INDEX.

TESTIMONY.

Exhibits.

NOTICE OF APPEAL.

Filed February 26, 1920.

ESSEX COUNTY CIRCUIT COURT.

CYRUS G. FREEMAN and HERMON M. FREEMAN, *Plaintiffs-Respondents,*	*Action at Law.*
vs.	*Notice of Appeal.*
JOHN C. CONOVER, *Defendant-Appellant.*	

To DAVIS, PERRY & GROSSO, Attorneys of Plaintiff's-Respondents:

TAKE NOTICE that the defendant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause.

Yours respectfully,

PITNEY, HARDIN & SKINNER,
Attorneys of Defendant-Appellant.

Service of the within notice is hereby acknowledged on this 25th day of February, 1920.

DAVIS, PERRY & GROSSO,
Attorneys of Plaintiffs-Respondents.

Extension of Time.

EXTENSION OF TIME.

Filed March 23, 1920.

New Jersey Court of Errors and Appeals

CYRUS G. FREEMAN and HERMON M. FREEMAN, *Plaintiffs-Respondents,* *vs.* JOHN C. CONOVER, *Defendant-Appellant.*	*Action at Law.* *On Appeal.* *Extension.*

The time within which the defendant shall serve and file his grounds of appeal in the above-entitled action is hereby extended until April 27, 1920.

DAVIS, PERRY & GROSSO,
Attorneys for Plaintiffs-Respondents.

GROUNDS OF APPEAL.

Filed April 27, 1920.

NEW JERSEY COURT OF ERRORS AND APPEALS.

CYRUS G. FREEMAN and HERMON M. FREEMAN, *Plaintiffs-Respondents,* *vs.* JOHN C. CONOVER, *Defendant-Appellant.*	*Action at Law.* *On Appeal.* *Grounds of Appeal.*

The appellant states the following grounds of appeal:

1. Defendant's motion for a non-suit should have been granted for one or more of the following reasons:

a. The plaintiffs failed to prove facts sufficient to constitute a cause of action.

b. There was no proof of any assignment from Isaac M. Williams to George C. Freeman.

c. There was no proof of any assignment, either oral or written, from George C. Freeman to plaintiffs, either as individuals or as trustees. The recitation in the declaration of trust is not enough. There was no testimony of any oral assignment.

d. The alleged cause of action did not accrue within six years before this action was commenced.

e. The stock was converted before the alleged assignment from George C. Freeman to Cyrus G. Freeman and Hermon M. Freeman, as trustees. The alleged assignment does not purport to assign a chose in action. Such an assignment confers no right to sue.

f. Plaintiffs have no right to sue in their individual names. The alleged assignment was to plaintiffs as trustees.

g. There was no conversion of the stock subsequent to plaintiffs' alleged acquisition of the title thereto.

h. There was no proof of the value of the stock alleged to have been converted.

Grounds of Appeal.

i. Plaintiffs, as the trustees of an alleged undisclosed principal, cannot claim under the receipt (Exhibit P. 1), given to Orville E. Freeman.

j. Plaintiffs cannot claim under said alleged lost written assignment from Isaac M. Williams. They failed to serve a copy of said assignment upon defendant in answer to his demand for a copy of the same.

2. The Trial Court refused to strike out testimony of Hermon M. Freeman concerning an alleged assignment of stock from Isaac M. Williams to George C. Freeman, even though it appeared on cross examination that the witness was not present at the meeting at which he testified the assignment was made and that he derived his information from what his brother, Orville E. Freeman, had told him.

3. The Trial Judge erroneously admitted in evidence certain oral testimony as to the contents of an alleged lost written assignment of stock from Isaac M. Williams to George C. Freeman, without sufficient proof as to the execution, existence and delivery of said assignment or as to the search for the original thereof.

4. The Trial Judge refused to strike out testimony of Hermon M. Freeman concerning the contents of a certain alleged lost written assignment of stock from Isaac M. Williams to George C. Freeman.

5. The Trial Court erroneously admitted in evidence a certain paper alleged to have been signed by defendant, dated September 5th, 1907 (marked Exhibit P. 1) without any connection having been shown between plaintiffs and the person to whom said receipt was alleged to have been given.

6. The Trial Judge erroneously admitted in evidence a certain written instrument from George C. Freeman to Cyrus G. Freeman and Hermon M. Freeman, as trustees, dated January 19th, 1910, and recorded in Book R 49 of Deeds, page 480, (marked Exhibit P. 3).

7. The Trial Court erroneously admitted in evidence a certain letter, dated February 2nd, 1911, from Hermon M. Freeman to John C. Conover, (marked Exhibit P. 4).

Grounds of Appeal.

8. Defendant's motion for a direction of verdict should have been granted for one or more of the following reasons:

a. The plaintiffs failed to prove facts sufficient to constitute a cause of action.

b. There was no proof of any assignment from Isaac M. Williams to George C. Freeman.

c. There was no proof of any assignment, either oral or written, from George C. Freeman to plaintiffs, either as individuals or as trustees. The recitation in the declaration of trust is not enough. There was no testimony of any oral assignment.

d. The alleged cause of action did not accrue within six years before this action was commenced.

e. The stock was converted before the alleged assignment from George C. Freeman to Cyrus G. Freeman and Hermon M. Freeman, as trustees. The alleged assignment does not purport to assign a chose in action. Such an assignment confers no right to sue.

f. Plaintiffs have no right to sue in their individual names. The alleged assignment was to plaintiffs as trustees.

g. There was no conversion of the stock subsequent to plaintiffs' alleged acquisition of the title thereto.

h. There was no proof of the value of the stock alleged to have been converted.

i. Plaintiffs, as the trustees of an alleged undisclosed principal, cannot claim under the receipt, (Exhibit P. 1) given to Orville E. Freeman.

j. Plaintiffs cannot claim under said alleged lost written assignment from Isaac M. Williams. They failed to serve a copy of said assignment upon defendant in answer to his demand for a copy of the same.

k. The proof of the substantial parts of the alleged lost written assignment from Isaac M. Williams to George C. Freeman was so vague, uncertain and in definite, that no jury would be justified in finding that such an alleged assignment transferred the title to the stock involved in this action to George C. Freeman, and the Trial Judge should have directed a verdict for defendant.

l. There was no evidence from which the jury could have found that the plaintiffs relied upon, and refrained from suing defendants because of, the alleged statements of the defendant

as to his possession of the stock, and the Trial Judge should have directed a verdict for defendant.

9. That the Trial Judge erroneously charged the jury in one or more of the following respects:

a. "Gentlemen, if you find that there was a transfer of this stock from Williams to George C. Freeman, then in view of the other testimony in the case relating to a transfer of the stock from George Freeman to the plaintiffs, that would make good title in the plaintiffs to the stock then in the possession of Mr. Conover."

There was no testimony of a transfer of the stock from George C. Freeman to the plaintiffs. The only evidence offered as to said transfer was the introduction of the declaration of trust.

b. "However, the mere fact that Orville acted, in relation to this stock with Mr. Conover as though it were his own, when it was, in fact, his father's, if it was, but without disclosing that fact to Mr. Freeman, would not deprive the plaintiffs of their right of action, because it is a well-known principle of law that an undisclosed principal, or his assignees, may appear and hold the other party to the contract made with the agent even though the agent failed to disclose that he was acting as agent and to disclose his principal. Therefore, if these plaintiffs are otherwise entitled to recover, the mere fact that Orville dealt with Mr. Conover as though this stock were his own, without disclosing to him that the stock was, in fact, his father's does not prevent them from maintaining this suit and recovering from the defendant."

c. "If that be true, then, even though you find that Orville was acting for his father, and even though you find that the defendant has never paid one penny to Orville as the proceeds of the sale of that stock, or to his father, your verdict must be for the defendant, unless you find that by his own actions he is estopped from asserting the statute of limitations and interposing it in a case of this kind.

