

INDEX.

	PAGE
Complaint	1
Schedule "A"	4
Amended Answer	7
Reply to Amended Answer	10
Judgment	12
Notice of Appeal	14
Testimony	16
Motion for a Direction of a Verdict on Behalf of the Defendant.....	57
Motion for a Direction of a Verdict on Behalf of the Plaintiff.....	61

WITNESSES FOR PLAINTIFF.

Gertrude Greidenberg,	
Direct	17, 22
Preliminary cross	19
Cross	23
Re-direct	27
Walter W. Haas,	
Direct	28
Cross	32
Re-direct	35
Philip Feldman,	
Direct	36

WITNESS FOR DEFENDANT.

	PAGE
James C. B. Millard,	
Direct	38
Cross	43

PLAINTIFF'S REBUTTAL TESTIMONY.

Philip Feldman,	
Direct	46, 48
By the Court.....	46
Cross	54
Re-direct	56

EXHIBITS.

	Admitted at Page	Printed at Page
P-1—Assignment	17	..
P-2—Certificate	17	..
P-3—Two Cards	21	62
P-4—Card	21	67
P-5—Voucher	30	68
P-6—Letter dated January 6, 1938.	31	69
P-7—Letter dated January 4, 1938.	32	70
P-8—Letter dated May 5, 1938....	37	71
P-9—Letter dated May 12, 1938...	37	72
P-10—Letter dated May 31, 1938...	37	73
D-1—Proof of Claim	39	74
D-2—Check	41	77
D-3—Check	41	77
D-4—Voucher	..	..
D-5—Voucher	58	78
D-6—Voucher	43	79

Complaint.

(Filed April 21, 1944.)

New Jersey Supreme Court

PASSAIC COUNTY.

GOLDIE S. ROBBINS, Assignee,
Plaintiff,

vs.

JAMES C. B. MILLARD, Executor of
the Estate of Jay Gould, de-
ceased,

Defendant.

Action at Law.
Complaint.

10

20

The plaintiff, Goldie S. Robbins, residing in the City of Paterson, County of Passaic and State of New Jersey, says that:

FIRST COUNT.

1. Plaintiff sues for the balance due, in the sum of \$1,231.42 for goods sold and delivered by Henri Bendel, Inc., a body corporate, to one, Jay Gould upon a book account, a copy of which is hereto annexed, made a part hereof and marked Schedule "A."

30

2. The said Jay Gould died and the defendant, James C. B. Millard, was appointed and is acting as the Executor of the estate of Jay Gould, deceased.

40

Complaint.

3. Payment has often been demanded of the defendant of the balance due but he has failed and refused to pay same.

4. The said book account was the property of Henri Bendel, Inc., a body corporate and was
10 duly assigned to the plaintiff herein.

WHEREFORE, plaintiff demands as damages the amount due on said book account being the sum of \$1,231.42 with interest from May 1st, 1938 and costs of suit.

SECOND COUNT.

1. Between June 1932 and August 1934 Henri
20 Bendel, Inc., a body corporate, sold and delivered wearing apparel and other merchandise to Jay Gould or for the account of Jay Gould, at the special instance and request of the said Jay Gould, at agreed prices totalling the sum of \$6,701.04, a copy of which account is hereto annexed and made a part hereof and marked Schedule "A."

2. Thereafter Jay Gould or his representa-
30 tives paid all interest accruing on said indebtedness to May 1st, 1938 and the sum of \$5,469.62 on account of the principal of said indebtedness, leaving due and unpaid a balance in the sum of \$1,231.42 with interest from May 1st, 1938.

3. The said Jay Gould died and the defendant, James C. B. Millard, was appointed and is acting as the Executor of the estate of Jay Gould, deceased.

Complaint.

4. Payment has often been demanded of the defendant of the balance due but he has failed and refused to pay same.

5. The said account was the property of Henri Bendel, Inc., a body corporate and was duly assigned to the plaintiff herein.

10

WHEREFORE, plaintiff demands as damages the sum of \$1,231.42 with interest from May 1st, 1938 and costs of suit.

IRVING I. RUBIN,
Attorney for Plaintiff.

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Schedule "A."

ESTATE OF JAY GOULD

39 BROADWAY

NEW YORK CITY

May 26, 1938

10	Date	Items	Charges	Merchandise	
				Returned or	Balance
				Cash Paid	
	1932				
	June 14	Gold Lame Wrap	\$ 110.00		
		White Beaded Gown & Belt.....	325.00		
	15	Blk Crepe Hat with Bow.....	30.00		
		Blue Balli & Silk Hat.....	35.00		
		Blk Vel Hat	30.00		
		Beig Hat	35.00		
		White Hat	35.00		
		White Panama Hat & Extra Band...	30.00		
		Blk Tulle Hat	35.00		
20		White Straw & Brown Ribbon Hat...	25.00		
		White Panama Hat & Band.....	35.00		
		Black Satin Turban	30.00		
		White Satin Turban	30.00		
		White Silk Hat	30.00		
		Blk French Hat	40.00		
		Blk Straw & Lace Hat.....	30.00		
		Yellow Balli Hat	35.00		
		Dyed Baumarten Scarf	185.00		
		Green Roma Negligee.....	85.00		
		Blue Satin Negligee	125.00		
		Fl. Chif & Lace Negligee.....	125.00		
		Fig. Chif. Negligee	115.00		
30		Pink Satin Slip	110.00		
		Pink Lace Negligee	150.00		
		Blue Bed Jacket	25.00		
		Fl. Roma Bed Jacket.....	30.00		
		White Roma Bed Jacket.....	30.00		
	15	Pk. Satin & Lace Stepin.....	76.50		
		2 Pc. Pk. Sat. & Lace Set.....	70.00		
		Blk Crepe & Lace Slip.....	40.00		
		White Crepe & Lace Stepin.....	20.00		
		Pk Chif & Lace Slip.....	60.00		
		White Satin Combination	18.00		
		Pk. Crepe Nightgown	24.00		
		Blue Roma Nightgown	40.00		
40		Fl. Satin Nightgown	40.00		

Schedule "A".

Date	Items	Charges	Merchandise Returned or Cash Paid	Balance
	White Geo. Nightgown	20.00		
	Flesh Roma Gown	50.00		2,358.50
	White Satin Slip	30.00		
	Blue Roma & Lace Emb.....	55.00		
	Blue Roma & Lace Nightgown	65.00		
	Blue Roma & Lace Combination.....	30.00		10
	White Satin Pants	32.00		
	White Satin & Lace Slip.....	55.00		
	Pink Roma & Lace Combination.....	42.00		
	White Roma Nightgown	35.00		
	Pink Satin Panty	28.00		
16	Green Lace Eve. Gown			
	Atl. included	195.00		
1932				
June 17	Flowered Organdie Gown	\$ 195.00		
	Blk & Pink Lace Eve. Gown.....	225.00		
	Blk Beaded Cape	95.00		
	Yel. & Blk. 3 Pc. Suit.....	195.00		20
	White Crepe Gown Trd. Brown Vel..	150.00		
	White Satin Eve. Gown	185.00		
	White Tucked Dress	195.00		4,315.50
	White Roma Gown Trd. Lace Gold...	250.00		
	Blk. Crepe Dress/Colored Neckline..	195.00		
	Black & White Cape.....	110.00		
	Brown & White Fig. Suit.....	195.00		
	Tan Tucked Gown	195.00		
	Blk Suit/Ruffled Sleeves	195.00		
	Flowered Chif. Gown	175.00		
21	Black Lace Teagown	195.00		5,825.50
23	Blk. Cloth Coat Trd. Ermine.....	295.00		
27	White Crepe Suit/Emb. Blue	225.00		
	Green Crepe Suit	195.00		30
July 6	Natural Leghorn Hat	30.00		
1934				
June 2	15½ Yds. Beige	38.75		
	43¾ Yd Beige Chiffon.....	76.79		
July 23	Hat Cleaned & Pressed.....	5.00		
31	New Red Belting Crown on Hat.....	10.00		
1937				
Sept. 28	Accrued Interest to Oct. 1, 1937.....	1,127.89		
	Accrued Interest to Nov. 1, 1937.....	16.00		
	Accrued Interest to Jan. 1, 1938.....	32.01		7,876.94
				40

Schedule "A".

	Date	Items	Charges	Merchandise Returned or Cash Paid	Balance
	1933				
	Dec. 12	By check		1,000.00	
	May 20	By check		2,500.00	4,376.94
	1938				
10	Jan. 6	Check/Portion applied to interest..... Portion applied to principal.....		1,175.90 424.60	2,776.44
	25	Accrued interest from Jan. 1, 1938 to March 1, 1938.....	27.76		
		Accrued interest from Mar. 1, 1938 to May 1, 1938.....	27.76		2,831.96
	May 26	Check/Portion applied to interest..... Portion applied to principal.....		55.52 1,542.02	
		PRINCIPAL DUE			1,231.42

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Amended Answer.

(Filed October 21, 1944.)

NEW JERSEY SUPREME COURT,
PASSAIC COUNTY.GOLDIE S. ROBBINS, Assignee,
Plaintiff,*vs.*JAMES C. B. MILLARD, Executor of
the Estate of Jay Gould, de-
ceased,
Defendant.

Action at Law.

Amended
Answer.

10

The defendant, of the Borough of Ridgewood, in the County of Bergen, as executor of the will of Jay Gould, deceased, answering the complaint says:

FIRST DEFENSE TO FIRST COUNT.

1. The defendant denies the truth of the matters in paragraphs 1, 3 and 4 of the First Count.

SECOND DEFENSE TO FIRST COUNT.

20

1. Heretofore the defendant has paid in full all moneys due from his testator to the plaintiff's assignor, Henri Bendel, Inc., a corporation.

THIRD DEFENSE TO FIRST COUNT.

1. The plaintiff's assignor during the time it was the owner of the claim has waived the right to interest and became estopped to claim to be en- 40

Amended Answer.

titled to interest and, consequently, the plaintiff is now not entitled to claim to be entitled to any interest.

FOURTH DEFENSE TO FIRST COUNT.

- 10 1. The goods sold for which the indebtedness was incurred by Jay Gould to the plaintiff's assignor were sold in the State of New York.
2. The said goods were delivered in the State of New York.
3. The payments made by Jay Gould in his lifetime and by the defendant after the death of Jay Gould were made in the State of New York.
- 20 4. The transaction in suit is, therefore, governed by the law of the State of New York.
5. By the case law under the controlling decisions of the courts of the State of New York the plaintiff's assignor and, consequently, the plaintiff has been fully paid and also has waived the right to recover any interest and is estopped from claiming any interest on the principal indebtedness incurred by the late Jay Gould to the
- 30 plaintiff's assignor.

FIRST DEFENSE TO SECOND COUNT.

1. The defendant denies the truth of the matters in paragraphs 1, 2, 4 and 5 of the Second Count.

Amended Answer.

SECOND DEFENSE TO SECOND COUNT.

1. Heretofore the defendant has paid in full all moneys due from his testator to the plaintiff's assignor, Henri Bendel, Inc., a corporation.

THIRD DEFENSE TO SECOND COUNT.

10

1. The defendant repeats the Third Defense to the First Count.

FOURTH DEFENSE TO SECOND COUNT.

1. Defendant repeats the Fourth Defense to the First Count.

McCARTER, ENGLISH & EGNER, 20
Attorneys of Defendant.

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Reply to Amended Answer.

(Filed October 27, 1944.)

NEW JERSEY SUPREME COURT

PASSAIC COUNTY.

10

GOLDIE S. ROBBINS, Assignee,
Plaintiff,

vs.

JAMES C. B. MILLARD, Executor of
the Estate of Jay Gould, de-
ceased,
Defendant.

Action at Law.

Reply to
Amended
Answer.

20

The plaintiff, Goldie S. Robbins, replying to
defendant's Amended Answer says that:

REPLY TO SECOND DEFENSE TO FIRST COUNT.

Plaintiff denies the truth of the matters therein
contained.

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REPLY TO THIRD DEFENSE TO FIRST COUNT.

Plaintiff denies the truth of the matters therein
contained.

REPLY TO FOURTH DEFENSE TO FIRST COUNT.

Plaintiff denies the truth of the matters therein
contained.

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Reply to Amended Answer.

REPLY TO SECOND DEFENSE TO SECOND COUNT.

Plaintiff denies the truth of the matters therein contained.

REPLY TO THIRD DEFENSE TO SECOND COUNT.

10

Plaintiff denies the truth of the matters therein contained.

REPLY TO FOURTH DEFENSE TO SECOND COUNT.

Plaintiff denies the truth of the matters therein contained.

IRVING I. RUBIN,
Attorney for Plaintiff. 20

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Judgment.

(Filed May 4, 1945.)

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

10

GOLDIE S. ROBBINS, Assignee,
Plaintiff,*vs.*JAMES C. B. MILLARD, Executor of
the Estate of Jay Gould, de-
ceased,

Defendant.

Judgment.

20

This case was tried before Hon. Robert H. Davidson, Circuit Court Judge, with a jury at the Passaic Circuit, on May 1st, 1945.

The said judge directed the jury to return a verdict against the defendant and in favor of the plaintiff for One Thousand Seven Hundred Forty-eight Dollars and Sixty-one Cents (\$1,748.61) and the jury did accordingly return a ver-

30 dict against the defendant and in favor of the plaintiff for the said sum of One Thousand Seven Hundred Forty-eight Dollars and Sixty-one Cents (\$1,748.61).

Whereupon it is adjudged that the plaintiff, Goldie S. Robbins, Assignee do recover of the said defendant, James C. B. Millard, Executor of the Estate of Jay Gould, Deceased, the sum of one thousand seven hundred forty-eight dollars and

40

Judgment.

sixty-one cents damages, together with his costs,
 which have been taxed at the sum of seventy-three
 dollars and eight cents, mak-
 ing in the whole the sum of
 Damages \$1,748.61
 Costs 73.09
 —————
 \$1,821.69

one thousand, eight hundred
 and twenty-one dollars and
 sixty-nine cents.

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Judgment entered and signed May 4, 1945.

THOMAS J. BROGAN,
 Chief Justice.

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Notice of Appeal.

NEW JERSEY SUPREME COURT,

(Filed June 8, 1945.)

10

GOLDIE S. ROBBINS,
Plaintiff,

vs.

JAMES C. B. MILLARD, Executor of
the Estate of Jay Gould, de-
ceased,
Defendant.

Action at Law.

Notice of
Appeal.

20 SIR:

TAKE NOTICE that the defendant appeals from the whole of the judgment entered on the 4th day of May, 1945, in favor of the plaintiff and against the defendant in the above entitled cause to the Court of Errors and Appeals on the following grounds:

30 1. Because the learned Trial Judge denied the motion of Counsel for the defendant to direct a verdict in the defendant's favor.

2. Because the learned Trial Judge granted the motion of Counsel for the plaintiff to direct a verdict in favor of the plaintiff.

3. Because the learned Trial Judge directed a verdict in favor of the plaintiff.

40 4. Because the learned Trial Judge did not direct a verdict in favor of the defendant.

Notice of Appeal.

5. Because the learned Trial Judge denied the motion of Counsel for the defendant that in any event the verdict in favor of the plaintiff could not exceed \$1,231.42.

6. Because the learned Trial Judge denied the motion of Counsel for the defendant to exclude from the verdict to be directed in favor of the plaintiff, if such a verdict were directed, the sum of \$517.19. 10

7. Because the learned Trial Judge directed the jury to include in their verdict for the plaintiff the sum of \$517.19, interest on interest.

Yours respectfully,

McCARTER, ENGLISH & EGNER, 20
Attorneys for Defendant.

To: IRVING I. RUBIN, Esq.,
Attorney for Plaintiff.

Service of the within Notice of Appeal is hereby acknowledged this 5th day of June, 1945.

IRVING I. RUBIN, 30
Attorney for Plaintiff.

Testimony.

NEW JERSEY SUPREME COURT,
PASSAIC COUNTY.

10

GOLDIE S. ROBBINS, Assignee,
Plaintiff,

vs.

JAMES C. B. MILLARD, Executor of
the Estate of Jay Gould, de-
ceased,
Defendant.

Action at Law.
Testimony.

20

Paterson, New Jersey,
Tuesday, May 1, 1945.

Before:

HONORABLE ROBERT H. DAVIDSON, Judge, and a
Jury.

Appearances:

For the plaintiff: IRVING I. RUBIN, Esq.

30

For the defendant: MESSRS. McCARTER,
ENGLISH & STUDER, by GEORGE W. C. Mc-
CARTER, Esq.

(The jury was empaneled and sworn.)

(The jury was excused until two o'clock
P. M.)

40

Gertrude Greidenberg, for Plaintiff—Direct.

AFTERNOON SESSION, 2 P. M.

(The trial was resumed.)

Mr. McCarter: Here, your Honor, is a trial memorandum in this case (handing).

The Court: All right.

(Mr. Rubin made an opening statement to the jury on behalf of the plaintiff.)

(Mr. McCarter made an opening statement to the jury on behalf of the defendant.)

10

GERTRUDE GREIDENBERG, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

20

Mr. Rubin: If your Honor please, with the consent of the attorney for the defendant I desire to offer in evidence the assignment by Henri Bendel, Incorporated, to Goldie S. Robbins.

Mr. McCarter: No objection.

Mr. Rubin: I offer it in evidence. At the same time, if your Honor please, I offer in evidence a Surrogate's certificate from the Ocean County Surrogate's Court attesting to the appointment of James C. B. Millard as an executor of this estate.

30

Mr. McCarter: No objection.

(The papers referred to were received in evidence and marked Exhibits P-1 and P-2, respectively.)

Direct examination by Mr. Rubin:

Q. Miss Greidenberg, what is your full name? 40
A. Gertrude Greidenberg.

Gertrude Greidenberg, for Plaintiff—Direct.

Q. Will you speak up so that the jurors can hear you? A. Gertrude Greidenberg.

Q. And where do you reside? A. 34 Hillside Avenue, Manhattan.

Q. By whom are you employed? A. Henri Bendel, Incorporated.

10 Q. And what is your position with that concern? A. I am the bookkeeper of the accounts receivable.

Q. And as far as bookkeepers are concerned, are you in charge there, Miss Greidenberg? A. Yes, I am.

Q. Now, what type of a shop is Henri Bendel? A. It is a specialty—ladies specialty shop.

Q. Do you have with you the original records of Henri Bendel, Incorporated, account with Jay Gould? A. Yes, I have.

20 Q. Will you produce them, please? A. (The witness does as requested.)

Q. Now, Miss Greidenberg, will you describe to us the manner of your operations with regard to keep track of the accounts receivable of Henri Bendel, Inc., in 1932? A. When a purchase is made a sales slip is made out by the sales person. It is then forwarded to the office, to the credit department, for O. K. The next day it is given to the bookkeepers to post on the account.

30 Q. And when you say "to post on the account," what have you reference to? A. To the customer's account.

Q. And what type of sheets are used for that? A. We have a regular ledger sheet like this one here (indicating).

Q. Referring to the sheets you have in your hand? A. That is right.

Q. Now, with regard to the account of Jay Gould will you tell us how the entries were made?

40

Gertrude Greidenberg, for Plaintiff
—Preliminary Cross.

A. The postings were made the day after the purchases were made. The bills were sent out monthly; that is, the first of every month.

Q. Referring back to the postings, the slips came into your department and the postings were made on the cards you have in your hands? A. 10
 That is right, right from the slips.

