until I pass on it.

Q. Don't answer until the court passes on Mr. Loeb's objection, if he does object. A. All right.

Q. You have an account with the K. S. B. Realty Company? That you can answer. A. Yes.

Q. Is that account still open on your books? A. Yes.

30 Q. How much does it indicate as due from the K. S. B. Realty Company?

Mr. Loeb: Let's see what the relevancy of that is.

40 Mr. Cohn: The relevancy is that it indicates the course of conduct upon the part of the Passaic-Bergen Lumber Company. There is the testimony by a prior witness, Mr. Herman, that the K. S. B. Realty Company was indebted to the Passaic-Bergen Lumber Company, and that its indebtedness

Phyllis Saville, direct.

was subsequently merged into a different company, called the Rogers Holding Company, which took title to the properties owned by the K. S. B. Realty Company. Now, we desire to show that the Passaic-Bergen Lumber Company pursued a course of conduct whereby it kept all of those accounts open, instead of closing them, although the transaction was entirely consummated through the acceptance of a deed for the properties or the buildings, on which the obligation was created. I think its being kept open, kept standing, shows the general course of conduct of the Passaic-Bergen Lumber Company. 10

The Court: I think it is immaterial whether they kept it open or not. I will sustain the objection. I think it is immaterial. You would be cluttering up the record, inserting something that would not be helpful. 20

Mr. Cohn: We will take an exception.

The Court: Is that all from this witness?

Mr. Cohn: That is all.

(Followed by discussion between court and counsel.) 30

(Noon Recess.)

December 21, 1931; 2:00 P. M.

PHYLLIS SAVILLE recalled.

Direct examination by Mr. Cohn (continued):

Q. Miss Saville, will you please turn to the account of Alguno in that ledger? A. (Witness does as directed.) 40

Phyllis Saville, direct.

Q. Is that account in your handwriting? A. Yes.

Q. Including both sides of the ledger, down to the very end of the account? A. Yes.

10 Q. I call your attention to the last credit item, November 2, 1928, of \$1,185.00; is that in your handwriting? A. Yes.

Q. Now, will you tell us the net amount due, as indicated on your books, from Mario Alguno? A. \$3,419.92.

Q. Now, I show you check for \$4,000.00, dated August 8, 1928, marked P-1, and ask you if this amount had been credited to the account of Mario Alguno, would there be any balance due? A. If it were credited, it would not be, but it had not been credited.

20 Q. Now, if it were credited, would there be any balance due? A. It would be a credit balance, if it were credited.

Q. The reverse would be true, wouldn't it, that you would owe Alguno \$600.00, approximately? A. Yes.

Q. Is that correct? A. Yes.

30 Q. In the course of your dealings with Mr. Alguno, was there, at any time, such a credit to Mr. Alguno? A. Not that I know of.

Q. Did he ever pay you for merchandise before he received it? A. It would show on the books, if he did.

Q. Well, does it show? A. No.

Q. Can you tell us why this difference exists? A. What difference?

Q. That, if Mr. Alguno had been credited with this check of \$4,000.00? A. I do not know—he has not been credited.

40 Q. I know it is not, but if it has not been credited, is there a reason why Mr. Alguno should

Phyllis Saville, cross.

have a credit to his balance of nearly \$600.00? A. I do not know of any reason why he should have.

Q. You do not know? A. No.

Mr. Cohn: That is all.

The Court: Did that check of \$4,000.00 go through your books? 10

Mr. Cohn: It is admitted that it has not gone through.

The Witness: No, it did not go through.

Mr. Cohn: My questions go to the point, that if it had been, there would have been a credit to Mr. Alguno of nearly \$600.00.

The Court: All right.

Mr. Cohn: That is all.

Cross examination by Mr. Loeb: 20

Q. Have you got an account of Mustacio on your books? A. (No audible response.)

Q. You have? A. Mustacio Construction Company.

Q. Yes; and has this account any connection or relation to the Alguno account? A. Not that I know of.

Mr. Loeb: All right. I will prove this by another witness, your Honor; I do not think she is familiar with the facts. 30

The Court: All right.

Q. Now, Miss Saville, will you turn to Mr. Maryanski's account? Have you got that? A. Yes.

Q. There does not appear a credit on the ledger account of Maryanski as of September or October, 1928, in the sum of \$5,700.00? A. No, there is no credit for that amount.

Q. There is no credit for that amount? A. No. 40

Phyllis Saville, cross.

Q. I show you check of Mr. Maryanski, known as P-2, and ask you to indicate when that check went through. (Continuing.) Don't look at your books; look at that exhibit.

10 Mr. Cohn: I object to that. Let the witness tell.

A. October—

Q. October? A. Yes.

Mr. Cohn: Let the witness tell.

A. October 17, 1928.

Q. Have you got any entry to the credit of Maryanski as of October 17th, or at any time in the month, of 1928? A. No.

20 Q. Now, will you explain to the Court and jury how it appears on your books that, as of May, 1929, about eight months later, a credit of \$5,700.00 appears on your book to Maryanski? A. (No answer.)

Q. Did you receive any check from Maryanski in that month? A. According to the books, we did, yes,—\$5,700.00.

30 Q. Yes. Did you see any check from Maryanski? A. I don't remember.

Q. Now, explain to the jury how an entry gets into the books. What is the process? A. A customer brings in a check or cash, whichever it might be, and we make a ticket out for it, crediting the customer, whoever brings the money in.

Q. Yes; and who generally makes out the ticket? A. Whoever receives the check or the cash.

40 Q. I show you a ticket dated May 9, 1929, and ask you in whose handwriting is that ticket? A. John R. Schick's handwriting.

Phyllis Saville, cross.

Q. What did you do, if anything, in pursuance of that ticket?

Mr. Loeb: Or, I will withdraw that.

Q. Was that ticket shown to you by Mr. Schick, or did he deliver it to you? A. I do not remember, —I see so many tickets. 10

Q. I see. Well, was there a deposit made on May 9th of \$5,700.00? A. I can tell by looking in the check book.

Q. Look at the check book, and tell us. A. I haven't got it here; it is right over there.

A Voice: What was the date?

The Witness: May 9, 1929.

A. (Continuing.) Yes, there is a deposit of that amount, May 9th. 20

Q. Is this the source of your entry for the transaction, for the cash transaction,—is this the ticket from which you got the information to make the entry?

Mr. Cohn: Where?

Q. Into the books?

Mr. Cohn: Which book? 30

Q. The ledger or the cash book, or wherever it may be? A. Yes, it is put on a daily journal sheet, and I post it from the journal sheet to the ledger.

Q. This is the first information, is it not, that you get? A. The ticket, yes.

Q. Who made the deposit of this \$5,700.00, do you know? A. I don't remember exactly.

Q. You do not remember, at this time? A. No.

Q. Did you make a deposit of \$5,700.00? A. I do not remember. 40

Phyllis Saville, cross.

Q. Well, did you see any check of \$5,700.00? A. I do not remember.

Q. You do not remember? A. No.

Q. If you had made a deposit of \$5,700.00, would you recall it now? A. Why, no, it is—I make so many deposits, and that is quite some time ago.

Q. Were there any other deposits of the same day, the day of this entry, May 9th? A. Yes, there was another deposit.

Q. What amount? A. \$2,837.64.

Q. Do you recall that deposit? A. No.

Q. I show you Exhibits P-4 and P-5, being the statement of account of Alexander Maryanski, and ask you if, as of May 9, 1929, there appears any withdrawals of the—of \$5,700.00, or any other amount, as purporting to come from Mr. Maryanski's account? Look at it, please.

Mr. Cohn: I object to that. I do not think this witness is qualified to testify as to that.

Mr. Loeb: If your Honor please, I think I may, myself, refer to it, but I think it would be more orderly to have the witness. I want the jury to note we have here—

The Court: In evidence?

Mr. Loeb: Yes, sir. We have here the original statement of the account of Alexander Maryanski, with the Bloomfield Savings Institution, and I want to call the jury's attention to the fact that as of May—in any part of May—there does not appear any withdrawal of \$5,700.00 from Mr. Maryanski's account.

The Court: Suppose she did not make it up?

Phyllis Saville, cross.

Mr. Loeb: Probably not, but I think I may call the jury's attention to that.

The Court: I will sustain the objection.

Mr. Loeb: Well, will your Honor then permit me to state to the jury, and they can get it from this record? 10

Mr. Cohn: I object to that.

The Court: You may wait until the end of the case.

Mr. Loeb: Sir?

The Court: You may wait until the end of the case. I think it will be proper then, at the proper time.

Mr. Cohn: There are other reasons, too. He may have had twenty accounts from which this check may have been withdrawn. 20

Mr. Loeb: Yes, there may be; you are assuming that.

The Court: All right.

Mr. Cohn: I do not assume anything.

By Mr. Loeb:

Q. Now, Miss Saville, you have testified regarding a number of checks made out to cash between September and December, 1928, and referred to as D-9. You see those checks, don't you? A. Yes. 30

Q. All right. Who made out these checks? A. I did.

Q. And who made out the stubs? A. Mr. Schick put the explanation on the stubs.

Q. And who made out the statement to cash? A. I did.

Q. Was the explanatory statement put on the check simultaneously with your notation or action? A. No, it was not. 40

Phyllis Saville, cross.

Q. When were those explanatory statements in the stubs of the check put in? A. At a later date.

Q. When did you get those explanatory statements, for the first time,— A. I don't remember.

Q. —if you remember? A. I don't remember.

10 Q. I show you a ticket of the plaintiff, Sheridan Construction Company, advance payroll, \$10,-496.60. Will you explain the circumstances under which that ticket was made? First, in whose handwriting is it? A. John Schick.

Q. Now, tell us, explain to us, about that ticket. A. Well, this is the amount of that check that was made out to cash.

Q. Between September and December? A. Between September and December.

20 Q. Yes; and did you enter in your books of account the various entries of cash as you made out the checks? A. No, I did not.

Q. Wouldn't that have been the usual course of business? A. Yes.

Q. Well, will you explain to the Court and jury why you did not enter them as they were made? A. Mr. Schick asked me to give him a check for these different amounts—

30 Q. Talk up. A. —to give him checks for these different amounts. I asked him for an explanation, in order to make a ticket out for explaining it. He said he would find out later, and he would explain to me later; he would find out later what it would be. Each time I would ask the reason, he would tell me the same thing, he would get it for me later, and on December 9, '29, he gave me an explanation—he put on the explanation himself on the checks.

40 Q. At that time? A. Yes, December 28, 1929, that is.

Phyllis Saville, cross.

Q. Why did he do it in December, if you know? Why did he make out the ticket and the explanation in December? A. I told him I would have to have it put back there, because it was the end of the year, for the books to balance.

Q. So that between December and September, 1929, your cash accounts did not balance, did they? 10

Mr. Cohn: I object to that, leading question.

Mr. Loeb: Well, this is cross examination, your Honor.

The Court: I will allow it.

A. Cash account?

Q. Well, your books. Did your books balance when you didn't have entered in the books of record all cash withdrawn between September and December? A. No. 20

Q. When this ticket was prepared and you made the entry in pursuance of that ticket, did that balance your books? A. Yes.

Q. Can you tell us, if you know, why Mr. Schick did not give you the explanatory details for the various cash items between September and December, 1928, so that you could enter them in your books? A. Well, he told me that he was going to find out, but he never found out; he told me he was going to find out what the explanation was to be, and I don't know— 30

Q. He was going to find out what? Did he tell you? A. No.

Q. Did he have, at that time, any suspicious transaction—

Mr. Cohn: I object.

The Court: Objection sustained. 40

Phyllis Saville, redirect.

Q. Was it a usual or a most unusual procedure to withhold from entering in the books cash items upon the dates that they were made? A. Yes—

Mr. Cohn: I object to that.

Mr. Loeb: I think that is proper.

10

The Court: Usual course of business, or not.

Mr. Loeb: Yes.

Q. Was it usual or unusual? A. Unusual.

Mr. Loeb: All right. That is all.

Redirect examination by Mr. Cohn:

20

Q. Miss Saville, you talked this matter over with Mr. Loeb and Mr. Pettersen in the last hour or two, did you not? A. No.

Q. Didn't you speak to Mr. Pettersen during the lunch hour? A. No, I didn't—I said "Hello!"

Q. What was the last answer? A. I said, "Hello!" to him probably; that was all.

Q. Didn't some one remind you about the fact that Mr. Schick, as you stated, gave you the explanation later? A. No.

Q. You remember that now? A. Yes.

30

Q. When I asked you before lunch, as to whether you had written this in, you stated that you had, on the stub of the check. Do you remember that, Miss Saville? A. No, I said Mr. Schick wrote the explanation on the stub.

Q. That is not what you said this morning? A. It is Mr. Schick's own handwriting.

40

Q. You didn't lead us to believe that; you lead us to believe, this morning, that you had made entries in these stubs? A. No, I said that was Mr. Schick's handwriting.

Phyllis Saville, redirect.

Q. What is the date of these first checks? A. I don't just know; it was around, September, I believe,—September or October.

Mr. Loeb: If your Honor please, I think that counsel is intentionally creating a misleading impression to the jury. He just asked the witness as to the ledger entries.

10

The Court: I have no recollection that she said she made the entries.

Mr. Cohn: We will find out in a minute or two. That is why I am referring to the checks. Let me have that pencil.

Q. I show you Check Stub 5807, dated October 11, 1928. Who made that check out? A. The name to whom the check was made out, Public Service, written by me, and the amount, 259, but the explanation is written by Mr. Schick.

20

Q. Isn't that the same handwriting, the balance of the writing, "Public Service Gas & Electric Company, \$259.00, deposit for installing gas for Sheridan Construction Company, will be refunded by the U. S. Mortgage Company"? A. No.

Q. "Will be refunded by the U. S. Mortgage"? A. That is not the same handwriting.

30

Q. Isn't that the same handwriting as the line on top, "Public Service Gas & Electric Company"? A. No, it is not.

Q. You wish to state, Miss Saville, that all of these entries were made at one time, on the stubs? A. I don't know when Mr. Schick wrote them in. He had to get the explanation, and he got it at a later date, and wrote them in himself.

Q. So you do not know when they were put in? A. No, I do not.

40

Q. How often did Mr. Pettersen come to check

Samuel Goldberg, direct.

up on the check book and make that signature of his?

Mr. Loeb: Your Honor please, this is not a signature; it is just initials.

10 Q. Symbol, whatever it is, whatever you call it?

Mr. Loeb: Yes.

Q. How often did he come and make these symbols? A. Oh, every couple of months.

Q. Did he ever call your attention to these checks which were made to the order of cash? A. Not to my attention, no.

Q. Didn't he ever make any comment whatsoever? A. Not to me.

20

Mr. Cohn: That is all.

SAMUEL GOLDBERG sworn.

Direct examination by Mr. Cohn:

Q. Mr. Goldberg, what was your business in 1928? A. Builder.

Q. Did you have any dealings with the Passaic-Bergen Lumber Company— A. Well—

30

Q. —in any capacity? A. —I finished eleven houses for them.

Q. Where? A. In Chatham.

Q. How did that come about? A. Mr. Schick took me over there—

Mr. Loeb: Will you speak up, Mr. Goldberg?

40

A. Mr. Schick took me over there, and he said they are in trouble there, they are in trouble,—Passaic-Bergen Lumber Company—they are trying to finish the houses.

Samuel Goldberg, direct.

Mr. Loeb: Now, just a moment. If your Honor please, I wish to make objection to this whole line of testimony, at this point, because I want to make my position very clear. Until the defendant will show that Schick, as an agent of the Passaic-Bergen Lumber Company, to make an endorsement —and, in other words, they are trying to connect up these checks with the Passaic-Bergen Lumber Company, and I submit no testimony is competent, which will bind the Passaic-Bergen Lumber Company, on that point, and that foundation must be laid. I think that my friend here is putting the cart before the horse, all of the time.

The Court: Well, we will allow it, subject to being connected up by proper testimony. That they will have to do, and if they do not, we will dismiss it, take it out of the record.

Mr. Loeb: Of course, the prejudicial effect of all of the testimony is laid before the jury, and it may be incompetent, unless they connect it up later with Mr. Schick. If we were trying this case before your Honor alone, I would not hesitate a moment to allow it to go in, because your Honor would simply eliminate it from consideration, but the prejudicial effect of it is all here, and unless they connect it, it must be stricken from the record.

The Court: We will allow it, subject to being connected up.

Mr. Loeb: Your Honor will allow me an exception?

The Court: I will protect you on it.

Samuel Goldberg, direct.

Q. Mr. Goldberg, I show you a series of checks, which have been marked Exhibit D-9, and ask you whether you received these checks. A. I received all of these that is endorsed, with the exception of this one. We went, both of us, Mr. Schick and I, to the Public Service, and we gave it to them.

Q. So that you had possession of all of these checks, and is it your signature that is endorsed on the back of these checks— A. Yes.

Q. —being eleven checks? A. (No audible response; witness indicates affirmatively.)

Mr. Cohn: I think that makes this witness' testimony competent. These are the checks of the Passaic-Bergen Lumber Company, and he received them as checks of the Passaic-Bergen Lumber Company, irrespective of any other testimony that is offered or not offered. This witness' testimony certainly is competent as having dealt directly with the Passaic-Bergen Lumber Company.

The Court: Well, we will see what the situation is at the end of the case.

Q. Where did you get these checks? A. In the office of the Passaic-Bergen Lumber Company, in East Orange.

Q. What did you use these checks for? A. To pay for the men to finish the houses.

Q. Where? A. In Chatham.

Q. On what street? A. Is it Roosevelt Street or Roosevelt Avenue? I can't recollect.

Mr. Cohn: Miss Saville, will you stand up, please?

Q. Did you ever see this young lady before, Mr. Goldberg? A. Yes.

Phyllis Saville, direct.

Q. Miss Saville? A. Yes.

Q. Where? A. In the office there.

Q. In which office? A. In East Orange, Passaic-Bergen Lumber Company.

Q. How often did you see her? A. Well, I saw her more times than I received the checks, because sometimes Mr. Schick used to complain, he has to call up the office— 10

Mr. Loeb: I object to what Mr. Schick said.

The Court: Objection sustained.

Q. Did you ever see Mr. Pettersen— A. No.

Q. —before? A. No.

Mr. Cohn: Cross examine. 20

Mr. Loeb: No questions.

The Court: All right. Are these checks in evidence?

Mr. Loeb: Yes, sir.

The Court: May I see them?

(The papers were handed to the Court.)

Mr. Cohn: I desire to recall Miss Saville for a moment.

30

PHYLLIS SAVILLE recalled.

Direct examination by Mr. Cohn:

Q. Miss Saville, I show you page 74 of a book, which, on its first page, is entitled: "Chase National Bank of New York," and again calling your attention to an item on page 74 under May, 1929, deposits, as of the 9th, \$5,700.00, and ask you what that indicates? A. That indicates a deposit to the Chase National Bank. 40

Alexander Maryanski, direct.

Q. Does that mean that there was actually a deposit of that amount? A. Yes.

Q. Would your books have balanced, if there had not been a deposit? A. No, of course not.

10 Q. By that, I mean, if that had merely been a bookkeeping entry and not an actual deposit, would your books have balanced? A. No.

Q. So that you are positive that this is an actual deposit of \$5,700.00? A. Yes.

Mr. Cohn: I will offer that page in evidence, your Honor please.

The Court: Is that the \$5,700.00 that is in dispute here?

Mr. Loeb: As of May, 1929.

20 Mr. Cohn: Well, only God knows; I do not.

The Court: I will admit it.

Mr. Loeb: All right.

(The same was marked Defendant's Exhibit D-10 in Evidence.)

Mr. Loeb: That is all.

ALEXANDER MARYANSKI sworn.

30 *Direct examination by Mr. Cohn:*

Q. Mr. Maryanski, you had dealings with the Passaic-Bergen Lumber Company? A. Yes, sir.

Q. Did you give the Passaic-Bergen Lumber Company, on or about September 29, 1929, a check for \$5,700.00, which is marked P-3? I now show you the check. A. Yes.