The mere concealment of an act does not serve to stay the running of the statute of limitations. If Mr. Conover said nothing, did nothing, to deceive the plaintiffs except to remain silent; if he said nothing at all to them and they had let this time go by, then they cannot maintain their action, but the rule of law is that where the conduct of a person has induced the other to take such a position that he will be injured if the first be permitted to repudiate his acts, then this principle of estoppel is applicable and he is estopped from asserting this statute of limitations;

he is estopped from saying he did not have the stock at the time when he said he had it, and he is estopped from saying that it had been sold at a time so remote that the statute of limitations applies.

The facts, as claimed by the plaintiffs, I have already recited to you. Mr. Herman Freeman says, and so does Mr. Grosso, that as to forty shares of this stock the defendant claimed he had it in his possession as late as 1911, and that these forty shares were a part of the eighty shares which Mr. Williams put up as collateral for his debt, and which, admittedly, were the property either of Orville or of George C. Freeman. If you find that he did that; that the plaintiffs relied upon it; if you find from the testimony that that induced the plaintiffs in this case to take a position, to refrain from bringing suit at that time—and in 1911 the statute had not run—if you find that they relied upon that, and they did, or refrained from doing something which they might have done to protect their interests, and that they were injured by that statement, then the defendant is estopped from pleading the statute of limitations.

However, the burden of proof is upon the plaintiffs to establish this estoppel. It is upon them to establish by the greater weight of the evidence that the defendant did say things to them which led them astray, which deceived them, and which led them to take a course other than they would have taken to protect their own interests. The defendant says that he never made such statements. He says that it was shortly after the sale of this stock, or shortly after the death of Orville—he thinks in 1908 or 1909—that a conversation took place in which he told them that he had sold this stock and paid the money to Orville. Gentlemen, if that be true, then there has been no bar to his pleading the statute of limitations; there has been nothing which should act as an estoppel, and the defendant has the right to interpose the statute of limitations and to rely upon that, and to your verdict upon that ground. But it will be for you to say whether or not he is estopped by his own acts and words from asserting it. If you find that he is, then the plaintiffs should not be barred from their action because of the lapse of time."

10. That the Trial Court refused to charge one or more of the following requests submitted on behalf of the defendant, or charged them with erroneous qualifications. (The numbers in brackets correspond with the numbers of the requests as submitted):

Grounds of Appeal.

a. (1). "If the jury find that the defendant received the money from the sale of the 80 shares of the capital stock of the United Water Supply Company mentioned in the complaint more than six years prior to September 28, 1916, the date when this action was started, the plaintiffs cannot recover anything from the defendant and your verdict should be for the defendant. 'I charge you that, with the qualification I have already made in my main charge. That is true, unless you find that the defendant is estopped by his own acts and statements from setting up the statute of limitations.' "

b. (2). "If the jury find that the defendant sold said 80 shares of the capital stock of the United Water Supply Company more than six years prior to September 28, 1916, the plaintiffs cannot recover anything from the defendant and your verdict should be for the defendant. 'I charge you that, with the same qualifications.' "

c. (3 and 4). The third, "A simple power conferred by one person upon another to sell property does not create an express trust which suspends the operation of the statute of limitations as to the proceeds of the sale,"

And fourth,

"The holder of a certificate of shares of stock, accompanied by an irrevocable power of attorney to transfer them, is the apparent owner, and when he is a holder for value without notice his title cannot be impeached, 'are mere statements of law, which are not made applicable at all to this case, and I decline to charge them.' "

d. (5). "If you find that the certificates of stock mentioned in the complaint were assigned to plaintiffs by George C. Freeman after defendant had sold said stock to Thomas J. Hillery, your verdict should be for the defendant. 'I charge you that, unless, as I said with reference to the statute of limitations, the defendant made the statements which the plaintiffs said that he made, and hence is estopped from setting that up as a defense in this case.' "

e. (7). "If you find that Isaac M. Williams did not deliver to George C. Freeman the certificate or certificates of stock representing said 80 shares of stock, or execute and deliver to George C. Freeman a written assignment and power of attorney to transfer said shares, your verdict should be for the defendant."

f. (8). "If you find that George C. Freeman did not deliver to plaintiffs the certificates of stock representing said 80 shares of stock, or execute and deliver to plaintiffs a written assignment and power of attorney to transfer said shares, your verdict should be for the defendant."

g. (9). "If you find that George C. Freeman, or his alleged representatives, the plaintiffs in this suit, for over two years after discovering that Orville E. Freeman had transferred the stock mentioned in the complaint, refrained from suing to recover it or the proceeds thereof, you are warranted in inferring that the transfer of the stock was within his authority."

h. (12). "The person who holds stock as collateral security for a debt is a bona fide holder for value to the same extent as though he were a purchaser for value."

i. (13). "By commercial usage, as universally acknowledged by the business community as the law of negotiable paper, and sanctioned by repeated adjudications in our courts as well as in those of other states, a certificate of stock accompanied by an irrevocable power of attorney, either filled up or in blank is, in the hands of a third party, presumptive evidence of ownership in the holder. And where the party in whose hands the certificate is found is a holder for value, without notice of any intervening equity, his title cannot be impeached. The holder of the certificate may fill up the letter of attorney, execute the power, and thus obtain the legal title to the stock and such a power is not limited to the person to whom it was first delivered, but enures to each bona fide holder into whose hands the certificate and power may pass. Under these well recognized principals large amounts of property daily pass from hand to hand; are sold and re-sold, or hypothecated for loans without an actual transfer on the books of the corporation, and without other evidence of ownership than the possession by the holder of a certificate and power of attorney."

j. (14 A). "Fraudulent concealment of a cause of action will not avoid the running of the statute of limitations."

k. (14 B). "Fraudulent concealment of a cause of action will not justify the inference of a new promise which will take the action out of the operation of the statute at law."

l. (14 C). "Fraudulent concealment of a cause of action does not estop defendant from setting up the bar of the statute."

m. (15). "If you first find that the plaintiffs are entitled to recover anything from the defendant, you then come to the question of the amount of such recovery. The general rule that the measure of damages for conversion is the market value of the property at the time of the conversion is not applicable to the conversion of stock

which is a commercial security of a fluctuating value in the market. The true measure of damages in an action for conversion of stock is the highest intermediate market value between the time of the conversion and a reasonable time after notice of conversion within which to replace the securities."

11. The judgment below is in divers other respects illegal, unjust, and improper.

PITNEY, HARDIN & SKINNER,
Attorneys for Defendant-Appellant.

Service of the within grounds of appeal is hereby acknowledged on this 26th day of April, 1920, and consent given to filing as in time.

DAVIS, PERRY & GROSSO,
Attorneys for Plaintiffs-Respondents.

COMPLAINT.

Filed February 20, 1917.

Plaintiffs, Cyrus G. Freeman of the Township of Passaic, New Jersey, and Hermon M. Freeman of the Town of West Orange, New Jersey, say that:

1. Prior to September 5, 1907, Isaac M. Williams was the owner of eighty shares of the capital stock of the United Water Supply Company; that the said Isaac M. Williams was indebted to John C. Conover in the sum of two thousand, one hundred and ninety-eight dollars and sixty-seven cents; that in order to secure the said debt the said Isaac M. Williams delivered to the said John C. Conover the said eighty shares of the capital stock of the United Water Supply Company as collateral security; that the said stock was delivered to the said John C. Conover by the said Isaac M. Williams endorsed in blank.

2. In September, 1907, the said Isaac M. Williams sold, assigned, transferred and set-over the said eighty shares of the capital stock of the United Water Supply Company to George C. Freeman.

Complaint.

3. In consideration of the said assignment mentioned in the last paragraph the said George C. Freeman agreed to pay to the said John C. Conover the sum of two thousand one hundred and ninety-eight dollars and sixty-seven cents, which sum represented the amount of the indebtedness of the said Isaac M. Williams to the said John C. Conover.