Q. Are you in charge of that department? A.
 Yes, sir.

The Court: Maybe we can save time; is there any dispute about this?

Mr. McCarter: I would like to take a look at it, that is all, your Honor.

The Court: Maybe we can save some time.

Mr. McCarter (to Mr. Rubin): If I may, 20
 Mr. Rubin?

Mr. Rubin: Yes, certainly (handing).

(Mr. McCarter looked at the card records.)

Mr. McCarter: May I ask a few questions, your Honor?

Preliminary cross examination by Mr. McCarter:

Q. Miss Greidenberg, referring to this account 30
 which I have here, I note at the top it has—withdraw that. The oldest sheet is the bottom sheet, isn't it? A. That is right. That is right.

Q. And the note at the top, it says—I will have to tear it a little bit, I guess—"Absolutely no bills to go out on this account. Give bills to Mr. Haggerty. Don't confuse with Mrs." What is the explanation for that? A. Well, Mr. Haggerty was the office manager at the time.

Q. Yes? A. Now—— 40

Gertrude Greidenberg, for Plaintiff
—Preliminary Cross.

Q. And that was his orders on that? A. That is right. That is right. Instead of mailing the bills out direct I had to give them to Mr. Haggerty.

10 Q. Yes. Now, I notice at the end of sheet No. 2 the balance due is \$3,201.04. That is correct, isn't it? A. That is right.

Q. Yes. Now, we turn to sheet No. 3.

The Court: Let me interrupt. Maybe I am being misled or misleading you in this respect. I assume you want to introduce this in evidence?

Mr. Rubin: That is the purpose of the foundation.

20 The Court: That was the only purpose I am asking you to look at it. You will have ample opportunity for cross examination.

Mr. McCarter: Then I will postpone my cross examination.

The Court: Is there any objection to the account?

Mr. McCarter: I have some important questions to ask on the third page, but I will postpone that, if the Court prefers.

30 Mr. Rubin: Then I offer these three sheets in evidence as one exhibit at this time.

Mr. McCarter: My only objection to that, your Honor, is—I have no objection to the first two sheets because they are, and as your Honor will see when you see them, entries for goods sold. The third sheet, as your Honor will see, is simply an entry of interest. I don't think a book account is the way to prove interest, and as long as my

Gertrude Greidenberg, for Plaintiff
—Preliminary Cross.

objection is noted and the matter may be postponed until cross examination, I don't have any objection to the thing physically going in.

The Court: Whether the interest is allowable or not, this is their account.

10

Mr. McCarter: Yes, sir, that is their account.

The Court: I think you ought to cross the bridge, of interest, when you come to it, if that is your only objection.

Mr. McCarter: I just want to get that before the Court right now.

The Court: But there is no question that these are the original records.

Mr. McCarter: No, sir, not the slightest.

20

The Court: I will permit them to be marked. For convenience, would you care to have them marked as separate exhibits?

Mr. McCarter: Each page? They can be P-3.

The Court: Primarily the page concerning interest.

Mr. McCarter: If the first two pages are P-3 and the page containing interest will be P-4, I think it might be better for us in the progress of the case.

30

The Court: We will do that.

(The two card records referred to were received in evidence and marked Exhibit P-3.)

(The one card record, the interest sheet, was received in evidence and marked Exhibit P-4.)

40

Gertrude Greidenberg, for Plaintiff—Direct.

Direct examination (continued) by Mr. Rubin:

Q. Now, with reference to this account which has been marked Exhibit P-3 and Exhibit P-4, were bills rendered on that account at all, Miss Greidenberg? A. Yes, there were bills sent out every month.

10 Q. And how often were bills rendered? A. Once a month.

Q. And until what time were bills rendered? Can you tell us, looking at that statement? A. Until June of 1938.

Q. Do you know what happened at that time? A. Well, the account was given over to the attorneys.

20 Q. Now, from the books of account of Henri Bendel, Inc., do you have what was the balance due on this account as of June 1st, 1938? A. \$1,231.42.

Q. Now, have you calculated the interest on that amount to this date? A. Yes, we have.

Q. And will you tell us what the amount is? Do you want to calculate it there or have you already done so? A. I believe it is about \$570 up to date; that is to May 1st, 1945.

30 Mr. Rubin: Might I show this to the witness?

Mr. McCarter: All right.

By Mr. Rubin:

Q. Can you give us the exact amount of that interest as calculated by you (handing)? A. From 1938 to 1945?

Q. That is right. A. It is \$517.19.

40 Q. Which would make the balance of \$1,748.61 due on that account as of this date, is that correct? A. That is right. That is right.

Gertrude Greidenberg, for Plaintiff—Cross.

Mr. Rubin: No further questions.

Cross examination by Mr. McCarter:

Q. Miss Greidenberg, to go back to where I was, if you don't mind. A. Not at all.

Q. And the balance at the conclusion of Exhibit P-3 is \$3,201.04, is that correct? A. That is right. 10

Q. And that was the balance as of July 31, 1934? A. That is right; 1935 that is.

Q. 1934, isn't it? A. Yes, that is right. The entry was made then, yes.

The Court: I will have to ask you to try to keep your voice up and speak right out.

The Witness: I will try. I have a little cold.

Mr. McCarter: I will try and keep away 20 from her, too.

By Mr. McCarter:

Q. Now, I want to invite your attention to Exhibit P-4, that is the third and most recent page. At what date was the first entry of accrued interest made on that account? A. September 28, 1937.

Q. Yes. And you said, I believe, that bills were sent out regularly during Mr. Gould's lifetime? 30

A. That is right. They were sent out to June of 1938.

Q. Well, they were sent out how frequently? A. Once a month.

Q. Once a month. And they were sent, of course, to Mr. Jay Gould as long as he was alive? A. That is right.

Q. Or given to Mr. Haggerty, weren't they? A. Well, they were given to Mr. Haggerty as of a certain date. 40

Gertrude Greidenberg, for Plaintiff—Cross.

Q. Let us get this straight. A. The date appears on the ledger card, previous to that.

Q. If you will remember, the first question I asked you was having to do with this entry: "Absolutely no bills to go out on this account. Give bills to Mr. Haggerty." A. Uh-huh.

10 Q. They were given to him, weren't they? A. That is right.

Q. They weren't just sent out in the ordinary way the way they would if one of these ladies (indicating the jurors) had an account with you? A. They were given to him much after June of 1932.

Q. But whether they were given to Mr. Haggerty or mailed to Mr. Gould, they were made up from these two sheets? A. That is right.

20 Q. So that at no time prior to the closing date on P-3, namely, this date in 1935 was any interest put on any bill, was there? A. No.

Q. Now, did you have anything to do with the receipts of payments on account either in Mr. Gould's lifetime or after his death? A. I just posted the entry.

30 Q. Yes. Now, I show you a verified proof of claim dated April 23, 1935, on the letterhead of Henri Bendel, Inc., which seems to be sworn to by Mr. C. J. Haggerty on the 23rd day of April, 1935. Did you have anything to do with making out that? A. Yes, I made out the statement.

Q. You made out that statement? A. That is right.

Q. And had Mr. Haggerty swear to it? A. That is right.

Mr. McCarter: I would like to have that marked for identification, please.

The Court: All right.

40

(The paper referred to was marked D-1 for identification.)

Gertrude Greidenberg, for Plaintiff—Cross.

By Mr. McCarter:

Q. Now, I show you a check to the order of Henri Bendel, Inc., to the Estate of Jay Gould, dated December 18, 1937, and ask you if that check passed through your hands. A. The actual check I did not see. This actual check I did not see. 10

Q. You do not know who handled that in your concern? A. The person who receives the mail hands it over to the credit department. In other words, the credit manager would have it.

Q. Yes. You know this sum of \$1,600.50 was received and credited to the account, though? A. That is right.

Mr. McCarter: I would like to have this check marked for identification. 20

The Court: All right.

(The check referred to was marked D-2 for identification.)

Q. Now, I show you another similar check dated May 2nd, 1938, to the order of Henri Bendel, Inc., for \$1,600.54, bearing the endorsement of Henri Bendel, and ask you if you know that that check was credited to the account? A. Yes, it was. 30

Mr. McCarter: Yes. I would like to have that marked for identification.

(The check referred to was marked D-3 for identification.)

Mr. McCarter: Now, Mr. Rubin, have you the original vouchers accompanying those checks?

(Some papers were handed by Mr. Rubin to Mr. McCarter.) 40

Gertrude Greidenberg, for Plaintiff—Cross.

Mr. McCarter: That is the first one, yes.

By Mr. McCarter:

10 Q. Now, I show you a document produced by counsel for the plaintiff headed Executor's Voucher dated December 18, 1937, for \$1,600.50, and ask you if you recall that at all? A. No, I wouldn't. I wasn't in a position to see these.

Q. You didn't see that? A. No.

Q. All you know is that concurrently with the check, Exhibit D-2 for identification, the sum of \$1,600.50 was credited to the account? A. That is right.

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

20 (The voucher referred to was marked D-4 for identification.)

Q. Now, I show you a similar voucher dated May 2nd, 1938, and ask you if you make the same answer? A. Yes.

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

30 (The voucher referred to was marked D-5 for identification.)

Q. Now, by whose instructions were the entries with respect to accrued interest made on Exhibit P-4? A. Instruction of the credit manager.

Q. And is he Mr. Haggerty? A. He was, yes.

Q. He was at that time? A. Yes, sir.

Mr. McCarter: That is all.

Gertrude Greidenberg, for Plaintiff—Re-direct.

Re-direct examination by Mr. Rubin:

Q. In the examination you have mentioned that bills were mailed to Mr. Gould and then later to Mr. Haggerty. Can you tell us when that change came about, from the records? A. Came about in 1935.

Q. In 1935. Was that when the change took place? A. So far as my memory. I can't give you the exact date. 10

Q. And can you tell us from the exhibit before you when the active purchases on that account were terminated? I will withdraw the question. Can you tell us from looking at that account what was the last date that a purchase was made on that account? A. July 31, 1934.

Q. Now, Mr. McCarter has referred to certain checks and I believe you testified those checks were credited on the account, is that so? A. That is right. 20

Q. Now, the balance that you gave me in answer to my question on direct examination, of \$1,746.61 due on this account, is that the amount that appears there after credit for these checks? A. That is right.

Mr. Rubin: Now, at this time I ask counsel to produce a letter dated January 4, 1938, for which demand was served upon counsel. It is from Henri Bendel, Inc., addressed to Knowles & Hack. 30

Mr. McCarter: I haven't got it.

The Court: You mean it isn't available or you refuse to produce it in accordance with the demand?

Mr. McCarter: Well, it isn't available, your Honor.

The Court: All right. 40

Walter W. Haas, for Plaintiff—Direct.

Mr. McCarter: Mr. Hack has died, and we can't find the letter.

Mr. Rubin: Might I ask counsel to examine this copy here? Perhaps we can save some time (handing).

10 Mr. McCarter: I can't admit that, Mr. Rubin (handing).

Mr. Rubin: May I have the use of the voucher?

Mr. McCarter: Certainly. This is D-4 and D-5 (handing).

By Mr. Rubin:

20 Q. Miss Greidenberg, at the time of the receipt of the check for \$1,600.50 did your company write to the representatives of the Estate of Jay Gould?
A. I believe we did.

Q. I ask you to examine that paper (handing). Withdraw the question. Do you know who sent the check of \$1,600.50 to your company? A. No, I do not.

Q. That didn't come to your attention? A. No.

Mr. Rubin: That is all.

Mr. McCarter: That is all.

30

WALTER W. HAAS, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Rubin:

Q. Mr. Haas, where do you reside? A. 78 Magnolia Avenue, Arlington, New Jersey.

40 Q. And are you connected with the firm of Henri Bendel, Inc.? A. Yes, I am.

Walter W. Haas, for Plaintiff—Direct.

Q. And since when have you been so connected?

A. Since 1928.

Q. And what is your present position with that concern? A. I am the comptroller.

Mr. McCarter: What is the answer?

Mr. Rubin: Speak right up.

The Court: Speak right up.

The Witness: Comptroller.

10

By Mr. Rubin:

Q. Just what does the word "comptroller" take in in the concern of Henri Bendel, Inc.? A. I take care of all the financial affairs, the accounting, and generally supervise the office.

Q. And in your work for the concern of Henri Bendel, Inc., were you acquainted with the account of Jay Gould? A. Yes, I was.

20

Q. And are you familiar with Exhibits P-3 and P-4? A. Yes, I am.

Q. What have you to say as to whether or not they correctly state and set forth the debits and credits on this account? A. They do state so correctly.

Q. And will you tell us under whose direction the interest items were set forth? A. Miss Moran, the credit manager.

30

Mr. McCarter: Who? I didn't hear him.

A. Miss Moran, the credit manager, prepared the interest.

Q. Now, are you familiar at all with Executor's Voucher marked D-4 for identification (handing)?

A. No. I didn't see that myself.

Mr. Rubin: If counsel so desires, I have no objection to it going in evidence at this time.

40

Walter W. Haas, for Plaintiff—Direct.

The Court: It is his exhibit. It can't very well go in in your case.

Mr. Rubin: Yes. I am making that suggestion.

10 Mr. McCarter: I think it is better that I put mine in when my turn comes, if the Court please.

Mr. Rubin: Well, it has been used, and I would offer it, if your Honor please.

Mr. McCarter: All right.

The Court: You are within your rights there. All right, let it be marked.

(Exhibit D-4 for identification was received in evidence and marked Exhibit P-5.)

20 Mr. Rubin: May I read this to the jury, if your Honor please?

It is entitled "Executor's Voucher. Estate of Jay Gould, to Henri Bendel, Inc., Dr." standing for debtor. "Address 10 West 57th Street, New York." There are headings: "Date. December 18, 1937. Check 254, Commercial Trust Company of New Jersey. Under amount \$1,600.50." This appears in the body: "Payment of fifty
30 per cent on account of principal of claim against——"

Mr. McCarter: Wait a minute. There is something scratched out first, isn't it?

Mr. Rubin: Yes.

Mr. McCarter: All right. Go ahead.

40 Mr. Rubin: There appears three lines that have been marked out, as you will see when the exhibit is handed to you, but the reading part reads: "Payment of fifty per cent on account of principal of claim

Walter W. Haas, for Plaintiff—Direct.

against the Estate of Jay Gould without prejudice to claimant's right to collect interest as per agreement. Please return this Voucher properly receipted to J. C. B. Milard, Executor, 39 Broadway, New York City. Received from the Executor of the will of Jay Gould \$1,600.50. Signed Henri Bendel, Inc." (Mr. Rubin handed the exhibit to the jury.) 10

Will your Honor bear with me? I want to get my exhibits together.

By Mr. Rubin:

Q. Did you on January 6th, 1938, receive this letter with reference to the account? A. Yes, I believe we did. 20

Mr. Rubin: I offer this letter in evidence.

The Court: No objection?

Mr. McCarter: I have no objection, but there are some pencil notations in the bottom which counsel has said are no part of the exhibit. I don't know what they are. I didn't even read it.

Mr. Rubin: It is understood, of course, that the pencil notations are out.

(The letter referred to was received in evidence and marked Exhibit P-6.) 30

(Mr. Rubin read Exhibit P-6 to the Jury.)

By Mr. Rubin:

Q. Now, do you know, Mr. Haas, what this letter was in answer to? A. Well, I don't, but I believe we probably made an exception on the voucher when we returned it. 40

Walter W. Haas, for Plaintiff—Cross.

Q. And were you familiar at all with a letter dated January 4th prior to this letter of January 6th, 1938, sent from your concern to— A. (Interrupting) Yes, I have seen this letter.

10 Mr. Rubin: I offer that in evidence, your Honor please, since it has been replied to, the letter that has gone into——

Mr. McCarter: Let me see it. Maybe I won't object. Where is the one you just had? May I see that, sir, just a moment (to a juror)? (Looking at the letter.) I have no objection to this. This is obviously an answer.

20 Mr. Rubin: And at the same time, Mr. McCarter, we are discussing Mr. Hack——

Mr. McCarter: Mr. Hack was attorney for the executor, yes; that will be admitted.

Mr. Rubin: Thank you. I offer in evidence this letter.

Mr. McCarter: What is the date on that?

Mr. Rubin: January 4, 1938.

(The letter referred to was received in evidence and marked Exhibit P-7.)

30 (Mr. Rubin read Exhibit P-7 to the jury.)

Mr. Rubin: That is all.

Cross examination by Mr. McCarter:

Q. Mr. Haas, Mr. Haggerty was the comptroller of Henri Bendel, Inc., before you, wasn't he? A. That is right.

40 Q. And he was comptroller for what period?
A. Up until about 1935. I believe he left in 1935.

Walter W. Haas, for Plaintiff—Cross.

Q. 1935. Well, now, let me see this proof of claim. He was still comptroller on the 23rd of April, 1935, was he not? And I show you in connection with that Exhibit D-1 for identification and ask you to see if—(interrupted). A. Yes, that is his signature.

Q. And did you succeed him then? A. That is 10 right.

Q. Was there a gentleman named Mr. Larue or some such name in the financial department of Henri Bendel? A. No.

Q. Ladew? A. No.

Mr. McCarter: All right. Where is that last letter?

Mr. Rubin: I gave it to the jury.

Mr. McCarter: Oh, the jury has it. That 20 yellow one, may I have that one for a moment, please?

By Mr. McCarter:

Q. Can you tell by looking at Exhibit P-7 who wrote that? I notice there as some initials. A. Yes. Miss Marguerite Moran, the credit manager.

Q. And was she under you at that time? A. That is right. 30

Q. And did you direct her to write that letter? A. Possibly. I wouldn't say exactly. She did a lot of things on her own.

Q. But it met with your approval? A. Oh, definitely.

Q. Now, I notice that on the ledger sheet before you there is a notation not to send the bills but to hand them to Mr. Haggerty. Can you tell us why that was done? Give us the explanation. A. No, I can't. It is possible that sometimes Mr. 40

Walter W. Haas, for Plaintiff—Cross.

Haggerty, when an account was old, or something like that, he received the bills so that he could write to the customers.

10 Q. I notice that was at the very commencement of the account, if you will see by looking at the page, P-3, that that is the oldest entry that appears there. A. Yes, I see that. I don't know the reason for it.

Q. You don't? A. No.

Q. Then I notice on the second page of Exhibit P-3 there is a notation of some entries transferred from the account of Mrs. Gould. You notice that, the last three entries? A. (No answer.)

20 Q. Well, I can point them out to you very quickly if I get up here. Over here on the second page of P-3 (indicating). A. I see. Yes, I see that.

Q. Do you now recall that it was a separate account for Mrs. Gould as distinguished from this one of Mr. Gould? A. Yes, I believe there was a separate account.

Q. And that that date in June, 1935, the two accounts were combined? A. Well, I don't know whether the two were combined or just certain items were transferred.

30 Q. I stand corrected. At any rate, those particular items from Mrs. Gould were transferred from Mr. Gould's account? A. That is right.

Q. And that would indicate that the previous and the bulk of the items were not to Mrs. Gould's account, they were not charged to her? A. Well, I wouldn't know without seeing the other account. I mean, there may have been two accounts.

40 Q. They wouldn't charge the same item to two people? A. We wouldn't charge the same item to two people.

Walter W. Haas, for Plaintiff—Re-direct.