Q. Did you, on May 9, 1929, or thereabouts, give them a check for \$5,700.00? A. No.

40 Q. Did you give the Passaic-Bergen Lumber

Alexander Maryanski, cross.

Company, on or about May 9, 1929, more than one check which together made \$5,700.00? A. I gave them two checks, but not for same amount as this.

Q. But not for the same amount as this? A. No.

Q. So that the only time you gave them \$5,700.00 was on September 29, 1928,— A. Yes, sir. 10

Q. —date of the check marked P-3? A. Yes, I paid all of my bills at that time—I paid—and the next month, one month—

Mr. Cohn: That is all, don't—cross examine.

Mr. Loeb: Are you through?

Mr. Cohn: Yes, sir.

Cross examination by Mr. Loeb:

Q. How many bank accounts have you got, Mr. Maryanski? A. Two. 20

Q. Where are they? A. Bloomfield.

Q. Both accounts in Bloomfield? A. (No answer.)

Q. What is the name of the banks? A. National Bank and—

Q. You mean, the Bloomfield National. What is the other one? A. Savings Institution.

Q. On what bank did you give the check of \$5,700.00, dated September 29, 1928? A. Savings bank. 30

Q. On the Bloomfield Savings Institution? A. (No answer.)

Q. Did you give any other check of \$5,700.00 from this account, or the other account, to the order of the Passaic-Bergen Lumber Company, in the sum of \$5,700.00? A. No.

Q. Did you make out your checks to the Passaic-Bergen Lumber Company exclusively from the 40

Case.

10 Savings Institution account or from the National, or from both? A. I build houses, I get the loan, if I get the loan from the Savings Institution, I give them from the Savings Institution; if I get the loan from the National, I give them from the National.

Q. But the fact is that you gave the Passaic-Bergen Lumber Company, or, rather, you issued a check payable to the order of the Passaic-Bergen Lumber Company, in the sum of \$5,700.00 only once; is that right? A. That is all I make, only one check.

Q. And you did not issue such a check in 1929, did you? A. I give him some another check, but not for that.

20 Q. I am talking about the \$5,700.00. A. No, only one.

Q. That was in 1928, September? A. September 29th.

Mr. Loeb: That is all.

30 Mr. Cohn: I will offer this certified copy of deed from the Sheridan Construction Company to the Fidelity Home Builders, Inc., dated May 7, 1928, recorded May 21, 1928, Book 63 of Deeds, on pages 9, etc.

40 Mr. Loeb: If your Honor please, I object to the admission of the deed, upon the general ground that it is immaterial, irrelevant, incompetent, and has no bearing on the issues in this case,—a deed from one company to another company, which has not been connected up with the Passaic-Bergen Lumber Company. As far as I view it, they might just as well offer a deed to the City Hall. I do not see its relevancy.

Case.

The Court: Where is it relevant, in view of the corporate entity?

Mr. Cohn: If your Honor please, the testimony of the defendant goes to the point that the Passaic-Bergen Lumber Company sold its merchandise to the Sheridan Construction Company, and their own books indicate that whatever was done in connection with the Fidelity Home Builders, Inc., were the consummation of the acts of their own agent, Mr. Schick. Now, whatever comes within the purview of that situation is relevant to the issue in question. There is a host of testimony that the Passaic-Bergen Lumber Company, at some date, knew of what had occurred, in so far as Mr. Schick is concerned, in that they ratified and confirmed everything that Schick did, and continued to pay out moneys thereafter in pursuance of the same things that Schick had initiated.

The Court: They did that, but Schick did not. You are trying to show that Schick had authority to deposit these checks to the credit of the Fidelity Home Builders, Inc., and that they ratified what he did.

Mr. Loeb: Your Honor please, there is not a thread of testimony in the case connecting the Fidelity Home Builders, Inc., with the Passaic-Bergen Lumber Company.

The Court: Not yet.

Mr. Loeb: So how can he put in a deed to the Fidelity Home Builders, Inc.?

Mr. Cohn: There is testimony that there were certain properties in Chatham, which properties were connected as being those of

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Case.

10 the Fidelity Home Builders, Inc.; there is testimony that the Passaic-Bergen Lumber Company, after the date of this deed, finished these houses, indicating their interest in these houses, and, therefore, it is a natural inference that the Passaic-Bergen Lumber Company took whatever benefits there were from the fact that these properties were transferred to the Fidelity Home Builders, Inc. I think it is very well tied up.

Mr. Loeb: Counsel, I think, just used the proper words, "natural inference". In other words, he is trying to take away our \$9,700.00 by inference. He cannot do it.

20 The Court: If you can connect it up that the Fidelity Home Builders, Inc., were owned and controlled by the Passaic-Bergen Lumber Company, I will permit it, but, as I understand it, it was another corporation, made up of other creditors, all of whom were working together.

30 Mr. Cohn: No, sir; you are mistaken, Judge. In reference to the Rogers Holding Company, this company was held by an employee of the Passaic-Bergen Lumber Company, Mr. Schick. What Mr. Herman testified to this morning was an entirely different group of houses, and we merely introduced that to show the course of conduct pursued by this Passaic-Bergen Lumber Company, which took unfinished houses in payment of their bills as a method of collecting their accounts, and that the Fidelity Home Builders, Inc., was only one of a number of corporations which were utilized for
40 that purpose.

Case.

Mr. Loeb: Your Honor is entirely correct as to the organization of the Fidelity Home Builders, Inc. Mr. Lesser, as a lawyer, testified that Schick and two employees in his office,—two of his clerks—constituted the incorporators of that company. There is no testimony in this case connecting the Passaic-Bergen Lumber Company with the Fidelity Home Builders, Inc.

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The Court: Except there is evidence that the Passaic-Bergen Lumber Company issued their money in payment of payrolls for completing it.

Mr. Loeb: * * * I submit, your Honor, there is nothing in the case yet to connect the Fidelity Home Builders, Inc., with the Passaic-Bergen Lumber Company.

20

The Court: Well, I will allow it to go in for what it is worth.

Mr. Loeb: I ask for an exception.

The Court (continuing): I do not think it is material to the issue, but I will allow it. Mark it.

(The same was marked Defendant's Exhibit D-1 in Evidence, previously marked D-1 for Identification.)

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(Following discussion about procuring a Mr. Schick, as a witness, in side-bar discussion, the court declared a recess until Tuesday, December 22, 1931, at 10:00 A. M.)

40

John R. Schick, direct.

December 22, 1931; 10:00 A. M.

JOHN R. SCHICK, produced as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

10 *Direct examination by Mr. Cohn:*

Q. Mr. Schick, where do you reside? A. 8 Hillside Avenue, Kearny, N. J.

Q. Were you formerly connected with the Passaic-Bergen Lumber Company? A. I was.

Q. In what capacity? A. Manager of the East Orange yard.

20 Q. Did you have any other duties in addition to those of manager? A. I was assistant to the president.

Q. How long were you connected with or employed by the Passaic-Bergen Lumber Company? A. About five years.

A Juror: Can't you ask him to speak up a little louder?

Mr. Cohn: Certainly.

The Witness: About five years.

30 Q. Were you employed by the Passaic-Bergen Lumber Company in the latter part of 1928 and the early part of 1929? A. I was.

Q. Where were you employed, at that time? A. In East Orange.

40 Q. Will you explain to us, in detail, the duties which you had in connection with your position as general manager and assistant to the president at the East Orange yard? A. Well, I had charge of the whole yard, the shipping of orders, collections, credits, and, to a certain extent, making adjustments.

Q. Did you sign checks for the company?

John R. Schick, direct.

Mr. Loeb: I object, your Honor. Now, counsel is leading the witness.

The Court: Yes.

Mr. Loeb: He is not asking him, what did he do.

The Court: Don't lead the witness. 10

Mr. Cohn: I think that is not a leading question.

The Court: Well, go ahead; answer it.

A. I did not.

Mr. Loeb: What was the question?

The Witness: I did not.

Mr. Loeb: What was the question?

The Court: Did he sign checks?

The Witness: I did not. 20

Q. Did you receive moneys for the company?

A. I did.

Q. I show you two checks,—one dated August 8, 1928, to the order of the Passaic-Bergen Lumber Company, for \$4,000.00, marked P-1, and the other dated September 29, 1928, for \$5,700.00, to the order of the Passaic-Bergen Lumber Company, marked P-3,—and I ask you whether you have ever seen these checks? A. I have. 30

Q. Were those checks received by you personally? A. They were.

Q. Will you explain to us under what circumstances this check of \$5,700.00 was received by you? A. On a settlement.

Q. With whom? A. With Maryanski.

Q. What do you mean by "on a settlement"? A. Well, we closed up the account of his credits and the charges that were made, and after the whole thing was settled, that was the whole amount that was due, at that time. 40

John R. Schick, direct.

Q. Under what circumstances did you receive this check for \$4,000.00? A. Why, I think that was a part payment—I am not sure—I cannot remember,—in the settlement of one of our cases.

10 Q. In both of those cases, these payments were made for materials sold by the Passaic-Bergen Lumber Company to the individuals for whom or by whom those checks were given? A. Well, on Maryanski; the other was a lawyer's check, that was for materials but not to them; it was one of their customers for making a loan on it.

Q. Whom was it for? A. I don't recall, Maryanski was the one, and I do not recall who the other one was, at this time.

20 Q. I think I can refresh your recollection.

Mr. Loeb: Alguno?

Q. Alguno? A. Alguno? That is right.

Q. Mario Alguno was the other? A. That is right.

Q. Now, when you received the first check, which is P-1, for \$4,000.00, what did you do with it? A. I deposited to the account of the Fidelity Home Builders.

30 Q. When you received the check of \$5,700.00, what did you do with it? A. I deposited to the Home Builders.

Q. Now, let's go into that with a little more detail. You say that you deposited to the credit of the Fidelity Home Builders? A. I did.

Q. The check was not made to the order of the Fidelity Home, was it? A. It was not.

Q. To whose order was the check made? A. To the Passaic-Bergen Lumber Company.

40 Q. Did you endorse, or, in any manner, indicate on that check the transfer from the Passaic-

John R. Schick, direct.

Bergen Lumber Company to the depositing company? A. Just the endorsement.

Q. How did you come to put the endorsement on, Mr. Schick? A. Why, I put it on, to use those funds for the Fidelity Home Builders.

Q. Now Mr. Schick, tell us how the Fidelity Home Builders, Inc., came into existence? A. Well, that was a composition of the Sheridan Construction Company, that we had furnished materials to, that the original incorporators got to the bad, and the only way we could save it was to take them over, so as to conserve whatever assets there were for the Passaic-Bergen. 10

Q. Had you sold to the Sheridan Construction Company? A. We had.

Q. In connection with what property? A. With properties in Chatham and Bloomfield, on the line— 20

Q. How many houses were being constructed in Chatham? A. Eleven.

Q. For this Sheridan Construction Company? A. Yes, sir.

Q. Do you remember the location? A. I know where that location is.

Q. Do you know the street or—? A. I think, it was, Roosevelt Boulevard or Roosevelt Street,—I am not sure. 30

Q. Roosevelt Avenue. Did you have any other interest in the Sheridan Construction Company? A. I did not, only for to protect the Passaic-Bergen Lumber Company's interest; that is all.

Q. Well, were you an incorporator of the Sheridan Construction Company? A. Well, that is not clear in my mind; at that time, I—

Q. I am asking you about the Sheridan Construction Company. A. Sheridan Construction 40

John R. Schick, direct.

Company? No, not the Sheridan Construction Company.

Q. Your relationship was entirely in behalf of the Passaic-Bergen Lumber Company? A. It was.

10 Q. And you had no monetary or financial interest in the Sheridan Construction Company? A. I had not, no.

Q. Now, how far had the Sheridan Construction Company gone with the construction of these eleven houses, when you decided—or when they decided that they could not go ahead? A. Well, they were in various—

Mr. Loeb: I object, your Honor, on the ground that it is immaterial, irrelevant.

20 The Court: We will allow it, for what it is worth.

Mr. Cohn: I am trying to bring out the whole story, if your Honor please; I do not see how I can do it otherwise.

A. There was various stages of construction—I don't know just exactly what was done. I know that there was considerable done,—some of them overlapped, window frames in, some of them were roofed, some of them had the rough plumbing in.

30 Q. What happened at that time? A. The three brothers got to fighting among themselves, at that time,—it seemed that there was nothing to do but to try and conserve the assets.

Q. Was the Passaic-Bergen Lumber Company a large creditor? A. Yes, we were.

Q. To what extent? A. I would say around thirty or thirty-five thousand dollars, if I can remember correctly—it is pretty hard.

40 Q. What did you decide to do? A. Why, to take it over, to conserve whatever there might be.

John R. Schick, direct.

Q. What do you mean by taking it over, for whom? A. For the Passaic-Bergen Lumber Company.

Q. In order to take it over, what process did you go through? A. Why, formed a new corporation, giving one of the brothers one share, so that it would not entirely go bad; otherwise, if we didn't do that, they would take a chance and let it go. 10

Q. What was the name of the corporation that was formed? A. Fidelity Home Builders.

Q. Where was that corporation formed? A. In Meyers & Lesser's office.

Q. At whose request? A. Well, I decided at that time, with Lesser, that that was the only way to do.

Mr. Loeb: I object to what conference this witness had with Mr. Lesser. It would not be binding on the Passaic-Bergen Lumber Company. 20

The Court: No, but it will be allowed to get the whole story in. If it was without authority of the company, he says, and he was exercising his judgment, he was not exercising the judgment of the Passaic-Bergen Lumber Company.

Mr. Loeb: All right. 30

Q. Did the Fidelity Home Builders Company take a deed for the premises? A. They did.

Q. What happened after that? A. Well, we proceeded to go ahead.

Q. Did you have the funds? A. We had some funds; yes, sir.

Q. Did the Fidelity Home Builders Company have any cash assets? A. No.

Q. Or where was the money to come from to 40

John R. Schick, direct.

finish these buildings? A. Why, I expected to get it from the mortgage money.

Q. Would that have been sufficient to complete the buildings? A. We thought so, at the time.

10 Q. Was there enough money from the mortgagee to complete the buildings? A. There was not.

Q. Was it necessary to have other funds? A. It was.

Q. Where did the other funds come from? A. From those moneys—moneys advanced by the Passaic-Bergen Lumber Company, on checks.

20 Q. Do you know the total amount of money advanced by the Passaic-Bergen Lumber Company to finish those buildings? A. I do not know exactly. It might be around \$10,000.00—I am not sure—I cannot keep it in my mind.

Q. Let me go back to those checks. Did you have any talks at all with Mr. Pettersen? A. I did not.

Q. (Continuing.) About those checks? A. I did not.

Q. What did you do with them? A. I thought that, in their behalf, that was the best thing to do.

30 Q. Did you open an account in the bank, with these checks? A. I do not recall just what took place, at that time.

Q. Well, where did you deposit these two checks? A. In the United States Trust Company, in an account we had there.

Q. Had the account already been opened? A. I think it had; I don't recall.

40 Q. What was done with the amount of these two checks? A. They were used on the buildings up in Chatham.

Q. Exclusively? A. Yes.

John R. Schick, direct.

Q. Who was your superior in the Passaic-Bergen Lumber Company? A. Mr. Pettersen.

Q. Did he ever come to the East Orange office? A. He did.

Q. How often? A. Well, sometimes once a week, sometimes more often; it was very hard to say, when we needed him, we called him; sometimes he would be over every two weeks. 10

Q. Did you ever go to the office where Mr. Pettersen was located? A. I did.

Q. Did you ever have any conversations about the accounts of the East Orange yard? A. I did.

Q. Was there ever any conversation about this Sheridan Construction Company account? A. Why, it is pretty hard to tell, exactly; we went over all of the accounts, yes. 20

Q. Well, did you ever mention the fact to him that you had made these two deposits? A. I did not.

Q. Did he know of it? A. Later, yes.

Q. How much later? A. I don't recall how much later it was.

Q. Well, was it before the end of 1928? A. I can't say.

Q. Well, how long did you stay with the Passaic-Bergen Lumber Company? A. Until October, 1929. 30

Q. Well, how much before October, 1929, was it that you spoke to him about this account? A. I don't recall just when it was; one time when we was over there, I don't just remember exactly when it was,—I couldn't keep it in my mind.

Q. Well, was it at any time in 1928? A. That is possible.

Mr. Loeb: I object to the answer of the witness, "That is possible." 40

John R. Schick, direct.

The Court: It doesn't mean anything.

Mr. Loeb: Yes.

10 Q. Did Mr. Pettersen examine the books or check books of the Passaic-Bergen Lumber Company account in the East Orange yard? A. Yes, sir.

Q. You say that you issued checks for the completion of these eleven houses in Chatham? A. It was used in the completion, yes.

The Court: He did not say he issued them. He said the company issued them.

Mr. Cohn: That is what I mean.

20 Q. By whom were those checks signed? A. Signed by Mr. Pettersen.

Q. Anybody else? A. It was countersigned by one of the vice-presidents, I don't recall.

Q. Do you know over how long a period those checks were being issued and used? A. No, I can't say, I don't know just exactly what period; it was in between that times that the mortgage money was coming in.

30 Q. How long did it take to finish the buildings? A. I don't believe they were ever finished, in my time.

Q. They were not? A. I don't think they were, no, in my time,—yes,—yes, they were finished,—just what the dates were, I cannot recall,—it is over two years ago, it is pretty hard to remember.

Q. Now, Mr. Schick, did you—

Mr. Cohn: I will withdraw that question.

40 Q. Did you ever have any financial interest in the Fidelity Home Builders Company? A. I had not.

John R. Schick, direct.

Q. Well, who had the interest? A. Well, I had it, for the Passaic-Bergen Lumber Company, if that is what you mean.

Q. That is what I mean. Did you have any personal interest in that company? A. I did not.

Q. For whose benefit was this proceeding gone through, and the whole transaction consummated? 10

Mr. Loeb: I object, your Honor, I think—

The Court: Immaterial.

Mr. Loeb: I think it is his conclusion.

The Court: Immaterial.

Mr. Loeb: And immaterial.

The Court: The only question is as to the control in the Fidelity.

Q. Did you have any books of account with the Fidelity Home Builders Company? A. I did. 20

Q. Where are they? A. I don't know.

Q. Where were they? A. Why, what books I had were left at the Passaic-Bergen Lumber Company. There might have been some books left in Meyers & Lesser's office,—I don't know—I never had them outside of those two places.

Q. Did you take them with you when you left the employment— A. I did not— 30

Q. —of the Passaic-Bergen Lumber Company? A. —no, sir.

Q. You did not take the corporation books? A. No, sir.

Q. Did not take the books of account? A. No, sir.

Q. You say you left them at the office of the Fidelity Home Builders Company or the office of the Passaic-Bergen Lumber Company, in East Orange? A. Either there or at Meyers & Lesser's office,—I don't recall. 40

John R. Schick, direct.

Q. Well, those books of account, would they be at Meyers & Lesser's offices? A. I do not think they would.

10 Q. Well, was there any occasion to make any checks or entries in the books of the Fidelity Home Builders? A. There was, yes.

Q. Who made them? A. I made them.

Q. Anybody else in your office? A. You are speaking now of the Fidelity Home Builders or—

Q. I am, yes. A. That is correct.

Q. You say that all of those books were in the Passaic-Bergen Lumber Company's East Orange yard?

Mr. Loeb: I object, your Honor—

20 The Court: Or Lesser's office, he don't know which.

Mr. Cohn: No, he said that the books of account were in the Passaic-Bergen Lumber Company's East Orange yard office; the others may have been in Meyers & Lesser's office.

A. Well, either one or the other, I don't know which.

30 Q. You didn't take them with you? A. I did not.

Mr. Cohn: We served notice upon Mr. Loeb to produce those books. Are they here?

40 Mr. Loeb: If your Honor please, we served the same notice upon my adversary. We are just as anxious to have those books here. We have subpoenaed Mr. Schick; we have subpoenaed Mr. Lesser; we have made every effort to get those books here. We want those books as much as Mr. Cohn.

John R. Schick, direct.