4. On September 5, 1907, Orville E. Freeman, on behalf of the said George C. Freeman, paid to the said John C. Conover one thousand one hundred and ninety-eight dollars and sixty-seven cents, and delivered to him his note for one thousand dollars, bearing date September 5, 1907, which said sum and said note were accepted by the said John C. Conover in satisfaction of the said debt of the said Isaac M. Williams.

5. On July 6, 1908, the said George C. Freeman paid the said note of one thousand dollars, given by the said Orville E. Freeman to the said John C. Conover, and thereupon became entitled to the possession of the said eighty shares of the United Water Supply Company stock.

6. On January 19, 1910, George C. Freeman appointed the said Cyrus G. Freeman and Hermon M. Freeman his trustees by declaration of trust bearing date January 19, 1910, and recorded in the Register's office of the County of Essex on September 8, 1911, in Book R 49 of deeds for said county, on pages 480-483.

7. On said January 19, 1910, the said George C. Freeman assigned, transferred and set-over by instrument in writing to the said trustees eighty shares of the capital stock of the United Water Supply Company, which said eighty shares of stock were then in the possession of this defendant.

8. The said eighty shares of stock were left in the possession of the said John C. Conover by the said Orville E. Freeman on behalf of said George C. Freeman and instructions were given by said Orville E. Freeman to said John C. Conover to sell the same.

9. Plaintiffs have learned since May 18, 1915, that on or about April 15, 1911, the said John C. Conover sold the said eighty shares of stock to one Thomas J. Hillery, without the knowledge of the said George C. Freeman or the said plaintiffs.

Complaint.

10. On May 14, 1915, and on numerous occasions since then, these plaintiffs have applied to the said John C. Conover for the delivery to them of the said shares of stock or of the proceeds of the said shares of stock, and that on each of such occasions the said John C. Conover has neglected, failed and refused to deliver the said stock, giving as an excuse for such neglect, failure and refusal that he had said stock in his possession, somewhere among his papers, and had not yet been able to locate them, but that he would look the same up and deliver them to these plaintiffs.

11. In the belief that the said shares of stock were safe in the possession and custody of the said John C. Conover these plaintiffs have not previously to May 14, 1915, demanded or insisted upon the delivery of the said shares of stock to them, and the said John C. Conover had never rendered to these plaintiffs, or to the said George C. Freeman an account of the proceeds of the sale of said stock, or informed these plaintiffs or the said George C. Freeman that the said stock had been sold.

12. Plaintiffs are informed and believe that the said John C. Conover received for the said shares of stock the sum of eight thousand dollars, which sum the said John C. Conover has failed, neglected and refused to turn over and pay to these plaintiffs.

Plaintiffs demand as damages eight thousand dollars, with interest from April 15, 1911.

DAVIS, PERRY & GROSSO,
Attorneys for Plaintiffs.

Demand for Copies of Documents and Agreement.

DEMAND FOR COPIES OF DOCUMENTS AND AGREEMENTS.

Filed March 14, 1917.

To Perry & Grosso, Attorneys for Plaintiffs:

The defendant herein demands that the plaintiffs serve copies of the following documents and agreements upon the defendant within five days after service of this demand:

1. Alleged assignment referred to in second paragraph of complaint.

2. Alleged agreement referred to in third paragraph of complaint.

3. Alleged note of Orville E. Freeman referred to in fourth paragraph of complaint.

4. Alleged declaration of trust referred to in sixth paragraph of complaint.

5. Alleged assignment referred to in seventh paragraph of complaint.

6. Alleged document of agreement referred to in eighth paragraph of complaint.

The defendant herein further demands that the plaintiffs serve upon the defendant within five days after service of this demand copies of all other express agreements and also of all other documents referred to in said complaint.

PITNEY, HARDIN & SKINNER,
Defendant's Attorneys.

Service of the within demand is hereby acknowledged on this 10th day of March, 1917.

PERRY & GROSSO,
Plaintiffs' Attorneys.

Answer to Demand.

ANSWER TO DEMAND.

To Pitney, Hardin & Skinner, Attorneys of Defendant:

The plaintiffs herein answering the demand of the defendants, say:

1. That the assignment referred to in the second paragraph of the complaint was a parole assignment.

2. The agreement referred to in the third paragraph of said complaint was an oral agreement.

3. The note referred to in the fourth paragraph of complaint is not in plaintiffs' possession.

4. A copy of the declaration of trust referred to in the sixth paragraph of complaint is hereto annexed.

5. The assignment referred to in the seventh paragraph of complaint is contained in the declaration of trust hereto annexed.

6. The agreement referred to in the eighth paragraph of complaint was a parole agreement.

PERRY & GROSSO,
Attorneys for Plaintiffs.

The copy of the declaration of trust annexed to the answer to demand was a true copy of Exhibit D. 11.

Amended Complaint.

AMENDED COMPLAINT.

Filed March 15, 1917.

Plaintiffs, Cyrus G. Freeman of the Township of Passaic, New Jersey, and Hermon M. Freeman of the Town of West Orange, New Jersey, say that:

1. Prior to September 5, 1907, Isaac M. Williams was the owner of eighty shares of the capital stock of the United Water Supply Company; that the said Isaac M. Williams was indebted to John C. Conover in the sum of two thousand one hundred and ninety-eight dollars and sixty-seven cents; that in order to secure the said debt the said Isaac M. Williams delivered to the said John C. Conover the said eighty shares of the capital stock of the United Water Supply Company as collateral security; that the said stock was delivered to the said John C. Conover by the said Isaac M. Williams endorsed in blank.

2. In September, 1907, the said Isaac M. Williams sold, assigned, transferred and set over the said eighty shares of the capital stock of the United Water Supply Company to George C. Freeman by parol assignment.

3. In consideration of the said assignment mentioned in the last paragraph, the said George C. Freeman orally agreed with the said Isaac M. Williams to pay to the said John C. Conover the sum of two thousand one hundred and ninety-eight dollars and sixty-seven cents, which sum represented the amount of the indebtedness of the said Isaac M. Williams to the said John C. Conover.

4. On September 5, 1907, Orville E. Freeman, on behalf of the said George C. Freeman, paid to the said John C. Conover one thousand one hundred and ninety-eight dollars and sixty-seven cents, and delivered to him his note for one thousand dollars, bearing date Sept. 5, 1907, which said sum and said note were accepted by the said John C. Conover in satisfaction of the said debt of said Isaac M. Williams.

5. On July 6, 1908, the said George C. Freeman paid the said note of one thousand dollars, given by the said Orville E. Freeman to the said John C. Conover, and thereupon became entitled to the possession of the said eighty shares of the United Water Supply Company stock.

6. On January 19, 1910, George C. Freeman appointed the said Cyrus G. Freeman and Hermon E. Freeman his trustees by declaration of trust bearing date January 19, 1910, and recorded in the Register's office of the County of Essex on September 8, 1911, in Book R-49 of deeds for said County, on pages 480-483.

7. On said January 19, 1910, the said George C. Freeman assigned, transferred and set over by instrument in writing to the said trustees eighty shares of the capital stock of the United Water Supply Company, which said eighty shares of stock were then in the possession of this defendant.

8. The said eighty shares of stock were left in the possession of the said John C. Conover by the said Orville E. Freeman on behalf of said George C. Freeman and oral instructions were given on or about September 5, 1907, by said Orville E. Freeman to said John C. Conover to sell the same.

9. Plaintiffs have learned since May 18, 1915, that on or about April 15, 1911, the said John C. Conover sold the said eighty shares of stock to one Thomas J. Hillery, without the knowledge of the said George C. Freeman or the said plaintiffs.