Q. And it is quite apparent from Exhibit P-3, is it not, that there were two accounts, one for Mr. Gould and one for Mrs. Gould? A. That is right.

Q. And it is also quite apparent that the entries on Exhibit P-3 until you get down to the last two or three were charged to Mr. Gould and not to Mrs. Gould? A. That is right. 10

Mr. McCarter: That is all. Thank you.

Re-direct examination by Mr. Rubin:

Q. Mr. Haas, I understand from the testimony that during 1938 this account was turned over to the attorneys of your concern; are you familiar with that? A. Yes.

Q. Do you know who the attorneys for the concern were at that time? A. Yes; Straus, Reich & Boyer. 20

Q. Of New York City? A. Yes, 141 Broadway.

Mr. Rubin: That is all.

Mr. McCarter: Just a minute. Would you mind reading that last question and answer, as I wasn't paying attention? I wish to apologize.

(The question and answer referred to were read as follows:) 30

“Question: Do you know who the attorneys for the concern were at that time?
Answer: Yes, Straus, Reich & Boyer.”

Philip Feldman, for Plaintiff—Direct.

PHILIP FELDMAN, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Rubin:

10 Q. Mr. Feldman, are you a member of the bar of the State of New York? A. I am.

Q. For how long have you been a member? A. Since April, 1929.

Q. And are you associated with any firm of attorneys? A. Straus, Reich & Boyer, 141 Broadway, New York.

Q. And how long have you been associated with that firm? A. Since January, 1928.

20 Q. And do you have the records of Straus, Reich & Boyer for the months of May and June, 1938? A. I do.

Q. Are they the office records? A. They are.

Mr. Rubin: If your Honor will pardon me for a moment, I think perhaps counsel and I can shorten this.

(Discussion between counsel.)

Mr. McCarter: You may put them all in.

30 Mr. Rubin: I offer in evidence with the consent of counsel for the defendant a letter dated May 5, 1938, to Knowles & Hack, Esqrs.

(The letter referred to was received in evidence and marked Exhibit P-8.)

Mr. Rubin: A letter from Knowles & Hack, Esqrs. to Straus, Reich & Boyer dated May 12, 1938.

40 (The letter referred to was received in evidence and marked Exhibit P-9.)

Philip Feldman, for Plaintiff—Direct.

Mr. Rubin: A letter dated May 31, 1938, from Straus, Reich & Boyer to Knowles & Hack, Esqrs.

(The letter referred to was received in evidence and marked Exhibit P-10.)

Mr. Rubin: May I read these letters to the jury? 10

The Court: I thought you might want to. Is the other one been marked?

Mr. Rubin: No; I didn't offer the other one. I didn't offer the other one, feeling that it wasn't necessary.

(Mr. Rubin read Exhibit P-8 to the jury.)

(Mr. Rubin read Exhibit P-9 to the jury.) 20

(Mr. Rubin read Exhibit P-10 to the jury.)

The Court: I think before we proceed, Mr. Rubin, I am going to let the jury have a five-minute recess, so we will take a recess of five minutes, madam forelady and ladies and gentlemen of the jury.

(A short recess was taken.) 30

(After recess.)

PHILIP FELDMAN, resumed the stand as a witness on behalf of the plaintiff, having been previously duly sworn, testified further as follows:

Mr. Rubin: No further questions of this witness, your Honor. 40

James C. B. Millard, for Defendant—Direct.

Mr. McCarter: No cross.

The Court: That is easy.

Mr. Rubin: Plaintiff rests.

The Plaintiff Rested.

Mr. McCarter: Mr. Millard.

10

DEFENDANT'S TESTIMONY.

JAMES C. B. MILLARD, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. McCarter:

20

Q. Where do you live, Mr. Millard? A. 148 Prospect Street, Ridgewood, New Jersey.

Q. And you are the defendant in this case? A. I am.

Q. The executor of the late Jay Gould? A. I am.

Q. When did Mr. Gould die? A. January 26, 1935.

30

Q. When following his death did you first have any communication of any kind from Henri Bendel, Inc., with respect to their claim? A. Well, about a month subsequent to Mr. Gould's death Mr. Haggerty of Henri Bendel & Co. called me on the telephone, said that he had—

Mr. Rubin: I object to any conversation with Mr. Haggerty.

Mr. McCarter: The testimony is that he was the comptroller and in charge of the finances.

40

James C. B. Millard, for Defendant—Direct.

The Court: Yes, and this is a party offering himself as a witness. It is perfectly all right.

Mr. Rubin: I will withdraw it.

A. He stated that he had two accounts, one Mrs. Jay Gould and the other Jay Gould personal account, and he said: "Now, what am I going to do?" 10

And I said: "Oh, just bunch the two of them; the decedent is responsible for his wife's debt, and I will accept the claim with the two accounts bunched together," being familiar as I was with the account.

Q. Thereafter did you receive D-1 for identification (handing)? A. Yes. Subsequently I again discussed it with Mr. Haggerty and asked him to file a sworn proof of claim, which I knew the amount before it was to come in, and I said I would honor it. 20

Mr. McCarter: I offer Exhibit D-1 for identification in evidence.

Mr. Rubin: May I see it?

Mr. McCarter: That is the sworn proof of claim (handing).

(D-1 for identification was received in evidence and marked Exhibit D-1.) 30

By Mr. McCarter:

Q. Did Mr. Gould leave a lot of debts?

Mr. Rubin: I object to that question as immaterial to this issue, not within the scope of the pleadings.

The Court: What is the purpose, Mr. McCarter?

James C. B. Millard, for Defendant—Direct.

10 Mr. McCarter: If your Honor please,
we claim that in any event under some of
the cases which I have in the memorandum
which I gave to your Honor, particularly
under *Hills v. Aetna Life Insurance Com-*
pany, there can be no interest demanded at
any time until the defendant is in default
for not paying a claim, and I am going to
bring out in this question and others that
will follow that he was not in a position to
pay any claim whatsoever until the hap-
pening of certain events which I shall de-
velop in subsequent questions. What I of-
fer to show, your Honor, is that the de-
cedent left debts in many hundreds of
thousands of dollars less cash on the debts
20 and inheritance tax liability, and it was
impossible to pay any debts until we got a
decree from the Court of Chancery in a
suit, a certified copy of which I shall offer
in evidence, requiring a transfer of a trust
fund in which Mr. Gould was a life tenant
but which the corpus went elsewhere, to
put the executor in funds to pay the per-
sonal taxes, and until that happened he was
in no position to pay any taxes.

30 Of course, this is merely the first step
in that line of proof which will develop, and
it will show that until a date which will be
developed that he wasn't in a position to
pay the claim even if he wanted to. I will
put it that way.

The Court: I would be inclined to agree
with Mr. Rubin on that. I can't see how it
is material.

40 Mr. McCarter: Well, under the case of
Hills v. Aetna Life Insurance Company.

James C. B. Millard, for Defendant—Direct.

that decision by Judge Speer, I think it is perfectly plain that on a running account like that there isn't any possibility of any kind of interest until the defendant is in default. An executor isn't in default when he hasn't funds to pay.

The Court: Well, it wasn't my understanding—I may be wrong in this—it isn't my understanding of the law that it is interest on a running account, anyway. 10

Mr. McCarter: I agree with that, your Honor, but I want to make my whole case; that is the only point of it. I simply want to develop that there were debts totaling "X" dollars, that until he got this Chancery decree he wasn't in a position to pay any debts. 20

The Court: How long is it going to take you to develop that?

Mr. McCarter: Five or ten minutes.

The Court: I personally can't see any necessity for it. I was going to suggest that you withhold any questioning along that line until possibly you need it later on, and I will give you the opportunity to do it if necessary.

Mr. McCarter: Very good, sir. Then I 30
offer in evidence now D-2 for identification, which is the earlier of the two checks.

(D-2 for identification was received in evidence and marked Exhibit D-2.)

Mr. McCarter: I offer in evidence D-3 for identification, the second of the two checks.

(D-3 for identification was received in 40
evidence and marked Exhibit D-3.)

James C. B. Millard, for Defendant—Direct.

By Mr. McCarter:

10 Q. I show you, Mr. Millard, Exhibit P-5, which is the earlier of the two vouchers sent by you with your checks, I believe; is that correct? A. That is correct, with the exception that this voucher has been altered. It is not the original as I sent it. There has been a legend of mine saying it was in payment of fifty per cent on account of claim, and in an entirely different typewriting there has been substituted another legend which reads: "Payment of fifty per cent on account of principal of claim against the Estate of Jay Gould without prejudice to claimant's right to collect interest as per agreement."

20 Q. That was not put on by you? A. It definitely was not, no, sir.

Q. When did you first see that? A. This afternoon.

Q. Now, I show you a document headed "Duplicate voucher, December 18, 1937." Is that a true copy of the voucher as sent out by you? A. That is a true copy, and with your permission I would like to say why this was made up. I was informed by Mr. Haggerty—

30 The Court: Unless counsel asks the question, don't volunteer.

By Mr. McCarter:

Q. But this is the true copy? A. Yes.

Mr. Rubin: I object to the entry of this in evidence. There is no evidence before the Court at this time that this was ever accepted by Henri Bendel, Inc.

40 The Court: Let me see it, please. This is a copy of the voucher before—

James C. B. Millard, for Defendant—Cross.

Mr. McCarter: Before it was changed, yes. It is evidence, your Honor, of the defendant payer's intention in paying, of his application for payment.

Mr. Rubin: It wouldn't be binding upon us, we having refused to accept that.

The Court: You have the one in evidence which you did accept, haven't you? 10

Mr. Rubin: That is right.

The Court: Well, I think the jury should properly have both sides of it. I will permit it to be marked.

Mr. Rubin: Your Honor, allow me an exception.

The Court: You may have your exception. It would be apparent from the deletion in your own piece of evidence, anyway. 20

Mr. McCarter: In fact, your Honor, the only reason I offered it is: It is impossible to read this one; it has been x-ed out so thoroughly.

(The voucher referred to was received in evidence and marked Exhibit D-6.)

Mr. McCarter: Now, subject to your Honor's ruling on those other points, that is all I have of this witness. The only other things I want to bring out from this witness is the testimony which I outlined to your Honor a few moments ago. 30

The Court: All right.

Cross examination by Mr. Rubin:

Q. Mr. Millard, you were acquainted with the firm of Knowles & Hack in New York, were you not? A. Very well. 40

James C. B. Millard, for Defendant—Cross.

Q. And it is the fact that Mr. Hack, Otto A. Hack, was the attorney for this estate in New York? A. That is true.

Q. He represented you in all the affairs up to the time of his death with regard to this estate?

A. That is correct.

10

Q. He was fully authorized to take steps on behalf of the executor with reference to the creditors of the estate? A. Yes, with the executor's approval.

Q. There were no difficulties between you and Mr. Hack? A. None at all.

Q. With reference to the handling of the account of Henri Bendel, Incorporated? A. None at all. No.

20

Q. I show you Exhibit P-5 and ask you if that is the exhibit you had reference to as being altered (handing). A. That is the one.

Q. You are acquainted with the signature of Mr. Hack? A. I am.

Q. And you recognize his signature on— A. I do.

Q. (Continuing) —P-6? Are you acquainted with the contents of that letter? A. Yes.

30

Q. And would you say that Mr. Hack was not authorized when he accepted—when he made the statement in that letter as to the alterations on the vouchers? A. Well, frankly, I never knew about this alteration on the voucher until this afternoon, and I don't read into this letter any right to alter the voucher.

Q. There is no doubt on your part that Mr. Hack had authority to deal with Henri Bendel, Incorporated? A. I had given him that authority.

40

Q. Have you any knowledge as to any of the dealings on this account prior to your appoint-

James C. B. Millard, for Defendant—Cross.

ment as executor? A. Yes. I knew quite a lot about the account.

Q. And do you know anything about the delivery of the merchandise on this account? A. Yes. I know the merchandise was delivered to a friend of Mr. Gould's.

Q. Where?

10

The Court: Well, now, I am just wondering. This might be very interesting, but I am wondering if it is material.

Mr. Rubin: The question was raised by the pleadings.

The Court: I don't think there is any question about delivery. Is there?

Mr. McCarter: No, sir. We admit the goods were sold and delivered to the—and charged to Mr. Gould and Mr. Gould was obliged to pay for them.

20

Mr. Rubin: The question was raised by the pleadings, to delivery in the State of New York.

The Witness: Well, I know delivery was made in the State of New York.

Mr. Rubin: That was the purpose of it.

The Court: All right. Does that answer the question?

30

Mr. Rubin: Because it opens up something that we had to take up with the Court.

No further questions.

Mr. McCarter: No re-cross.

The Court: All right.

The Witness: Thank you.

Mr. McCarter: That is our case, your Honor.

The Defendant Rested.

40

Philip Feldman, for Plaintiff in Rebuttal—Direct.

PLAINTIFF'S TESTIMONY IN REBUTTAL.

PHILIP FELDMAN, recalled as a witness on behalf of the plaintiff, in rebuttal, having been previously duly sworn, testified as follows:

10 *Direct examination by Mr. Rubin:*

Q. Mr. Feldman, I believe when you were on the stand before you testified that you were admitted to the bar of the State of New York? A. That is correct.

Q. And are you admitted to practice before the highest court? A. That is correct.

Q. Since when? A. In 1929.

20 Q. Now, Mr. Feldman, are you acquainted with the law of the State of New York with reference to charging interest on indebtednesses? A. I am.

Q. And can you tell the Court and jury the law of the State of New York when interest begins to run on an indebtedness in the State of New York? A. Interest begins to run on an indebtedness in the State of New York from the date when a bill is rendered for the principal amount. In other words, if I received a bill from a creditor of mine on January 1st, 1941, and if it was a liquidated amount, interest automatically begins to run from January 1st, 1941.

30

Q. Now——

By the Court:

Q. Let me just ask you a question: When does it run on an open account? A. Interest runs even on an open account from the date of the rendition of the bills. Of course, many times the stores or creditors don't require payment of interest, or

40 they may waive the payment of interest by ac-

Philip Feldman, for Plaintiff in Rebuttal
—By the Court.

cepting merely principal, but, as a matter of law, interest is an incident to the payment of principal. I might also say this, your Honor—

Q. Even though it may be an open, running account from month to month? A. That is correct, upon the rendition of a bill. In other words, if a customer buys goods during the month of June and a bill therefor is rendered on the 1st day of July, interest is due from July 1st until the date of payment. Now, some stores, as a matter of practice, don't ask for any interest if the bills are timely met, but if these bills aren't timely met, all of the stores, or a good many of them, insist on interest, which they have the legal right to do. 10

I might also say this, your Honor, if it is agreeable. The very same question came up recently in the Surrogate's Court in New York County involving the estate of Edith Gould McNeil, who was related to the decedent here, Jay Gould. The estate was represented by the very same attorneys, Knowles & Hack, and it was the same creditor, of Henri Bendel, Inc., and the sole issue was tested out in New York before Surrogate Foley, submitted on a memorandum, showing how the interest is computed, and Surrogate Foley rendered a decision which is reported in the New York Law Journal, finding, as a matter of law, we are entitled to interest and in the manner computed in our memorandum. His decision reads as follows:— 20 30

The Court:: Wait. I think you are going a little too far at this time.

Mr. Rubin: My question was as to the status of the law. 40

Philip Feldman, for Plaintiff in Rebuttal—Direct.

By the Court:

Q. Is your statement of the law derived from statute or from the decisions? A. From the decisions, your Honor.

Q. There is no statute for any— A. (Interrupting) None that I know of.

By Mr. Rubin:

Q. Do you have any citations of case law? A. I do.

Q. Will you please give the Court the benefit of those citations? A. *White v. Miller*, 78 N. Y. 393, that is our Court of Appeals. *Sweeney v. City of New York*, 173 N. Y. 414. *de Carricarti v. Blanco*, 121 N. Y. 230. *Parker v. New Jersey Fidelity and Plate Glass Insurance Company*, 245 N. Y. 1. *Blackwell v. Finley*, 233 N. Y. 351. I have several others, too.

Q. Now, Mr. Feldman, can you give us your opinion as to the New York law with reference to partial payments on an indebtedness? A. I can, and that was also the precise matter which was decided by Surrogate Foley in the other case that I referred to.

Q. In the case that you referred to? A. Yes.

Q. By the way, going back to the case you referred to, can you give us the book or the date of the document or paper in which it appeared? A. Yes. It appeared in the New York Law Journal on July 26, 1944, which is the official paper for the rendition of decisions by the Surrogate's Court, and Surrogate Foley's opinion appears therein.

Q. Going back to my original question again, will you please let me have your answer as to the New York law with reference to partial payments on account of an indebtedness? A. I will

Philip Feldman, for Plaintiff in Rebuttal—Direct.

quote from a comparatively recent case of the Appellate Division in New York, namely, the case of *Woolley v. Johnson*, 209 App. Div. 474, wherein the following rule is stated, which rule is referred to as the United States rule. The quotation appears on page 479:

“There is, therefore, no doubt whatever that the parties agreed that Woolley should receive interest on his payments to Johnson. Under such circumstances, the plaintiffs are correct in their contention that the rule for casting interest usually applied must be followed. That rule was laid down in *French v. Kennedy*, 7 Barb. 452, at page 455, as follows:

“‘In the case of partial payments, the rule was laid down in the case of *Connecticut v. Jackson*, 1 Johns. Ch. 17, in these words:’” and these words, and then there is a quote within the quote: “‘The rule for casting interest when partial payments have been made is to apply the payment in the first place to the discharge of the interest then due. If the payment exceeds the interest, the surplus goes towards discharging the principal, and the subsequent interest is to be computed on the balance of principal remaining due. If the payment be less than the interest, the surplus of interest must not be taken to augment the principal; but interest continues on the former principal until the period when the payments, taken together, exceed the interest due and then the surplus is to be applied towards discharging the principal, and interest is to be computed on the balance of

Philip Feldman, for Plaintiff in Rebuttal—Direct.

principal as aforesaid.' ” End of inner quote.

“The like rule is laid down in nearly the same words by the judges of the Supreme Court as a direction to their clerks in the computation of interest.”

10

And then it cites some Supreme Court cases.

I also say this, if I may, in a practical illustration, which was approved by Surrogate Foley in the Edith Gould McNeil's case, in which Knowles & Hack were the attorneys in New York recently. I think that will give the jury and the Court a graphic picture of exactly what method of interest—

20

Mr. McCarter: I submit that is not competent, your Honor.

The Court: Unless you are going to quote that as the law.

30

A. Yes, I will quote this as the law, which has been approved by Surrogate Foley, because he says the method of computation of interest, as we have computed here, is correct, and his method—I will quote his decision first and then the computation. Moreover, I think it will give the jury a clearer picture instead of reading from a book, which may be more difficult for them to follow.

Mr. McCarter: I object, to giving the jury a clearer picture. If a question of foreign law is involved under the comparatively recent statutes, it is a question for the Court; not for the jury.

The Witness: Your Honor, here is the decision of Surrogate Foley.

40

Philip Feldman, for Plaintiff in Rebuttal—Direct.

Mr. Rubin: I am submitting the testimony as that of an expert, and I believe that may be proper.

The Court: I understand that foreign law had to be proven as a fact.

Mr. McCarter: Well, it used to be, your Honor, but to my great surprise—we have 10
so-called uniform—what is it called—uniform judicial notice of foreign law act, Chapter 104 of the Laws of 1942, which I will hand up to your Honor and you can see that it makes it entirely a question for the court. I didn't even know about this statute until a few days ago (handing to the Court).