The Court: All right. They are not in your possession?

Mr. Loeb: No, sir.

Q. Mr. Schick, in connection with your duties at the East Orange yard, did you have many customers? A. Quite a few, yes. 10

Q. Did you make any settlements with these customers? A. I did.

Q. Did you always get cash? A. No.

Q. Well, what did you take in lieu of cash? A. Why, sometimes a mortgage, sometimes a second mortgage,—it all depended on the circumstances.

Q. Did you have occasion to take any property over? A. I did.

Q. I call your attention to a deed from the Benneman Realty Company to John R. Schick, or Berryman? A. Berryman, that is right. 20

Q. Was that your own property? A. No.

Q. How did you come to take that?

Mr. Loeb: Just a moment. I object to this line of testimony. I think it would only confuse the issue. I cannot see where the introduction of any deeds has any bearing on the issue in this case, whether Mr. Schick had authority from the Passaic-Bergen Lumber Company to divert these checks to the Fidelity Home Builders Company. 30

The Court: No, it does not, but it might develop something that does.

Mr. Cohn: It shows the general course of conduct which he pursued and the ratification of all of his actions, if all of this property went back to the Passaic-Bergen Lumber Company, and was over a period of time, that officials of the Passaic-Bergen 40

John R. Schick, direct.

Lumber Company knew what he was doing, and they confirmed and ratified whatever he did.

The Court: I will allow it.

10 Mr. Loeb: If counsel is going to connect it up.

The Court: If it is not, we will disregard it.

Q. Did you have personally any interest in that property? A. I did not.

Q. What became of it? A. It was turned back to the Passaic-Bergen Lumber Company, or one of the—

20 Q. You took that deed in the name of John R. Schick, Trustee? A. That is right.

Q. Was that solely for the benefit of the Passaic-Bergen Lumber Company?

Mr. Loeb: Now, if your Honor please!

The Court: Very leading—

Mr. Loeb: That is very leading.

Mr. Cohn: Well, I do not want to lead the witness, but I want him to tell us what the situation is.

30 Mr. Loeb: Ask him to tell us.

The Court: If he knows.

Q. Did you take a deed for premises in Coeyman Avenue from one Thomas Pignataro? A. I did.

Q. Did you have any interest in that property? A. I did not.

Q. Why was that deed taken? A. To protect what interest we had in it.

40 Q. When you speak of "we," whom do you mean? A. The Passaic-Bergen Lumber Company, I should have said.

John R. Schick, direct.

Q. Did you take a deed to the Titanic Realty Company on Eagle Rock Road? A. I did.

Q. Did you, personally, have any interest in that property? A. No, that was to enforce the same thing; this man owed us moneys.

Q. Did you take a deed from Humbert Constantino, Hawthorne Avenue? A. I did. 10

Q. Did you, personally, have any interest in that property? A. I did not.

Q. For whom was it taken? A. Passaic-Bergen Lumber Company.

Q. Did you take a deed from George H. Becker? A. I did; that was mine.

Q. Did you have any personal interest in it? A. That was mine.

Q. That was yours, but are there instances those deeds were taken for the benefit of the Passaic-Bergen Lumber Company? 20

Mr. Loeb: I object, your Honor.

Mr. Cohn: That is not a conclusion; it is a question.

Mr. Loeb: I know, but it is decidedly leading.

The Court: It may be, but it is immaterial. 30

Q. Well, for whose benefit was it taken? A. For the Passaic-Bergen Lumber Company.

Q. Were the properties transferred to the Passaic-Bergen Lumber Company? A. They were transferred to the Company, yes.

Q. Did the officials of the Passaic-Bergen Lumber Company know of these transactions? A. They knew of them afterwards, after they had transpired, yes.

Q. And they took— A. (Continuing.) When 40

John R. Schick, direct.

those deeds were made back to the Passaic-Bergen Lumber Company.

Q. Did they know of it? A. Yes.

Q. Was it done with your knowledge? A. Yes.

10 Q. Did you have occasion to pursue the same course of conduct in connection with other debtors as you did with the Sheridan Construction Company? A. Would you repeat that question?

(Question repeated by stenographer.)

A. I don't quite get the—

Q. Well, in the case of the Sheridan Construction Company, you say you took the property over, in the name of the Fidelity Home Builders, Inc. A. Yes.

20 Q. Did you do the same thing in other instances? A. Just the ones that are cited; that is all.

Q. Well, weren't there any other companies formed, either by you or through you, for the purpose of taking properties over instead of in your own name? A. No.

Q. Are you sure of that? A. I don't recall of any, no.

30 Q. Well, don't you recall that other corporations were formed, either at your instance or at somebody's else instance, in connection with debtors who could not pay? A. I don't recall of any now, outside of the ones that you have already mentioned there.

Q. Which ones that I mentioned? A. Berryman, Pignatore, Humbert Constantino, Titanic.

Q. Those were all individuals, and you took the property in your own name, personally? A. Yes.

40 Q. And you subsequently conveyed the properties back to the Passaic-Bergen Lumber Company?

John R. Schick, direct.

Mr. Loeb: Now, I object, your Honor, to counsel's examining in this fashion. He is practically testifying.

The Court: It is cross examination.

Mr. Loeb: Yes.

Mr. Cohn: If your Honor please, I think we have a right to consider this witness is a very reluctant witness, and we ought to be entitled to some latitude in the examination.

10

Mr. Loeb: He doesn't appear reluctant to me.

The Court: I will allow you the widest possible latitude, as I told you before, but there is nothing yet that changes the situation in regard to his authority on spending somebody's else money.

20

Mr. Loeb: He has answered every question as fully as he knows how.

Q. Now, Mr. Schick, did you affix the stamp on these two checks that are marked P-1 and P-3?

A. I did.

Q. How did you come to do that?

Mr. Loeb: The witness has already testified, your Honor, but I have no objection.

30

A. We needed funds in the Fidelity Home Builders.

Mr. Cohn: Cross examine.

Mr. Loeb: Now, if your Honor please, I wish to renew my motion to strike out all of the testimony with respect to whatever deeds Mr. Schick took, either in his own name or as trustee. I did not press my objection at the time that I made it, because I thought that my opponent would introduce

40

John R. Schick, cross.

10 evidence to connect it, but since there has been no evidence to connect it with any authority with respect to the issues here, I cannot see any possible relevancy. We might have given him authority to do these things, but it does not necessarily follow, for a moment, that we gave him authority to take our negotiable paper and stick it in his pocket or in the pocket of a company that he formed.

The Court: He was on the receiver end of this company, but we will allow it to stand for what it is worth, to show an authority for what he did.

20 Mr. Loeb: I will respectfully ask an exception.

The Court: You may note it.

Mr. Loeb: Will your Honor allow us five minutes' recess, because I want to consult my client with regard to the cross examination of Mr. Schick?

The Court: All right.

(A brief recess was taken.)

30 *Cross examination by Mr. Loeb:*

Q. Mr. Schick, when did you enter the employ of the Passaic-Bergen Lumber Company? A. In 1924, I think, June.

Q. In the year 1928, the date of these checks, what was your position with the Passaic-Bergen Lumber Company? A. Manager of the East Orange yard and assistant to the president.

40 Q. Have you been under subpoena by the Passaic-Bergen Lumber Company, in this case? A. Only to produce those books.

Q. What books? A. Fidelity Home Builders.

John R. Schick, cross.

Q. That subpoena called upon you to produce here at the trial books and records of the Fidelity Home Builders; is that what you want to say? A. That is correct; I have it here.

Q. What books were there of the Fidelity Home Builders? What records were there? A. The ledger, if I remember correctly, and the journal and the check book. 10

Q. Huh-huh? A. Outside of the stock books, if that is what you are referring to. Are you referring to that, too?

Q. I want all of the records. A. That would be the stock books and the minutes.

Q. Who kept the minutes of the Fidelity Home Builders? A. Meyers & Lesser. 20

Q. In his handwriting? I mean, were they kept by him, or were they kept by you? A. They were not kept by me, no.

Q. Who was the president of the Fidelity Home Builders? A. I don't know; I was the treasurer—

Q. Huh-huh? A. —I think, Sam Wexler, I think, was the name.

Q. Did Sam Wexler have any connection with the Passaic-Bergen Lumber Company, as far as you know? A. No. 30

Q. Who incorporated the Fidelity Home Builders? A. Meyers & Lesser.

Q. Lawyers of Newark? A. Yes.

Q. As far as you know, did they have any connection with the Passaic-Bergen Lumber Company? A. No.

Q. They were never employed by the plaintiff, were they? A. Not to my knowledge, no.

Q. Well, you would know, wouldn't you, if there were any accounts of the East Orange yard that needed legal attention, whether Meyers & Lesser 40

John R. Schick, cross.

were employed by the Passaic-Bergen Lumber Company? A. During my time, I do not know that they were.

Q. Yes? A. Previous to that, they might have been.

10 Q. Did I understand you to say that the Fidelity Home Builders had a ledger and book of account?

A. They did, yes.

Q. Whom did you say kept those books? A. I kept the accounts—that is, outside of the stock records, I kept the record of that.

Q. Did Mr. Pettersen know about those books?

A. I don't think so, no.

20 Q. Did any of the office personnel of the Passaic-Bergen Lumber Company at East Orange, where your office was located, know of those books? A. They might have seen them; I had them in the private file there.

Q. They might have, but you don't know whether they did see— A. No, I don't know.

Q. You didn't call the books to their attention?

A. No, I don't recall that I did, no.

30 Q. You didn't ask your assistants, Miss Colombo, or the bookkeeper, Miss Saville, to make any entries in those books, did you? A. No.

Q. Can you give us your best recollection as to the first time that you called the attention of Mr. Pettersen, if you did, to those books of the Fidelity Home Builders? A. I don't recall, no.

Q. But with respect to the dates of these checks, was this time some period after their date? A. What was that question?

Mr. Loeb: Read the question.

40 Q. (Question repeated by stenographer.) A. I don't understand that question.

John R. Schick, cross.

Mr. Loeb: I will withdraw the question;
I will try to make it a little clearer.

Q. Did you ever call Mr. Pettersen's attention to the books of the Fidelity Home Builders at any time?

10

The Witness: Will you repeat that question?

Q. Did you ever call Mr. Pettersen's attention to the books of the Fidelity Home Builders at any time? A. No.

Q. Did you open a bank account of the Fidelity Home Builders? A. I did.

Q. In what bank? A. United States bank, I think it is.

20

Q. Defendant in this case? A. Yes.

Q. Who was authorized to sign checks for the Fidelity Home Builders? A. I was.

Q. You alone? A. Can I explain that?

Q. Just answer my question. A. Yes.

Q. You alone? A. Yes.

Q. No other person or official representing the Passaic-Bergen Lumber Company was authorized to sign checks; is that correct? A. Nobody outside of myself.

30

Q. Now, where is the ledger accounts of the Passaic-Bergen Lumber Company?

(The papers requested were produced.)

Q. Mr. Schick, I call your attention to the books of account of the Passaic-Bergen Lumber Company, and I show you the ledger account of Alexander Maryanski, and I direct your attention to a credit entry of May 9th, Ticket 5903326, in the sum of \$5,700.00, and ask you if you recollect that entry? A. I recollect the transaction.

40

John R. Schick, cross.

The Court: What year was that?

Mr. Loeb: 1929.

The Witness: May, the 9th.

Q. You do recollect it? A. Yes.

10

Q. Now, will you explain—

Mr. Loeb: I will withdraw that.

Q. I show you a ticket of the Passaic-Bergen Lumber Company, dated the same date, and I ask you if you recognize this ticket. A. I do.

Q. In whose handwriting is the ticket? A. Mine.

Q. Now, can you tell us the circumstances by which that entry came in the books, if you know?

20

A. Well, there was a check drawn from my account to take care of that amount, to take care of that entry, so that it would balance it up.

Q. You drew a check from your personal account? A. Yes.

Q. To the order of the Passaic-Bergen Lumber Company? A. That is correct.

Q. Did you advise the bookkeeper that it was your check? A. I do not recall what was said at that time, no.

30

Q. You do not recall it? A. I do not recall what was said at that time, no.

Q. Well, it was your personal check, wasn't it? A. It was, yes.

Q. No question about that? A. It was, yes.

Q. Now, what is the custom of the Passaic-Bergen Lumber Company with respect to identifying on tickets the sources from which moneys come? A. Well, it is usually written down "by check" or "by cash", or whatever it might be.

40

Q. Well, doesn't the ticket identify the source from which the money comes? Ordinarily, I mean. A. Ordinarily, yes, a man would get credit for

John R. Schick, cross.

what it was, that he would give. Is that what you mean?

Q. Yes. A. Yes.

Q. I mean this: If you got a check from John Smith for \$5,000.00, you would indicate on your ticket, "Credit John Smith by his check for \$5,000.00," and hand that ticket to the bookkeeper; is that right? A. The ticket is made out that way, yes. 10

Q. Is that the way it would be done? A. That is the way it would be, yes.

Q. Well, why did you then place on the ticket, "Alexander Maryanski, \$5,700.00," when the check emanated from you personally? A. I cannot explain that.

Q. You cannot explain that? A. No. 20

The Court: Was that check collectible, a good check?

Mr. Loeb: Yes.

The Court: Was it collected by the Passaic-Bergen Lumber Company?

Mr. Loeb: Yes, sir. We will show, your Honor, where the moneys came from.

The Court: All right.

Q. Now, you say that check came from your personal account; is that right? A. That is correct. 30

Q. Where did the moneys come from that went into your personal account—

Mr. Cohn: I object to that.

The Court: I will allow it. Go ahead.

The Witness: Do I have to answer that, your Honor?

The Court: Unless you feel it would incriminate you. 40

The Witness: I think it would.

John R. Schick, cross.

10 Mr. Loeb: Well, if your Honor please, I do not think that the witness is privileged to refuse to answer the question for the reason that the date, when these transactions took place, have resulted in the statute of limitations intervening, so the witness could not be prosecuted; and I have here a text-book on Evidence, which is to the same effect.

The Court: More than two years have gone by?

Mr. Loeb: Yes, sir.

20 The Court: All right. You may answer the question. You may answer it; there isn't any liability on your part. Liability is—

The Witness (interrupting): It would affect me a great deal, in this case, wouldn't it?

The Court: It is very material here; it is the whole crux of the case.

The Witness: Can you frame that question in another way?

30 Mr. Loeb: Mr. Stenographer, read the question.

(The question was repeated by stenographer.)

By the Court:

Q. Did you pay them back with their own money? A. Yes.

Mr. Loeb: Now, in order that that answer may be clear—

The Court: That is right.

John R. Schick, redirect.

By Mr. Loeb:

Q. Did I understand that you paid the check back with moneys of the Passaic-Bergen Lumber Company? A. That is correct.

Q. Is that correct? A. (No answer.)

10

Mr. Loeb: Your Honor will indulge me a few minutes?

The Court: All right.

Mr. Loeb: I am through with the witness, your Honor.

The Court: All right. Anything further?

Redirect examination by Mr. Cohn:

Q. Mr. Schick, I want you to look at the account of Alguno here. A. I will find it.

20

Q. Were you in the employ of the Passaic-Bergen Lumber Company on November 2, 1929?

A. November 22nd?

Q. On November 2, 1928? A. Yes.

Q. Do you notice a credit on that date of Alguno's, \$1,185.00? A. I do.

Q. Was that cash paid by Alguno? A. I would not know, unless I see the ticket; I presume it would be—it is a credit.

30

Q. Was that moneys which you put in, will you say? A. I don't know; I can't remember what took place there. I will have to see the ticket.

Q. You know that Alguno gave a check of \$4,000.00 in August, the 8th, 1928? A. That is correct.

Q. And by having that check of \$4,000.00, if that were credited to Alguno, he would have overpaid approximately \$600.00? A. He would, yes.

Q. Can you explain that? A. I cannot, no.

40

John R. Schick, redirect.

The Court: What was the depository of the Passaic-Bergen Lumber Company, that you would deposit their money in?

The Witness: You mean—

10 The Court: What bank did you use, when you deposited their money?

The Witness: Bloomfield National Bank.

The Court: Bloomfield? Not in the United States?

The Witness: No.

Q. Mr. Schick, do you remember a case in the Court of Chancery between Charles Riley and Charlotte Riley and Alexander Maryanski and others? A. I do.

20 Q. And that you testified in that case? A. I did.

Q. Do you recall that the following question was asked of you: What did you do with the proceeds of the funds received in the transaction of the Sheridan Construction Company that I understand was merged in the Fidelity Home Builders, and your answer was, what?

Mr. Loeb: I object—

Mr. Cohn: Let me finish the question.

30 Mr. Loeb: I beg pardon,—I am sorry, I dont want to be loud, but I think this is an improper manner, for counsel to persist in directing the witness' attention to testimony or statements previously made by him. I think the procedure should be: Did he make certain statements at a certain time and place, and then get his answer to that.

The Court: That is correct.

40 Q. Well, did you make the answers to the questions, as I am going to read them to you, at the trial—

John R. Schick, recross.

Mr. Loeb: I must press another objection, your Honor, that counsel is attempting to impeach his own witness; I must object to that procedure.

The Court: Yes, but I will allow it, but only for the purpose of neutralization, if you claim surprise, but not to establish the fact. (Citing *State v. D'Adami*.) This man is a witness, not a party. 10

Mr. Cohn: All right. We will withdraw the question. That is all, your Honor.

Mr. Loeb: Just a moment.

Recross examination by Mr. Loeb:

Q. Mr. Schick, you were asked questions by Mr. Cohn with respect to the Alguno account, and to explain the fact as to how it appears there, let me refresh your recollection. Do you remember the Mustaccio account? A. I do. 20

Q. Do you remember, if there was any relation between Mustaccio and Alguno? A. There was a relation.

Q. Do my questions recall your recollection as to the \$4,000.00 check came in for Alguno, and whether it was to be credited in full on the Alguno account, and the balance to be credited on the Mustaccio account? Does that refresh your recollection? A. There was some arrangement on that—just exactly what it was, I do not recall, but there was an arrangement of some kind. 30

Q. What relation existed between Alguno and Mustaccio? A. I think Alguno did the mason work and Mustaccio had some arrangements to do the carpenter work. I don't recall the details now, because it was— 40

Q. Well, now, when this check of \$4,000.00 came

John R. Schick, recross.

in from Alguno, bearing that in mind, your recollection, as it is refreshed now, can you reconcile the receipt of the \$4,000.00 check and how that \$4,000.00 check would be credited on the plaintiff's account? A. On whose account?

10 Q. On the accounts of Alguno and Mustaccio?

The Witness: I cannot understand that, your Honor.

Q. You don't understand? A. I don't remember the exact details of it; it is very hard, so much gone by since that time.

Q. Well, your attention has been called by counsel to the fact that it appears upon the ledger page of Alguno, that there is a balance of \$3,400.00, and yet a check for \$4,000.00 was paid by Alguno. A. There was a connection, there was, whatever the exact amount, I don't recall, but that was to be credited to Mustaccio.

Q. That was to be credited to Mustaccio? A. Yes, for some arrangements there; I don't recall the details of it.

Q. Did Mustaccio owe us any money? A. Plenty.

Q. And the excess over the amount due Alguno was to be credited on the Mustaccio account; is that correct? A. That is correct.

Q. Is that clear now? A. Whatever the exact amount is, I don't recall.

Q. What is that? A. Whatever the exact amount is, I don't recall.

Q. We are not concerned with the amount, but as it came in, was that what was done with the money, as it came in? A. Yes.

40 Mr. Loeb: That is all.

Plaintiff's Motion for Direction of a Verdict.

Mr. Cohn: The defense rests.

DEFENDANT RESTS.

The Court: Plaintiff rests?

Mr. Loeb: That is all, yes. The plaintiff rests.

10

BOTH SIDES REST.

PLAINTIFF'S MOTION FOR DIRECTION OF A VERDICT.

Mr. Loeb: Now, if your Honor please, at this point, I move for a direction of a verdict in favor of the plaintiff, in the amount of the two checks, representing \$9,700.00.