10. On May 14, 1915, and on numerous occasions since then these plaintiffs have applied to the said John C. Conover for the delivery to them of the said shares of stock or of the proceeds of the said shares of stock, and that on each of such occasions the said John C. Conover has neglected, failed and refused to deliver the said stock, giving as an excuse for such neglect, failure and refusal that he had said stock in his possession, somewhere among his papers, and had not yet been able to locate them, but that he would look the same up and deliver them to these plaintiffs.

11. Plaintiffs are informed and believe that the said John C. Conover received for the said shares of stock the sum of eight thousand dollars, which sum the said John C. Conover has failed, neglected and refused to turn over and pay to these plaintiffs.

Plaintiffs demand as damages eight thousand dollars with interest from April 15, 1911.

DAVIS, PERRY & GROSSO,
Attorneys for Plaintiffs.

ANSWER TO AMENDED COMPLAINT.

Filed April 4, 1917.

Defendant, residing at 25 Conover Terrace, Orange, New Jersey, says that:

FIRST DEFENSE:

1. He admits the allegations of the first paragraph except that he says that the said Isaac M. Williams was indebted to said defendant in the sum of $2,198.71.

2. He denies the second paragraph.

3. He denies the third paragraph.

4. He denies the fourth paragraph.

5. He denies the fifth paragraph.

6. As to the statements in the sixth paragraph, the defendant has not any knowledge or information thereof sufficient to form a belief.

7. He denies the seventh paragraph.

8. He denies the eighth paragraph.

9. He denies the ninth paragraph.

10. He denies the tenth paragraph except so far as admitted in the following statements:

On or about May 14th, 1915, plaintiffs asked defendant whether he had any stock of the United Water Supply Company which belonged to George C. Freeman.

11. He denies the eleventh paragraph.

12. In or about the month of September, 1907, said Isaac M. Williams sold, assigned, transferred and set over to Orville E. Freeman all his right, title and interest in and to said eighty shares of the capital stock of said United Water Supply Company; that in consideration of said transfer, said Orville E. Freeman on or about September 5, 1907, delivered to defendant his check for $1,198.67 and his note for $1,000.; that defendant accepted said check and said note in discharge of said indebtedness of said Williams; (that it was mutually agreed between defendant and said Orville E. Freeman at the same time that said defendant should continue to hold said stock as collateral security for the payment of said note of said Orville E. Free-

man, or any renewal or extension thereof in whole or in part, and that upon payment of said note said stock should be immediately returned to said Orville E. Freeman.)

13. In April or May, 1908, said Orville E. Freeman requested defendant to find a purchaser for said eighty shares of stock then held by said defendant as collateral security for said Freeman's note; that on or about May 20, 1908, one Thomas J. Hillery offered to purchase said eighty shares of stock for $40.00 per share; that defendant advised said Orville E. Freeman of said offer to purchase said stock and said Orville E. Freeman thereupon expressly authorized and directed defendant to sell the said eighty shares of stock to said Thomas J. Hillery at the price aforesaid; and that defendant on or about May 20, 1908, by virtue of said direction and authorization, sold, assigned, transferred, set over and delivered said eighty shares of stock of the United Water Supply Company to said Thomas J. Hillery and received from him the sum of $3,200.

14. Defendant, in the year 1908, paid part of said purchase price, at the request and at the direction of said Orville E. Freeman, to said Isaac M. Williams, and paid the balance of said purchase price to said Orville E. Freeman.

SECOND DEFENSE:

The alleged cause of action did not accrue within six years next before the commencement of this action.

PITNEY, HARDIN & SKINNER,
Attorneys for Defendant.

REPLY.

Filed October 24, 1917.

Plaintiffs deny every allegation in the answer.

DAVIS, PERRY & GROSSO,
Attorneys of Plaintiffs.

Judgment.

JUDGMENT.

Entered January 16, 1920.

ESSEX COUNTY CIRCUIT COURT.

CYRUS G. FREEMAN and HERMON M. FREEMAN, *Plaintiffs,* *vs.* JOHN C. CONOVER, *Defendant.*	*Action at Law.* *Verdict by Jury.* *Judgment for Plaintiff.*

This action was tried before Judge Nelson Y. Dungan with a jury at the Essex County Circuit Court on January 16, 1920.

The cause having been heard and submitted to the jury they return their verdict as follows: They find in favor of the plaintiffs, Cyrus G. Freeman and Hermon M. Freeman and assess the damages against the defendant, John C. Conover, at the sum of four thousand eight hundred and eighty dollars.

Whereupon it is adjudged that the plaintiffs recover of the defendant the sum of four thousand eight hundred and eighty dollars and costs which are taxed at the sum of eighty-one dollars and forty-nine cents, making in the whole the sum of four thousand nine hundred sixty-one dollars and forty nine-cents. Judgment entered and signed January 16, 1920.

WILLIAM S. GUMMERE,
Judge.

Opening.

ESSEX CIRCUIT COURT.
DECEMBER TERM, 1919.

CYRUS G. FREEMAN, *et al.*
vs.
JOHN C. CONOVER.

Transcript of shorthand notes of testimony, etc., taken at the court house, Newark, N. J., Wednesday, January 14, 1920, before Hon. Nelson Y. Dungan, Judge, and a jury.

Davis, Perry & Grosso for plaintiffs.

Pitney, Hardin & Skinner (by John H. Conover) for defendant.

Mr. Davis opens for the plaintiff.

Mr. Conover. If your Honor please, I would like, first, to get some admissions on the record that I think should be placed there, with the plaintiff's consent. In their written complaint—

The Court. What do you mean, before you open?

Mr. Conover. Before I open. They allege that the stock was sold on April 15, 1911. They now admit that it was sold some time in May, 1908, May 20, is the exact date.

Mr. Davis. We are not prepared to admit that because we understood that the transaction didn't take place on the books of the company until April, 1911. It now appears we are in error as to the date of this transaction, from what Mr. Conover the defendant, and Williams, tells as to the transaction, placing the actual transfer of the stock at an earlier date. It didn't take place, as I say, on the books of the company until 1911.

Mr. Conover. I understood you were willing to admit that Mr. Conover sold it in 1908.

Mr. Davis. I don't want to admit it.

Mr. Conover. If your Honor please, I would request that the jury be excused pending a non-suit upon the complaint, I think that would seem to raise it.

HERMON M. FREEMAN, sworn in behalf of plaintiff.

Direct examination by Mr. Davis.

Q Mr. Freeman, you are one of the plaintiffs in this action? A I am.

Q Are you a brother of Orville Freeman? A Yes, sir.

Q And a son of George C. Freeman? A Yes, sir.

Q I show you a paper dated September 5, 1907, signed by John C. Conover, and ask if you were present when that paper was executed? A I was.

Mr. Conover. I object to the offering of this paper at the present time. It is a receipt made to Orville E. Freeman. No connection has been shown between the plaintiff and the party to whom this receipt was given.

The Court. I assume it is expected to connect this?

Mr. Davis. Yes, sir, it is.

The Court. The paper will be admitted.

Mr. Conover. Your Honor will allow me an exception?

(Paper marked Exhibit P-1, dated September 5, 1907.)

Exception to this ruling is noted by defendant's counsel as ground of appeal.

Q You say you were present when that paper was executed? A Yes, sir.

Q Where? A At Mr. John C. Conover's office, Lincoln avenue, Orange.

Q Who else was there? A My brother Orville E. Freeman and John C. Conover.

Q And you and Mr. Conover? A Yes, sir.

Q Anybody else? A Not to my knowledge.

Q Under what circumstances was this paper given? A Isaac M. Williams owed my father certain sums of money for loans that had been made him and Mr. Williams had made the proposition to give my father any equity that might be in this stock over and above what he owed Mr. Conover and that my father would have the amount which Williams owed Conover paid to Conover. In other words, if my father settled the debt that Williams owed Conover, he was entitled to have any balance remaining in the stock.

Q Where was this stock? A In the possession of John C. Conover.

Q What was the stock? A Stock of the United Water Supply Company; I think that is the official title, of Boonton, New Jersey.