The Court: There doesn't seem to be 20
much question about it.

Mr. Rubin: If your Honor please, that is the manner in which counsel is proceeding I submit is the proper manner under Section 2:98-18 of the Revised Statutes, which has not been altered. I didn't hear the section advanced.

Mr. McCarter: This is an amendment.

Mr. Rubin: I am familiar with it, but I would like counsel to state the section. I 30
am prepared to argue the matter.

Mr. McCarter: Here it is, Chapter 104 of the Laws of 1942. It is subsequent to the Revised Statutes, so I can't give the section number.

Mr. Rubin: I am familiar that the Revised Statutes, of course, your Honor knows is brought down to date by the supplements. The former Section 2:98-18 which your Honor is quite familiar with 40
also says that the reports of other states

Philip Feldman, for Plaintiff in Rebuttal—Direct.

10 may be judicially noticed by the courts, also giving your Honor the opportunity to rely upon your own notice. The section now read by counsel says that your Honor shall take judicial notice thereof, but it does not do away with the provisions of the section which tells us how to prove the law of another jurisdiction. And we have our cases and they have not been over-ruled.

I submit there has not been any revocation or repeal of Section 2:98-18, which is the fundamental way to prove the law of a foreign jurisdiction.

20 The Court: I can't agree with you. The section which counsel has called to my attention, the foreign law had to be proven to the jury's satisfaction as a fact and as any other fact. Now it is a matter for the Court to determine.

30 Mr. McCarter: And it was so held, construing this amendment, by the case of *Franzen v. The Equitable Life Assurance Society of the United States*, 130 N. J. L. 457. A quotation from that case is: "The general rule at common law is that a foreign law is essentially a matter of 'fact' determinable by the jury," and is not subject to judicial notice.

Mr. Rubin: Your Honor please, to foreclose me at this moment on just the part lacking in that section of the statute would be most injurious to my case.

40 The Court: Nobody has foreclosed you from anything. You have proven the law very adequately by this witness.

Philip Feldman, for Plaintiff in Rebuttal—Direct.

Mr. Rubin: I would like to proceed with the form of a hypothetical question.

The Court: Very well.

By Mr. Rubin:

Q. Now, Mr. Feldman, assuming that goods were sold and delivered at stated prices on June 14, 1932, June 15, 1932, June 16, 1932, June 17, 1932, June 21, 1932, June 23, 1932, June 27, 1932, July 6, 1932— 10

The Court: Now, wait just a minute. Maybe we can save a lot of time. Are you going to read the whole account?

Mr. Rubin: Only a few more items. That is why I thought I would do it that way. 20

The Court: I think counsel would agree.

Mr. McCarter: There are two pages of it.

Mr. Rubin: Withdraw the question.

By Mr. Rubin:

Q. Assuming that goods were sold and delivered at stated prices between June 14, 1932, and July 31, 1934, totaling in the sum of \$6,701.04, and that bills had been rendered monthly during the running of this account, in your opinion when under the law of the State of New York would interest commence to run? A. Interest commences to run from the dates of the rendition of those monthly bills. 30

Q. And assuming that a statement was rendered for the total amount of all the bills, when would you say that interest commences to run? A. Well, if a statement is first rendered, for 40

Philip Feldman, for Plaintiff in Rebuttal
—Cross.

example, August 1st, 1934, for purchases made going back to 1932, and assuming no bills were rendered between 1932 and August 1st, 1934, interest would run from August 1st, 1934.

Mr. Rubin: No further questions.

10

Cross examination by Mr. McCarter:

Q. Would you qualify any of your statements at all when the bills did not include a demand for interest? A. That is correct, that is, I will not. The statement, the bills don't have to demand interest. Interest is an incident to the rendition of the bill.

20 Q. Whether or not it is demanded? A. That is correct. That is what the cases have held.

Q. And whether or not it is charged against the debtor on the books? A. That is correct.

Q. In other words, when we look at the books of account here, Exhibit P-3, and we find no charge of interest, but a total balance of some \$3,201.04, you would still say that the plaintiff is entitled to interest under the law of New York? A. If bills were rendered, then I say the answer is yes, interest is automatically put on.

30 Q. All right, if bills were rendered. Now, would you qualify your statement at all when I show you Exhibit D-1, the verified proof of claim delivered to the executor in this case, in which there is no demand for interest? A. No, I will not qualify that. As I have explained before, Mr. McCarter, if I rendered a bill for a thousand dollars five years ago and if that bill is paid to me at the present time, the thousand dollars principal, I may take that, and if I take that I am,
40 therefore, waiving interest. But I have a perfect

Philip Feldman, for Plaintiff in Rebuttal
—Cross.

legal right to demand interest on that thousand dollars for the five-year period even though my bill doesn't say anything about interest. It automatically draws interest from the date of the rendition of that bill.

Q. Even though the creditor swears under oath 10
that thirty-seven hundred, or whatever the sum is, as all that is due? A. Well, this is not a sworn statement of all that is due. This is a statement of the principal account as of that time.

Q. Do you see a word about it being the principal account? A. No, I do not, but your statement that this is all that is due.

Q. Well, you see a statement, that is, indebted in the sum of 3,201 and 4/100ths dollars, don't you? A. Yes, I see that, but my answer is still 20
the same, Mr. McCarter.

Q. Now, are you familiar with the New York case of *Ledyard v. Bull*, 119, I think 62, in the Court of Appeals? A. No, I don't know that case. It may be that I came across it in my examination, but I am not presently familiar with it.

Q. You are not familiar with the fact that the New York Court of Appeals in that case held that in the case of a running account it is not sufficient, to entitle a creditor to interest, that the 30
account is capable of accurate statement in order to accrue interest, that the interest is accrued? You are not familiar with the *Bull* case? A. No. I cited some later cases.

Q. All right. Are you familiar with the case of *Crane v. Craig*, 230 N. Y. 452, a decision in the Court of Appeals, in which the Judge, whose name I haven't got here, said: "The rule, however, appears to be that where the interest is not payable by the terms of the contract, but is simply 40

Philip Feldman, for Plaintiff in Rebuttal
—Re-direct.

allowable as damages for the default in payment, then the interest is not regarded as a part of the debt, but as a mere incident to it, and the receipt of the principal bars a subsequent claim for interest"— A. I don't know what the facts are in that case.

10 Q. Are you familiar with that case? A. No. That may be on some unliquidated amount. Here we have a liquidated amount. I mean, there are those two cases I am unfamiliar with, Mr. McCarter. Here I say that in New York, as a matter of law, where it is a liquidated amount, one is entitled to interest from the date of the rendition of a bill, and I know of no authoritative case in New York to the contrary that has not been over-
 20 ruled.

Q. Are you familiar with the case of *Davison v. Klaess*, 280 N. Y. 252, 20 Northeastern (2d) 744, a case in the New York Court of Appeals; do you know that case? A. No.

Q. And do you know that in that case they allowed interest simply and only because stamped on the face of the bill was the word "Cash—Accounts Overdue Subject to Interest," and implied very plainly that had that not been there there
 30 wouldn't have been any interest? A. I don't know that to be the fact at all.

Q. You don't. All right.

Mr. McCarter: I think that is all.

Re-direct examination by Mr. Rubin:

Q. The cases cited by you, are you acquainted with the facts in those cases? A. Yes. I read each and every one of those cases which are referred to in this memorandum that was submitted to Sur-
 40 rogate Foley in the other case.

*Motion for a Direction of a Verdict on Behalf
of the Defendant.*

Mr. Rubin: That is all. That is the plaintiff's case.

Mr. McCarter: We rest, too, your Honor.

Both Sides Rest.

10

The Court: Have you any motions?

Mr. McCarter: Yes, sir. I move, if your Honor please——

The Court: I think we ought to hear the motions in chambers, and I am going to excuse the jury for just a few minutes while the Court hears the legal motions.

20

MOTION FOR A DIRECTION OF A VERDICT ON BEHALF
OF THE DEFENDANT.

Mr. McCarter: If the Court please, I move for a direction of a verdict in favor of the defendant on the following grounds: In the first place, although the suit is in the guise of a claim for a balance of unpaid principal, I submit first that under the evidence which I will recite in more detail in a moment, the principal conclusively has been paid and the sole question remaining is whether or not the plaintiff is entitled to interest, and, as a second ground of my motion I urge that, as a matter of law, the plaintiff is not entitled to interest.

(Argument.)

The Court: Let me get just a couple of things straightened out. Are you agreed that there is

40

*Motion for a Direction of a Verdict on Behalf
of the Defendant.*

no disputed matter of fact to go before a jury here? I mean, will you just tell me what I should submit to the jury?

10 Mr. Rubin: That thought was going through my mind during the trial. No; all the facts were admitted, practically admitted, in this case. I don't see any fact situation to submit to the jury.

The Court: I can't, myself.

(Argument.)

Mr. McCarter: It may be that in the hurry of the trial I forgot to offer that in evidence. Might I now have the case reopened long enough to have this D-5 for identification marked formally in evidence?

20 The Court: Yes. And this is the one that was sent back——

Mr. McCarter: No; neither one of them were accepted, so to speak, but the other one, P-5, was the earlier of the two.

The Court: You objected at the time.

Mr. Rubin: No objection to his reopening the case and allowing the exhibit to be offered, but I did object to this offer at that time.

Mr. McCarter: I don't think I offered it at all.

30 The Court: I thought you did, and I overruled the objection. Maybe I am wrong.

Mr. McCarter: No, I offered the December—is that testimony there? No, that is May. This one I forgot to offer.

The Court: Well, I will permit it to be marked in evidence.

(D-5 for identification was received in evidence and marked Exhibit D-5.)

40

(Argument.)

*Motion for a Direction of a Verdict on Behalf
of the Defendant.*

The Court: Well, I don't know, I would like personally to find for the defendant on this, but I feel that the law is otherwise. It seems to me that if a man pays the principal that that ought to be the end of it, just between us, but there has been no contradiction of counsel's statement of the law of New York, and I have to accept that as a fact, and under those circumstances, there being no disputed facts, I am afraid that I will have to grant a motion for a directed verdict for the plaintiff. 10

Mr. McCarter: All I would like to say to that then, of course, that must not include this same five hundred dollars that they are asking for. That would be asking for interest upon interest. They are not entitled to compound interest. They are suing for the balance of interest. If the Court feels that they are entitled to it, that is all they would be entitled to. 20

Mr. Rubin: I submit that, your Honor, going back to the very beginning, we are not suing on the interest. That is principal. And the court also says—I am sorry that we have to rely so much on the language—on the case of New York—they say it is not compound interest. They say this is interest on principal. The original figure was \$1,231.42. And the complaint asked for interest from May 1st, 1938, on that sum, which, under all the rules, we say is the balance of principal. And I computed the interest in court to be \$517.19. 30

The Court: I can't see how that is interest on interest if the other is principal.

Mr. McCarter: If the other is principal, of course not, but my point is, if the Court please, that under the law's application of payments, the principal was paid. You say they are nevertheless 40

*Motion for a Direction of a Verdict on Behalf
of the Defendant.*

entitled to interest. Well and good, but they are not entitled to interest on that. There is no possible theory upon which you can say this is a theory for balance of principal.

10 The Court: Well, if it were interest upon it, it became a stated account; that would become the principal sum, wouldn't it?

Mr. McCarter: No. If you will give me a moment, if your Honor please, no matter how long the interest is overdue, you just get interest from the date of the maturity of the debt. Now, this debt matured at a certain time. They claim they are entitled to interest. Your Honor feels that they are.

20 The Court: I don't feel that they are. I feel that the law says they are.

Mr. McCarter: You feel that their claim is well-founded, that they are entitled to interest. I say all right, then they are entitled to interest, but they are not entitled to interest on that interest, and I say that under the application-of-payments rule, which is a New Jersey doctrine—we are in New Jersey now and governed by the New Jersey law—we have applied those payments to the principal.

30 (Argument.)

The Court: I am afraid I have to disagree with you, Mr. McCarter. If you want to take me up and show me I am wrong, all right.

40 Mr. McCarter: May I, therefore, note on the record an exception first to your Honor's denial for my motion of a directed verdict and, second, to your Honor's granting a motion by the plaintiff for a directed verdict and, third, for the direction of a verdict for the plaintiff in any sum greater than \$1,231.42.

*Motion for a Direction of a Verdict on Behalf
of the Plaintiff*

The Court: All right. And I will have to direct the judgment for \$1,748.61.

Mr. Rubin: Now, I don't recall whether the record had my motion set forth there.

MOTION FOR A DIRECTION OF A VERDICT
ON BEHALF OF THE PLAINTIFF.

10

Mr. Rubin: I respectfully move that your Honor direct a verdict in favor of the plaintiff in this case in the sum of \$1,748.61. Your Honor is granting that motion?

The Court: Yes. I would rather grant it the other way, to be perfectly honest, but I am bound by the law just as well as you are.

20

(In the court room. The jury returned to the jury-box.)

The Court: Madam forelady and ladies and gentlemen of the jury: I am very sorry that we had to delay you so long today, but the Court had to hear a lengthy motion or, rather, several motions in the case, and it finally developed that the matter became one of law for the Court to determine, there being no disputed facts to submit for your determination, and the Court, as a result of the various motions, has determined, as a matter of law, that the plaintiff is entitled to a recovery, and that the plaintiff should receive a verdict against the defendant in the sum of \$1,748.61, and the Court directs you to return such a verdict, and the clerk will take it in the sum of \$1,748.61 for the plaintiff and against the defendant.

30

(The clerk took the verdict as directed.)

40

The Court: And now, ladies and gentlemen, you will be excused until next Monday morning.

Exhibit P-3.

Sheet 1.

ABSOLUTELY NO BILLS TO GO
OUT ON THIS ACCOUNT. GIVE BILLS TO MR. HAGGERTY.

Name GOULD MR. JAY /DO NOT CONFUSE WITH MRS./
Address HOTEL ELYSEE 54TH ST. CITY
Business
Remarks FOR MISS S. PARRISH REIGLER.

Account. No.
Limit
R. C. A.
Other

Date	Folio	Description	Debit	Credit	Proof	Balance
1932						
June						
14		Gold Lame Wrap	110.00			
		Wht. Beaded Gown & Belt.....	325.00			435.00
15		Blk. Crepe Hat With Wht. Brow....	30.00			
		Blue Bali & Silk Hat.....	35.00			
		Blk. Vel. Hat	30.00			
		Blk. French Hat	40.00			
		Beige Hat	35.00			
		Wht. Hat	35.00			
		Wht. Panama Hat & Extra Band....	30.00			
		Blk. Tulle Hat	35.00			
		Wht. Straw & Brown Ribbon Hat.....	25.00			
		White Panama Hat & Band.....	35.00			
		Blk. Satin Turban.....	30.00			
		Wht. Satin Turban.....	30.00			

Wht. Silk Hat.....	30.00		
Blk. Straw & Lace Hat.....	30.00		
Yel. Bali Hat.....	35.00		
Dy. Baum Marten Scarf.....	185.00		
Green Roma Negligee.....	85.00		
Blue Satin ".....	125.00		
Fl. Chif. & Lace ".....	125.00		
Fig. Chif. ".....	115.00		
Pink Satin Slip	110.00		
Pink Lace Negligee.....	150.00		
Blue Bed Jacket.....	25.00		
Fl. Roma " ".....	30.00		
Wht. " " ".....	30.00		
Pk. Sat. & Lace Stepin.....	76.00	435.00	1,900.00
2 Pc. Pk. Sat. & Lace Set.....	70.00		
Blk. Crepe & Lace Slip.....	40.00		
Wht. " " Stepin	20.00		
Pk. Chif. & Lace Slip.....	24.00		
Wht. Satin Combination.....	18.00		
Pk. Crepe Nightgown	24.00		
Blue Roma Nightgown.....	40.00		
Fl. Satin ".....	40.00		
Wht. Geo. ".....	20.00		
Flesh Roma Gown	50.00	1,900.00	2,322.00

Exhibit P-3.

Sheet 2.

*NO BILLS TO GO OUT ON THIS
ACCT. BILLS TO MR. HAGGERTY.*

Name GOULD MR. JAY /DO NOT CONFUSE WITH MRS./
Address HOTEL ELYSEE 54TH ST. CITY
Business
Remarks RIEGLER

Account. No.
Limit
R. C. A.
Other

Date	Folio	Description	Debit	Credit	Proof	Balance
1932						
June						
15		Brt. Forward				2,322.00
		Wht. Satin Slip	30.00			
		Blue Roma & Lace Emb.....	55.00			
		Blue " & Lace Nightgown	65.00			
		Blue Roma & Lace Combination.....	30.00			
		Wht. Satin Pants	32.00			
		Wht. Satin & Lace Slip.....	55.00			
		Pink Roma & Lace Combination.....	42.00			
		Wht. Roma Nightgown.....	35.00			
		Pink Satin Pants.....	28.00		2,322.00	2,694.00
		Green Lace Eve. Gown				
		Alt. Included	195.00			

Exhibit P-3.

17

Wht. Crepe Suit, Plaid Blouse			
Alt. Incl.	150.00		
Blk. Coat Silver Fox Alt. Inc.....	295.00	2,694.00	3,334.00
Fld. Organdie Gown	195.00		
Blk. & Pink Lace Eve. Gown.....	225.00		
Blk. Beaded Cape	95.00		
Yel. & Blk. 3 Pc. Suit.....	195.00		
Wht. Crepe Gown Trd. Brown Vel..	150.00		
Wht. Satin Eve. Gown.....	185.00		
Wht. Tucked Dress.....	195.00		
Wht. Roma Gown Trd. Gold Lace...	250.00		
Bl. Crepe Dress Colored Neckline...	195.00		
Blk. & Wht. Cape.....	110.00		
Brown & Wht. Fig. Suit.....	195.00		
Tan Tucked Gown	195.00		
Blk. Suit Ruffled Sleeve.....	195.00		
Fld. Chif. Gown.....	175.00	3,334.00	5,889.00
Add. Chg. on Pink Sat. & Lace			
Stepin	.50		
Pk. Chif. & Lace Slip.....	36.00	5,889.00	5,925.50
Blk. Lace Tea Gown.....	195.00	5,925.50	6,120.50

Italics appear in red.

Exhibit P-3.

Sheet 3.

Name ESTATE OF JAY GOULD /DO NOT CONFUSE WITH MRS./
 Address 39 BROADWAY CITY
 Business
 Remarks REIGLER

Account No.
 Limit
 R. C. A.
 Other

Date	Folio	Description	Debit	Credit	Proof	Balance
1932						
June		Brt. Forward				6,120.50
23		Blk. Cloth Coat with Ermine.....	295.00		6,120.50	6,415.50
27		Wht. Crepe Suit Emb. Blue.....	225.00			
		Green Crepe Suit.....	195.00		6,415.50	6,835.50
22		<i>Blk. Coat Trd. Silver Fox 6/16/32</i>		295.00	6,835.50	6,540.50
July						
6		Nat. Leghorn Hat.....	30.00		6,540.50	6,570.50
Dec.						
12	3704	<i>By Cash</i>		1,000.00	6,570.50	5,570.50
1933						
May						
20	3798	<i>By Cash</i>		2,500.00	5,570.50	3,070.50
1935						
June						
20		Trans. from Mrs. Jay Gould				
	6/2/34	15 1/2 Yds Beige	38.75			
		43 7/8 Yds Beige Chif.....	76.79			
	7/23/34	L. O. Hat Cleaned & Freshened.....	5.00			
	7/31/34	L. O. Hat New Red Belting Crown	10.00		3,070.50	3,201.04

Italics appear in red.