The testimony in this case is clear, explicit and uncontradicted, that two checks were received by John Schick, a local manager of the plaintiff, of the lumber yard situated at East Orange. Mr. Schick took these checks and placed a rubber stamp, "Passaic-Bergen Lumber Company", without any signature of officials appearing thereon, and deposited these two checks in the account of a corporation known as the Fidelity Home Builders, Inc. The testimony is also clear and uncontradicted that the Passaic-Bergen Lumber Company had no connection, with no relationship and absolutely no cognizance of the existence of this corporation, the Fidelity Home Builders. Mr. Schick testifies that these moneys were placed in the Fidelity Home Builders because he conceived the idea that he would protect the interests of the Passaic-Bergen Lumber Company in some properties where we had furnished materials. Mr. Schick had no conference with an official of the Passaic-Bergen Lumber Company, and the responsible officials and executives of that company knew nothing of what he was doing.

20

30

40

Plaintiff's Motion for Direction of a Verdict.

10 So we find, at this point, \$9,700.00 of the funds of the Passaic-Bergen Lumber Company in the account of the Fidelity Home Builders, simply upon the strength of a rubber stamp. There has been no evidence introduced, in this case, your Honor, that the United States Trust Company made any effort to ascertain and determine the genuineness of the endorsement or the transfer of the title of the Passaic-Bergen Lumber Company to the Fidelity Home Builders, and so the defense that they make of estoppel in their pleadings collapses completely.

20 Now, your Honor, there does appear an entry in the account of Alexander Maryanski that on May 9, 1929, his account is credited with \$5,700.00. The testimony is clear that the check of September 29th, and that it was cleared—to the defendant—on October 15, 1928, amounting to \$5,700.00—did not go to the account of the Passaic-Bergen Lumber Company but went to the account of the Fidelity Home Builders, and we find this entry of \$5,700.00 on May 9th, period of seven or eight months thereafter.

30 Mr. Schick, a witness produced by the defendant, testifies that he took other moneys of the Passaic-Bergen Lumber Company, and placed \$5,700.00 in that account, in other words, with other stolen moneys,—he admits he put back \$5,700.00—in other words, our own money he puts back in that account. The net result of this transaction is that the Passaic-Bergen Lumber Company is out the \$5,700.00.

40 Now, I come to “authority”. What authority did Mr. Schick have for doing what he did? I will consider the testimony, for a moment, of Mr. Petersen, who has shown by his books and records

Plaintiff's Motion for Direction of a Verdict.

and by his oral testimony, that no manager—even himself—could not negotiate checks to other persons or corporations. Now, I do not think I need make any further comment, that there is no question whatever that there was no authority shown by the defendant for the diversion of these checks. 10

Now, if your Honor please, I have already been privileged to call the Court's attention to the leading cases on this, and I cited the case of *DiGallo v. Second National Bank*, where the check was made out by the assistant treasurer of the United States directly to the order of DiGallo, and the attorney received the check and diverted it. The court held, in that case, that there was a privity of contract between the plaintiff, DiGallo, and the defendant, that when the defendant received that check and property of DiGallo, there was raised by intent of law a promise on the part of the defendant bank that the proceeds of that check shall go to its true and rightful owner. We have a number of cases in this State, your Honor, along the same line. I do not want to consume too much time, if your Honor thinks I am elaborating the point too much, I am perfectly willing to stop, but I have some interesting cases I would like to call to your Honor's attention. 20 30

We have a case recently decided by the Court of Appeals,—and I am referring to the *Economy Auto Supply Company* case against the bank—reported in 105 Law 206. This case went up to our Court of Errors and Appeals, and in this case the facts were briefly:

(Counsel continues, reading memorandum of law, citing from 105 N. J. L. 206, 99 N. J. L. 365, 60 N. J. L. 417.) 40

Plaintiff's Motion for Direction of a Verdict.

10 But I submit, your Honor, there is not a doubtful or conflicting fact in this case. I think it is clear and undisputed, beyond the peradventure of a doubt or fact, that when John Schick took these two checks of the Passaic-Bergen Lumber Com-
10 pany and deposited them with the United States Trust Company, he did something which is admittedly without authority; that he took the prop-
erties of the Passaic-Bergen Lumber Company and diverted them to other uses and purposes, and the United States Trust Company, under the authority of the cases that I have cited, is responsible to the Passaic-Bergen Lumber Company for the loss therein, and there is raised by law a definite duty
20 on the part of the bank to account to us, the true and rightful owner of these checks for these proceeds. I therefore respectfully submit that a direction of a verdict in favor of the plaintiff should be directed by your Honor.

Mr. Cohn: If your Honor please, the three cases that Mr. Loeb cites are familiar to me, to some extent, and I think they can be readily distinguished from the case at bar. The DiGallo case was a case where there was a forged endorsement, and I think takes it out of the line of cases such
30 as the case at bar presents. The Dennis case and the Economy Auto case are cases where the plaintiff was an appellee, but the plaintiff was the company that issued the checks, and in both of those cases the court practically held that that relationship must exist before there could be any recovery as against the defendant.

Now, that is not the case at bar. In this case, the Passaic-Bergen Lumber Company received these checks. They did not issue these checks.
40 They received these checks, and they went into the

Plaintiff's Motion for Direction of a Verdict.

hands of one of the managers of this company, a man who was invested with authority to run one of their largest branches and enter into negotiations for the sale of lumber to the extent of \$35,000, \$40,000 or \$50,000.

Now, we submit, your Honor, that this case is not similar to the ones that Mr. Loeb has argued; but we have in this case, where the funds were used for the purposes of the Passaic-Bergen Lumber Company. There is no diversion of the funds in this case. Mr. Schick has clearly testified as to his authority. Mr. Schick has told us that he had authority to make settlements, and so he went on, in a great number of instances, and he states that when he used this money, it was used solely for the purposes of the Passaic-Bergen Lumber Company. And, if your Honor please, subsequent to this transaction, and while Mr. Schick was still in the employ of the Passaic-Bergen Lumber Company, there was ratification and there was a confirmation of everything that Mr. Schick did, to protect the Passaic-Bergen Lumber Company's interests in the assets that were obtained through the use of these funds, in that it assumed control over these assets, collects the rents, credits the Sheridan Construction Company with the rents that they collected from the very assets which were obtained by the use of this money.

Now, if your Honor please, as to the \$5,700.00, we respectfully submit that this defendant should not be called upon to pay this sum again,—it makes no difference whatsoever as to where these funds came from. Mr. Maryanski was credited with the \$5,700.00. If Mr. Schick had stolen this money from somebody else, and had deposited this money to the credit of Maryanski, there could

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Plaintiff's Motion for Direction of a Verdict.

not be any recovery against this defendant company,—and I think, if there was defalcation upon the part of Mr. Schick as a result of other checks, but, at the same time, he deposited this money to the credit of Maryanski, and there was a credit to Maryanski, as indicated upon the books, that as far as this case is concerned, this bank cannot be called upon to make double payment to the Passaic-Bergen Lumber Company, upon this check. And therefore I respectfully submit that there are so many questions, such a conflict of evidence, so many divergent statements made, directly and indirectly, so many inferences to be drawn, that it is a matter for the jury to decide and not your Honor.

The Court: This is a motion for the direction of a verdict on behalf of the plaintiff, the Passaic-Bergen Lumber Company, against the United States Trust Company, the plaintiff being a wholesale lumber company, with several branches, one of which was in East Orange, and the defendant being a banking corporation, incorporated for the purpose of handling moneys. Two checks were drawn, which are the subject of the dispute in this litigation, one for the \$4,000.00, marked P-1, dated August 8, 1928, drawn from the Trustee Account of Lintott, Kahrs & Young, Attorneys, payable to the order of the Passaic-Bergen Lumber Company; the other one was a check for \$5,700.00, dated September 29th, signed by Alexander Maryanski, certified by the Bloomfield Savings Institution, and payable to the order of the Passaic-Bergen Lumber Company.

On the reverse side of both checks there appears the rubber stamp endorsement, or the alleged endorsement, "Passaic-Bergen Lumber Com-

Plaintiff's Motion for Direction of a Verdict.

pany," without further words, either for deposit or limitation, merely the rubber stamp, "Passaic-Bergen Lumber Company", under which is endorsed "Fidelity Home Builders, Inc.", on one "For Deposit", the one for \$5,700.00, on the one for \$4,000.00, merely "Fidelity Home Builders, Inc." without further comment. 10

The sole question in this case is whether the United States Trust Company is liable for recognizing the action of one Schick, who was the local manager of the Passaic-Bergen Lumber Company, in "stamping" \$9,700.00 on two checks with a rubber stamp, and then endorsing it to the Fidelity Home Builders.

In the Court's opinion, the rubber stamp "Passaic-Bergen Lumber Company" is not an endorsement in the legal sense referred to in the Negotiable Instruments Act where reference is made in Section 234 to a blank endorsement. The rubber stamp in question was not a blank endorsement in the Court's opinion, in the legal sense; it was merely a rubber stamp. 20

There is in this case no evidence of an express authority of Schick to transfer title to the \$9,700.00, nor is there any evidence of any authorization, by inference, to support such opinion. 30

The evidence is undisputed that Schick, the local manager, substituted his judgment for the judgment of his employers, without any express or implied authority, and that there is, therefore, no legal transfer, in any legal sense, of the \$9,700.00 represented by the two checks, which was a legal authority for the bank to transfer \$9,700.00 from the Passaic-Bergen Lumber Company to the Fidelity Home Builders, Inc., or to anyone else. 40

The facts being uncontradicted and there being

Verdict.

no evidence from which an inference of difference of opinion may be drawn by reasonable minds, there will be a direction of a verdict, on the first count, for \$4,000.00, with interest, from August 8, 1928, at six per cent.; and a direction of a verdict, on the second count, for \$5,700.00, with interest, from September 29, 1928, at six per cent. An exception will be allowed to the defendant on the ruling of the Court.

DISCHARGE OF JURY.

Ladies and Gentlemen of the Jury:

The function of the jury is to decide disputed questions of fact. The duty of the Court is to decide all questions of law, where there is no dispute on the fact, and, in my opinion, there are no disputes on the facts—they are clear and uncontradicted—therefore, the question to be settled in this litigation is one that is my responsibility and not yours.

Therefore, I instruct the jury to bring in a verdict, on the first count, for \$4,000.00, with interest from August 8, 1928, and, on the second count, for \$5,700.00, with interest from September 29, 1928, at six per cent.

The Clerk will take the verdict, and he will compute the interest.

(The jury, as directed by the Court, renders a verdict accordingly, and was excused from further consideration of the case.)

*Exhibits.***Exhibit P-1.**

LINTOTT, KAHRS & YOUNG
Trustee Account

No. 1115 Newark, N. J. August 8 1928 10

Pay to the
order of Passaic-Bergen Lumber
Company \$4000 00/100
Exactly Four Thousand Dollars No Cents
Exactly Dollars

LINTOTT, KAHRS & YOUNG
Trustee Account
JOSEPH KAHRS

TO NATIONAL STATE BANK } 20
55-2 Newark, N. J. }

(Perforation through check.)

PAID
8 14 28
N S B

(Back of check.)

Passaic Bergen Lumber Co.
Fidelity Home Builders Inc 30

RECEIVED PAYMENT
Through the Newark Clearing House
Prior Endorsements Guaranteed
AUG 13 1928
UNITED STATES TRUST Co. No. 23

Exhibit P-2.

Sheet No.

LINTOTT, KAHR & YOUNG, Trustee Acct.

Name

NATIONAL STATE BANK, NEWARK, N. J.

Address

Old Balance	Date	Checks in Detail		Date	Deposits	Date	New Balance
		Balance Brought Forward		Jul 31 '28	2,630.27	Jul 31	2,630.27 s
				Aug 1	3,500.00	Aug 1	6,130.27 s
	Aug 2	9.50—		Aug 2	6,489.84	Aug 2	12,610.61 s
	Aug 2	3,735.10—				Aug 2	8,875.51 s
	Aug 3ex	5.00—	2,445.36—			Aug 3ex	2,996.90 s
			3,428.25—	Aug 3	17,085.80	Aug 3in	20,082.70 s
	Aug 3	138.58—	14,276.80—	Aug 3	3,000.00	Aug 3	8,667.32 s
				Aug 3	5,000.00	Aug 3	13,667.32 s
	Aug 4	2,049.00—	5.00—			Aug 4	11,613.32 s
	Aug 6	3,000.00—				Aug 6	8,613.32 s
	Aug 8	425.00—				Aug 8	8,188.32 s
				Aug 8	10,000.00	Aug 8	18,188.32 s
	Aug 9	30.00—	1,000.00—			Aug 9	17,158.32 s
	Aug 9	3,048.50—				Aug 9	14,109.82 s
	Aug 10	5.00—	6,951.50—			Aug 10	7,153.32 s
				Aug 10	1,400.00	Aug 10	8,553.32 s
	Aug 11	1,400.00—				Aug 11	7,153.32 s
				Aug 11	6,000.00	Aug 11	13,153.32 s
	Aug 13	6,000.00—	217.85—	Aug 13	7,000.00	Aug 13	13,935.47 s
	Aug 13	5,365.00—				Aug 13	8,570.47 s
	Aug 14	4,000.00—				Aug 14	4,570.47 s
	Aug 14	1,235.00—		Aug 14		Aug 14	3,335.47 s
	Aug 15	354.73—		Aug 15	2.87	Aug 15	2,983.61 s
	Aug 16	191.50—				Aug 16	2,792.11 s
	Aug 16	200.00—				Aug 16	2,592.11 s
	Aug 17	165.00—	505.00—			Aug 17	1,922.11 s
				Aug 24	3,000.00	Aug 24	4,922.11 s
	Aug 27	1,000.00—				Aug 27	3,922.11 s
	Aug 28	30.94—	400.00—			Aug 28	3,191.17 s
	Aug 29	825.00—	775.00—				
			300.00—	Aug 29	3,500.00	Aug 29 in	5,101.01 s
				Aug 29 in	9.84	Aug 31	1,701.01 s
	Aug 31	3,400.00—				Aug 31	9,201.01 s
	Aug 31	76.00—	1,537.50—	Aug 31	7,500.00	Aug 31 '28	7,587.51 *

Exhibits.

Exhibits.

Exhibit P-3.

No..... Bloomfield, N. J. Sept. 29 1928
 BLOOMFIELD SAVINGS INSTITUTION 55-203
 Account Subject to Check

Pay to the 10
 order of Passaic Bergen Lumber Co. \$5700 00/
 Fifty seven hundred no/100Dollars
 Presentment, Protest, and Notice of Dishonor
 Waived

ALEX MARYANSKI

Payment in full to date
 for #1 & #2 Liberty St Job
 and Fairview Job. 20

(Certification on face of check.)

CERTIFIED

At the request of the } Maker
Holder
 without liability for genuineness
 except as to Maker's signature
 Oct 13 1928

BLOOMFIELD SAVINGS INSTITUTION
 John Edgeley 30
 Sec-Treasurer

Bloomfield Savings Inst \$5700 and 00 cts

Exhibits.

(Back of check.)

Presentment for Payment, Protest, and
Notice of Dishonor is Hereby Waived.

Passaic Bergen Lumber Co.
Fidelity Home Builders Inc.

10

For deposit:

Pay Any Bank
Banker or Trust Co.
or Order

Prior Endorsements

Guaranteed

OCT 15 1928

FEDERAL RESERVE BANK
OF NEW YORK

20

2 PAID 3

OCT 17 1928

BLOOMFIELD SAVINGS
INSTITUTION

Pay to the Order of
Federal Reserve Bank of New York
Prior Endorsements Guaranteed

OCT 15 1928

UNITED STATES TRUST Co.

30

Bloomfield Savings Institution

PAID

OCT 17 1928

40

*Exhibits.***Exhibit P-4.**TRANSCRIPT OF CHECKING ACCOUNT
OF

ALEXANDER MARYANSKI

68 Thomas Street

Bloomfield, N. J.

with

BLOOMFIELD SAVINGS INSTITUTION OF

11 Broad Street

Bloomfield, N. J.

7-31-28 to 12-4-28

10

Stamped on top of sheet:

A True Copy

BLOOMFIELD SAVINGS INSTITUTION

John Edgerley

Secretary & Treasurer

20

Date	Checks	Checks	Deposits	Sym. Balance	
7-31-28				290.83	
8- 7-28	7.00	62.50		221.33	
8- 7-28	6.00			215.33	
8-10-28	93.25			122.08	
8-18-28	65.00			57.08	
8-23-28			1,646.75	1,703.83	30
8-23-28			5,000.00	6,703.83	
8-25-28	400.00			6,303.83	
8-27-28	140.00			6,163.83	
8-28-28	80.00			6,083.83	
8-30-28	95.25			5,988.58	
9- 1-28	300.00			5,688.58	
9- 1-28	170.00			5,518.58	
9- 4-28	110.00			5,408.58	
9- 4-28	35.00			5,373.58	
9- 7-28	71.00			5,302.58	40
9- 8-28	160.00	180.00		4,962.58	

Exhibits.

	Date	Checks	Checks	Deposits	Sym. Balance
	9-10-28	875.00			4,087.58
	9-11-28	50.00			4,037.58
	9-12-28	3.32			4,034.26
10	9-13-28	90.00	100.00	1,000.00	4,844.26
	9-13-28	50.00			4,794.26
	9-15-28	200.00			4,594.26
	9-17-28	658.04			3,936.22
	9-18-28	125.17			3,811.05
	9-22-28	240.00			3,571.05
	9-29-28			16.82	3,587.87
	9-29-28	165.00	40.00		3,382.87
	10- 1-28			2,000.00	5,382.87
	10- 1-28			2,000.00	7,382.87
20	10- 4-28	60.00	70.00		7,252.87
	10- 5-28	200.00			7,052.87
	10-10-28	875.00			6,177.87
	10-11-28	150.00			6,027.87
	10-13-28	5,700.00			327.87
	10-13-28	80.00			247.87
	10-15-28	44.40			203.47
	10-26-28	50.00			153.47
	10-29-28	50.00		600.00	703.47
	10-30-28	449.38			254.09
30	11- 1-28			300.00	554.09
	11- 1-28			10.00	564.09
	11- 2-28	150.00			414.09
	11- 9-28	31.20			382.89
	11- 9-28	129.50			253.39
	11-15-28			500.00	753.39
	11-15-28	120.00			633.39
	11-19-28	400.00			233.39
	11-21-28	28.00			205.39
	11-23-28	130.00			75.39
40	12- 4-28			238.43	313.82

*Exhibits.***Exhibit P-5.**

BLOOMFIELD SAVINGS INSTITUTION
 TRANSCRIPT OF CHECKING ACCOUNT
 OF
 ALEXANDER MARYANSKI
 from
 January 12, 1929 to March 28, 1930

10

Stamped on top of sheet:

A True Copy
 BLOOMFIELD SAVINGS INSTITUTION
 John Edgerley
 Secretary & Treasurer

Date	Checks	Checks	Deposits	Sym. Balance	
1-12-29				31.24	20
3-12-29	31.24			0.00	
5 -9-29			800.00	800.00	
5-11-29	130.00			670.00	
5-14-29	80.00			590.00	
5-14-29	13.00			577.00	
5-16-29	90.00	8.50		478.50	
5-16-29	25.00			453.50	
5-25-29	50.00			403.50	
5-25-29	120.00	80.00		203.50	30
5-27-29	19.00			184.50	
5-28-29	30.00			154.50	
6- 4-29	80.00			74.50	
6-10-29	7.00			67.50	
6-11-29			205.00	272.50	
6-12-29	6.00			266.50	
6-13-29	200.00			66.50	
6-28-29	0.50			66.00	
6-29-29			0.75	66.75	
7-19-29			62.75	129.50	40

Exhibits.