Q How many shares of the stock? A Eighty shares were in that.

Q And that stock is already in Mr. Conover's possession? A Yes, sir.

Q As security?

Mr. Conover. If your Honor please, I object to those questions. They are all leading. Let the witness testify.

The Court. Yes, they are leading.

Mr. Davis. Yes, they are.

The Court. All those questions that have now been asked your answer admits.

Mr. Conover. No, that is the gist of the case. We allege a sale from Isaac M. Williams to Orville, the son. They claim a sale to their father.

Q At the time this paper was signed by Mr. Conover was anything delivered to Mr. Conover? A A check and a note.

Q A check and a note? A Yes, sir.

Q Was the check as referred to in this receipt for $1,198 and some cents? A Yes, sir; the check was for $1,198 and some cents, and the note was for $1,000.

Q Those were given to Mr. Conover at that time—and a note was given to—

Mr. Conover. He is persisting in the same practice.

The Court. Objection sustained.

Q What else was given besides the check at that time? A I do not recall anything especially; my memory tells me that during the writing my brother Orville had a writing from Williams authorizing this transaction.

Q Was there anything else given to Mr. Conover besides the check for $1,198? A A note for $1,000.

Q A note for $1,000, and who gave those papers to Mr. Conover? A My brother Orville.

Hermon M. Freeman, direct.

Q Have you got those papers and the check and the note? A No, I have not.

Q Do you know to whom they were sent? A They were sent to my brother Orville.

Q At the time of this transaction how old a man was your father? A He was about around eighty or eighty-five, I think.

Q Did he have any property? A He had property, yes, sir.

Q Did he look after it himself? A No, sir; he did not.

Q Who did look after his property? A My brother Orville.

Q Did your father have any personal property? A Yes, sir.

Q Of what nature? A Mortgages, some bonds.

Q Who managed those mortgages for him? A My brother Orville.

Q Who collected the interest on those mortgages, if anybody? A I would; eventually my brother Orville Freeman, or sometimes the moneys were turned over to myself or some employee of the Freeman Brothers Company, but it was all turned in to my brother Orville for final settlement.

Q When you received the money for the interest on your father's mortgages what did you do with it? A I turned it over to my brother Orville.

Q Was that the situation in 1907, when this agreement was made? A Yes, sir.

Q I show you a book and ask you what this book is? A It is a book in which accounts were kept of my father's business, that is, mortgages and other papers.

Q Who kept that book? A I assisted in it; my brother Orville had charge of it.

Q Who made the entries in the book? A He has made a great many of them, but employees of Freeman Brothers also, although there were some entries of my brother; I won't be positive on that point.

Q By your brother? A Orville.

Q By your brother Orville. And you made some entries in the book? A Yes, sir.

Q When you made the entries in the book where did you get your information to make the entries; from what did you make the entries into this book? A From the stub of the check book.

Q From the stub of whose check book? A Orville E. Freeman.

Hermon M. Freeman, direct.

Q Do you know how your brother Orville kept your father's bank account? A He kept it in conjunction with his own items; we entered according to name and we always knew who the account belonged to; whether it was my brother's or my father's.

Q Who signed checks on his bank account? A Whose account do you refer to?

Q To the account of moneys received for the benefit of your father? A Orville E. Freeman alone.

Q Didn't your father sign those checks? A No, sir; it was my brother's account and I had my own.

Q Was there an account in this book of the transaction with Isaac M. Williams? A There are two items in there.

Mr. Davis. I offer that book in evidence and ask you to turn to the account of Isaac M. Williams.

Mr. Conover. What part do you want to offer in evidence?

Mr. Davis. I want to offer the whole book in evidence.

Mr. Conover. If your Honor please, I object to the admission of this book, which is entitled O. E. Freeman rent book, as I understand that it is offered for the purpose of showing that although Orville E. Freeman conducted the entire transaction, gave his own note and check, that he was really acting for George Freeman. Now, we contend, regardless of whether that be so or not the account books of Orville E. Freeman are not binding upon us in any way, particularly in the absence of any showing on the part of the plaintiff that we had any notice that Orville was the agent of George.

The Court. The objection will be sustained; it is not a suit on a book account at all.

Mr. Davis. I am offering it in evidence for the purpose of showing that in this transaction Orville was acting as agent for his father.

The Court. The objection will be sustained.

Mr. Davis. May I ask an exception?

The Court. Exception will be noted. You may have it marked for identification, if you desire.

Book marked P-2 for identification.

Hermon M. Freeman, direct.

Q I show you a certified copy of the deed, what purports to be a deed from George C. Freeman to Cyrus G. Freeman and Hermon M. Freeman, dated January 19, 1910, and recorded in Book R49 of Deeds for Essex County, on pages 480, etc., and ask you if you ever received the original of that paper? A (Witness examines paper.) Yes, sir.

Q From whom did you receive that? A From my father, George C. Freeman.

Q From your father, George C. Freeman?

Mr. Conover. I understand that is to be offered in evidence. I take objection to it.

Mr. Davis. I offer it in evidence to show the transfer of eighty shares of stock upon which we are suing from George C. Freeman to the present complainants.

Mr. Conover. If your Honor please, in the first place I object to the admission of this paper, because it has not yet been shown in the evidence that the stock was assigned from Isaac M. Williams to George C. Freeman; as I recall the testimony an arrangement had been made between Mr. Williams and George that George should pay the indebtedness of William to Conover and that George would then be entitled to any surplus on the stock.

The Court. That who would be entitled to the stock?

Mr. Conover. From my memory of the testimony, it was any surplus of the stock.

The Court. Turning over the stock is what the testimony was.

Mr. Conover. If that is correct, then my memory is at fault; I wish to have your Honor rule upon the question as to whether there could be any transfer of that certificate of stock from Isaac M. Williams to George C. Freeman, bearing in mind that the certificate itself was not in the possession of George Freeman, but was—endorsed by power of attorney as collateral security for a debt; that Williams did not execute any writing to George and made no delivery of the certificate.

The Court. Was it an admitted fact that this certificate of stock had been signed in blank when it was turned over to John C. Conover?

Hermon M. Freeman, direct.

Mr. Conover. I do not think that that is admitted in the pleadings, your Honor.

The Court. I say, is that the fact?

Mr. Conover. That is the fact; I do not know whether Mr. Davis will admit it or not.

(After argument.)

Mr. Conover. They are relying on this as a transfer of the stock. It merely recites a previous assignment. On that ground I do not think it proper to admit this paper in evidence.

The Court. It will be received and an exception noted.

Deed of Trust received in evidence and marked Exhibit P-3.

Q Mr. Freeman, at the time of this transaction when this receipt was signed by Mr. Conover, were you familiar with all the details of the transaction? A Yes, sir.

Q Did you know for whom Orville Freeman was acting? A I did.

Q Was he acting for himself? A He was not.

Q For whom was he acting? A For George C. Freeman, my father.

Q When did Orville Freeman die? A I think it was March, 1909, about that time.

Mr. Conover. If your Honor please, we can stipulate as to that; the exact date is March 15, 1909.

Mr. Davis. I think that is correct.

Q Then you did know, did you not, what happened to that note? A It was paid.

Q It was paid when it became due? A No.

Q What happened to it when it became due? A It was renewed.

Q When was it finally paid, if you know? A I think it was in June or July of the following year.

The Court. That is 1908, June or July, 1908?

Witness. Yes, sir.

Mr. Davis. Who paid that note?

Mr. Conover. If your Honor please, I object to that question unless the source of his knowledge be known.

The Court. The question is, do you know who paid the note, from your own knowledge?

Witness. Only from the account, your Honor.

The Court. The objection will be sustained.

Mr. Davis. I understand that the court will not permit me to put in evidence anything in the account that will show the transaction so far as Orville and George are concerned.