Exhibit P-3.

Exhibit P-4.

Sheet 4.

Name	ESTATE OF JAY GOULD /DO NOT CONFUSE WITH MRS./	Account No.
Address	39 BROADWAY N Y C	Limit
Business		R. C. A.
Remarks	REIGLER	Other

Folio	Date	Description	Debit	Credit	Balance	Proof
	1935					
	Dec.					
	28				3,201.04	3,201.04
J920	1937					
	Sept.					
	28	Accrued Interest to Oct. 1 1937 at 6%	1,127.89		4,328.93	4,328.93
	Oct.					
	30	Accrued Interest to Nov. 1, 1937	16.00		4,344.93	4,344.93
J12028	Dec.					
	27	Accrued Interest to Jan. 1, 1938	32.01		4,376.94	4,376.94
	1938					
	Jan.					
	5	<i>By Check</i>		1,600.50	2,776.44	2,776.44
J217	25	Accrued Interest	16.01		2,792.45	2,792.45
J426	Apr.					
	29	Accrued Interest	16.01		2,808.46	2,808.46
	May					
J532	26	Interest Accrued—32.02 should Have Been 55.52	23.50		2,831.96*	2,831.96
	Jan.					
	1	<i>By Check</i>		1,600.54	1,231.42	

67

(Rubber Stamp)

FROZEN

Jul 10 1943

Italics appear in red.

Exhibit P-5.**EXECUTOR'S VOUCHER.**

ESTATE OF JAY GOULD, TO HENRI BENDEL, INC. DR.

Address 10 West 57th Street,
New York City.

10

CHECK NO. 254 Commercial Trust Co. of N. J.

Date

Amount

Dec. 18, 1937 Payment of 50% on ac-
count of principal of claim
against Estate of Jay
Gould without prejudice to
claimant's right to collect
interest as per agreement \$1600.50

20

Please return this Voucher properly receipted
to J. C. B. Millard, Executor, 39 Broadway,
N. Y. C.

Date Received from the Executor of the
Will of Jay Gould, One Thousand Six Hundred
and 50/100 Dollars,

In full for the above account.
\$1600.50

30

HENRI BENDEL, INC.

Per ? ? ? ? ? ? ? ? ? ?

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Exhibit P-6.

KNOWLES & HACK
COUNSELLORS AT LAW
551 Fifth Avenue
New York

January 6 1938.

Henri Bendel, Inc.,
10 West 57th St.
New York.

10

Re: *Jay Gould Estate*

Dear Sirs:—

I return herewith the voucher which you sent in for the payment of \$1600.50 made by the Executor of the Estate of Jay Gould, on account of the principal of your claim against the estate.

I advised you and your attorney that the Executor would accept a receipt voucher reading that it was a payment of 50% on account of the principal of the claim against the estate without prejudice to your right to claim interest, but I did not state, or agree, that it would be accepted without prejudice to your

20

“right to collect interest as per agreement.”

It is not admitted that you have a right to collect interest and there was no agreement in such connection. The matter of interest is a question for future consideration. Will you therefore kindly strike out what you have said in the voucher and state the same as follows:—

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“payment of 50% on account of principal of claim against the Estate of Jay Gould without prejudice to right to claim interest”
and we will then accept the voucher.

Very truly yours,

OTTO A. HACK.

OAH/CEG
Enc.

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Exhibit P-7.

January 4th, 1938

Knowles & Hack
551 Fifth Avenue
New York, N. Y.

10

Att: Mr. Hack
Re: Estate of Jay Gould

Gentlemen:

We enclose, herewith, executor's voucher in
acknowledgement of check received in the amount
of \$1600.50 which we have accepted as payment of
50% on account of principal of claim against
Estate of Jay Gould without prejudice to claim-
ant's right to collect interest as per agreement.

20

Very truly yours,

HENRI BENDEL, INC.

Credit Manager

MM:KK
Enc

30

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Exhibit P-8.

May 5th, 1938.

Gentlemen:

Re: Estate of Jay Gould, deceased

We are general counsel for Henri Bendel Inc.,
10 West 57th Street, New York City.

10

Our client has transmitted to us check of the
above estate to the order of Henri Bendel Inc.
in the sum of \$1,600.54, together with voucher
stating that the check is in payment of the bal-
ance of the claim, as per account rendered. Our
client has advised you on several occasions that
there is unpaid interest due on its claim which,
as at May 1, 1938, amounted to \$1,207.92.

Our client is entitled to interest on its claim,
which has been outstanding for a period of ap-
proximately six years. In New York interest is
payable on all past due accounts by representa-
tives of the estates of decedents, and we are
advised by our New Jersey correspondent attor-
ney that the law is the same in that state.

20

We are accordingly holding the check which
you sent our client, as Henri Bendel Inc. will not
accept it in full payment of the claim. Will you
please advise us whether the balance of interest
due will be paid, otherwise we have been in-
structed by Henri Bendel Inc. to take such steps
as may be necessary to collect the amount thereof.
Your immediate response will be appreciated.

30

We attempted to reach you by telephone on
several occasions, but we were unable to speak
with you.

Very truly yours,

Knowles & Hack, Esqs.,
551 Fifth Avenue
Otto A. Hack, Esq.,
S.P.P.

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Exhibit P-9.

KNOWLES & HACK
COUNSELLORS AT LAW
551 Fifth Avenue
New York

May 12, 1938.

10

Messrs. Strauss, Reich & Boyer,
141 Broadway,
New York.

Re: Estate of Jay Gould, deceased

Dear Sirs:—

I have your letter of May 5th, in regard to the claim of Henri Bendel, Inc. against the above estate.

20

The amounts heretofore sent to Bendel, Inc. by the Executor of Mr. Gould's Estate in connection with their claim were paid on account of the principal of their claim.

30

As heretofore advised them if the Estate liquidates for sufficient to pay interest on any of the claims, the matter will be presented to the Court for instructions and its directions. I expect that the Court will direct that interest should be paid pro rata to all the creditors to the extent that the Executor may have funds on hand to pay the same. It is, of course, the intent of the executor to treat all creditors alike.

Other than that the Executor can make no definite promises at this time. The acceptance and deposit of the check recently paid to them, is, of course, without prejudice to their rights in such connection.

Very truly yours,

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OTTO A. HACK.

OAH/CEG

Exhibit P-10.

May 31st, 1938.

Gentlemen:

Re: Estate of Jay Gould, deceased
 Claim of Henri Bendel Inc.

10

Pursuant to your letter of May 12th and our subsequent telephonic conversation with Mr. Hack of your firm, our client, Henri Bendel Inc., has accepted the check as a payment on account of its claim against the Estate of Jay Gould, deceased. There is a balance due of \$1,231.42, statement for which is enclosed herewith.

On behalf of our client we hereby demand payment immediately of the balance due.

In default of payment, we have been advised by our client to have the necessary legal steps taken to compel payment.

20

We are sending a copy of this letter to Mr. J. C. B. Millard, Executor.

Very truly yours,

Knowles & Hack, Esqs.

551 Fifth Avenue

Otto A. Hack, Esq.

SP.P.

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Exhibit D-1.

Sheet 1.

All Claims Must Be Made Within Five Days After Receipt of Goods

HENRI BENDEL INC.

10, 12 and 14 West Fifty-seventh Street

NEW YORK

Apr. 23 1935

- 10 Sold to Estate of Jay Gould
39 Broadway
New York City

Terms:

1932

June 14	Gold Lame Wrap	110.00
	Wht. Beaded Gown & Belt.....	325.00
15	Blk. Crepe Hat with Wht. Bow...	30.00
	Blue Bali & Slik Hat.....	35.00
	Blk. Vel. Hat	30.00
	Beige Hat	35.00
	Wht. Hat	35.00
	Wht. Panama & Extra Band.....	30.00
20	Blk. Tulle Hat	35.00
	Wht. Straw & Brown Ribbon Hat	25.00
	Wht. Panama Hat & Band.....	35.00
	Blk. Satin Turban	30.00
	Wht. Satin Turban	30.00
	Wht. Silk Hat.....	30.00
	Blk. French Hat	40.00
	Blk. Straw & Lace Hat.....	30.00
	Yel. Bali Hat	35.00
	Baum Marten Scarf	185.00
	Green Roma Negligee.....	85.00
	Blue Satin "	125.00
	Fld. Chif. & Lace Negligee.....	125.00
30	Fig. Chif. Negligee	195.00
	Pink Satin Slip.....	110.00
	Pink Lace Negligee.....	150.00
	Blue Bed Jacket.....	25.00
	Fld. Roma "	30.00
	Wht. Roma "	30.00
	Pink Satin & Lace Stepins.....	76.50
	2 Pc. Pink Satin & Lace Set.....	70.00
	Blk. Crepe & Lace Slip.....	40.00
	Wht. Crepe & " Stepin	20.00
	Pink Chif. & Lace Slip.....	60.00
	Wht. Satin Combination.....	18.00
	Pink Crepe Nightgown.....	24.00
40	Blue Roma "	40.00
	Fld. Satin "	40.00
	Wht. Geo. "	20.00

Exhibit D-1.

Sheet 2.

All Claims Must Be Made Within Five Days After Receipt of Goods

HENRI BENDEL INC.

10, 12 and 14 West Fifty-seventh Street

NEW YORK

Sold to Estate of Jay Gould
39 Broadway
New York City

10

Terms:

June 15	Flesh Roma Gown	50.00	
	Wht. Satin Slip	30.00	
	Blue Roma & Lace Emb.....	55.00	
	Blue " " " Nightgown	65.00	
	Blue Roma & Lace Combination....	30.00	
	Wht. Satin Pants	32.00	
	Wht. Satin & Lace Slip.....	55.00	
	Pink Roma & Lace Combination....	42.00	
	Wht. Roma Nightgown.....	35.00	
	Pink Satin Pants	28.00	
16	Green Lace Eve. Gown Alt. Incl.....	195.00	20
	Wht. Crepe Suit Plaid Blouse Alt. Incl.	150.00	
17	Fld. Organdie Gown.....	195.00	
	Blk. & Pink Lace Eve. Gown.....	225.00	
	Blk. Beaded Cape	95.00	
	Yel. & Blk. 3 Pc. Suit.....	195.00	
	Wht. Crepe Gown Trd. Brown Vel.	150.00	
	Wht. Satin Eve. Gown.....	185.00	
	Wht. Tucked Dress	195.00	
	Wht. Roma Gown Trd. Gold Lace	250.00	
	Blk. Crepe Dress Col. Neckline.....	195.00	
	Blk. & Wht. Cape	110.00	
	Brown & Wht. Fig. Suit.....	195.00	30
	Tan Tucked Gown	195.00	
	Blk. Suit Ruffled Sleeve	195.00	
	Fld. Chif. Gown.....	175.00	
21	Blk. Lace Teagown	195.00	
23	Blk. Cloth Coat with Ermine.....	295.00	
27	Wht. Crepe Suit Emb. Blue.....	225.00	
	Green Crepe Suit	195.00	
July 6	Nat. Leghorn Hat	30.00	
1934			
June 2	15½ Yds. Beige Crepe.....	38.75	
	43⅞ Beige Chif.	76.79	
July 23	L. O. Hat Clean & Freshened.....	5.00	
July 31	L. O. Hat New Red Belting Crown	10.00	40
		6,701.04	

Exhibit D-1.

Sheet 3.

All Claims Must Be Made Within Five Days After Receipt of Goods

HENRI BENDEL INC.
10, 12 and 14 West Fifty-seventh Street
NEW YORK

Apr. 23 1935

- 10 Sold to Estate of Jay Gould
39 Broadway
New York City

Terms:

6,701.04

1932
Dec. 12 By Cash 1,000.00
1933
May 20 By Cash 2,500.00

3,500.00

3,201.04

20

T. J. HAGGERTY, being duly sworn, deposes and says that he is Comptroller for Henri Bendel Inc., to whom the above Estate is indebted in the sum of THREE THOUSAND TWO HUNDRED AND ONE AND 04/100 DOLLARS, and that the annexed statement is a true and correct claim justly due from said Estate; that no payments have been made thereon, and there are no offsets against same to his knowledge.

T. J. HAGGERTY,
Comptroller for Henri Bendel Inc.

Sworn and subscribed before me
the 23rd day of April, 1935.

30

D. WIELAND,
Notary Public.
NOTARY PUBLIC
Queens Co. Clk. No. 3535 Reg. No. 5285
N. Y. Co. Clk. No. 852 Reg. No. 6-W-530
My Commission Expires March 30, 1936

(Seal)

Italics appear in red.

40

Exhibit D-2.

(Check)

Estate of Jay Gould

No. 254

COMMERCIAL TRUST COMPANY OF NEW JERSEY

15 Exchange Place, Jersey City, N. J. 10

Jersey City, N. J. December 18, 1937

Pay to the

Order of Henri Bendel, Inc. \$1,600 50/100
One Thousand Six Hundred & 50/100 Dollars

Estate of Jay Gould

J. C. B Millard

Executor

(Bank indorsements) 20

Exhibit D-3.

(Check)

Estate of Jay Gould

No. 429

COMMERCIAL TRUST COMPANY OF NEW JERSEY

15 Exchange Place, Jersey City, N. J. 30

Jersey City, N. J. May 2 1938

Pay to the

Order of Henri Bendel, Inc. \$1600 54/100
One Thousand Six Hundred & 54/100 Dollars

Estate of Jay Gould

J. C. B Millard

Executor

(Bank indorsements) 40

Exhibit D-5.**EXECUTOR'S VOUCHER.**

Estate of Jay Gould, to Henri Bendel, Inc., Dr.

Address 10-12-14 West 57th Str., N. Y. C.

10 CHECK NO. 429 Commercial Trust Co. of N. J.

Date

Amount

May 2, 1938. Balance of Claim against
Estate of Jay Gould, as
per account rendered....\$1,600.54

Please return this Voucher properly receipted
to J. C. B. Millard, Executor, 39 Broadway,
Room 1916, New York City.

20 Date Received from the Executor of the
Will of Jay Gould, One Thousand Six Hundred
and 54/100 Dollars,

In full for the above account.
\$1,600.54

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Exhibit D-6.**EXECUTOR'S VOUCHER.**

Estate of Jay Gould, to Henri Bendel, Inc. Dr.

Address 10, 12 & 14 West 57th Str.,
New York City.

10

CHECK NO. 254 Commercial Trust Co. of N. J.

Date

Amount

Dec. 18, 1937. Payment of 50% account
of claim against Estate of
Jay Gould, as per account
rendered\$1,600.50

Please return this Voucher properly receipted
to J. C. B. Millard, Executor, 39 Broadway,
N. Y. C.

20

Date Received from the Executor of the
Will of Jay Gould, One Thousand Six Hundred
and 50/100 Dollars,

In full for the above account.

\$1,600.50

30

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2
FEB T. 1946

New Jersey Court of Errors and Appeals

GOLDIE S. ROBBINS,
Plaintiff-Respondent,

v.

JAMES C. B. MILLARD, as Executor
of the Estate of JAY GOULD, de-
ceased,
Defendant-Appellant.

On Appeal
from
Supreme Court.

BRIEF FOR APPELLANT.

Statement.

The plaintiff sues as assignee of Henri Bendel, Inc., a creditor of Jay Gould, now deceased. The defendant is the Executor of Jay Gould, pursuant to letters testamentary issued by the Surrogate of the County of Ocean, of which Jay Gould died a resident. While the assignment to the plaintiff was formally denied in the answer, it was conclusively proved at the trial. No question arises on the assignment and to all intents and purposes, the case is as if it was between Henri Bendel, Inc. and the defendant. We shall, therefore, from time to time use the word "respondent" in referring to Henri Bendel, Inc.

The respondent filed with the appellant a duly verified proof of claim for goods sold on the order of the decedent, in the sum of \$3,201.04. (Exhibit D-1, Case 74-76). This was verified April 23, 1935. On December 18, 1937, the appellant paid the respondent \$1,600.50, and on May 2, 1938, \$1,600.54 (Case 77) making a total of \$3,201.04, the amount

of the proof of claim. By the bill of particulars annexed to the complaint, the respondent not only charged for the various items enumerated in the verified proof of claim, but also entered accruals of interest, credited the amounts paid by the decedent in his life time, totalling \$3,500. which were also credited on the proof of claim on which no interest was accrued, and credited the payments made by the appellant partly to interest and partly to principal (Case 6), and demanded the balance due of \$1,231.42.

The Answer admitted the appointment of the appellant as Executor of Jay Gould, denied the balance of each of the counts of the complaint and pleaded that the appellant had paid in full all moneys due from his testator to the respondent, and that the respondent had waived the right to recover interest and became estopped thereto. The appellant also pleaded that the goods were sold and delivered in the State of New York, where the payments by Jay Gould in his lifetime and by the appellant after his death were made, and that the transactions are governed by the law of New York, by the law of which respondent had been fully paid, and had waived the right to recover any interest, and was estopped from claiming any.

At the conclusion of the trial at the Passaic Circuit, before his Honor Judge Davidson and a jury, the Trial Judge denied the appellant's motion to direct a verdict in his favor, and directed a verdict in favor of the respondent for \$1,748.61. From the judgment entered on that verdict, this appeal is taken.

Grounds of Appeal Relied On.

1. Because the learned Trial Judge denied the motion of Counsel for the defendant to direct a verdict in the defendant's favor. Motion Case 57, line 25; Direction, Case 61, line 35; Exception, Case 60, line 35; Ground of Appeal, Case 14.

2. Because the learned Trial Judge granted the motion of Counsel for the plaintiff to direct a verdict in favor of the plaintiff for \$1,748.61. (Motion, Case 61, l. 15; Direction, Case 61, l. 35; Exception, Case 60, l. 35; Ground of Appeal, Case 14).

3. Because the learned Trial Judge denied the motion of Counsel for the defendant that in any event the verdict in favor of the plaintiff could not exceed \$1,231.42 (Motion, Case 59, l. 16; Direction, Case 61, l. 35; Exception, Case 60, l. 40; Ground of Appeal, Case 15).

4. Because the learned Trial Judge denied the motion of Counsel for the defendant to exclude from the verdict to be directed in favor of the plaintiff, if such a verdict were directed, the sum of \$517.19 (Motion, Case 59, l. 16; Direction, Case 61, l. 35; Exception, Case 60, l. 40; Ground of Appeal, Case 15).

5. Because the learned Trial Judge directed the jury to include in their verdict for the plaintiff the sum of \$517.19, interest on interest (Motion, Case 59, l. 16; Direction, Case 61, l. 35; Exception, Case 60, l. 40; Ground of Appeal, Case 15).

ARGUMENT.

No jury question is involved. The Trial Judge was bound to direct a verdict either for the defendant or for the plaintiff. The appellant complains of the action of the Trial Judge in two respects: first, in that he did not direct a verdict for the defendant; secondly, in that having decided to direct for the plaintiff, he did so direct for an excessive amount.

I.

The verdict should have been directed for the defendant.