	Date	Checks	Checks	Deposits	Sym. Balance
	8- 7-29	6.00			123.50
	8- 7-29	7.00			116.50
	9- 5-29	15.00			101.50
10	1- 6-30			903.79	1,005.29
	1-10-30	125.00			880.29
	1-13-30	300.00	43.03		537.26
	1-16-30	63.82	10.00		463.44
	1-18-30	265.00			198.44
	1-27-30	100.00			98.44
	2-27-30			1,500.00	1,598.44
	2-28-30	270.00			1,328.44
	3- 1-30	340.00			988.44
	3- 3-30	350.00		300.00	338.44
20	3- 7-30	200.00		7,000.	7,138.44
	3- 8-30	475.			6,663.44
	3-11-30	33.54			6,629.90
	3-11-30	6.00			6,623.90
	3-12-30	350.00			6,273.90
	3-13-30	90.00	62.25		6,121.65
	3-13-30	15.00			6,106.65
	3-15-30	382.07			5,724.58
	3-15-30	556.98	1.50		5,166.10
	3-15-30	6.82			5,159.28
30	3-15-30	225.00			4,934.28
	3-17-30	260.65	3.80		4,669.83
	3-18-30	44.92			4,624.91
	3-18-30	1,504.75			3,120.16
	3-21-30	250.00			2,870.16
	3-24-30	54.56			2,815.60
	3-26-30	170.76			2,644.84
	3-27-30	200.00			2,444.84
	3-28-30	8.64			2,436.20

*Exhibits.***Exhibit P-6.**

A special meeting of the board of directors of the Passaic-Bergen Lumber Co., was held at the registered office of the Company, South End of Main Ave., (Delawanna Section) Passaic, N. J. on the 28th day of February 1927, at 10 o'clock A. M. 10

Present: Messrs. Einar A. Pettersen and Richard J. Post, constituting a quorum of the board.

Mr. Pettersen was chosen temporary chairman and Richard J. Post was appointed secretary of the meeting.

The secretary presented and read a written waiver of notice of the meeting, signed by all the directors, and same was ordered filed. 20

The subject up for discussion was the advisability of opening up a new bank account with the Bogota National Bank, of Bogota, N. J.

On motion duly made and seconded it was ordered and authorized by the directors present that an account should be opened with the Bogota National Bank, of Bogota, N. J., and that the officers be empowered to borrow such sums of money as may be required from time to time for the proper conduct of the business. 30

Furthermore, on motion duly made and seconded, it was ordered and authorized by the directors present, that in the future all checks drawn by the Company must be signed by E. A. Pettersen, treasurer and countersigned by Richard J. Post, Second Vice-President.

All notes issued by the company shall only be signed by E. A. Pettersen, Treasurer, 40

Exhibits.

On motion duly made and seconded the meeting adjourned.

RICHARD J. POST

[SEAL]

Secretary of the meeting.

10

Attest:

E. A. PETTERSEN

Chairman

I hereby certify that the above minutes are a true copy of the proceedings as duly entered on the books of the Company.

RICHARD J. POST

Secretary.

20

Exhibit P-8.

A special meeting of the board of directors of the Passaic-Bergen Lumber Co. was held at the registered office of the Company, South End of Main Ave. (Delawanna Section) Passaic, N. J. on the 9th day of March 1926, at 10 o'clock A. M.

Present: Messrs. Einar A. Pettersen and Richard J. Post, constituting a quorum of the board.

30

Mr. Pettersen was chosen temporary chairman and Richard J. Post was appointed secretary of the meeting.

The secretary presented and read a written waiver of notice of the meeting, signed by all the directors, and same was ordered filed.

The subject up for discussion was the election of a new director and secretary to fill the unexpired term of Frank J. Durkin, resigned—

40

On motion duly made and seconded Katherine M. Pettersen was elected a director and Richard

Exhibits.

J. Post, Second Vice-President was elected Secretary. Furthermore, on motion duly made and seconded, it was authorized by the directors present, that in the future all checks drawn by the Company must be signed by E. A. Pettersen, Treasurer, and countersigned by Richard J. Post, Second Vice-President, and that, 10

All notes issued by the company shall only be signed by E. A. Pettersen, Treasurer,

On motion duly made and seconded the meeting adjourned.

RICHARD J. POST
Secretary of the meeting.

Attest:

E. A. PETTERSEN 20
Chairman.

I hereby certify that the above minutes are a true copy of the proceedings as duly entered on the books of the Company.

RICHARD J. POST
Secretary.

[SEAL]

Exhibit P-9.

A regular meeting of the board of directors of the Passaic-Bergen Lumber Co., was held at the registered Office of the Company, South end of Main Ave, (Delawanna Section), Passaic, N. J., on the 11th day of February 1924 at 10 o'clock A. M. 30

Present: Messrs Einar A. Pettersen, Frank J. Durkin and Richard J. Post.

Mr. Pettersen was chosen temporary chairman and Mr. Durkin was appointed secretary of the meeting. 40

Exhibits.

The secretary presented and read a written waiver of notice of the meeting, signed by all the directors, and same was ordered filed.

10 The subject up for discussion was the election of new officers and directors for the ensuing year.

On motion duly made and seconded the following officers and directors were elected.

Officers as follows:

Einar A. Pettersen, Pres., Treas., & General Mgr.

Frank J. Durkin, First Vice-Pres., & Secretary.

Richard J. Post, Second Vice-President.

20 Furthermore, on motion duly made and seconded, it was ordered and authorized by the directors present, that in the future all checks drawn by the Company must be signed by E. A. Pettersen, treasurer and countersigned by Frank J. Durkin, First Vice-Pres., or Richard J. Post, Second Vice-President.

30 All notes issued by the Company shall only be signed by Frank J. Durkin, First Vice-President and E. A. Pettersen, treasurer.

On motion the meeting adjourned.

FRANK J. DURKIN
Secretary of the meeting.

Attest:

E. A. PETERSEN
Chairman.

40 I hereby certify that the above minutes are a true copy of the proceedings as duly entered on the books of the Company.

Secretary.

*Exhibits.***Exhibit P-10.**EXCERPTS OF BY-LAWS OF PASSAIC-BERGEN LUMBER
COMPANY.

POWER OF THE DIRECTORS.

10

12. The board of directors shall have the management of the business of the company and may, subject to the provisions of the statute, of the charter and of the by-laws, exercise all such powers and do all such things as may be exercised or done by the corporation.

OFFICERS.

13. At the first meeting after the annual election of directors, when there shall be a quorum, the board of directors shall appoint a president and vice-president from their own number who shall hold office for one year and until their successors are appointed and qualified.

20

14. The board shall also annually choose a secretary and treasurer (or one person who can act as both secretary and treasurer) who need not be members of the board, who shall hold office for one year, subject to removal by the board at any time, for cause. The board may appoint and remove such other officers and agents as they may deem proper.

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PRESIDENT.

15. The president shall be the chief executive officer and head of the Company, and in the recess of the board of directors and of the executive committee, shall have the general control and management of its business and affairs. He shall, with

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Exhibits.

the treasurer, sign all certificates of stock and all certificates of indebtedness.

VICE-PRESIDENT.

10 16. The vice-president shall be vested with all the powers, and shall perform all the duties of the president in his absence.

SECRETARY.

17. The secretary shall be ex-officio clerk of the board of directors and of the standing committee, he shall attend all sessions of the board, and shall record all votes and the minutes of all meetings in a book kept for the purpose.

20 TREASURER.

20. The treasurer shall keep full and accurate accounts of receipts and disbursements in books belonging to the company, and shall deposit all moneys and other valuable effects in the name and to the credit of the company in such depositories as may be designated by the board of directors.

30 21. He shall disburse the funds of the company as may be ordered by the board, taking paper vouchers for such disbursements, and shall render to the President and directors at the regular meetings of the board, and whenever they may require it, an account of all his transactions as treasurer and of the financial conditions of the company. He shall, with the president, sign all certificates of stock.

*Exhibits.***Exhibit D-1.**

Sheridan Construction Co.

To

Fidelity Home Builders, Inc.

This Indenture, Made the 17th day of MAY in the year of our Lord One Thousand Nine Hundred and Twenty-eight BETWEEN SHERIDAN CONSTRUCTION Co. a corporation with its principal office in the City of Newark, County of Essex and State of New Jersey party of the first part And FIDELITY HOME BUILDERS, INC. a corporation with its principal office in the City of Newark, County of Essex and State of New Jersey, party of the second part: WITNESSETH, That the said party of the first part, for and in consideration of ONE DOLLAR AND OTHER GOOD AND VALUABLE CONSIDERATION lawful money of the United States of America, to it in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part being therewith fully satisfied, contented and paid, has given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents does give, grant, bargain, sell, alien, release, enfeoff, convey and confirm unto the said party of the second part, and to its successors and assigns, forever, All that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Borough of Chatham in the County of Morris and State of New Jersey. BEGINNING at a point on the West-erly line of Roosevelt Avenue as laid out on "Map No. 1 of Chatham Park" prepared by Frank T. Shepard and Son Surveyors, Newark, New Jersey,

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Exhibits.

dated June 12, 1926, which point is three hundred sixty three and one-half feet more or less North of the intersection of the said avenue and the Northerly line of Main Street as laid out on said map, which beginning point is also the Southeast-
 10 easterly corner of lot #10 on said map; from said point running thence (1) North seventy eight degrees eighteen minutes West one hundred three and fifty nine one-hundredths feet along the Southerly line of lot #10 to the Westerly line of the property now or formerly owned by the Mutual Development Corporation; thence (2) running along the same North ten degrees forty four minutes East eighty two feet; thence (3) running along
 20 the same North twenty four degrees fifty minutes East five hundred four and ninety one-hundredths feet; thence (4) still running along the same North twenty six degrees three minutes East one hundred thirteen and ninety one-hundredths feet to the Northwesterly corner of lot #36 on said map; thence (5) South sixty four degrees three minutes East ten feet; thence (6) North twenty-six degrees three minutes East twenty six and thirty-one-hundredths feet to the Southerly line of Wilson Street; thence (6) North twenty six degrees three
 30 minutes East twenty six and thirty one-hundredths feet to the Southerly line of Wilson Street; thence (7) along the same Southeast one hundred feet and ten one-hundredths of a foot to the Westerly line of Roosevelt Avenue; thence (8) along the same South twenty five degrees fifty seven minutes West six hundred sixteen and fifty two one-hundredths feet; thence (9) still along the same South eleven degrees forty two minutes West eighty seven and twenty eight one-hundredths feet
 40 to the point and place of BEGINNING. Being twenty

Exhibits.

eight lots numbered 10 to 37 inclusive, as shown on said map. Being the same premises conveyed to the party of the first part by the Mutual Development Corporation, by deed dated August 30, 1927 and recorded in the Register's Office of Morris County on September 8, 1927. Subject to restrictions of record. TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity of the said party of the first part, of, in or to the above described premises, and every part and parcel thereof, with the appurtenances. To HAVE AND TO HOLD all and singular, the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, * * * and assigns, to its own proper use, benefit and behoof forever. And the said SHERIDAN CONSTRUCTION Co. for itself, its successors or assigns, does covenant, grant and agree, to and with the said party of the second part, its successors and assigns, that the said SHERIDAN CONSTRUCTION Co. at the time of the sealing and delivery of these presents, was lawfully seized in its own right of a good, absolute, and indefeasible, estate, of inheritance in fee simple, of and in all and singular the above granted, bargained and described premises, with the appurtenances and has good right, full power and lawful authority to grant, bargain, sell and convey the same in manner and form aforesaid And that the said party of the second part, its successors and assigns, shall and may at all times hereafter,

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Exhibits.

peaceably and quietly have, hold, use, occupy, possess and enjoy the above granted premises, and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction or disturbance of the said party of the first part, its successors or assigns, or of any other person or persons lawfully claiming or to claim the same. And that the same now are free, clear, discharged and unencumbered of and from all, former and other grants, titles, charges, estates, judgments, taxes, assessments and incumbrances of what nature and kind soever. And also, that the said party of the first part, and its successors or assigns, and all and every other person or persons whomsoever, lawfully or equitably deriving any estate, right, title, or interest, of, in, or to the hereinbefore granted premises, by, from, under or in trust for it or them, shall and will at any time or times hereafter upon the reasonable request, and at the proper costs and charges in the law, of the said party of the second part its successors and assigns, make, do and execute, or cause or procure to be made, done or executed, all and every such further and other lawful and reasonable acts, conveyances and assurances in the law for the better and more effectually vesting and confirming the premises hereby intended to be granted, in and to the said party of the second part, its successors and assigns forever, as by the said party of the second part, its successors or assigns, or its counsel learned in the law, shall be reasonably advised or required. And the said SHERIDAN CONSTRUCTION Co. its successors or assigns, the above described and hereby granted and released premises, and every part and parcel thereof, with the appurtenances, unto the said party of the second part, its

Exhibits.

successors and assigns, against the said party of the first part, and its successors or assigns, and against all and every person or persons, whomsoever, lawfully claiming or to claim the same, shall and will Warrant and by these presents forever Defend. IN WITNESS WHEREOF, the said party of the first part hath caused its Corporate Seal to be hereto affixed and attested by its Secretary and these presents to be signed by its President the day and year first above written. 10

SHERIDAN CONSTRUCTION Co.

ATTEST BY

Charles Wexler Sam Wexler
SECRETARY PRESIDENT

Signed, Sealed and Delivered 20
in the presence of

Sheridan
Construction
Co.,
Incorporated
1927,
New Jersey

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Exhibits.

STATE OF NEW JERSEY,
 COUNTY OF ESSEX ss.:

10 BE IT REMEMBERED, That on this 17th day of May,
 Nineteen hundred and twenty-eight before me the
 subscriber, an ATTORNEY AT LAW OF NEW JERSEY,
 personally appeared CHARLES WEXLER, and made
 proof to my satisfaction that he is the Secretary
 of SHERIDAN CONSTRUCTION Co. the Grantor named
 in the foregoing Instrument; that he well knows
 the corporate seal of said corporation; that the
 seal affixed to said Instrument is the corporate seal
 of said corporation; that the said seal was so
 affixed and the said Instrument signed and deliv-
 20 ered by SAMUEL WEXLER, who was at the date
 thereof the PRESIDENT of said corporation, in the
 presence of this deponent, and said President, at
 the same time acknowledged that he signed, sealed
 and delivered the same as his voluntary act and
 deed, and as the voluntary act and deed of said
 corporation, and that deponent, at the same time,
 subscribed his name to said Instrument, as an
 attesting witness to the execution thereof.

CHARLES WEXLER

30 Sworn and Subscribed to before me
 at Newark, N. J. the date aforesaid

LIONEL L. MEYERS
 An Attorney at Law
 of New Jersey

Received and Recorded May 21, 1928, at 11:03
 o'clock A. M.

E. BERTRAM MOTT, Clerk,
 No. 23568

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Exhibits.

State of New Jersey, }
 County of Morris. } ss.:

I, E. BERTRAM MOTT, Clerk of the County of Morris, do hereby Certify that the foregoing is a true copy of the record of a Deed given by Sheridan Construction Co. To Fidelity Home Builders, Inc. as fully and entirely as the same remains in my office in Book E-31 of Deeds for said County, on pages 9, etc.

10

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said County, at Morristown, this fifteenth day of December, A. D. nineteen hundred and thirty-one.

E. BERTRAM MOTT

20

Clerk.

[SEAL]

By SUSAN O. NIXON

Special Deputy Clerk.

30

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Exhibit D-2.

68
 Name SHERIDAN CONSTRUCTION CO.,
 Address 83 Watson Ave., Newark, N. J.

Sheet No. 7
 Credit Limit
 Rating
 Business

Date	Description	Fol.	✓	Debits	Dr. Balance	Date	Description	Fol.	✓	Credits	Cr. Balance
1928						1928					
	Ford			37,694.40			Ford				
Dec. 28	52876	770	✓	10,496.60	*48,191.00						
1929						1929					
Feb. 7	54502	66	✓	1,260.00		Feb. 14	54806	78	✓	127.89	
25	45649	94	×	187.67		25	49212	94	×	5.06	
25	46955	94	×	364.93							
25	47074	94	×	30.50							
25	47472	94	×	6.00							
25	47730	94	×	15.00							
25	47734	94	×	155.75							
25	47876	94	×	61.15							
25	48228	94	×	309.14							
25	48411	94	×	20.25							
25	48639	94	×	118.00							
25	48680	94	×	11.25							
25	48806	94	×	75.11							
25	49142	94	×	32.75							
25	49164	94	×	3.00							
25	49178	94	×	24.00							
25	49229	94	×	28.08							
25	49286	94	×	4.05							
25	50663	94	×	3.60							
25	50749	94	×	11.70	*50,779.98						
					*50,479.98	Mar. 11	55842	121	✓	300.00	
Aug. 29	64369	460	✓	2,306.57	*52,786.55						
	Ford				52,786.55		Ford				

* Red ink in original.

Exhibits.

Sheet No. 8
 Credit Limit
 Rating
 Business

68

Name SHERIDAN CONSTRUCTION CO.
 Address 83 Watson Ave. Newark
 N. J.

Date	Description	Fol.	✓	Debits	Dr. Balance	Date	Description	Fol.	✓	Credits	Cr. Balance
1929						1929					
	Ford.			52,786.55			Ford.				
Sept. 19	65797	493	✓	34.53	*52,821.08	Oct. 7	66059	529	✓	145.00	
						17	66647	551	✓	39.00	
					*52,637.08	Nov. 8	67756	594	✓	40.00	
						19	68220	613	✓	38.92	
					*52,558.16						

* Red ink in original.

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Exhibits.

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Sheet No. 9
 Credit Limit
 Rating
 Business

Name SHERIDAN CONSTRUCTION COMPANY,
 Address

Date	Description	Fol.	✓	Debits	Dr. Balance	Date	Description	Fol.	✓	Credits	Cr. Balance
1930						1930					
Jan. 1					*52,558.16	Jan. 10	70515	16		40.00	
					*52,518.16						
Apr. 12	74322	177	✓	25.00	*52,043.16	Apr. 17	74574	188	✓	500.00	
					*51,917.37	Oct. 11	83166	541		125.79	
					*51,717.37	1931					
					*51,180.79	June 19	93689	319		200.00	
					*49,920.79	Oct. 15	98977	546		536.58	
						1932					
						Feb. 23	4826	98		1,260.00	

* Red ink in original.

Exhibits.

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Exhibit D-3.

8
 Name ALEX MARYANSKI,
 Address 68 Thomas Street, Bloomfield
 N. J.

Sheet No. 18
 Credit Limit
 Rating
 Business

Date	Description	Fol.	✓	Debits	Dr. Balance	Date	Description	Fol.	✓	Credits	Cr. Balance
1929						1929					
				Ford	12,124.42					Ford	66.25
Apr. 19	✓	57909	201	5.76							
20	✓	57949	202	14.00							
23	✓	58050	206	16.29							
23	✓	58074	206	22.45							
23	✓	58090	207	10.81							
25	✓	58221	212	4.95							
26	✓	58233	213	23.75							
27	✓	58292	216	11.88							
29	✓	58485	219	130.00							
29	✓	58353	220	14.00							
29	✓	58361	220	15.00							
30	✓	58470	224	4.64	*12,331.70						
May 3	✓	57798	232	98.01		May 9	59033	246		5,700.00	
3	✓	58319	232	11.00		24	✓	59850	278	20.92	
3	✓	58670	233	6.48							
6	✓	58794	238	3.68							
8	✓	58920	243	1.67							
8	✓	58969	244	1.00							
9	✓	59031	246	2.19							
13	✓	59220	253	7.24							
14	✓	59307	256	1.59							
18	✓	59527	263	8.90							
20	✓	59594	267	7.93							
20	✓	59614	267	19.00							
21	✓	59658	270	1.50							
21	✓	59676	270	12.30							

* Red ink in original.

Exhibits.

Exhibits.

Exhibit D-4.

Telephones-Orange-1494
1495
1496
3030

10 Received from

PASSAIC-BERGEN LUMBER CO.
LUMBER-MILLWORK & MASON MATERIALS

Ticket Number 70515

47 LAWRENCE ST.,

East Orange, N. J., Jan 10 1930

Name Cash a/c Dr

Address Sheridan Cons Co a/c Cr

Trim Analysis

20 Driver Loaded by Number

All stock is carefully tallied and re-checked before leaving our yards and our responsibility ceases upon delivery to customer's destination.