Q After you received this assignment from your father, did you see Mr. John C. Conover about the stock? A Yes, sir.

Q When did you see him? A On several occasions; I don't remember the exact dates of them.

Mr. Davis. I ask counsel for the defendant to produce the original of the letter written to Mr. John C. Conover on February 2, 1911, signed H. M. Freeman.

(Paper produced.)

Q I show you a letter; is that your signature? A Yes, sir.

Q Did you send that letter to Mr. Conover? A I did.

Mr. Davis. I shall offer the letter in evidence.

Letter dated February 2, 1911, marked Exhibit P. 4.

Mr. Conover. For the purpose of the record I wish to enter an objection on the ground that this letter refers to stock of George Freeman, and that there has been nothing in the case to show that the plaintiff ever received any title from him or that George Freeman received title to the stock from Isaac M. Williams, and also on the further ground that this suit is brought by Hermon Freeman and Cyrus G. Freeman in their own individual capacities and not as trustees; that from the declaration of trust that your Honor has admitted in evidence it appears that there were other people in interest in that trust who had never been made parties plaintiff or defendant in this action and because of that they are not entitled to sue.

The Court. You may offer the letter.

Mr. Conover. Your Honor will allow me an exception?

The Court. Yes, sir.

Hermon M. Freeman, direct.

Q Did you receive a reply from Mr. Conover to that letter, Mr. Freeman? A In all probability at a later date.

Q How soon after sending that letter did you see Mr. Conover about it? A Yes, sir, several times.

Q I say, how soon after sending that letter? A Well, it is pretty hard to state now; I should think several months, perhaps.

Q Did you have a talk with him about the stock? A Yes, sir; several, I think.

Q What were those talks?

Mr. Conover. If your Honor please, I would like to have the dates fixed.

The Court. Yes, it should be fixed with reasonable certainty.

Q The first conversation you had in relation to this letter you sent him, when was that, about? A Why, I should say probably a month or two after the letter was written.

Q Can you fix it any more closely than that? A I cannot at this time.

Q That is the first conversation you had with him about the stock? A Yes, sir.

Q What was that conversation? A That he had been very busy and had not yet had time to look over his papers, but he felt sure that he had those in his safe and he would look further.

Q That is what he said to you? A That is the purport of the conversation, yes, sir.

Q When was the next time you saw him about the matter, if you did? A I am not so positive; I should say inside of a year, anyway.

Q Where? A I met him once or twice on Main street in Orange by accident; I was down on business and ran across him and naturally this was the only subject of interest between us; I brought the matter up and requested that he make endeavors to get the thing straightened out; that it put me in an embarrassing position not having those things to settle up the matters that I had in charge.

Q What did he say? A The answer was the same thing that I have stated; that he had been busy and had not had time to search carefully through his papers, but that he would make the search, that he thought it would be all right.

Hermon M. Freeman, direct.

Q Did you have further conversations with him after that? A Yes, sir.

Q Under what circumstances? A I met him one day at Mr. Grosso's office.

Mr. Conover. Will you fix the date of that?

Q Who was Mr. Grosso? A An attorney in Orange.

Q Had you consulted him about this stock? A I had; yes, sir.

Q You saw Mr. Conover at Mr. Grosso's office? A Yes, sir.

Q When? A I should judge around the 14th or 15th.

Q Can't you fix it any more closely than that? A No; I cannot, sir.

Mr. Conover. If your Honor please, I think that the date should be fixed; although that is after May 20th, 1914, it has no relevancy to this issue as the cause of action was then barred and any statement the defendant made could not affect the reason of why the plaintiff did not bring action.

The Court. You cannot fix this meeting in Mr. Grosso's office any closer than the 14th or 15th?

A It was subsequent to the starting of the suit; I would not be positive about the starting of the suit, but after I had consulted Mr. Grosso regarding the start of the suit.

Q What was that conversation? A Probably the same thing, but with this exception that Mr. Conover said at the time that he had 40 shares of stock still in the safe and he presumed the other 40 would still be found.

Q Who was present at that conversation? A Mr. Conover, Mr. Grosso and myself.

Q Between the time of this conversation in Mr. Grosso's office on the 14th or 15th and the one conversation you have testified to in 1912, did you have other conversations with Mr. Conover? A Between 1912 and 1915, is that the question?

Q Yes, between the time you met him in Mr. Grosso's office and the conversation you testified to you had about all that after this 1911 letter was written; did you have any other conversations with him in between? A Yes, sir, but I could not fix the dates.

Hermon M. Freeman, cross.

Q To what effect were those conversations? A The same as I have testified; they were all in the same tenor.

Q Are you able to say how many conversation altogether you had with Mr. Conover about this stock? A I should judge four or five altogether.

Q Did Mr. Conover say previous to the conversation in Mr. Grosso's office, did he tell you that he had sold the stock? A No, sir.

Q Did he ever tell you that the stock was no longer in his possession? A No, sir; the only time I had any knowledge of that was in his reply to our suit.

Q Mr. Freeman, do not answer this question until the court rules on it. Who is your brother's executor?

Mr. Conover. I object; it has no bearing on the suit.

The Court. The question may be answered.

Q Who is the executor of Orville Freeman? A I am.

Q When were you appointed as executor? A In 1909; filing of the will.

The Court. That standing alone amounts to nothing. I understood you were going further. If that is all your proof I should be inclined to strike it out.

Q Was Mr. Conover ever informed of the fact that you were Orville's executor? A I do not know.

Mr. Conover. I move that the testimony be stricken out.

The Court. It will be.

Mr. Davis. May I ask for an exception.

The Court. It will be noted.

Cross examination by Mr. Conover.

Q Mr. Freeman, where did this transaction take place in which you say this receipt was delivered? A At Mr. Conover's office, Lincoln avenue, Orange.

Q And when? A At the date therein specified.

Q You were present in Mr. Conover's office? A Yes, sir.

Q Are you positive about it? A Yes, sir: I am positive about it.

Q Who else was present? A Mr. Conover and my brother Orville.

Q And no one else? A I do not recall anyone else.

Q Mr. Freeman, were you present at the interview between Isaac M. Williams and George Freeman at which you claimed an arrangement was made in regard to the stock which was then held by Mr. Conover? A No.

Q Where did you derive your information in reference to the transaction? A From my brother Orville.

Mr. Conover. If your Honor please, it seems to me it appears that Mr. Freeman testified that he had knowledge of this transaction. It appears that he has only hearsay knowledge on that and I move that all of his testimony on that point be stricken out.

The Court. I will hear you, Mr. Davis, as to why that may not be done.

Mr. Davis. It seems to me, if the court please, that it is in the case by repeating the declaration of the agent. It is not to bind the principal; it is to bind the agent.

Mr. Conover. So that there may be no misunderstanding as to your Honor's ruling, I understand that strikes out all the testimony in regard to the—

The Court. It strikes out nothing but his answer which was to the effect that Williams did owe a sum of money and agreed to turn over the stock after the debt was paid that Williams owed Conover.

Q That is what your brother told you? A At the time my brother Orville had a writing from Williams to that effect.

Q (*By Mr. Davis.*) Had you ever seen that writing? A Yes, sir.

Q Do you know where it is? A No, sir; I do not know; that was the source of my knowledge, your Honor, not that I was present at any interview.

Q (*By the Court.*) Has any search been made for that writing? A I have looked for it among the papers.

Q Whose papers? A My father's and my brother Orville's, both.

Q How extensive has that search been? A Well, I searched pretty carefully through all the papers that I know of.

Q In that statement is that your recollection of the contents of the paper? A It is my recollection of the contents of the paper; that is my source of knowledge upon the agreement.

Q (*By the Court.*) That seems to put it in a different position. A I was not present at any interview, but that is the source of my knowledge.

Mr. Conover. Would your Honor mind telling me on what principle you think it is admissible now, so that I may direct my argument to that?