Concededly the appellant's testator was indebted to the respondent in the sum of \$3,201.04, the amount of the proof of claim (Case 74). Equally certain, the appellant paid the respondent the full amount of the sworn claim of \$3,201.04. Whether the respondent was entitled to any more is a matter of interest, application of payment, waiver and estoppel.

1. As a matter of law no interest is payable.

While the appellant is the Executor of a New Jersey decedent holding his letters testamentary from the Surrogate of Ocean County (Case 17, l. 30) and consequently accountable only to the Courts of New Jersey, the goods were sold and delivered in the State of New York (Case 45, ll. 8, 26). It may be, therefore, that until we come to transactions with the New Jersey Executor, the law of New York governs. This conflict of laws need not be resolved, however, because whether the law of New Jersey or that of New York governs, no interest is payable.

The Facts.

The respondent had a running account with the appellant's testator evidenced by Exhibit P-3 (Case 62-66) which contains debits for goods sold and credits for goods returned and cash paid. P-4 (Case 67, 68) contains only entries made after Jay Gould's death. Not only is there no evidence that Jay Gould ever agreed to pay the respondent interest, but the respondent never demanded interest from Jay Gould in his lifetime (Case 24, l. 20). Not even the sworn proof of claim filed with the appellant demanded interest (Case 74). Jay Gould died January 26, 1935 (Case 38, l. 27). It was not until September 28, 1937, that the respondent did anything indicating that it even claimed to be entitled to interest. This was the entry on that day in Exhibit P-4 (Case 67) of an accrual of interest to October 1, 1937. This was done at the instruction of the respondent's credit manager (Case 26, l. 35). This was, of course, a purely unilateral and indeed secret act. Not until January 4, 1938, after the respondent had received from the appellant his check as Executor for \$1,600.50, dated December 18, 1937 (Exhibit D-2, Case 77) accompanied by the Executor's voucher (Exhibit D-6, Case 79), showing that this check was tendered in "Payment of 50% account of claim against Estate of Jay Gould, as per account rendered" did the respondent for the first time make known to the appellant that the respondent claimed any interest. This was made by the respondent's letter, Exhibit P-7 (Case 70). It cannot be, therefore, that the parties contracted to pay interest. Interest is payable only if the duty to pay it is imposed by law.

a. The Law of New Jersey.

On this subject our cases are clear.

Polhemus v. Annin, 1 N. J. Law 176 (Supreme 1793). In this case the trial court in a suit for goods sold and delivered allowed interest on the account. In reversing the judgment, the Supreme Court said:

“The allowance of interest upon an open account is also illegal.”

Hills v. Aetna Life Insurance Co., 39 N. J. L. J. 132 (Hudson County Circuit Court 1916). This was an action against an insurance company by an alleged beneficiary, there having been some question as to who was the proper beneficiary or properly entitled to the proceeds of the policy. The company was at all times ready to pay the proper recipient of payment. The question was whether interest should be allowed in addition to the face amount of the policy. In holding that interest was not recoverable, Speer, Circuit Court Judge, said:

“Defendant Insurance Company on the argument insisted that interest should not be awarded against it on the policies, for two reasons. First, because the amounts due on the policies are, by provisions of the policies themselves, to be paid in exchange for the surrender of the policies, and such surrender was not made until February 25, 1916; and secondly, because it has not been guilty of a wrongful detention of payment, having always been willing to pay to the person who was rightfully entitled to such payment, and having been prevented from making such payment through no fault of its own, but because it did not know, and could not ascertain to whom such payment should be made; this uncertainty as between the diverse claimants being

caused really in the last analysis by plaintiff herself, by reason of the first assignments made by her to her husband.

The agreed statement of facts also states that the Insurance Company has not derived any benefit from the moneys in question, but has kept them on hand in bank, without interest or benefit therefrom, ready for immediate payment to the proper payee, as soon as the same could be determined.

I have examined all the points which have been urged, both on the oral argument and in the briefs presented by both counsel, and I have come unhesitatingly to the conclusion that the plaintiff is not entitled to interest on the proceeds of either of these policies prior to the 25th day of February, 1916.

At the conclusion of the oral argument I stated to counsel that my opinion, subject to revision after I should have examined the cases bearing upon the subject, was that the determination of the difficult questions involved depended upon whether the allowance of interest in these cases rested upon a contractual basis or upon that of a penalty for wrongful detention of the money. My researches have confirmed me in the correctness of that view and have also led me to conclude that the allowance of interest in a case of this kind is not made upon any theory of contract, but rests entirely upon the notion of the imposition of a penalty by way of damages for the wrongful detention of money."

Munn & Co. v. Americana Co., 82 N. J. Equity 443, (Emery, V.-C. 1913). This was a suit in which the complainant among other things prayed for an accounting. The Vice-Chancellor held that the complainant was entitled to a minimum sum contractually agreed to be paid, and with respect to the question of interest said on page 449:

"Complainant waiving on this application for a decree for accounting, any claim to recover beyond the \$2 for the minimum number

of subscriptions guaranteed, is entitled to a decree that the amount due on the accounting is the amount of the yearly deficiency, and for payment of such sum. Interest, however, cannot be allowed. The minimum contract for a yearly number was a running account of a kind which required a yearly demand for a settlement of the deficiency, if it was intended that interest should be claimed. The contract was renewed from 1907 until 1911, without any express formal agreement and only by the mutual action of the parties. Where the promise to pay interest is implied only and not express, facts sufficient to support the implication must be shown. 16 Am. & Eng. Encycl. L. (2d ed.) 1006. The failure to demand interest at any time during this informal continuance of the contract, prevents the addition of this liability to that expressed in the contract itself, under which they continued to act, and which did not provide for it, either originally or in the single written extension."

Warren Bros. Co. v. Hartford etc. Co., 102 N. J. Law 616 (C. E. A. 1926). The question in this case was whether a materialman who sued on the bond of a principal contractor with a municipality was entitled to interest. In holding that no interest was recoverable, Parker, J., for the Court of Errors, said at page 619:

"In considering this question, we should bear in mind the fundamental principle of law, often overlooked that interest is no part of a debt unless so stipulated in the contract; that, usually, it is of statutory origin, and is awarded as damages for the detention of a debt. 33 C. J. 182. This principle is illustrated by such cases as *North Hudson County Railway Co. v. Booraem*, 28 N. J. Eq. 593 (interest on award of commissioners denied to a mortgagee); *Freeholders v. Veghte* (Mr. Justice Magie, Somerset Circuit), 7 N. J. L. J. 145;; *Anderson v. Huff*, 49 N. J. Eq. 349, 355;

Hills v. Aetna Life Insurance Co. (Mr. Justice Speer, Hudson Circuit), 39 N. J. L. J. 132, 135; *Hoover Co. v. Schaefer Co.*, 90 N. J. Eq. 515, and *Fidelity Co. v. Wilkes-Barre Co.*, 98 N. J. L. 507."

b. The Law of New York.

Controlling in this connection is the uniform Judicial Notice of Foreign Law Act, Chapter 81 of the laws of 1941, as amended by Chapter 104 of the Laws of 1942, N. J. S. A. 1945 pocket part, 2:98-28 to 34. This, so far as material, reads as follows:

"2:98-28 Whenever the common or statute law of any State, territory or other jurisdiction of the United States is pleaded in an action in any court of this State, the court shall take judicial notice thereof. In the absence of such pleading, it shall be presumed that the common law of such State, territory or other jurisdiction of the United States is the same as the common law as interpreted by the courts of this state.

2:98-29 The court may inform itself of such laws in such manner as it may deem proper, and the court may call upon counsel to aid it in obtaining such information.

2:98-30 The determination of such laws shall be made by the court and not by the jury, and shall be reviewable."

The New York cases do not leave the matter in doubt. *Ledyard v. Bull*, 119 N. Y. 62 (Court of Appeals 1890). In this case the question was whether an administrator was required to pay interest to the next of kin on certain open account credits in a business which the administrator was conducting, and in which the next of kin were entitled to share. In delivering the opinion of the Court, Earl, J. said at page 74:

“Interest is payable for the loan or retention of money by express contract, or as damages for non-payment of money due. Here there was no contract to pay interest; and hence no interest could be claimed upon the \$75,000, unless that amount became due and payable, and the son was in some way in default for not paying. The general rule is, that in the absence of an agreement to pay interest, it is implied by law as damages for not discharging a debt when it ought to be paid. The important practical inquiry, therefore, in each case in which interest is in question is, what is the date at which this legal duty to pay as an absolute present duty arose? In the case of a running account it is not sufficient that the account is capable of accurate statement or of liquidation from the facts which it contains, or that its payment may be presently enforced. Interest is refused upon such accounts more upon the ground that there is a running credit, than because the demand is uncertain and actually unliquidated. (1 South-erland on Damages, 582, 596, 615). Money payable on demand does not draw interest until after demand, and so, money deposited with a depository, does not draw interest until after demand. These general rules of law might be more fully stated, but they are sufficient for the present purposes.”

De Carricarte v. Blanco, 121 N. Y. 230, 24 N. E. 284. This case held that where a claim for services is unliquidated, and the right to recover anything is contested, interest is not set running until a demand is made in the shape of an account showing the balance claimed. Gray, J., for the Court said at page 285 of 28 N. E.:

“Hence I think it cannot be said that the defendant was in default towards the plaintiff in the discharge of any indebtedness, until, at least, the plaintiff had made a demand upon him after the close of his services, and in such wise as to charge him with notice of his deficiency.

To the same effect is *Prager v. New Jersey Fidelity & Plate Glass Insurance Co.*, 245 N. Y. 1, 156 N. E. 76 (Court of Appeals 1927).

Davidson v. Klaess, 280 N. Y. 252, 20 N. E. 2d 744 (Court of Appeals 1939). In this case, the defendant had purchased building materials from the plaintiff over a period of time. The bills rendered by the plaintiff always stated the cash amount, without any accrued interest. However, stamped on the face of each bill was the wording:

“Cash—Accounts overdue subject to interest.”

The Court found there was no express agreement to pay interest, but held that the mere presenting of the bill with the quoted language on it was a sufficient demand to start interest running.

Turning to the facts in the case at bar, we find that the plaintiff's Exhibit P-1, contains at the head, the following:

“Absolutely no bills to go out on this account. Give bills to Mr. Haggerty.”

The reason for this undoubtedly unusual provision is no doubt found in the fact that the merchandise was delivered not to Jay Gould's wife, but to a friend (Case 45, l. 8). At any rate, the respondent's bookkeeper testified that those were the orders of Mr. Haggerty, the Manager (Case 20, l. 1). She said:

“Instead of mailing the bills out direct, I had to give them to Mr. Haggerty.” (Case 20, l. 2).

Mr. Haggerty was not called, and there is absolutely no proof that any bill or any kind of a demand for any sum was ever made on Jay Gould in

his lifetime. The first formal demand of which there is any evidence whatsoever, is the verified proof of claim (Exhibit D-1), which was delivered to the appellant. The exact date of delivery does not appear, but it appears from the exhibit itself (Case 76) that it was verified April 23, 1935. That is the very earliest date on which any demand within the New York cases can be said to have been made. Consequently, under the widest expansion of an alleged New York theory, there can be interest only on \$3,201.04 from April 23, 1935 to December 18, 1937, and on \$1,600.54 from December 18, 1937 to May 2, 1938. This would be a sum between \$500. and \$600. There would have been a decided error, even if the Court directed a verdict for \$1,231.42.

2. The payments made by the appellant and by his testator, having been applied to principal, cannot be by the respondent applied to interest.

There is no doubt as to the law on this.

Terhune v. Colton, 12 N. J. Equity 232 (Williamson, C. 1859). In this case the Chancellor said at page 237:

“The general rule of law is, in reference to the appropriation of payments, ‘that a debtor owing several debts to the same creditor has a right to apply his payment, at the time of making it, to which debt he pleases. If he makes a general payment without appropriating it, the creditor may apply it as he pleases. And where neither party appropriates it, the law will apply it according to its own view of the intrinsic justice and equity of the case.’ 2 Greenleaf §529.

First. Were these payments appropriated by the debtor? This may be shown, not only by the express declaration of the debtor, but by any circumstances from which his inten-

tion can be inferred. Note 1, 2 Greenleaf §530. But the circumstances from which the intention is to be presumed must be known to the creditor at the time—the intention must be signified to the creditor in some way. Thus it has been held that an entry made by the debtor in his own books of account is insufficient to determine the application of the payment.”

His decree in line with his opinion just quoted, was affirmed by the Court of Errors and Appeals, 12 N. J. Eq. 312. In the course of the opinion, Elmer, *J.* said at page 320:

“The well established rule is, that with some exceptions not affecting this case, where a debtor owing several debts makes a payment to a creditor, he has a right to apply it to what debt he pleases; if he makes no specific appropriation, the creditor may apply it as he pleases; and where neither party appropriates it, the law will apply it according to its own notion of the intrinsic justice of the case. All the cases in which the court has made the application, so far as I am aware, are cases where neither party had appropriated it before a controversy arose. The opinion has been expressed, that the creditor must do it soon, or in a reasonable time; but no case limits the right of either party to the precise time when the money was received.”

Benson v. Reinshagen, 75 N. J. Equity 358 (Garrison, *V.-C.* 1909). In the course of his opinion the learned Vice-Chancellor said, page 360:

“The law undoubtedly is that the debtor may direct the application. 2 Am. & Eng. Encycl. L. (2d ed.) 435; and if the creditor receives the money, even though he does not assent to such application, he is bound to make it if he receives the money under such direction. *Idem.* 448. * * *

Since the debtor entirely failed to give any direction or suggestion as to the appropria-

tion of this payment it was within the right of the creditor to appropriate. * * *

The defendants suggested that this was a case in which the court should appropriate the payments, but the rule is that the court will only make the application where neither party has appropriated it."

Marsh v. Vanness, 75 N. J. Equity 607 (C. E. A. 190). The question in this case was whether a payment of \$500. made by a mortgagor should or should not be applied to the mortgage. The opinion of the Court of Errors and Appeals was a *per curiam* affirming the decree advised on the opinion of Emery, V.C., who said at page 609:

"It is admitted that on or about July 16th, 1894, a payment of \$500 was made by Vanness to Marsh, and the dispute is whether the payment was to be applied wholly to the mortgage, or to be first applied to bills for meat, then owing by Vanness to Marsh, and the balance applied toward interest on the mortgage. The payment was made at the beef house of Marsh, and in the presence of a witness named Lewis, a butcher who was there on business at the time. Lewis says that Vanness drove up in his wagon; Marsh went to the wagon, about two feet distant from the platform where they (Marsh and Lewis) were standing, and that Vanness handed Marsh a \$500 bill and told him to put it on the bond and mortgage. * * *

But inasmuch as it is clear that some payment was to be made on the mortgage, because the bills at that time did not amount to \$500, and inasmuch as the mortgagor failed to endorse any payment at all on the bond at the time, the burden is on him, or those claiming under him, to satisfy the court that Lewis' evidence as to the object of the payment should not be received, notwithstanding the non-production of the receipt, if it was given. The witness appeared to me to be honest and credible, and I think his evidence sufficiently

corroborative of that of Vanness to establish the fact that this payment was made, and that it was made only on account of the mortgage. If this appropriation was made, then the creditor had no right to withhold the payment for other bills, and the credit must be allowed."

Long v. Republic Varnish etc. Co., 115 N. J. Equity 212 (C. E. A. 1933). In holding valid an application of payment by a debtor, Heber, *J.* for the Court of Errors and Appeals said at page 216:

"As between debtor and creditor, it is the debtor's legal right to direct that any payment he makes shall be applied to whichever of two or more debts he chooses; equally it is the creditor's legal right to select the application if the debtor fails to do so at the time of payment."

Naidech v. Hempfling, 127 N. J. Law 430 (Supreme 1941). In the opinion in this case, Parker, *J.*, with respect to the rules of application of payment said at page 432:

"Those here applicable are as follows:

1. A debtor owing several debts to a creditor is entitled to direct application of any payment to whichever debt he wishes it applied. 2. If the debtor does not so direct, the creditor may make the application. 3. If neither party makes the application, and one debt is secured and another unsecured, a court of equity will usually direct application to the unsecured debt; and 4, as regards the items of a running account, payments not appropriated by either party will be applied to the earlier items."

The law of New York on application of payment not having been pleaded by the defendant, N. J. S. A. 2:98-28 quoted *supra*, requires the Court to

presume that New York law is the same as the common law is interpreted by the laws of New Jersey. Consequently, the decisions above referred to are controlling, regardless of whether under any circumstances by the doctrine of conflict of laws, the New York rule on application of payment could be applicable.

Let us examine the facts. So far as the payments made in the lifetime of Jay Gould are concerned, it is clear that they were by the respondent, Jay's creditor, applied to principal. Exhibit P-3 (Case 66) shows that before the first cash payment there was a balance due to \$6,570.50. This cash payment was, by the respondent's own bookkeeping record, credited to principal, so that the balance of principal after such payment was \$5,570.50. In like manner, the second payment of \$2,500. was credited to principal, leaving a balance, by Exhibit P-3, of \$3,070.50. That is the balance at which the account stood at the death of Jay Gould. In June 1935, certain items formerly on the account of Mrs. Jay Gould were transferred to Jay's account, bringing the balance due up to \$3,201.04. This transfer was made pursuant to the directions of the appellant in answer to an inquiry from Mr. Haggerty, the respondent's manager (Case 39, l. 9-16). This application of payment by the respondent, the creditor, was confirmed in the proof of claim Exhibit D-1 (Case 74-76). In this, the long list of items was repeated, and a total debit of \$6,701.04 shown. Then the cash payments totalling \$3,500. were by the sworn proof of claim deducted from the principal, leaving a balance of principal of \$3,201.04 remaining (Case 76). Nothing could be clearer than that according to the creditor itself, there was on April 23, 1935, due a principal sum of no more than \$3,201.04. The effort by the respondent to revoke these applications of payment and apply them to

interest by the entries made on Exhibit P-4 (Case 67) on October 1, 1937, over two years later, is too late and ineffective.

In *White v. Trumbull*, 15 N. J. Law 314 (Supreme 1836) the creditor claimed the right by an entry on its books two years after the payment, to make a certain application of payment. In ruling this out, Ryerson, *J.* for the Supreme Court said at page 319:

“Nor can I yield to the plaintiff’s pretensions in this case. The debtor must direct the application, when the payment is made. The creditor is not held so strictly to time; but what he asks, an interval of two years, or until the bringing of the action, would be an unreasonable indulgence. I am therefore of opinion the verdict is right, and that the plaintiff should have judgment thereon.”

Coming to the payments made by the appellant as Executor, we find that the two checks—Exhibits D-2 and D-3—say nothing. It must be remembered, however, that when the earlier of the two—Exhibit D-2—was sent in December 1937, the appellant had no knowledge of the entries on Exhibit P-4, but knew only of the sworn proof of claim by which there was sworn to be due only \$3,201.04. The appellant in his voucher accompanying the check (Exhibit D-6) stated the payment to be “Payment of 50% account of claim against Estate of Jay Gould, as per account rendered.” (Case 79). Clearly, this was an application by the debtor to 50% of the principal sworn to be due by the proof of claim. This application was acquiesced in by the creditor in its letter of January 4, 1938, (Exhibit P-7, Case 70) acknowledging the voucher. It reads:

“We have accepted as payment of 50% on account of principal of claim against Estate of Jay Gould * * *,”

It goes on to reserve its right to collect interest, which reservation was acquiesced in by the appellant's Attorney, Mr. Hack, by Exhibit P-6 (Case 69). The effect of that reservation, however, is merely to prevent the check and voucher from binding the respondent to an agreement that it had no right to demand interest. As Mr. Hack wrote in Exhibit P-6:

"It is not admitted that you have a right to collect interest, and there was no agreement in such connection. The matter of interest is a question for future consideration."