Claims of errors, by customers, must be established by listing the number of pieces received on back of this ticket. When we agree to deliver by truck our delivery of material will be to curb in front of property on which the building is to be erected, and in no case will delivery be made on the same premises unless a proper road is provided.

Unit ✓ Price Amount ✓
40.00

30 By check

(Rent from C E Thompson
#6 Roosevelt Ave. Chatham)

List all stock
returned items
on back of this ticket

OFFICE VOUCHER

"STOCK RETURNED" by our customers is a constant source of dissatisfaction and dispute. We reserve the right to accept or reject it. Co-operate with us by reducing it to a minimum.

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Exhibits.

Exhibit D-5.

Telephones-Orange-1494
 1495
 1496
 3030

Received from

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PASSAIC-BERGEN LUMBER CO.
 LUMBER-MILLWORK & MASON MATERIALS

Ticket Number 66059

47 LAWRENCE ST.,
 East Orange, N. J., Oct 7 1929

Name Cash a/c Dr

Address Sheridan Const Co a/c Cr

Trim Analysis 20

Driver.....Loaded by.....Number.....

All stock is carefully tallied and re-checked, before leaving our yards and our responsibility ceases upon delivery to customer's destination.

Claims of errors, by customers, must be established by listing the number of pieces received on back of this ticket. When we agree to deliver by truck our delivery of material will be to curb in front of property on which the building is to be erected, and in no case will delivery be made on the same premises unless a proper road is provided.

Unit ✓ Price Amount ✓ 30

Rents received to date

Mrs. Davis—Sept & Oct	\$80.00	
Mrs. Beach Oct.	50.00	
Mr. Thompson	15.00	\$145.00

List all stock
 returned items
 on back of this ticket Sign and Return

“STOCK RETURNED” by our customers is a constant source of dissatisfaction and dispute. We reserve the right to accept or reject it. Co-operate with us by reducing it to a minimum. 40

Exhibits.

Exhibit D-6.

Telephones-Orange-1494
1495
1496
3030

10 Received from

PASSAIC-BERGEN LUMBER CO.
LUMBER-MILLWORK & MASON MATERIALS

Ticket Number 66647

47 LAWRENCE ST.,
East Orange, N. J., Oct. 17 1929

Name Cash a/c Dr.

Address Sheridan Constr Co. a/c Cr.

20

Trim Analysis

Driver Loaded by Number

All stock is carefully tallied and re-checked before leaving our yards and our responsibility ceases upon delivery to customer's destination.

Claims of errors, by customers, must be established by listing the number of pieces received on back of this ticket. When we agree to deliver by truck our delivery of material will be to curb in front of property on which the building is to be erected, and in no case will delivery be made on the same premises unless a proper road is provided.

Unit √ Price Amount √

30

By check from C E. Thompson
rent for Oct. 39.00

List all stock
returned items
on back of this ticket Sign and Return

"STOCK RETURNED" by our customers is a constant source of dissatisfaction and dispute. We reserve the right to accept or reject it. Co-operate with us by reducing it to a minimum.

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Exhibits.

Exhibit D-7.

Telephones-Orange-1494
 1495
 1496
 3030

Received from 10

PASSAIC-BERGEN LUMBER CO.
 LUMBER-MILLWORK & MASON MATERIALS

Ticket Number 67756

47 LAWRENCE ST.,
 East Orange, N. J., Nov. 7 1929

Name Cash Acct Dr.

Address Sheridan Con Co. Cr.

Trim Analysis

Driver.....Loaded by.....Number..... 20

All stock is carefully tallied and re-checked before leaving our yards and our responsibility ceases upon delivery to customer's destination.

Claims of errors, by customers, must be established by listing the number of pieces received on back of this ticket. When we agree to deliver by truck our delivery of material will be to curb in front of property on which the building is to be erected, and in no case will delivery be made on the same premises unless a proper road is provided.

Unit ✓ Price Amount ✓

By cash—rent of Mrs. Davis 30

14 Roosevelt Ave. Chatham \$40.—

List all stock
 returned items
 on back of this ticket

OFFICE VOUCHER

“STOCK RETURNED” by our customers is a constant source of dissatisfaction and dispute. We reserve the right to accept or reject it. Co-operate with us by reducing it to a minimum.

Exhibits.

Exhibit D-8.

Telephones-Orange-1494
1495
1496
3030

10 Received from

PASSAIC-BERGEN LUMBER CO.
LUMBER-MILLWORK & MASON MATERIALS

Ticket Number 68220

47 LAWRENCE ST.,
East Orange, N. J., Nov. 19 1929

Name Cash a/c Dr

Address Sheridan Construction Co a/c Cr

Trim Analysis

20 Driver.....Loaded by.....Number.....

All stock is carefully tallied and re-checked before leaving our yards and our responsibility ceases upon delivery to customer's destination.

Claims of errors, by customers, must be established by listing the number of pieces received on back of this ticket. When we agree to deliver by truck our delivery of material will be to curb in front of property on which the building is to be erected, and in no case will delivery be made on the same premises unless a proper road is provided.

Unit √ Price Amount √

30 By check from C E. Thompson for
rent—for November 1929

38.92

List all stock
returned items
on back of this ticket

OFFICE VOUCHER

*"STOCK RETURNED" by our customers is a constant source of dissatisfaction and dispute. We reserve the right to accept or reject it. Co-operate with us by reducing it to a minimum.

Exhibits.

Exhibit D-9.

THE BLOOMFIELD NATIONAL BANK 55-204
2

Bloomfield, N. J. Sept. 18 1928 No. 5768

Pay to the
order of Cash \$325 00/100
Insured Three Hundred Twenty Five
Dollars InsuredDollars
Collectible at Par Through the Federal Reserve
Bank of New York

PASSAIC-BERGEN LUMBER Co.

E. A. PETTERSEN

Treasurer

Countersigned By

RICHARD J. POST

First)

Second) Vice-Pres.

(Perforation through check.)

PAID

9 20 28

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Exhibits.

(Back of check.)

S. Goldberg

Pay Any Bank
Banker, or Trust Co.
or Order

10

2 Prior Endorsements B
Guaranteed
SEP 19 1928

FEDERAL RESERVE BANK
OF NEW YORK
1-120

Pay to the Order of
Any Bank, Banker or Trust Co.
All Prior Endorsements Guaranteed
SEP 18 1928

20

HAWTHORNE AVENUE TRUST Co.
55-658 Newark, N. J. 55-658
LEE R. HILL Sec.-Treas.

Pay to the Order of
Any Bank, Banker or Trust Co.
All Prior Endorsements Guaranteed
SEP 19 1928

30

CHASE NATIONAL BANK
New York
1-74 W. P. HOLLY, Cashier
2,190.45T
1 926 64

4 117.09

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Exhibits.

THE BLOOMFIELD NATIONAL BANK 55-204
2

Bloomfield, N. J. Sept 22 1928 No. 5780

Pay to the
order of Cash \$470 00/100 10
Insured Four Hundred Seventy
Dollars InsuredDollars
Collectible at Par Through the Federal Reserve
Bank of New York

PASSAIC-BERGEN LUMBER Co.
E. A. PETERSEN
Treasurer

Countersigned By
RICHARD J. POST 20
First }
Second } Vice-Pres.

(Perforation through check.)
PAID
9 25 28

(Stamp on check.)
Cashed
1st Teller
30

Exhibits.

(Back of check.)

S. Goldberg

Pay Any Bank
Banker, or Trust Co.
or Order

10

2 Prior Endorsements B

Guaranteed
SEP 24 1928

FEDERAL RESERVE BANK
OF NEW YORK
1-120

Pay to the Order of
Any Bank, Banker or Trust Co.
All Prior Endorsements Guaranteed
SEP 22 1928

20

HAWTHORNE AVENUE TRUST CO.
55-658 Newark, N. J. 55-658
LEE R. HILL Sec.-Treas.

Pay to the Order of
Any Bank, Banker or Trust Co.
All Prior Endorsements Guaranteed
SEP 24 1928

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CHASE NATIONAL BANK
New York
1-74 W. P. HOLLY, Cashier

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Exhibits.

THE BLOOMFIELD NATIONAL BANK 55-204
2

Bloomfield, N. J. Sept 29 1928 No. 5791

Pay to the
order of Cash \$605 00/100 10
Insured Six Hundred Five
Dollars InsuredDollars
Collectible at Par Through the Federal Reserve
Bank of New York

PASSAIC-BERGEN LUMBER Co.
E. A. PETERSEN
Treasurer

Countersigned By
RICHARD J. POST 20
First }
Second } Vice-Pres.

(Perforation through check.)
PAID
10 2 28

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Exhibits.

(Back of check.)

- 10 2 S. Goldberg
 Pay Any Bank
 Banker, or Trust Co.
 or Order
 Prior Endorsements B
 Guaranteed
 OCT 1 1928
 FEDERAL RESERVE BANK
 OF NEW YORK
 1-120
- 20 Pay to the Order of
 Any Bank, Banker or Trust Co.
 All Prior Endorsements Guaranteed
 SEP 29 1928
 HAWTHORNE AVENUE TRUST Co.
 55-658 Newark, N. J. 55-658
 LEE R. HILL Sec.-Treas.
- 30 1-74 Pay to the Order of
 Any Bank, Banker or Trust Co.
 All Prior Endorsements Guaranteed
 OCT 1 1928
 CHASE NATIONAL BANK
 New York
 W. P. HOLLY, Cashier

Exhibits.

THE BLOOMFIELD NATIONAL BANK 55-204

2

Bloomfield, N. J. Oct 5 1928 No. 5800

Pay to the		
order of Cash	\$1423 00/100	10
Insured Fourteen Hundred Twenty Three		
Dollars Insured	Dollars	
Collectible at Par Through the Federal Reserve		
Bank of New York		

PASSAIC-BERGEN LUMBER Co.

E. A. PETERSEN

Treasurer

Countersigned By
 RICHARD J. POST
 First)
 Second (Vice-Pres.

20

(Perforation through check.)

PAID
10 7 28

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Exhibits.

(Back of check.)

S. Goldberg

Pay Any Bank
 Banker, or Trust Co.
 or Order

10

2 Prior Endorsements B

Guaranteed
 OCT 5 1928

FEDERAL RESERVE BANK
 OF NEW YORK
 1-120

Pay to the Order of
 Any Bank, Banker or Trust Co.
 All Prior Endorsements Guaranteed
 OCT 5 1928

20

HAWTHORNE AVENUE TRUST Co.
 55-658 Newark, N. J. 55-658
 LEE R. HILL Sec.-Treas.

Pay to the Order of
 Any Bank, Banker or Trust Co.
 All Prior Endorsements Guaranteed
 OCT 6 1928

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CHASE NATIONAL BANK
 New York
 1-74 W. P. HOLLY, Cashier

40

Exhibits.

THE BLOOMFIELD NATIONAL BANK 55-204

2

Bloomfield, N. J. October 11 1928 No. 5807

Pay to the

order of Public Service Gas & Elect Co. \$259 00/ 10

Insured Two Hundred Fifty Nine

Dollars InsuredDollars

Collectible at Par Through the Federal Reserve
Bank of New York

PASSAIC-BERGEN LUMBER Co.

E. A. PETERSEN

Treasurer

Countersigned By

RICHARD J. POST

20

First }

Second } Vice-Pres.

(Perforation through check.)

PAID

10 18 28

30

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Exhibits.

(Back of check.)

Man's Ext. 259 00/

Pay Any Bank
Banker, or Trust Co.
or Order

10

2 Prior Endorsements B

Guaranteed
OCT 17 1928

FEDERAL RESERVE BANK
OF NEW YORK
1-120

Pay to the Order of
THE SUMMIT TRUST Co.
Summit, N. J.

20

Public Service Electric & Gas Company
Gas Department

I. W. VAN MIDDLESWORTH, Treas.

Pay HANOVER NATIONAL BANK
New York City or Order

THE SUMMIT TRUST Co.

55-260 of Summit, N. J. 55-260

GEO. V. LUM, Treas.

30

Pay to the Order of
Any Bank, Banker or Trust Company
Prior Endorsements Guaranteed

OCT 17 1928

THE HANOVER NATIONAL BANK
1-33 of the City of New York 1-33
FREDERICK A. THOMAS, Cashier

40

Exhibits.

THE BLOOMFIELD NATIONAL BANK 55-204
2

Bloomfield, N. J. Oct 13 1928 No. 5811

Pay to the
order of Cash \$1435 00/ 10
Insured Fourteen Hundred Thirty Five
Dollars InsuredDollars
Collectible at Par Through the Federal Reserve
Bank of New York

PASSAIC-BERGEN LUMBER Co.
E. A. PETTERSEN
Treasurer

Countersigned By
RICHARD J. POST 20
First }
Second } Vice-Pres.

(Perforation through check.)

PAID
10 16 28

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Exhibits.

(Back of check.)

S. Goldberg

Pay Any Bank
Banker, or Trust Co.
or Order

10

2 Prior Endorsements B

Guaranteed
OCT 15 1928

FEDERAL RESERVE BANK
OF NEW YORK
1-120

Pay to the Order of
Any Bank, Banker or Trust Co.
All Prior Endorsements Guaranteed
OCT 13 1928

20

HAWTHORNE AVENUE TRUST Co.
55-658 Newark, N. J. 55-658
LEE R. HILL Sec.-Treas.

Pay to the Order of
Any Bank, Banker or Trust Co.
All Prior Endorsements Guaranteed
OCT 15 1928

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CHASE NATIONAL BANK
New York
1-74 W. P. HOLLY, Cashier

40

Exhibits.

THE BLOOMFIELD NATIONAL BANK 55-204

2

Bloomfield, N. J. Oct 20 1928 No. 5854

Pay to the		
order of Cash	\$1329 00/100	10
Insured Thirteen Hundred Twenty Nine		
Dollars Insured	Dollars	
Collectible at Par Through the Federal Reserve		
Bank of New York		

PASSAIC-BERGEN LUMBER CO.

E. A. PETERSEN

Treasurer

Countersigned By
 RICHARD J. POST
 First)
 Second (Vice-Pres.

20

(Perforation through check.)

PAID

10 23 28

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Exhibits.

(Back of check.)

S. Goldberg

Pay Any Bank
Banker, or Trust Co.
or Order

10

2 Prior Endorsements B

Guaranteed
OCT 22 1928

FEDERAL RESERVE BANK
OF NEW YORK
1-120

Pay to the Order of
Any Bank, Banker or Trust Co.
All Prior Endorsements Guaranteed
OCT 20 1928

20

HAWTHORNE AVENUE TRUST Co.
55-658 Newark, N. J. 55-658
LEE R. HILL Sec.-Treas.

Pay to the Order of
Any Bank, Banker or Trust Co.
All Prior Endorsements Guaranteed
OCT 22 1928

30

CHASE NATIONAL BANK
New York
1-74 W. P. HOLLY, Cashier

40

Exhibits.

THE BLOOMFIELD NATIONAL BANK 55-204

2

Bloomfield, N. J. October 26 1928 No. 5861

Pay to the		
order of Cash	\$1829 00/100	10
Insured One Thousand Eight Hundred		
Twenty Nine Dollars Insured Dollars		
Collectible at Par Through the Federal Reserve		
Bank of New York		

PASSAIC-BERGEN LUMBER Co.

E. A. PETTERSEN

Treasurer

Countersigned By	
RICHARD J. POST	20
First)	
Second) Vice-Pres.	

(Perforation through check.)

PAID

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Exhibits.

(Back of check.)

S. Goldberg

Pay Any Bank
 Banker, or Trust Co.
 or Order

10

2 Prior Endorsements B

Guaranteed
 OCT 27 1928

FEDERAL RESERVE BANK
 OF NEW YORK
 1-120

Pay to the Order of
 Any Bank, Banker or Trust Co.
 All Prior Endorsements Guaranteed
 OCT 26 1928

20

HAWTHORNE AVENUE TRUST Co.
 55-658 Newark, N. J. 55-658
 LEE R. HILL Sec.-Treas.

Pay to the Order of
 Any Bank, Banker or Trust Co.
 All Prior Endorsements Guaranteed
 OCT 27 1928

30

CHASE NATIONAL BANK
 New York
 1-74 W. P. HOLLY, Cashier

40

Exhibits.

THE BLOOMFIELD NATIONAL BANK 55-204
2

Bloomfield, N. J. Nov 9 1928 No. 5880

Pay to the
order of Cash \$514 00/100 10

Insured Five Hundred Fourteen Dollars. .Dollars
Collectible at Par Through the Federal Reserve
Bank of New York

PASSAIC-BERGEN LUMBER Co.

E. A. PETERSEN

Treasurer

Countersigned By

RICHARD J. POST

First)

Second) Vice-Pres.

20

(Perforation through check.)

PAID

11 13 28

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Exhibits.

(Back of check.)

S. Goldberg

Pay Any Bank
Banker, or Trust Co.
or Order

10

2 Prior Endorsements B

Guaranteed
NOV 12 1928

FEDERAL RESERVE BANK
OF NEW YORK
1-120

Pay to the Order of
Any Bank, Banker or Trust Co.
All Prior Endorsements Guaranteed

20

NOV 11 1928

HAWTHORNE AVENUE TRUST Co.
55-658 Newark, N. J. 55-658
LEE R. HILL Sec.-Treas.

Pay to the Order of
Any Bank, Banker or Trust Co.
All Prior Endorsements Guaranteed
NOV 12 1928

30

CHASE NATIONAL BANK
New York
1-74 W. P. HOLLY, Cashier

Exhibits.

THE BLOOMFIELD NATIONAL BANK 55-204
2

Bloomfield, N. J. Nov. 2 1928 No. 5873

Pay to the		
order of Cash	\$1109 25/100	10
Insured Eleven Hundred Nine Dollars		
Twenty Five Cents Insured Dollars		
Collectible at Par Through the Federal Reserve		
Bank of New York		

PASSAIC-BERGEN LUMBER Co.
E. A. PETTERSEN
Treasurer

Countersigned By	
RICHARD J. POST	20
First } Second } Vice-Pres.	

(Perforation through check.)

PAID
11 5 28

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Exhibits.

(Back of check.)

S. Goldberg

Pay Any Bank
Banker, or Trust Co.
or Order

10

2 Prior Endorsements B

Guaranteed
NOV 3 1928

FEDERAL RESERVE BANK
OF NEW YORK
1-120

Pay to the Order of
Any Bank, Banker or Trust Co.
All Prior Endorsements Guaranteed

20

NOV 2 1928

HAWTHORNE AVENUE TRUST Co.
55-658 Newark, N. J. 55-658
LEE R. HILL Sec.-Treas.

Pay to the Order of
Any Bank, Banker or Trust Co.
All Prior Endorsements Guaranteed
NOV 3 1928

30

THE CHASE NATIONAL BANK
of the City of New York
1-74 W. P. HOLLY, Cashier

40

Exhibits.

THE BLOOMFIELD NATIONAL BANK 55-204
2

Bloomfield, N. J. Nov 16 1928 No. 5915

Pay to the		
order of Cash	\$325 00/100	10
Insured Three Hundred Twenty Five		
Dollars Insured	Dollars	
Collectible at Par Through the Federal Reserve		
Bank of New York		

PASSAIC-BERGEN LUMBER Co.
E. A. PETERSEN
Treasurer

Countersigned By	
RICHARD J. POST	20
First } Second } Vice-Pres.	

(Perforation through check.)
PAID
11 19 28

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Exhibits.

(Back of check.)

S. Goldberg

Pay Any Bank
 Banker, or Trust Co.
 or Order

10

2 Prior Endorsements B

Guaranteed
 NOV 17 1928

FEDERAL RESERVE BANK
 OF NEW YORK
 1-120

Pay to the Order of
 Any Bank, Banker or Trust Co.
 All Prior Endorsements Guaranteed
 NOV 16 1928

20

HAWTHORNE AVENUE TRUST CO.
 55-658 Newark, N. J. 55-658
 LEE R. HILL Sec.-Treas.