The Court. I suppose a written document coming from Williams to George Freeman would be admissible, anyway, wouldn't it?

Mr. Conover. I better cross examine the witness as to just what was in it?

The Court. Yes, you better do that.

Q Mr. Freeman, was there any other statement in that paper that Williams owed your father a certain sum of money? A Yes, sir.

Q What amount did it state? A I do not think it stated any specific amount, but it was certainly more than the equity in the stock would be; that is, the amount that was owed, was more than that.

Q Just what did the paper state? A Well, it is pretty hard to recall the exact words.

The Court. You are not asked to do that.

Witness. I hereby agree to turn over to George C. Freeman certain shares of stock upon his payment of my indebtedness to Conover. I think the approximate amount of his indebtedness to Conover was stated there; I would not be positive of that.

Q (*By the Court.*) It did not mention stock? A It did mention stock.

Q Well, you have not told us that. A I said certain shares of stock; I think the name of the stock was specified in that; that is my recollection of it; it was United Water Supply Company stock.

Q Well, that is what you were asked, but the paper from your recollection of it was United Water Supply Company stock? A Yes, sir.

Q Was it signed by anybody? A It was signed by Isaac M. Williams.

Q Was the signature attested by anybody? A Any witness?

Q As a matter of fact, do you know whether it said stock of the United Water Supply Company or was it stock of the Boonton Water Company? A Well, as far as those facts go, that is identical, although the names are not—it was ordinarily known as the Boonton Water Company, although the official title was the United Water Supply Company.

The Court. You are asked now what the agreement said, whether it was Boonton Water Company or United Water Supply Company?

A I am not absolutely positive of that; reference was to Boonton Water Company, we would ordinarily call it.

Q Have you told us everything you can recollect that that paper said? A I do not recall anything further at this time, sir.

Q As a matter of fact, you knew there were two separate corporations, one, the Boonton Water Company, and the other, the United Water Supply Company? A There may have been. I understand there was a reorganization at one time.

Q Was it the old corporation that was reorganized or was an entirely new corporation formed? A It was stock of the new corporation.

Q Was a new corporation formed? A I understood so. I do not know positively.

Q So there were two separate corporations. Is that correct? A Well, I do not know as to the actual fact of that, that is from personal knowledge. I know only from hearsay, perhaps, on that point, by newspaper items.

Q We do not want any hearsay. Who was this paper directed to? Was it directed to anybody? A I am not so positive as to just who it was directed to.

Q Who wrote it? In whose handwriting was it? A I think the writing was in my brother's handwriting, signed by Isaac M. Williams.

Q (*By the Court.*) Did you know Mr. Williams' signature? A Yes, sir; quite familiar with it.

Q Was it signed by him? A Yes, sir; it was signed by him.

Q You said a paper. Is that what he agreed to turn over to you? A Well, I am not positive of the exact name in there; either Orville or George C. Freeman.

Q It might have been drawn to either? A Yes, sir; it might have been drawn to either.

Q In whose possession was that paper at the time you saw it? A In my brother Orville's possession.

Q Did it mention certificate numbers? A No, sir.

Q Did it mention the number of shares of stock? A I do not believe it specified the exact number.

Mr. Conover. I do not know what your Honor's feeling about this matter is now, but it seems to me that it would be highly improper if this transaction which took place twelve years ago to allow a witness—to allow testimony of this indefinite nature to be introduced to prove title. In the first place, it must be very clearly established that there was such a paper, and the exact contents of it. In this case, the witness said that the paper said, "I agree to turn over—" The witness says he does not know whether it was to Orville or George—it seems to me that is the big point in this case, where the title is, which of them had title to that stock. He says he does not know which it was. Another thing, the paper did not purport to be an assignment. He says, "I agree to turn this over when the debt is paid." Now, that, it seems to me, was nothing but an authorization, and even if notice of that was brought home to the defendant that the person from whom he received the stock was not the owner, he was an agent who is not a special agent for some particular transaction but a general agent authorized to collect the funds.

The Court. The difficulty is you are assuming many things that do not yet appear in evidence and of which the Court has no knowledge except by reading the pleadings.

Mr. Conover. They have not attempted to prove any. It seems to me in a case like this the Court may exercise discretion.

The Court. The Court can say at the end of his case if he has not made out his case that a non-suit can be granted.

Mr. Conover. Then if you pass up the question of notice you still have a case where a man is trying to prove the contents of an instrument and he says he does not remember whether it was Boonton stock or United Water Supply stock; he does not identify the stock, he does not mention the certificate numbers. He says, "I don't know whether it mentioned the total number of shares or not." This transaction is so far back in the distance that it seems to me we are entitled to have some sort of strict proof. Failing that, everything is stale, the evidence is stale, as a matter of fact, your Honor, that they allege in the pleadings.

The Court. The very reason you have given, for instance, is a very good reason why the proof is difficult. That is one of the reasons why the Court will allow some laxity. I am inclined to overrule the motion to strike out this testimony.

(After argument.)

The Court. I am inclined at present to allow the testimony to stand. At the close of the entire case a motion may be made to strike it out if it is not connected.

Mr. Conover. Your Honor will allow me an exception, please.

(After argument.)

The Court. For the present I do not want to strike it out. You may proceed with the examination.

Q Mr. Freeman, did you personally retain Davis, Perry & Grosso in this case? A Yes, sir.

Q Did you give them the facts which constituted your cause of action? A I think they got them from me and the papers I had in my possession.

Q Did they ask you whether this first assignment from Isaac M. Williams to George C. Freeman, how it was made? A I don't think they did.

Q Didn't you tell them whether there was a written or oral assignment?

Mr. Davis. I object to the question on the ground—

The Court. The objection will be overruled. In view of the pleadings and your statement that you never knew of any other assignment it makes the question eminently proper—the information upon which the pleadings are based.

Q Mr. Freeman, what did you tell Mr. Davis, how your father got title to this stock? A I do not know whether I thoroughly understand your question.

Q Did you tell him how he got title? How did the stock come from Williams to your father, how was it transferred? A I endeavored to. I do not know whether I gave him all of the facts.

Q What did you tell him? A Why, the same facts as stated here.

Q Tell us the facts now. What did you tell them? A Just the matter referred to.

The Court. What did you tell Mr. Davis about how this stock was assigned to your father?

Mr. Davis. Who did you see about this matter?

Mr. Conover. I think I am questioning the witness. If he wants to object to the question he may.

The Court. Did you tell Mr. Davis? Is he the one to whom you told the facts?

The Witness. I think Mr. Grosso is the gentleman that I had most of my transaction with.

Q And you had your agreement with Mr. Grosso? A Yes, sir.

Q Mr. Grosso is a member of the firm that represents you in this suit? A Yes, sir.

Q And he has been since the beginning? A Yes, sir.

Q What did you tell Mr. Grosso about the way in which your father got title to this stock? A That Isaac M. Williams owed John C. Conover a certain sum of money; that he also owed George C. Freeman certain sums of money; that Williams consented to have my father pay off his indebtedness to Conover in return for which he would have any excess value in this water company stock to credit against the indebtedness that Williams

owed George C. Freeman, and that the transaction had been through my brother, Orville E. Freeman.

Q Just confine yourself to this. How was the title to the stock transferred? What did you tell him about that? A The title transferred?

Q Yes, from Williams to George. A I don't get your exact point.

Q (*By the Court.*) The exact point is whether you said anything to him about this writing that you have been telling us about. A I do not think I said anything about this writing. I do not recall it. I do not think the question was ever asked me.

Q (*By Mr. Conover.*) You saw the pleadings after they were drawn up? A I saw them. I am not a lawyer—

Q Did you see them? That is, the first complaint in the action in the Essex Circuit after it had been transferred from the Court of Chancery. You saw them, didn't you, Mr. Freeman? A I think I have seen them.

Q Turning to the second paragraph, you recall that it does not say whether the assignment was in writing or was oral? You notice that, don't you? A It does not say either way.