Coming to the second payment of May 1938, we find that by Exhibit D-5, the voucher sent with the check, the appellant debtor said "Balance of Claim against Estate of Jay Gould, as per account rendered." Clearly, therefore, the appellant paid only the balance of principal. That application by the debtor was, under the law hereinabove cited, binding, and its effectiveness of that application is not diminished by the correspondence between the Attorneys of the parties (Exhibits P-8, P-9 and P-10) from which it appears that the respondent claimed to be entitled to interest. It conclusively follows therefore that all principal has been paid, and that all that the respondent under any theory of the case was entitled to recover in the Court below was unpaid interest, if any interest was demandable. We have already shown that no interest was demandable, and that therefore a verdict should have been directed for the present appellant.

II.

In any event, the verdict for the plaintiff below could not include more than simple interest on the sworn claim.

Inasmuch as all principal was paid, the most that the respondent could have recovered in the Court below was interest. That sum, if due at all, amounted to much less than \$1,231.42. For the Trial Judge to have permitted the respondent to recover an additional sum of \$517.19, is to allow it interest on interest. This is palpably illegal.

In *Corrigan v. Delaware Falls Co.*, 5 N. J. Equity 232 (Halsted, C., 1845) the Court was concerned with a receivership and the priority in which the corporation's creditors should be paid. The Chancellor said at page 245:

"The exception to certificates for interest upon interest to holders of claims under some mortgages is allowed."

In *Force v. City of Elizabeth*, 28 N. J. Equity 403 (Van Fleet, V.-C.) suit was brought to compel the payment on two bonds. On the subject of interest upon interest, the Vice-Chancellor said at page 404:

"The proofs entitle the complainant to the conditional relief she asks in respect to the \$500 bond. Interest is claimed on the amount of the unpaid interest coupons from the time indemnity was offered and refused. To sanction this claim compound interest must be allowed. Such allowance would not be usury, but it has been said to savor of it, and obviously tends to the encouragement of avarice. The courts of some of our sister states have held that, where the payment of the principal debt is postponed to a distant day, and inter-

the contrary, he should have, as moved by the ap-
pellant, 23 N. J. Equity 387, and not permitted the
jury in any event to find for more than \$1,231.42.
Therefore it is respectfully submitted that the
judgment appealed from should be reversed with
costs. It is respectfully suggested that the
costs be paid by the appellant, as it is in the
interest of justice that the costs be paid by the
party who has caused the litigation. The
appellant, W. C. McGowan, is a resident of
New York City, and the appellee, J. W. McGowan,
is a resident of New Jersey. The costs of the
litigation should be paid by the party who has
caused the litigation, and in this case, the
appellant, W. C. McGowan, is the party who
has caused the litigation. Therefore, the costs
should be paid by the appellant, W. C. McGowan.
The costs of the litigation should be paid by the
party who has caused the litigation, and in this
case, the appellant, W. C. McGowan, is the party
who has caused the litigation. Therefore, the costs
should be paid by the appellant, W. C. McGowan.

This case was reversed by the Court of Errors
and Appeals in 29 N. J. Equity 387. The part of
the Vice-Chancellor's opinion hereinabove relied
on, however, was expressly affirmed.

West End Trust Company v. W. C. McGowan, 78 Atl.
Rep. 756 (not officially reported, Lansing, V. C.
1910). This case was on a bond and was appealed
to interest upon interest, the Vice-Chancellor said
at page 572:

"Under the authority of *Fever v. Day*, 23
Elizabeth, 23 Eq. 493, compound interest will
not be allowed."

The decree advised by the Vice-Chancellor was
affirmed by this Court on his opinion, 27 N. J.
Equity 596.

The law being as stated, the interest on interest
is not permitted, the Trial Judge in any event was
in error in directing the verdict for \$1,231.42.

New Jersey Court of Errors and Appeals

GOLDIE S. ROBBINS, Plaintiff-Respondent, vs. JAMES C. B. MILLARD, as Execu- tor of the Estate of JAY GOULD, Deceased, Defendant-Appellant.	}	Action at Law. On Appeal from New Jersey Supreme Court, Passaic County.
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BRIEF OF PLAINTIFF-RESPONDENT.

Facts.

The plaintiff-respondent sued the defendant-appellant on a book account for goods sold and delivered in the State of New York (S. C., p. 45, ll. 23-27) by her assignor, Henri Bendel, Inc., to defendant's testator, Jay Gould, upon which there was due on July 31st, 1934, the principal sum of \$3201.04 (Ex. P-3, Sheet 3, S. C. p. 66).

Thereafter defendant's attorneys (S. C., p. 44) forwarded a check and an executor's voucher in the sum of \$1600.50 to plaintiff's assignor, who advised the attorneys by letter (Ex. P-7, S. C., p. 70) that it accepted the check without prejudice to its right to collect interest. The voucher (Ex. P-5, S. C., p. 68) was receipted accordingly, and the defendant's representative agreed to accept it with a minor change not relevant to the issue (Ex. P-6, S. C., p. 69). Subsequently a check and voucher in the sum of \$1600.54 was forwarded to plaintiff's assignor, which was turned over to counsel for Henri Bendel, Inc.,

who advised defendant's representatives by letter that it would not accept the check in full payment of the balance of the claim and again set forth its claim for interest (Ex. P-8, S. C., p. 71). The attorneys for the executor answered this letter advising that the acceptance and deposit of the check would be without prejudice to the rights of plaintiff's assignor (Ex. P-9, S. C., p. 72). On May 31st, 1938 this letter was acknowledged and a demand was made for payment of the balance due in the sum of \$1231.42 (Ex. P-10, S. C., p. 73).

After crediting said payments made by defendant there was a balance due of \$1231.42 as of June 1st, 1938 (S. C., p. 22) and the interest to date of trial amounted to \$517.19, totalling the sum of \$1748.61 (S. C., p. 22).

The witness, Philip Feldman, a member of the New York Bar testified that under the law of the State of New York interest was properly charged and credited on this account by plaintiff's assignor (S. C., pp. 46-57).

It is undisputed that plaintiff's assignor did not accept the checks in settlement of the claim and that the vouchers (D-5, S. C., 78, D-6, S. C., 79) forwarded by defendant were not accepted by Henri Bendel, Inc.

At the conclusion of the testimony the Court granted the motion for a direction of a verdict in favor of the plaintiff and directed the jury to return such a verdict for \$1748.61 (S. C., p. 61).

Statement.

The facts were considered by the Court and by counsel as undisputed (S. C., p. 57, l. 25—p. 58, l. 12) and the only two issues framed by counsel were first, whether plaintiff's assignor was legally entitled to charge interest and second, were the payments properly credited.

ARGUMENT.

1.

Plaintiff's assignor had a legal right to accrue interest.

The transactions set forth in the book account, the basis of the suit herein, took place in the State of New York (S. C., p. 45, ll. 23-27) and the law of that State applies.

There was ample testimony that bills were rendered to the debtor monthly (S. C., p. 22, ll. 11-12; S. C., p. 23, ll. 29-37; S. C., p. 27, ll. 5-18).

The well established law of New York is that one who has a liquidated claim is entitled to interest thereon from the time a demand is made. The rendering of a bill is sufficient demand. See *Sweeney v. City of New York* (Ct. of App., 1903) 173 N.Y. 414 where the Court said, at page 416:

“Ever since the case of *Van Rensselaer v. Jewett*, 2 N. Y. 135 and *McMahon v. N. Y. & Erie R. R. Co.*, 20 N. Y. 463, the rule has been established that in actions to recover for services rendered, materials fur-

nished or goods sold, the plaintiff is entitled to interest on his claim from the time of his demand for its payment."

The same principle was enunciated by the Court in *White v. Miller*, 78 N. Y. 393 (Ct. of App., 1879), *de Carricarti v. Blanco*, 121 N. Y. 230 (Ct. of App., 1890), *Prager v. New Jersey Fidelity and Plate Glass Insurance Company*, 245 N. Y. 1, (Ct. of App., 1927), *Blackwell v. Finley*, 233 N. Y. 351, (Sup. Ct., Appl. Div. 1921).

To the same effect see *Davison v. Klaess*, 280 N. Y. 252, 20 N. E. 2nd 744 (Ct. of App. 1939) cited by appellant and which supports respondent's position. There the Court stated at page 746:

"The mere presenting of the bill, if there were nothing more, constituted a sufficient demand to start interest running. *Blackwell v. Finlay*, 233 N. Y. 361, 135 N. E. 600.

Philip Feldman, Esq., a member of the New York Bar, testified as to the law on this point, (S. C., p. 46, l. 10, p. 47, l. 19, S. C., p. 48, ll. 15-22) and that interest was properly charged on this account.

"Q. Assuming that goods were sold and delivered at stated prices between June 14, 1932 and July 31, 1934, totaling in the sum of \$6,701.04, and that bills had been rendered monthly during the running of this account, in your opinion when under the law of the State of New York would interest commence to run? A. Interest commences to run from the dates of the rendition of those monthly bills."

(S. C., p. 53, ll. 27-36 also p. 54, ll. 12-29).

It is interesting to note that the New Jersey cases are in accord. See *Camden v. Allen*, 26 N. J. L. 398 (Sup. Ct. 1857), *Van Giesen v. Van Houten*, 5 N. J. L. 822 (Sup. Ct. 1820), *Ruckman v. Bergholz*, 37 N. J. L. 437 (E. & A. 1874), *Ruckman v. Bergholz*, 38 N. J. L. 531 (E. & A. 1875).

The cases cited by the appellant are clearly inapplicable to the case *sub judice*.

Interest has been defined as the penalty for the detention of a debt and again as compensation for delay in payment. *In re: Edge*, 115 N. J. Eq. 408 (E. & A. 1934), *Burlington County v. Martin*, 128 N. J. L. 203 (Sup. Ct. 1942).

The cases cited by appellant refer to situations where payment had not been wrongfully withheld and, therefore, compensation for delay or interest was properly refused.

Polhemus v. Annin, 1 N. J. L. 176 (Sup. Ct. 1793) was a suit wherein there was no evidence of a previous demand for payment or bill rendered. In *Hills v. Aetna Life Insurance Co.*, 39 N. J. L. J. 132, the defendant was ready to pay and was not in default. *Munn & Co. v. Americana Co.*, 82 N. J. E. 443 (Ch. 1913) was an accounting situation which required a demand for settlement, which demand was never made, and *Warren Bros. Co. v. Hartford, etc., Co.*, 102 N. J. L. 616 (E. & A. 1926) reaffirmed the principle that interest is awarded as damages for the detention of a debt but held under the applicable statute that there had been no such detention.

The New York cases mentioned in appellant's brief likewise do not support his contention. In *Ledyard v. Bull*, 119 N. Y. 62 (Ct. of App. 1890) at page 75 the Court specifically pointed out that:

“The sum of \$75,000 was not definitely fixed as the sum absolutely to be paid by the son. It was merely tentative. It was based upon statements which might or might not prove accurate. * * * The son did not have the \$75,000 in money or in assets readily convertible into money and hence the father said that he did not consider that it was ‘at present due and payable’ to him.”

The Court also added:

“In the face of these statements and others contained in the letter, how can it be said that any sum was absolutely established as payable to the father? Clearly the \$75,000 was not presently payable. The son was not at once in default for not paying it. * * * But if we are wrong in this, yet, we think, upon the facts, the referee could justly draw the inference that it was the understanding of the parties that the sum should not draw interest.”

In *de Carricarti v. Blanco*, 121 N. Y. 230 (Ct. of App., 1890), the claim was for services on a quantum meruit basis, for which a bill was not rendered until December 31, 1882, and the Court in referring to the interest question, said on page 233:

“I think then was the time when the defendant may be said to have been put in default and that no earlier date could be fixed upon, consistently with the authorities and with the principles upon which interest is ever allowed.”

Prager v. New Jersey Fidelity and Plate Glass Insurance Company, 245 N. Y. 1, (Ct. of App. 1927) likewise was a quantum meruit action and here again the Court held that the plaintiff was entitled to interest from the date of his demand.

Appellant for the first time raises the question of the arithmetical computation of the interest resulting in the figure of \$1231.42 which was accepted by counsel and the Court in the trial below and relies on the inference from some of the testimony that bills were given to one Haggerty. However, respondent's bookkeeper testified that this change came about after the last purchase on the account (S. C. 27, ll. 5-18) and that prior thereto bills had regularly been mailed to Mr. Gould and further, that Ex. P-4, S. C. p. 67 reflected the correct balance due as of June 1st, 1938.

It is submitted that this Court will not review a question that has not been legally raised in the lower Court and, therefore, appellant cannot be heard at this time to dispute the figures. Such principle (with exceptions not pertinent to this issue) is well established in this State. See *Smith v. Wahl*, 88 N. J. L. 623 (E. & A. 1915), *Wyckoff v. Luse*, 67 N. J. L. 218 (Sup. Ct. 1901), *Billagh Realty v. Dumont*, 111 N. J. L. 32 (E. & A. 1933).

2.

The payments by defendant were credited pursuant to law.

The correspondence between the attorneys for the parties clearly reserved the right on the part of respondent's assignor to assert this claim. (Ex. P-8, S. C. 71, Ex. P-9, p. 72, Ex. P-10, p. 73).

Defendant's vouchers (Ex. D-5 and D-6, S. C. 78-79) were never accepted. Hence the question is whether the payments of \$1600.50 and \$1600.54, were properly applied by respondent's assignor first to interest and then to principal.

That this is the proper manner of application is the established law of the State of New York. The rule was stated in *Woolley v. Johnson*, 209 App. Div. 474, at page 479, as follows:

“There is, therefore, no doubt whatever that the parties agreed that Wooley should receive interest on his payments to Johnson. Under such circumstances, the plaintiffs are correct in their contention that the rule for casting interest usually applied must be followed. That rule was laid down in *French v. Kennedy* (7 Barb. 455) as follows:

‘In the case of partial payments the rule was laid down in the case of *Connecticut v. Jackson* (1 John. Ch. Rep. 17) in these words: ‘The rule for casting interest when partial payments have been made is to apply the payment in the first place to the discharge of the interest then due. If the payment exceeds the interest, the surplus goes towards discharging the principal and the subsequent interest is to be computed on the balance of principal remaining due. If

the payment be less than the interest, the surplus of interest must not be taken to augment the principal; but interest continues on the former principal until the period when the payments, taken together, exceed the interest due; and then the surplus is to be applied towards discharging the principal; and interest is to be computed on the balance of principal as foresaid.' The like rule is laid down in nearly the same words by the judges of the Supreme Court as a direction to their clerks in the computation of interest. (See *Williams v. Houghtaling*, 3 Cowen, 87, note a.) The same rule prevails in Massachusetts. (*Edes and Al., Admrs. v. Goodridge*, 4 Mass. 103; *Dean v. Williams*, 17 id. 417; *Fay, Judge, etc., v. Bradley*, 1 Pick. 194.)', "

At page 480 it was said:

"In *Peyser v. Myers* (135 N. Y. 599, 607) the court said: 'The interest was computed on the principal to such time as the payments equalled or exceeded the interest and then a new principal was ascertained. The method of computation adopted has been long recognized in this State as legal and we perceive no reason for disregarding it in the present case.' "

The matter of application of payments was recently before Surrogate Foley in the Surrogate's Court, New York County, in the *Matter of Edith Gould MacNeal*, (S. C., p. 47, ll. 20-35). In that case a schedule was submitted to the court showing application of payments as follows:

"September 1, 1935 Amount due	\$1,000.00
Interest thereon from September 1, 1935 to September 9, 1940 (the date of next payment on account)	301.33
	\$1,301.33
September 9, 1940 Paid on account	450.00
Balance	\$ 851.33
Interest thereon from September 9, 1940 to May 26, 1941 (the date of next payment on account)	36.18
	\$ 887.51
May 26, 1941 Paid on account	100.00
Balance	\$ 787.51
Interest thereon from May 26, 1941 to November 13, 1942 (the date of next payment on account)	71.14
	\$ 858.64
November 13, 1942 Paid on account	450.00
Balance	\$408.64"

The executors in that case likewise erroneously claimed that this method of computation permitted the creditor to receive interest on interest. Surrogate Foley, however, rendered his decision, which appeared in the New York Law Journal on July 26th, 1944, reading as follows:

"Estate of Edith G. MacNeal.—The following dispositions are made in this contested accounting proceeding: (1) The claim of Henri Bendel, Inc., for interest is allowed and the method of calculation set forth in the brief of its attorneys approved."

That decision followed the rule enunciated in *Woolley v. Johnson*, *supra*, and in the following authorities:

Peyser v. Myers, 135 N. Y. 599 (Ct. of App. 1892);

Haffey v. Lynch, 193 N. Y. 67 (Ct. of App. 1908);

Van Schaick v. Aron, 170 Misc. 520.

That such was the law was before the trial court by the testimony of Philip Feldman, Esq. (S. C., p. 48, l. 37-p. 50, l. 19).

Although the case at bar is controlled by the law of the State of New York we note that the great weight of authority, including the New Jersey cases are in accord. In 33 Corpus Juris at page 259, Sec. 168, it is stated:

“D. PARTIAL PAYMENTS—1. APPLICATION.

“Where partial payments are made, the rule is to apply the payments in the first place to the discharge of the interest then due. If a payment exceeds the interest then due, the surplus goes toward discharging the principal and interest is to be computed thereafter on the balance of the principal. If the payment is less than the interest, the surplus of interest must not be taken to augment the principal, but interest continues on the former principal until the payments, taken together, exceed the interest due and then the surplus is to be applied toward discharging the principal and interest is to be computed on the balance of the principal as before. This is known as the ‘United States Rule.’ ”

In this jurisdiction the applicable principle was set down in *Holcombe v. Holcombe*, 74 N. J. L. 257 (Sup. Ct. 1907), which was a suit to recover

interest due, the plaintiff admitting that the whole of the principal had been paid over a number of years. The trial court directed a verdict in favor of the plaintiff. In denying an application for a new trial, Chief Justice GUMMERE said at page 258:

“The rule applicable to the calculation of interest in a case of this kind is stated by Chief Justice WHELPLEY in *Baker v. Baker*, 4 Dutcher 13, to be that where a payment is in excess of the interest which has accrued up to the date when it is made, the excess shall be deducted from the principal, but that no payment shall be credited unless it more than satisfies the interest. In other words, that where the interest always remains in excess of the payments made, the proper method for determining the amount due is to calculate the interest and add it to the principal sum, and then deduct from this gross amount the total of the payments made.”

To the same effect are: *Meredith v. Banks*, 6 N. J. L. 408 (Sup. Ct. 1797), *Lowentraut v. Jackson*, 82 N. J. L. 402 (E. & A. 1911), *Collerd v. Tully*, 77 N. J. E. 439 (Ch. 1910).