Pay to the Order of
 Any Bank, Banker or Trust Co.
 All Prior Endorsements Guaranteed
 NOV 17 1928

30

CHASE NATIONAL BANK
 New York
 1-74 W. P. HOLLY, Cashier

40

Exhibits.

THE BLOOMFIELD NATIONAL BANK 55-204

2

Bloomfield, N. J. November 22 1928 No. 5925

Pay to the		
order of Cash	\$640 00/100	10
Insured Six Hundred Forty		
Dollars Insured	Dollars	
Collectible at Par Through the Federal Reserve		
Bank of New York		

PASSAIC-BERGEN LUMBER Co.

E. A. PETERSEN

Treasurer

Countersigned By
 RICHARD J. POST
 First }
 Second } Vice-Pres.

20

(Perforation through check.)

PAID

11 24 28

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Exhibits.

(Back of check.)

S. Goldberg

Pay Any Bank
Banker, or Trust Co.
or Order

10

2 Prior Endorsements B

Guaranteed
NOV 24 1928

FEDERAL RESERVE BANK
OF NEW YORK
1-120

Pay to the Order of
Any Bank, Banker or Trust Co.
All Prior Endorsements Guaranteed
NOV 23 1928

20

HAWTHORNE AVENUE TRUST CO.
55-658 Newark, N. J. 55-658
LEE R. HILL Sec.-Treas.

Pay to the Order of
Any Bank, Banker or Trust Co.
All Prior Endorsements Guaranteed
NOV 24 1928

30

CHASE NATIONAL BANK
New York
1-74 W. P. HOLLY, Cashier

40

New Jersey Court of Errors and Appeals

PASSAIC-BERGEN LUMBER COMPANY, a
corporation of New Jersey,
Plaintiff-Appellee,

v.

UNITED STATES TRUST COMPANY, a
corporation of New Jersey,
Defendant-Appellant.

Action at Law.

On Appeal from
Supreme Court,
Passaic County.

BRIEF OF DEFENDANT-APPELLANT.

Statement of Facts.

Plaintiff-appellee instituted suit against the defendant-appellant, a banking corporation of this State, for the recovery of the amount of two checks, one in the sum of four thousand dollars (\$4,000.00) and the other in the sum of five thousand one hundred dollars (\$5,100.00) alleged to have been wrongfully collected by the defendant-appellant. Both of said checks were drawn to the order of the plaintiff-appellee, endorsed by rubber stamp reading, "Passaic-Bergen Lumber Co." and both checks were deposited in the account of the Fidelity Home Builders, Inc., with the defendant bank. The proceeds of said checks were collected by defendant and paid out on the order of Fidelity Home Builders, Inc., and were used exclusively for the completion of the construction of buildings owned by Fidelity Home Builders, Inc., on Roosevelt Avenue, Chatham, New Jersey.

The defense to the action is that the respective endorsements of said checks were made by J. R. Schick, manager of the East Orange Yard of the Passaic-Bergen Lumber Co., with authority of plaintiff-appellee, and further, that plaintiff-appellee is estopped from denying said authority by reason of the fact that the entire transaction involving the endorsement and the use of the proceeds of said checks was subsequently ratified by the plaintiff-appellee. Testimony was adduced by the defendant-appellant that Sheridan Construction Co. was the owner of premises on Roosevelt Avenue, Chatham, New Jersey, where it was constructing several houses. The materials used in said buildings had been purchased from the plaintiff-appellee on credit which amounted to about the sum of thirty-five thousand dollars (\$35,000.00) in May, 1928. When J. R. Schick, the manager in full charge of the East Orange Yard of the plaintiff-appellee, from whom the materials were purchased, learned that the Sheridan Construction Co. was financially embarrassed and that the Passaic-Bergen Lumber Company would probably sustain a great loss on this account, he arranged to take over this property in the name of Fidelity Home Builders, Inc., for and in behalf of the plaintiff-appellee and to complete the buildings, rent or sell them, and thereby salvage as much as possible for the plaintiff-appellee.

The case further shows that a conveyance was made by the Sheridan Construction Co. to Fidelity Home Builders, Inc., and that the buildings were finished and funds paid directly from the plaintiff-appellee were used for the purpose of completing the buildings. It also appeared that plaintiff-appellee collected rents from the tenants of the premises on Roosevelt Avenue, Chatham, New Jersey, between October 7, 1929, and January 10, 1930.

At the close of plaintiff-appellee's case, defendant-appellant moved for a nonsuit, which was denied and excepted to.

At the close of defendant-appellant's case, plaintiff-appellee moved for a direction of verdict in favor of the plaintiff and against the defendant.

After argument of counsel the Court directed a verdict in favor of the plaintiff-appellee and against the defendant-appellant in the full sum sought, which was excepted to.

Defendant-appellant appeals from the judgment entered herein, on the grounds that the Court erred in refusing to grant defendant's motion of nonsuit as against the plaintiff, and it erred in directing a verdict against the defendant and in favor of the plaintiff.

POINT I.

The trial court erred in denying defendant's motion of nonsuit at the close of plaintiff's case.

The point made by the defendant-appellant on its motion for nonsuit was that there was no privity of contract or relationship between the plaintiff and the defendant. Each of the checks is drawn to the order of plaintiff-appellee but on the drawer's bank in each instance and not on the defendant bank. There was no relationship of bank and depositor between the parties under which the bank would owe a duty to disburse funds of a depositor upon the proper order of the depositor as was the case in the cases of *Economy Auto Supply Co., Inc., v. Fidelity Union Trust Co.*, 144 Atl. Rep. 30; *Harter v. Mechanic's National Bank*, 63 N. J. L. 578; *Denis v. Fidelity Union Trust Company*, 99 N. J. L. 365; and *Ameri-*

can Saw Company v. First National Bank, 60 N. J. L. 417, all of which were relied upon by plaintiff-appellee at the trial. The defendant bank was not called upon to collect for the Passaic-Bergen Lumber Company. There was no duty cast upon the defendant bank to make any inquiry as to the authority of the endorser on the check. There was nothing on the check to show or indicate in anywise a breach of fiduciary relationship as in the case of *American Saw Company v. First National Bank*, *supra*. In that case, Bissell, secretary of the Saw Company, endorsed to his own order a check payable to his own company and cashed same at the very same bank in which the Saw Company had its banking account. The bank there, of course, was immediately put on inquiry because the check was payable to an officer of the corporation.

In the case of *Denis v. Fidelity Union Trust Company*, *supra*, the check was payable to the plaintiff company and endorsed by the president thereof to his own order. In the present case, there is no relationship of bank and depositor nor is there anything on the respective checks to indicate a breach of good faith and lack of authority in order to cast a duty upon the defendant bank to make an inquiry.

At the trial, counsel for plaintiff-appellee relied upon the case of *Buckley v. Second National Bank of Jersey City*, 35 N. J. L. 400. The decision turned on the point that the endorsement in that case was forged. The Court decided the case on the general rule that no title could be obtained through a forgery, page 403. In the case at bar, there is no proof whatsoever of a forged endorsement and we therefore believe that the *Buckley* case is not applicable to the present situation.

It therefore appearing that there was no contractual relationship between the plaintiff-appellee

and the defendant-appellant, and that there appeared nothing in the case to impose a duty upon the defendant bank to inquire as to the endorsement on said checks, defendant bank could not be liable on said checks, and the Court should have nonsuited the plaintiff.

POINT II.

The trial court erred in directing a verdict against the defendant and in favor of the plaintiff.

At the close of plaintiff's case voluminous testimony was offered in behalf of the defendant-appellant to show the general authority of J. R. Schick, the manager of the East Orange Yard of the plaintiff-appellee, and to show the ratification of all of his acts by the plaintiff-appellee. When defendant rested, counsel for the plaintiff-appellee moved for a direction of verdict in favor of the plaintiff and the Court, we believe, wrongfully granted said motion, because there was plenty of evidence to indicate that the entire transaction, involving the endorsements and use of the proceeds of the checks in this matter, was ratified by the plaintiff-appellee.

The general theory of defendant's case is that J. R. Schick, the manager of the East Orange Yard of the plaintiff-appellee, was given general authority in the operation of the business at the East Orange Yard, and that this included the sale of merchandise in as large amounts as thirty-five thousand dollars (\$35,000.00), fixing of the terms and prices on the said sales, collecting debts due, compromising of disputes and signing postponements of mechanics' lien claims. During his connection with the company, on many occasions,

where accounts were bad, and in an effort to mitigate the loss occasioned thereby, real estate holdings of the debtors were conveyed over to said J. R. Schick and held by him in his own name for and in behalf of the plaintiff-appellee. That in one particular instance, in the case of the K. S. B. Realty Company, Schick held stock in said company, which was a holding company of creditors of which plaintiff-appellee was one, for said plaintiff-appellee. The testimony further shows that Schick, as manager of the plaintiff-appellee, had sold to the Sheridan Construction Co., a corporation, materials used in the erection and construction of several buildings of said Sheridan Construction Co. on Roosevelt Avenue, Chatham, New Jersey. That the said Sheridan Construction Co. owed the Passaic-Bergen Lumber Company for said materials so sold and delivered, a sum in the neighborhood of thirty-five thousand dollars. That at that time the Sheridan Construction Co. was in bad financial shape, and Schick, in line with his previous experiences with the Passaic-Bergen Lumber Company, and in order to salvage as much of the debt to the Passaic-Bergen Lumber Company, took over the land owned by the Sheridan Construction Co. by securing a deed from said company to the Fidelity Home Builders, Inc., which was entirely controlled by Schick. This entire transaction was done for and in behalf of the Passaic-Bergen Lumber Company (Case p. 127, lines 1 to 3). All of this was done prior to the dates of the checks in this matter. It was testified that the proceeds of these two checks were used exclusively to pay for the completion of the construction of the buildings formerly owned by the Sheridan Construction Co.

It also appears that the Passaic-Bergen Lumber Company, through checks signed by its president and vice-president, advanced the sum of approxi-

mately ten thousand dollars, which was used in the completion of the construction of the buildings owned by the Fidelity Home Builders, Inc. (Exhibit D-9, Case pp. 187 to 210, inclusive).

It appears further that Schick was in the employ of the Passaic-Bergen Lumber Company until the latter part of 1929, when his alleged defalcations are claimed to have been discovered. Notwithstanding this fact, the plaintiff-appellee continued to collect rents from tenants who occupied premises on Roosevelt Avenue, Chatham, New Jersey, owned by Fidelity Home Builders, Inc. These facts appear very clearly from the tickets marked Exhibits D-4, 5, 6, 7 and 8, which indicate the specific tenants from whom rent was received. These receipts were credited to the account of Sheridan Construction Co., as indicated on sheets 8 and 9 of Exhibit D-2.

It therefore clearly appears that there was evidence in the case to indicate that the Passaic-Bergen Lumber Company, after knowledge of the alleged defalcation of its manager, John R. Schick, accepted the benefits of his transactions and thereby ratified all his acts in connection therewith, including the endorsement of the checks involved herein.

“By accepting and retaining the beneficial results of an unauthorized act of his agent, the principal, having knowledge of the facts, ratifies such act and cannot repudiate the consequences of a particular act of the same agent in the identical transaction which produces the contract, the fruits of which are retained.”

Bodine v. Berg, 82 Atl. 901, 904;

Keim v. Lindley, 30 Atl. 1063, affirmed 54 Eq. 418, 34 Atl. 1073, 1 Parsons Contracts, 40-52;

Roder's Administrator v. Maddox, 150 U. S. 128, 14 Sup. Ct. 46, 37 L. Ed. 1025, 31 Cyc. 1257-1270.

In 2 *Corpus Juris*, page 489, Sec. 109, the proposition is stated as follows:

“Generally speaking, a ratification may be implied from any acts, words, or conduct on the part of the principal which reasonably tend to show an intention on the part of the principal to ratify the unauthorized acts or transactions of the alleged agent, provided the principal in doing the act relied on as a ratification acted with knowledge of the material facts.”

On page 493 of the same volume the following proposition is stated:

“It is well settled that as a general rule if the principal with full knowledge of all the material facts takes and retains the benefits of the unauthorized act of an agent he thereby ratifies such act and that with the benefits he accepts also the liabilities and burdens resulting therefrom.”

If the defendant-appellant's case disclosed sufficient evidence from which a jury might infer such ratification the trial court was wrong in directing a verdict. In *Hoff v. Public Service Railroad Company*, 101 Atl. 404, the Court said that

“In passing upon a motion for the direction of a verdict a court cannot weigh the evidence, but is bound to concede to be true all evidence which supports a view of the party against whom the motion is made, and to give to him the benefit of all legitimate inferences which are to be drawn in his favor.”

In this case there was plenty of evidence from which it might be inferred that any unauthorized acts of Schick in connection with the entire transaction of taking over the Sheridan Construction property in the name of the Fidelity Home Builders, Inc., and the use of the funds derived from

the two checks involved in this matter was subsequently ratified by the Passaic-Bergen Lumber Company accepting the benefits derived by collecting rents of said premises at a time when Schick had been discharged from the employ of the Lumber Company and his alleged defalcations known.

CONCLUSION.

We therefore respectfully submit that the judgment in favor of the plaintiff-appellee and against the defendant-appellant should be reversed for the reasons above stated, to wit, the trial court erred in refusing to grant the motion of nonsuit and in directing a verdict in favor of the plaintiff-appellee and against the defendant-appellant.

Respectfully yours,

SAUL and JOSEPH E. COHN,
Attorneys of Defendant-Appellant.

New Jersey Court of Errors and Appeals

PASSAIC-BERGEN LUMBER COMPANY,
a corporation of New Jersey
Plaintiff-Appellee

vs.

UNITED STATES TRUST COMPANY,
a corporation of New Jersey
Defendant-Appellant

Action at Law

On Appeal
from Supreme
Court, Passaic
County

BRIEF OF PLAINTIFF-APPELLEE

Statement of Facts

This action was instituted by the Passaic-Bergen Lumber Company, the plaintiff-appellee, against the United States Trust Company, the defendant-appellant, to recover the proceeds of two checks, amounting to the sum of \$9700.00.

The plaintiff-appellee is a corporation engaged in the retail lumber business, and maintains six yards in various towns in this state. Each of these yards is conducted by a local manager under the general direction and control of the president and general manager of the company, whose office is located at Passaic.

It was the duty of these local managers to supervise the local plant, sell materials, receive payment for the same, and when these payments were made by check, to deposit the same to the account of the corporation in designated banking depositories. (Case, page 31, lines 7-9; page 32, lines 9-14.) The testimony in this case showed that one, John R.

Shick, was the local manager of the plaintiff-appellee at East Orange. Mr. Shick received in the usual course of business two checks, the first, bearing date August 8th, 1928, in the sum of \$4000.00, made by Lintott, Kahrs and Young, drawn on the National State Bank of Newark, to be applied to the credit of Mario Alagno, one of the plaintiff's customers. This check was not endorsed by the plaintiff-appellee, but a rubber stamp impression of the name of the Passaic-Bergen Lumber Company was stamped on the back of the check, and following said rubber stamp endorsement appeared the name of the Fidelity Home Builders, Inc., a corporation organized by Shick without the knowledge of the plaintiff-appellee. (Case, page 127, lines 8-19.) This check was deposited by Shick to the account of the Fidelity Home Builders, Inc., with the defendant bank, which collected the check from the bank upon which it was drawn, and credited the same to the Fidelity Home Builders, Inc. The plaintiff-appellee received no part of the proceeds of this check.

Mr. Shick received a second check from another customer of the Passaic-Bergen Lumber Company, one, Alexander Maryanski, dated September 29th, 1928, and in similar manner placed a rubber stamp impression of the name of the plaintiff-appellee on this check and endorsed the name of the Fidelity Home Builders, Inc., depositing said check to the latter's account. This check was likewise collected by the defendant-appellant from the bank upon which it was drawn, and the Fidelity Home Builders, Inc. credited therewith.

The plaintiff-appellee proved by its by-laws, minutes and resolutions filed with its banking depositories that all checks must be signed by its treasurer and one of its vice-presidents. (Case, page 35, lines 33-40; page 36, lines 1-21; page 40, lines 24-34; page 165, exhibit P-6; page 167, exhibit P-8; page 168, exhibit P-9.)

It was further brought out that a manager has no power to endorse or negotiate any check. (Case, page 46, lines 12-15.)

The plaintiff-appellee, having established by plenary evidence, that its agent, Shick, had received two checks, totalling \$9700.00 from plaintiff-appellee's customers, had placed a rubber stamp impression of the name of the plaintiff-appellee thereon, and then endorsed the name of the Fidelity Home Builders, Inc., a corporation in which the plaintiff-appellee owned no stock, had no interest or control therein, and had further established by its corporate records, that the officials who had authority to sign checks were its treasurer and one of its vice-presidents, and that it had not received the proceeds of these checks, rested. A motion for a non-suit was made which the court denied.

ARGUMENT

POINT I

The Motion for a Non-Suit Was Properly Denied

The defendant-appellant rests its principal point for the granting of a non-suit upon the ground that there existed no privity of contract between the plaintiff-appellee and the defendant-appellant. That this contention is unsound is effectively disposed of by the case of Buckley v. Second National Bank of Jersey City, 35 N. J. L. 400.

In the Buckley case, the plaintiff sued the defendant bank for the amount of a check drawn on the United States Treasury, made out to his order. It appeared that the plaintiff was entitled to an additional bounty from the government and had employed one, Charles Crossman, to appear for him.

Crossman negotiated with the government on behalf of Buckley and received by mail the check in question endorsed to the order of Buckley. Crossman endorsed Buckley's name on the check, which came into the possession of the defendant bank, which collected the amount of the check from the government and paid the proceeds to Crossman who failed to pay the money over to Buckley. The plaintiff had no knowledge of the existence of the check until sometime after its collection by the defendant.

The principal contention made by the defendant to resist liability in this case was that there was no privity of contract between the parties. The court, in deciding adversely to the defendant, states at page 402:

“It is insisted, on the part of the defendants, that this action cannot be maintained, for want of privity between the parties. But if the check in question, at the time it was received and collected by the defendants, was in fact the property of the plaintiff, he may, in the absence of any fault or laches on his part, maintain this action, and recover from the defendants the money received by them from the assistant treasurer of the United States. *Lamine v. Dorell*, 2 *Ld. Raym.* 1216; *Talbot v. Bank of Rochester*, 1 *Hill* 295.

“Can there be any doubt that the plaintiff owned the check when it came into the defendant's hands? Having been sent to the plaintiff's agent, and received by him for the plaintiff's use, the transfer of title from the United States to the plaintiff was complete. The plaintiff, by such transfer, became the absolute owner of the check. Did he cease to be the owner when, by means of a forged endorsement of the plaintiff's name, the check was passed by Crossman to the defendants? On this point the law is well settled.”

The court held that the check was at all times the property of the plaintiff, and he may recover the amount sued for in this action as money received by the defendant to his use. The court further ruled that the defendant had no equitable claim as between it and the plaintiff to be exempt from paying the check to the plaintiff for the defendant was negligent

“in taking the check without first ascertaining the genuineness of the endorsement” (at page 404),

and concludes that if it has taken the check from Crossman on the strength of his endorsement, and he turns out to be worthless, that it is its misfortune, but on no principle of law or equity can it be justified in withholding from the plaintiff the money which this action is brought to recover.

It seems, therefore, quite clear that when the plaintiff in the instant case offered evidence that its two checks received by its local manager in the usual course of business, made payable directly to its order, and stamped with a rubber stamp bearing the name of the plaintiff, and the checks were presented to the defendant for credit to the account of the Fidelity Home Builders, Inc., the defendant's duty was to inquire as to the genuineness of the payee's endorsement; that its failure to make such inquiry was a breach of the duty that it owed the plaintiff, and it is liable to the plaintiff for the amount of the checks for money received by the defendant to the use of the plaintiff. The motion for a non-suit was, therefore, properly denied.