In the recent case of *State of New Jersey v. Erie Railroad*, 23 Misc. 203 (Sup. Ct. 1945) the “United States Rule” was reaffirmed by the Court (Judge OLIPHANT) at page 215:

“Were we not here concerned with the construction of a very detailed statute and had the Legislature merely provided for the payment of interest on defaulted taxes, in view of my holdings hereinbefore expressed, I would determine that the rule laid down by Chancellor KENT in *Conn. v. Jackson*, 1 Johns Ch. (N. Y.), 13, 17 and generally referred to as the ‘United States

Rule,' would apply. That has been followed in this state in *Meredith v. Banks*, 6 N. J. L. 408; *Stark v. Hunton*, 3 N. J. Eq. 300; *Baker v. Baker*, 28 N. J. L. 13; dictum by the court in *Holcombe v. Holcombe*, 74 Id. 275; 65 Atl. Rep. 855, and *Collerd v. Tully*, 77 N. J. Eq. 439; 77 Atl. Rep. 1079."

The two payments of \$1600.50 and \$1600.54 made by defendant were, pursuant to the principles herein outlined, applied to the discharge of the interest due, and the surplus then applied in reduction of the principal. Ex. P-4, S. C. 67. Interest was only charged on the balance of principal.

Therefore, it will be observed that the contention that respondent is seeking compound interest, or interest on interest, is utterly without merit and the decisions cited by appellant on this point (pp. 19 and 20 of appellant's brief) are clearly inapplicable.

The appellant's argument on pp. 15-16 of his brief that the Court must follow the New Jersey common law, rather than the New York law, because the defendant did not plead that the law of New York governs is conclusively refuted by defendant's own amended answer (S. C., p. 8).

"Fourth Defense to First Count.

* * * * *

4. The transaction in suit is, therefore, governed by the law of the State of New York."

Appellant reviews a line of New Jersey cases on the question of application of payment. It would serve no purpose to discuss these cases in detail except to say that these decisions are on issues readily distinguishable from the issue at

hand. They refer in the main to situations where two separate debts existed between the parties, whereas, in the instant case there is but one debt, the interest being considered incidental to, or forming an integral part of the principal debt and not as a separate demand. See *State of N. J. v. Erie R. R.*, *supra*.

Appellant argues commencing at p. 12 of his Brief that Respondent is attempting to revoke partial payments which have been applied to principal and now apply them to discharge of interest. This is totally erroneous. The payments to which the Appellant is referring were made on December 12, 1932 and May 20, 1933 (Ex. p. 3, S. C., p. 66). At this time the account was current and therefore no interest was added on the current account. It is clear under the New York law that the creditor has a right to charge interest on an account after it is due, which right he may or may not exercise as he sees fit. In this case it was not until the debtor's account was long in default that interest was computed and charged on the account. Thereafter any payments which were received were applied, first in discharge of interest, and the balance in discharge of principal.

The attempt by Appellant to avoid his obligation, due to the act of Respondent's assignor in filing a claim with the Executor which did not include the interest must fall in the light of the decision in *Davison v. Klaess*, 280 N. Y. 252, 20 N. E. 2nd 744, *supra*. In that case the plaintiff delivered merchandise to the defendant at her request and rendered an itemized statement on August 18, 1926 showing the amount due to be \$7647.44. Thereafter defendant made partial payments on account. There was no express agreement by defendant to pay interest. The payments

as made were credited to defendant on plaintiff's books but interest was not computed or entered thereon and on statements sent by plaintiff to defendant interest was not added. In July 1936 plaintiff rendered a statement showing a balance unpaid of \$4,573.01, which for the first time included interest figured from August 18, 1926, on the partial payment plan, applying the payments made by defendant first to interest, and the balance, if any, to principal. Defendant refused to pay the amount demanded. The New York Court of Appeals affirmed a recovery of the full balance including interest, holding that there was no waiver of the right to claim interest and stated at page 746:

“ * * * Upon the conceded facts, when the bill was rendered and accepted on the terms stated, there arose an implied contract to pay interest from August 18, 1926, upon each and every part of the account until paid as part of the original debt and interest became an integral part of the creditors' claim. *Braun v. S. F. Hess & Co.*, 187 Ill. 283, 58 N. E. 371, 79 Am. St. Rep. 221; *Lambeth Rope Co. v. Brigham*, 170 Mass. 518, 49 N. E. 1022; approved, *Edgar v. Joseph Breck & Sons Corp.*, 172 Mass. 581, 583, 52 N. E. 1083; *Carson v. Alexander*, 34 Miss. 528; *Matter of Crane v. Craig*, 230 N. Y. 452, 130 N. E. 609; *Prager v. N. J. Fidelity & Plate Glass Ins. Co.*, 245 N. Y. 1, 156 N. E. 76, 52 A. L. R. 193. ‘The debt by operation of law necessarily grew in amount as the duty of paying it was delayed, and cannot be legally satisfied except by the payment of the sum due upon it when it is attempted to be discharged’, *Chester v. Jumel*, 125 N. Y. 237, 254, 26 N. E. 297, 301.’”

* * * * *

at page 748:

“ * * * The original agreement as to payment of interest being such as indicated, it became immaterial whether plaintiffs accepted the partial payments and applied them exclusively on the principal indebtedness, for when interest is due by the terms of the contract the payment of the principal is no bar to its subsequent recovery. *People v. County of New York*, 5 Cow. 331; *Purdy v. Philips*, 11 N. Y. 406; *Shepard v. City of New York*, 216 N. Y. 251, 110 N. E. 435, Ann. Cas. 1917C, 1062; *Matter of Crane v. Craig*, 230 N. Y. 452, 130 N. E. 609; *Nelson v. Chicago Mill & Lumber Corp.*, 8 Cir., 76 F. 2d 17; 100 A. L. R. 87, with annotation of cases from all jurisdictions to the same effect; 22 Cyc. 1572. In *Matter of Crane v. Craig*, 230 N. Y. 452, 130 N. E. 609, *CRANE, J.*, laid down the rule for an unanimous court, 230 N. Y., at page 461, 130 N. E. at page 612, that when the interest is reserved as an integral part of the debt ‘the acceptance of the principal without the interest does not extinguish the debt and the mere acceptance of part, either of principal or interest, does not bar a subsequent claim for the whole, whether with or without protest, for the payment of part is not generally a satisfaction of the whole, unless there is an agreement of some kind that the payment made should be a satisfaction of the whole’ (citing cases) * * * .”

* * * * *

“It follows that nothing has transpired in the case at bar to abrogate or change the implied agreement to pay interest as part of the original debt which grew out of the rendering and acceptance of the statement of August 18, 1926. As matter of law, no such change resulted from the rendering of the bills or the dealings between the parties. No offer or request in any form was made

by defendant to modify or vary the original contract and there is no evidence that she ever had such a thing in mind, nor is there evidence that plaintiffs voluntarily offered to waive interest or had such a thing in mind. No consideration has been shown or exists as a basis for any alleged agreement by the plaintiffs to give up their legal contract right to recover interest upon the partial payments nor is there any evidence of a meeting of the minds of the parties upon any change or modification of the original contract."

See also testimony of Philip Feldman, Esq., S. C., pp. 54-55. Similarly in this jurisdiction where a defendant sought to avoid payment of interest because of a writing which set forth the amount due but did not state that interest was claimed (although the original agreement called for interest) the Supreme Court in *Mathushek & Son Piano Co. v. Hudson*, 3 Misc. 757 (Sup. Ct. 1925), reversed the holding of the lower court that the writing constituted a waiver and said at page 758:

"The contract obligated the defendant to pay interest as well as principal and in the absence of a stated rate of interest, the law implies the legal rate. From such payment he could only be absolved by some method recognized in the law. An erroneous statement of the balance due by the creditor could not effect such result. Debts are not so easily extinguished. As was said in *Clifton v. Tulane*, 47 N. J. Eq. 351; affirmed 48 Id. 310, a case in which, like the present, the effort was made to establish that interest had been forgiven or cancelled, 'a debt * * * cannot be extinguished by a mere statement of the creditor that he will not enforce it, or that he forgives it, or even by a receipt for the whole, when, in fact, a

part only has been paid.' On the undisputed facts as they appear in the record the court should have found for the plaintiff."

Conclusion.

For the foregoing reasons it is respectfully urged that the judgment of the Court below be affirmed.

Respectfully submitted,

IRVING I. RUBIN,
Attorney for and of Counsel
with Plaintiff-Respondent.

To be argued by
IRVING I. RUBIN.

2 FEB T. 1946

Filed by leave of Court

New Jersey Court of Errors and Appeals

GOLDIE S. ROBBINS,
Plaintiff-Respondent,

vs.

JAMES C. B. MILLARD, as Executor
of the Estate of Jay Gould,
Deceased,
Defendant-Appellant.

On Appeal from
Supreme Court.

REPLY BRIEF FOR APPELLANT.

The claim was unquestionably on a running account which contained entries of both debits and credits. See Exhibit P-3 (Case 62) and Exhibit D-1 (Case 64). Consequently under New Jersey law interest does not accrue until in some way the debtor is put in default. See the cases on pages 6 to 9 of our main brief. The authorities cited at the top of page 5 of the respondent's brief are not in point. *Camden vs. Allen*, 26 N. J. L. 398, simply held that a tax is not a debt and is not collectible by action. *Van Giesen vs. Van Houten*, 5 N. J. L. 822, merely held that a promissory note with a definite due date carries interest from that date although interest is not mentioned therein. *Ruckman vs. Bergholz*, 37 N. J. L. 37, held that a broker is entitled to interest on an agreed 5% commission from the date of sale. Runyon, C., in delivering the opinion of this court, said at page 439:

“The rule governing the allowance of interest on a running account or a claim for unliquidated damages has no application to this case.”

The same case, when before this Court a second time, 38 N. J. L. 531, is to the same effect.

Nor does the New York law, if that be held to govern, help the respondent any more. Counsel's contention is that in New York the presentation of a demand starts the running of interest. We say, in the first place, that in the case on which he mainly relies, *Davison vs. Klaess*, 280 N. Y. 252, 20 N. E. (2d) 744 (1939), the bill contained the statement "Cash-Accounts overdue subject to interest." See our main brief at page 11. Since the statute, Chapter 104 of the Laws of 1942, quoted on page 9 of our main brief, this court is not bound by the testimony of the respondent's expert, Mr. Feldman, but must reach its own conclusion on the law as a matter of law as to New York law, as well as to New Jersey law. In his cross examination he admitted ignorance of *Ledyard vs. Bull* and *Davison vs. Klaess*, cited on pages 9 and 11 of our main brief. His testimony on cross examination (Case 54, 55) that interest would accrue as a matter of New York law notwithstanding that the sworn proof of claim, Exhibit D-1 (Case 74-76) makes no demand for interest but simply swears that a balance of \$3,201.04 is due. The cases he relies on do not bear him out in this.

But what is even more fatally defective under both New Jersey and New York law is the fact that there is no such evidence that the bills were sent out monthly to Jay Gould in his lifetime so as to start the running of interest every month on that month's balance, as admittedly must be done to justify a verdict as directed for the respondent. The record of the respondent's account with Jay Gould, Exhibit P-3, reads at its very heading:

"Absolutely no bills to go out on this account. Give bills to Mr. Haggerty."

The respondent's bookkeeper testified on cross examination, when asked what was the meaning of this, said:

"Instead of mailing the bills out direct I had to give them to Mr. Haggerty." (Case 20, l. 2.)

True it is that on redirect she testified:

"Q. Now with reference to this account, which has been marked Exhibit P-3 and Exhibit P-4, were bills rendered on that account at all Miss Griedenberg? A. Yes, there were bills sent out every month."

And again referring to Mr. Haggerty, she testified:

"Q. They were given to him, weren't they? A. That is right." (Case 24, l. 10.)

It must be remember that this was all testimony on the part of the plaintiff, and that there was nothing else on the subject in the case than the testimony of Miss Griedenberg and the Exhibit P-3 itself. Mr. Haggerty did not testify. Certainly this is not sufficient proof to justify the trial judge, as a matter of law, holding that Jay Gould received a demand in the form of a bill each and every month during the running of this long account.

Even assuming that New York law governs the transactions with a New Jersey executor responsible to a New Jersey court of probate jurisdiction, which of course we deny, so that the proof of claim, Exhibit D-1, could be deemed a demand from which interest would run, this would not justify a verdict of \$1,748.61, or indeed one of

\$1,231.42. Counsel argues at page 7 of his brief that in mentioning this point we are in some way raising something not raised below. Nothing could be further from the truth. The plaintiff below, the present respondent, never claimed that interest should start running only from the date of the proof of claim, Exhibit D-1. It wanted all or nothing and moved for a directed verdict in the sum of \$1,748.61. To this we excepted. See paragraph 2, page 3, of our main brief. The fact that if the respondent had been less greedy and had asked for interest from the date of Exhibit D-1, it might possibly (although we do not admit it) have been entitled to such interest, does not justify it in asking for interest from an earlier date or the trial judge in directing a verdict for such larger amount over appellant's exception.

Nor is the respondent in any sounder position when we consider the question of the application of payment. It is perfectly clear from Exhibit P-3 that no interest was accrued on the books until after Jay Gould's death. It is a reasonable inference, therefore, that no interest was demanded, and that Jay Gould did not have interest in mind when in his lifetime he made certain cash payments on account. Whatever his attitude, however, it is plain from Exhibit P-3 (Case 66) that the respondent, the creditor, applied those payments not on account of interest but in reduction of principal. The New York cases cited by counsel on pages 8 to 11 of his brief do not hit the point at all. None of them is a case where payment was applied by either the debtor or the creditor, but simply decided how in the absence of application by the parties the law would apply. We have no quarrel with the rule, which we believe has been the rule in New York since the days of Chancellor Kent, in *Connecticut vs. Jackson*, 1 Johnson Chancery 17,

quoted at page 8 of the respondent's brief. That rule is also quoted in a note to *Meredith vs. Banks*, 6 N. J. L. 408 (1797). We believe our court in that case anticipated Chancellor Kent. That rule has been most frequently applied to negative another and what is sometimes called the mercantile rule by which an unpaid balance of interest is added to principal so as to make a new principal which from then on bears interest, thus resulting in compound interest. So far as we know, it has never been applied in New York to prevent effect being given to the application of payment by either of the parties. One of the New York cases of which the respondent's expert, Mr. Feldman, professed ignorance (Case 55, l. 36) is *Crane vs. Craig*, 230 N. Y. 452, 130 N. E. 609. That was a case in which was involved the question of interest on an award in condemnation. Two different statutes provided for interest running from different dates and the question was, which one applied. In delivering the opinion of the New York Court of Appeals, Crane, J., said at page 612 of 130 N. E.:

"The rule, however, appears to be that where the interest is not payable by the terms of the contract, but is simply allowable as damages for the default in payment, then the interest is not regarded as a part of the debt, but as a mere incident to it, and the receipt of the principal bars a subsequent claim for the interest, for the reason that in such cases interest, being a mere incident, cannot exist without the debt, and, the debt being extinguished, the interest must necessarily be extinguished also. *Stewart v. Barnes*, 153 U. S. 456, 14 Sup. Ct. 849, 38 L. Ed. 781. But where interest is specifically reserved by the instrument and forms an integral part of the debt, the rule is different, for then the acceptance of the principal without the interest does not extinguish the debt, and the mere acceptance of part, either of principal or interest, does not bar a subsequent claim for the whole,

whether with or without protest, for the payment of part is not generally a satisfaction of the whole, unless there is an agreement of some kind that the payment made should be a satisfaction of the whole. *Fake v. Eddy's Ex'r*, 15 Wend. 76; *Southern Cent. R. R. Co. v. Town of Moravia*, 61 Barb. 180; *New York Trust Co. v. Detroit, etc., Ry.*, 251 Fed. 514, 517, 163 C. C. A. 508; *Davis v. Harrington*, 160 Mass. 278, 35 N. E. 771; *King v. Phillips*, 95 N. C. 245, 59 Am. Rep. 238.

"In this case the statute specifically allowed interest. The interest was therefore, by analogy of reasoning, a part of the relator's claim. Acceptance of principal and part of the interest did not extinguish the claim. * * *"

In *Davison v. Klaess*, 280 N. Y. 252, 20 N. E. (2d) 744, cited in our main brief and hereinabove, *Rippey, J.*, for the Court of Appeals, said at page 748 of 20 N. E.:

"There was no agreement or understanding between the parties nor direction by the defendant as to how the partial payments should be applied. Plaintiffs might then apply them to principal or to interest or to both as and when they elected so to do. * * *"

The recent New Jersey decision by *Oliphant, J.*, *State v. Erie Railroad Co.*, 23 N. J. Misc. 203, is not an authority against our position. In the first place, that was a case of tax, and by many decisions our courts have held that a tax is *sui generis*. *Camden v. Allen*, 26 N. J. L. 398, *supra*. *Burlington County v. Martin*, 128 N. J. L. 203, 129 N. J. L. 92. *Jersey City v. Zink*, 44 Atl. (2d) 825 (not yet officially reported). On the other hand, a long line of New Jersey decisions in cases between private debtor and creditor, cited at pages 12 to 17 of our main brief, show that the debtor may direct the application of payment in the first instance, and if he does not the creditor may and is

bound thereby. We feel that the better rule is that where a debtor owes a debt composed of a long list of items for which he became indebted at different times, he may direct the application of a partial payment to interest or to principal if he prefers and on which of the items he prefers. That, however, is not the case here. The significant applications in the case at bar were made by the creditor, first on December 12, 1932, when Jay Gould paid \$1,000.00, and secondly on May 20, 1933, when he paid \$2,500.00, Exhibit P-3 (Case 66), and third when he filed the proof of claim Exhibit D-1, demanding only \$3,201.04 (Case 67). The cases hold that a creditor on a claim where interest has accrued may, if he prefers, credit a partial payment to principal rather than interest. The strongest case to that effect which we have found is *Phillips v. United Investors, Ltd.*, 27 Manitoba 410, 34 Dom. L. R. 283 (1917). In this case there was interest in arrears and because of such fact the debtor was not entitled to the benefit of a moratorium act. Nevertheless, the creditor was permitted to apply partial payment to principal, leaving interest still in arrears and the debtor out of the protection of the moratorium.

The case may be summarized as follows:

1. There is no proof of any demand made upon Jay Gould in his lifetime sufficient to start the running of interest.
2. A verdict of \$1,748.61, or indeed one of \$1,231.42, can be justified only if the creditor is permitted to reverse its application of the payments made by Jay Gould in his lifetime.
3. The sworn proof of claim demanding only the fixed sum of \$3,201.04 without any demand for

interest, the plaintiff is not entitled to interest thereon.

4. In any event, the plaintiff is entitled only to interest on that sum from the date of the proof of claim, a sum far less than \$1,748.61.

Wherefore, the judgment should be reversed.

Respectfully submitted,

G. W. C. McCARTER,
Of Counsel.

INDEX.

	PAGE
Writ of Appeal.....	1
Order of Reversal and Remittitur.....	2
Options.....	2a
Specification of Determinations.....	3
Reversal.....	4
State of Demand.....	5
Specification of Defenses.....	7
Transcript of Testimony.....	8
Certificate of Stenographer.....	55
Certificate of Judge.....	56
Opinion.....	56
Transcript of Proceedings.....	60
Clerk's Certificate.....	68

WITNESSES FOR PLAINTIFF.

Catherine Breganti,	
Direct.....	11
Cross.....	14
Walter Kally,	
Direct.....	15
Cross.....	16
Re-direct.....	27, 32
Re-cross.....	31
Michael Earight,	
Direct.....	32
Cross.....	37

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