POINT II**The Direction of a Verdict by the Trial Court in Favor of the Plaintiff and Against the Defendant Was Proper**

The defenses interposed, and which the defendant sought to establish at the trial, were principally two:

1. Authority by Shick to endorse the checks in question;

2. Estoppel to deny Shick's authority because of subsequent ratification of his acts.

In the attempt to prove authority on the part of Shick, testimony was introduced by the defendant to the effect that Shick had sold a large quantity of materials to a corporation known as the Sheridan Construction Company, which was erecting a number of houses; that when Shick discovered that the account was not collectible, he conceived the idea to organize another company, known as the Fidelity Home Builders, Inc., to take over these houses in the name of the Fidelity Home Builders, Inc., sell them, and from such sales endeavor to liquidate the account. (Case, page 126, lines 39-40; page 127, lines 1-19, 31-40.)

At the outset, it must be noted clearly that Shick had no authority to organize a company for this purpose; that the testimony of Shick himself is quite clear that he had never apprised the president or any other responsible official of the plaintiff that he was forming a company for any such purpose, and that the existence of the Fidelity Home Builders, Inc., was not brought home to the knowledge of the officials of the plaintiff until a considerable time after the negotiation of these checks. Consequently, how can it be argued with any degree of plausibility that Shick had authority to negotiate these checks when the plaintiff had no knowledge of his operations; and

the same reasoning applies to the defence of estoppel. A party cannot be estopped from repudiating an act of his agent when he is in ignorance of the facts, assuming that evidence of the facts which are alleged to constitute estoppel are relevant or competent. A perusal of Shick's testimony makes it evident that because of his improvident and reckless granting of credits to a customer, which had fallen into financial difficulties, and in his attempt to cover up his defalcations, he contrived a scheme by which he hoped to retrieve some of the losses, and escape the penalty of his acts. It cannot be too emphatically stated that during the period of time that Shick was operating in this manner, that his responsible superiors had no intimation or knowledge of what he was doing. Obviously, it cannot be urged that the plaintiff is bound by its agent's act in surreptitiously taking customers' checks, affixing rubber stamp endorsements with no signatures appearing thereunder, and negotiating them over to the credit of a corporation in which the plaintiff had no stock, no voice, no control, or even knowledge of its existence. The very character of the rubber stamp impression of the plaintiff's name was sufficient evidence to put the defendant on notice and on guard, when these checks were presented to it for payment.

The defendant, in its brief, makes a point of the fact that certain deeds for property had been taken over in the name of Shick and held by him in his name for the benefit of the plaintiff. Granting that this was true, this fact could convey no inference that Shick as an agent had authority to take the plaintiff's negotiable paper, received from its customers in the usual course of business, and negotiate the same over to another company, particularly in the face of the circumstance that the by-laws, minutes and the resolutions, formally adopted by the plaintiff, recited that checks or other evidence of

indebtedness of the company may be signed only by the treasurer and a vice-president.

A case that is precisely in point in its facts with the instant case is that of *American Saw Co. v. First National Bank*, 58 N. J. L. 438. The facts as stated in the opinion of Chief Justice Beasley are as follows:

“The plaintiff was a corporation doing business in the City of Trenton, having its banking account with the defendant. In payment of its manufactured articles sold in various parts of the country, it was in the habit of receiving a large number of drafts and checks, which were usually deposited to its credit in the bank of the defendant, by one, Bissell, one of its employes, who to that end was duly authorized. In the course of time the plaintiff discovered that this agent had, as it is alleged, forged its name upon the back of a large number of these checks and had thereby, instead of depositing the same in the bank for the benefit of the plaintiff, received the money due thereon and applied it to his own use. The drafts and checks thus paid had been collected by the defendant of their respective makers. The suit is for moneys thus received by the bank.”

It was contended that even if the bank had paid the money to Bissell because of his forged endorsement, there was no contractual relation between the bank and the plaintiff, and therefore no ground for the action. The Chief Justice answering this point holds that the facts do not stop at this point for it was shown

“that, after such payment, the bank collected upon the checks and drafts the moneys due upon them. As these vouchers were the property of the plaintiff, it is difficult to see why the sums thus obtained did not belong to the plaintiff, and why, under such circumstances a promise, by interment of law, did not arise, to pay them to the

person thus entitled to them. It is believed that no decision or judicial dictum can be found that, in any degree whatever, is opposed to such a result. The precedent of *Buckley v. Second National Bank*, 35 N. J. L. 400, is thoroughly in point, and would have to be overruled in order to sustain this contention of the defense."

The foregoing case was appealed to the Court of Errors and Appeals and is reported in 60 N. J. L. 417. After stating the facts to the same effect as above set forth, that court in an exhaustive opinion by Chancellor McGill stated that the principal point at the trial revolved around the fact whether Bissell was authorized to receive the amounts of the checks from the bank for the companies, and this question was left to the jury by the trial judge who refused to direct the verdict for the plaintiff. At the conclusion of the trial it was held that it was clear from the undisputed facts that such authority could not be held to exist either in express terms or by implication, or by way of estoppel, and therefore the desired instructions to the jury should have been given.

The court says:

"Where the facts are clear and undisputed and conclusively show lack of authority in an agent, question as to his authority in a given particular being the matter in issue, it is the duty of the court to determine the issue by peremptory instruction to the jury."

It appears that Bissell was connected with the plaintiff company for a number of years, he being its secretary. The by-laws of the company provided that the treasurer should have charge of the funds of the corporation and should deposit all moneys in the bank designated by the executive committee, and that all moneys exceeding \$200.00 shall be drawn by

the treasurer, and countersigned by the president or a member of the executive committee. The court points out that whatever laxity there was in its financial operations lay in the practice of depositing money in the bank. But it was in the manner in which money was drawn out that Bissell operated in the perpetration of his fraud. He received checks from the plaintiff's customers and without knowledge to the bookkeeper printed with a rubber stamp the name of the plaintiff and signed his own name as secretary, and cashed the check at the bank, and thereafter for about two and one-half years, eighty-eight other checks were cashed in similar manner. Bissell continued this course for two and one-half years until he had withdrawn \$17,000.00, and the bank never inquired where this large amount was going to. Bissell kept these moneys operating only with the checks of a few customers whose financial standing seemed to offer an excuse as to their delay in making payment. The court then states at page 424:

“The proofs make it perfectly clear that Bissell's endorsement for other purposes than deposit to the credit of the companies of which he was secretary, was without express authority. The by-laws expressly circumscribed and limited his powers to as to exclude such authority and make plain the financial policy that all moneys should in the first instance be deposited in a bank to the credit of the companies respectively, and thereafter be from thence drawn for use in a prescribed manner, and that no moneys should immediately upon receipt without deposit, be applied by any officer to the uses of the companies.”

The court then discusses the fact of the resolution which appointed Bissel as manager,

“with full power to act in all matters in the absence of Mr. Putnam,” (the treasurer of the company.)

The court then proceeds at page 426:

“It is equally clear that Bissell was not impliedly given authority to endorse otherwise than for deposit. Authority by implication could arise only from a course of dealing sanctioned by the directors. The only course of dealing in financial affairs unrecognized by the by-laws which appears to have been known to, and to have had the sanction of the directors, was an exercise by the secretary of the powers which the proposed amendment to the by-laws sought to confer upon him—that is, endorsing for deposit, countersigning checks and drawing drafts upon debtors. It is impossible to distort such sanction into the implied bestowal of power to endorse for the purpose of immediately obtaining possession of money. Such a practice was never known to the directors or sanctioned by them. On the contrary, as has already been stated, such endorsing was in direct conflict with the practice of drawing money, which was the policy of the by-laws, and alone had the sanction of the directors.

“Nor can there be found in the proofs any fact which shows that the company suffered false appearance of authority in Bissell which could have misled the defendant. In January, 1893, when Bissell’s course of fraud was half completed, some twenty-one promissory notes, held by the New York Company, were discounted by the defendant, upon an unauthorized endorsement of them by Bissell. This circumstance is much relied upon as the creation of a deceptive appearance of general financial powers in Bissell, but it is not perceived that it could possibly create such appearance. The proceeds of the discount went to the credit of the New York Company and were drawn from it by the countersigned checks of the treasurer. The transaction put money in the

bank and stands as of kin to other endorsements for deposit.

“It is not claimed that there was a ratification of Bissell’s conduct by silence during the time he drew the checks. It could not be so claimed, for the companies knew nothing of his procedure in that respect. *Gulick v. Holmes, supra.*”

“It is deemed that the proofs make it clear that Bissell was not authorized by the plaintiffs to receive the payments made to him by the bank which are here sued for, and hence that the request that the jury should be instructed to find for the plaintiffs should have been acceded to.”

It will be observed that the points of similarity between the American Saw Company case and the case before the court are strikingly similar. In both cases, it was an entrusted employe of the plaintiff who was engaged in the commission of the fraud, namely, by using his position, as an officer to obtain the checks of customers, endorse or print the name of the plaintiff by means of a rubber stamp, and then cash or credit the amount of the check and convert the proceeds thereof. As the Court of Errors and Appeals points out in the foregoing case, the officer of the plaintiff had no implied authority to endorse the check except for deposit. Implied authority could arise only from a course of dealing warranted and sanctioned by the board of directors, and could not be held to be any ratification of the agent’s act, for the plaintiff knew nothing of his procedure in that respect. The court therefore held that since Bissell was not authorized to receive the payments made to him by the bank, that the plaintiff’s request of the court for a direction of the jury to find for the plaintiff should have been granted and then sent the case back to the trial court for that purpose.

The case of *Economy Auto Supply Co. v. Fidelity*

Union Trust Co., 105 N. J. L. 206, decided recently by this court, holds that the president of a corporation is without authority under the general powers vested in him as such, to endorse checks payable to the corporation. In that case it appeared that the plaintiff owed the Cox Corporation money and gave two checks in payment of its debt. When the Cox Corporation received the checks, its president, William M. Cox, endorsed them over to another corporation, the Sheldon Axle and Spring Company. Then the checks were presented to the bank and paid. On this state of facts, Judge Dungan directed the jury to find a verdict in favor of the plaintiff, and it is from his ruling that the appeal resulted. This court, in disposing of the contention that the president, by virtue of his office, had authority to endorse checks over to another, held that this contention was unsound, and stated:

“The president of a corporation, although its executive head is not empowered to bind the corporation in all its business affairs.”

and affirmed the judgment of the trial court directing a verdict for the plaintiff.

The case of Dennis Metal Mfg. Co. v. Fidelity Union Trust Co., 99 N. J. L. 365, is enlightening upon this subject. The facts are as follows:

Two checks had been drawn to the order of the plaintiff corporation and R. W. Dennis, its president, had endorsed the checks as follows: “Pay to R. W. Dennis, Dennis Metal Manufacturing Co., R. W. Dennis, President.” Then follows the individual endorsement of R. W. Dennis. The checks were credited to R. W. Dennis in a personal account which he had with the defendant, and in due course, were collected by the defendant bank upon the banks upon which

the checks were drawn. The plaintiff was in the mail order business, and these checks were received in the mail and were taken by the president and cashed in the manner above stated. The by-laws of the company offered in evidence showed that checks may be drawn over the signature of such officers as may be designated for that purpose by the board of directors. The treasurer or the assistant-treasurer is given authority in the by-laws to open the account and to sign, endorse checks, etc. These facts were proven by the plaintiff, and it rested; the defendant offered no testimony. The trial court found judgment for the plaintiff.

The principal contention of the defendant was admitted by it to be as follows:

That the endorsements of the checks were made by the president of the plaintiff corporation in charge of its office who received all the company mail, was its general manager, and that, therefore, as a matter of law, his endorsements bound the plaintiff corporation and were authority for the defendant to cash the said checks.

The court, in an opinion delivered by Mr. Justice Katzenbach, held that this proposition is legally unsound. There was no express authority given by the plaintiff in its by-laws or its resolutions to authorize the president to endorse its checks. The record did not disclose anything to show that the plaintiff was estopped from claiming that its president did not have authority to endorse the check.

At page 368, the court states:

“A president of a corporation does not have, by virtue of holding the office of president, any power to endorse checks, drafts, notes and other obligations payable to the corporation.

There are many matters in which one holding the high office of president cannot bind the cor-

poration. Where a bank receives a check payable to a corporation and endorsed by the president so as to make it payable to himself, and the president deposits it in his personal account with the bank, the bank is chargeable with notice so as to put it on inquiry to determine whether the president of the corporation was authorized so to use its funds as against the corporation.

“The Court of Appeals of New York held in the case of *Ward v. City Trust Co. of New York*, 192 N. Y. 61; 84 N. E. Rep. 585, that where a president of a manufacturing corporation produced a check payable to its order, and having endorsed it in the corporation name by himself as president and general manager, delivered it to a trust company in payment of a personal loan obtained by himself and the secretary-treasurer of the corporation, the form of the check was notice to the trust company that such president was using the property of the corporation to pay the personal debt of himself, and the secretary-treasurer of the corporation in apparent violation of the rights of the corporation, and that the effect of such notice was to put the trust company upon inquiry. In this case the City Trust Co. made no inquiry as to the authority of the president to endorse the check for the corporation. It knew it was receiving the check of the corporation in payment of a personal loan. In so acting, it acted at its peril. Prima facie, the act was unlawful. The trust company in accepting and using the check was deemed to have taken it with knowledge of the rights of the corporation to which it was made payable. The cases of *Niagara Woolen Co. v. Pacific Bank*, 141 App. Div. (N. Y.) 265; and *Wilson v. Metropolitan Elevated Railway Co.*, 120 N. Y. 145, are cases to the same effect.

And the court pertinently and significantly observes that for the bank to have credited or cashed for a person or corporation other than the payee

“was in effect to permit him to withdraw moneys of the company from the bank account upon his signature instead of upon checks signed and countersigned as provided by the by-laws,”

which pronouncement was sustained by this court. (See plaintiff's by-laws. Case, page 170, Exhibit P-10, Sec. 20.)

In a recent case decided by the New York Court of Appeals, *Wagner Trading Co. v. Battery Park Nat'l Bank*, 228 N. Y. 37, 126 N. E. 347, 9 A. L. R. 340, the facts are so apropos of the case at bar, that it seems opportune to advert briefly to that case.

The president of the plaintiff corporation endorsed a number of checks by rubber stamp and then deposited them to his account with the defendant bank which collected the proceeds in the regular course of business and paid the checks on the president's personal account. The court held that the bank was liable, and stated:

“Wagner had authority to endorse the checks although no by-law is in evidence to that effect, but only for the purposes of corporation business, and not to transfer the checks to himself, personally, or for his personal use. The defendant endeavored to prove estoppel and negligence of the plaintiff. The trial court rightly excluded all such evidence. The plaintiff had no relations with and owed no special duty to the defendant. It was not a depositor of the defendant. When the defendant accepted the deposit of Wagner and became his banking agent, the defendant was in complete control of its relation with Wagner. It could, to safely protect itself in its dealings with Wagner, inquire as to his relations with the plaintiff, the authority he possessed, and could insist upon an examination of the plaintiff's by-laws and minutes if it thought that necessary to protect itself. When it accepted the checks payable to the

plaintiff, and endorsed by Wagner as president of plaintiff for deposit to the account of Wagner himself, it did so at its peril to ascertain whether Wagner had authority to endorse them and by his endorsement transfer the money to be paid thereon to his personal account. If Wagner had no such authority, title to the money in question never passed to the defendant, and if it received it, it did so without authority and must account and make payment to the owner."

Counsel for the defendant-appellant argues at some length that because of the fact that the plaintiff-appellee received certain rents from the properties on Roosevelt Avenue, Chatham, that there followed a ratification of the act of Shick in converting to the use of the Fidelity Home Builders, Inc. the proceeds of the checks, and that thereby the plaintiff accepted the benefits of the transaction and approved Shick's acts in depriving the plaintiff of the amounts of the said checks.

But in order that ratification may be shown, it is incumbent on the defendant to prove that the plaintiff had full knowledge of all the material facts. There is not a scintilla of evidence in this case that the plaintiff had knowledge when Shick received these checks that it knew of the conversion of these checks to the use of Shick's company. On the contrary, a perusal of the testimony of Shick, the defendant's principal witness, discloses that he carried on these operations surreptitiously and that at no time did he ever acquaint his superior, Mr. Pettersen, with this knowledge.

At page 129 of the State of Case, lines 21-39, Shick testified:

Q. "Well, did you ever mention the fact to him that you had made these two deposits?" A. "I did not."

Q. "Did he know of it?" A. "Later, yes."

Q. "How much later?" A. "I don't recall how much later it was."

Q. "Well, was it before the end of 1928?" A. "I can't say."

Q. "Well, how long did you stay with the Passaic-Bergen Lumber Company?" A. "Until October, 1929."

Q. "Well, how much before October, 1929, was it that you spoke to him about this account?" A. "I don't recall just when it was; one time when we was over there, I don't just remember exactly when it was,—I couldn't keep it in my mind."

Q. "Well, was it at any time in 1928?"
A. "That is possible."

At page 128 of the State of Case, lines 22-28, he also testified:

Q. "Let me go back to those checks. Did you have any talks at all with Mr. Pettersen?" A. "I did not."

Q. (Continuing.) "About those checks?"
A. "I did not."

Q. "What did you do with them?" A. "I thought that, in their behalf, that was the best thing to do."

It is, therefore, quite patent from the testimony that Shick never disclosed to his superiors the facts relating to the diversion of the checks and for the defendant to strain at this point reveals the desperate straits they are put to in order to muster up a defense. To constitute a ratification of Shick's defalcations, there must be

“an intention on the part of the principal to ratify the unauthorized acts or transactions of the alleged agent, provided the principal, in doing the act, relied on as a ratification, acted with knowledge of the material facts.” (2 Corpus Juris, page 489, Sec. 109; 31 Cyc 1253, citing numerous cases.)

Assuming without conceding for the purpose of this discussion that the plaintiff had knowledge when it received the rents that Shick had more than a year prior thereto, fraudulently diverted its checks to his company, how can the circumstance of the receipt of rents lead to a conclusion that the plaintiff condoned and ratified Shick's acts. Suppose it were true that the plaintiff had received a minute fraction of return from the extensive frauds and reckless credits of Shick. Would that fact warrant an inference that the plaintiff had ratified Shick's act in diverting \$9700.00 from its treasury, and is estopped from asserting its claim on these checks against this defendant bank? What would the defendant have the plaintiff do? Turn these sums back to the Sheridan Construction Company? The acts which are contended constitute a ratification must be such as

“reasonably tend to show an intention on the part of the principal to ratify.”

Can it be plausibly said that because certain insignificant items of rent were received, that there was an intent on the plaintiff's part to ratify these grave acts of misfeasance of Shick. It may be also observed that the act of receiving rents had no relation to or connection with the flagrant act of Shick's rubber stamping the name of the plaintiff on the back of its customers' checks, and there being no logical connection between these two acts, it can-

not be urged that there was any ratification. That would be tantamount to stating that if the Sheridan Construction Company had made any payment on its debt to the plaintiff, the receipt of such payment would be a ratification of Shick's acts in fraudulently diverting the checks,—palpably an absurdity.

It was, therefore, manifestly within the province of the court to determine the question whether there were any conflicting facts to submit to the jury, and where the facts are clear and conclusively show lack of knowledge on the part of the principal of all the material facts, it was his duty to determine the issue by peremptory instruction to the jury. For if the court had submitted the issue to the jury, where the evidence failed to show a scintilla of proof to warrant a contrary inference, and the jury would have come in with an adverse verdict, it would have been the duty of the court to set the verdict aside.

In conclusion, it is respectfully submitted that in view of the clear uncontradicted evidence that Shick had without any power or authority diverted to the use of a company foreign to the plaintiff the two checks amounting to \$9700.00, and that the defendant had credited the said amount without taking the obvious precaution to ascertain and determine whether such transfer and negotiation to the Fidelity Home Builders, Inc., had been authorized by the plaintiff, and had guaranteed such endorsements, and it further appearing that the plaintiff had been deprived of the proceeds of these checks, the action of the trial court was eminently proper and justified when he ordered the jury to return a verdict in favor of the plaintiff-appellee and against the defendant-appellant.

Respectfully submitted,

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Attorney for Plaintiff-Appellee.