Q When you saw that paper didn't someone in the firm of Perry & Grosso, or Davis, Perry & Grosso, get in touch with you and tell you that the attorneys for the defendant had asked for copies of certain papers that were mentioned in that? A I do not recall it.

Q Didn't they ask you whether you had a copy of the note mentioned in the fourth paragraph of the complaint? A They asked for a copy of the note.

Q At the time they asked for a copy of the note didn't they also ask you whether the assignment mentioned in the fourth paragraph was an oral assignment or a written assignment? A I have no recollection of that.

Q At the same time did they ask you whether the agreement mentioned in the third paragraph of the complaint was an oral agreement or a written agreement? A What was that question again, please?

Q (Last question read.) A This applies to the agreement between George C. Freeman and Conover, not between Williams and Conover.

Q I call your attention to the agreement for the payment of the debt of Williams. Didn't they ask you whether that agree-

ment was in writing or oral? A I do not think any mention was made of the agreement with Williams, as to whether it was written or otherwise.

Q Did they ask you at that same time for a copy of the declaration of trust? A I do not remember.

Q Did they ask you at that time whether the assignment from George C. Freeman to you and your brother was contained in the declaration of trust or not? A I do not remember whether they asked that particular question or not.

Q Did they ask you where the assignment was from, George C. Freeman to you? A I do not recall.

Q Would you say that they did not? A No; I would not say that they did not.

Q Didn't you see this paper, Mr. Freeman, this answer to the demand for copies of the documents mentioned in the pleadings? A (After examining paper.) I may have seen that.

Q You would not say you did not see that. Now, you will notice that that paper says that the assignment referred to in the second paragraph of the complaint, which is the one from William to George was a parole assignment? A Yes, I see it there.

Q And that the agreement referred to in the third paragraph of the complaint, which was the agreement in regard to the payment of $2,198.67 to I. M. Williams, was an oral agreement? A Yes, I think that was correct.

Q And that the note referred to in the fourth paragraph of the complaint was not in plaintiff's possession? A Yes. I searched for it but could not find it.

Q But they did ask you for it? A Yes, sir.

Q And told you that we wanted it? A I don't know that they told me that you wanted it, but they asked me to look for it.

Q And that the assignment referred to in the seventh paragraph of the complaint, which is the one from your father to you and your brother, was contained in the declaration of trust? A Yes; the assignment was in the declaration of trust.

Q There is no other assignment from your father to you except what may be contained in the declaration of trust, is there? A Father made a certain assignment of mortgages.

Q I mean of the stock? A I do not think there was any other assignment except that, not that I recall at this time.

Hermon M. Freeman, cross.

Q (*By the Court.*) When did you start to look for this paper signed by Williams to your father, relative to this stock? A I don't get the exact idea of the paper you are referring to.

Q To this assignment of stock from Williams to your father? A The assignment of Williams to Conover, since the start of the suit?

Q I did not say Williams to Conover. I said Williams to Freeman. A Williams to Freeman; since the start of the suit.

Q How long ago? Suit was started several years ago; how long ago was it you started to look for it? A I should say a year ago, anyway.

Q Why did you start to look for it? A Why? To establish my claim.

Q You thought it to be an important paper in the suit? A Yes, sir; I did.

Q Yet you never said a word to your attorney about it? A There were other papers, your Honor, too.

Q I am talking about this paper. I say, and yet you never said a word to your attorney about having seen such a document? A I do not recollect it.

By Mr. Conover.

Q Mr. Freeman, at the time your attorney started this suit you thought that was an oral assignment, didn't you? A What is that?

Q The assignment from Williams to your father was an oral assignment? A I don't know exactly what my thoughts were on the matter then.

Q Didn't you tell them one way or the other, that it was oral or written? A I do not think I did.

Q But you thought it was oral? A I do not think I did.

Q Some time in March, 1913, when in answer to our demand for a copy of the document mentioned in the complaint you answered that the assignment from Williams to your father was an oral assignment, you knew that they had made such an answer, didn't you? A I do not know that I understood that word parole in there, not being an attorney; some of those terms are confusing to me.

Q You understood at the time that it was an oral assignment, didn't you? A I don't know that I did.

Hermon M. Freeman, cross.

Q You didn't know of any written assignment, did you? A From Williams to my father?

Q From Williams to your father. A The paper I have?

Q No. But at the time did you know of any written assignment? A Yes, sir; there was; my brother had in possession a paper from Williams—

Q No, at the time did you know that there was any written assignment from Williams to your father? A I did not know that there was any in existence; I knew that it had existed for years.

Q Why didn't you tell your attorneys? A I do not know why; I had no particular reason for not telling them.

Q You knew that would be a very important document in any suit, didn't you? A I thought so; yes, sir.

By Mr. Conover.

Q Did your attorneys request you to look for a written assignment? A I do not know whether they did or not; they may have; they asked me to look for all the papers connected with the case and find everything that I possibly could. Which I did.

Q As a matter of fact, they asked you to look for an assignment from Williams to your father, didn't they? A Not specifically, I don't think.

Q You knew that they believed that that assignment was an oral one, didn't you? A No, I did not.

Q Didn't you say you saw this paper? A You say it referred to a parole assignment. Now, I do not know what parole means?

Q When a man is allowed to go on parole, you know what that means, don't you? A What man?

Q When a criminal is allowed to go on parole what does that mean? A He is put under the jurisdiction of the court; that is, is permitted under certain restrictions—

Q Is put on his word that he will do certain things? A I have never had any experience, sir.

Q When a man is allowed to go on parole he is allowed to go on his promise to do certain things.

Mr. Davis. Is an explanation so necessary at this time?

The Court. No, I think we are going a little too far at this time.

Hermon M. Freeman, cross.

Q Mr. Freeman, you said a little while ago that the understanding between Williams and your father was that any excess value of the stock should be turned over when the debt was paid; did you state that? A I do not think I said it just that way.

Q That is my recollection of your testimony. What did you say? A I said any excess over and above the debt that Williams owed Conover that came out of the stock was to be credited against money that Williams owed my father.

Q Was the stock to be sold to pay the debt and then the excess in money given to your father? A I don't think there was any necessity for the stock being sold.

Q (*By the Court.*) The question is whether the paper said anything about that? A No, I do not think there was anything said about that in the paper. The stock had to be held until such time it could be realized, and anything that was realized was to go to the debt.

Q Mr. Freeman, you testified that Orville was sort of a general agent for your father, to collect his interest, and deposit your father's money in his, Orville's own account and deduct it; did he also collect the principal of the mortgages, if any were paid off? A I do not recall any having been paid off.

Q Was he supposed to? A Yes, sir.

Q Upon what do you base your knowledge that Orville was your father's agent? A By having been intimately associated with him and assisting him in taking care of those.

Q That is, in assisting Orville? A Yes, sir.

Q And your knowledge is based upon statements made by Orville? A Why, actual facts. I had the papers in my possession. I did not need to hear him say it.

Q On what did you base your knowledge? A I say by information, intimately connected and assisting my brother in taking care of those accounts. The actual papers were there.

Q What do you mean by the actual papers? A Well, mortgages and things of that kind.

Q (*By the Court.*) Do you know, having seen him do it, that he had actual knowledge of your father's business? A I knew that he actually handled it, your Honor.

Mr. Conover. It seems to me that there was no proper proof of Orville's agency.

The Court. At the end of the plaintiff's case you may make your motion.

Q (*By Mr. Conover.*) This paper that you have been testifying to, was that delivered to your brother Orville? A He had it in his possession.

Q Do you know how he got it? A Not absolutely, no, except that he told me he had gotten it from Williams—if that is permissible.

Q Was he authorized to pledge that stock to secure his note to John C. Conover? A He was authorized to transact my father's business.

Q All his business? A Yes, sir.

Q Receive the principal, interest and everything and pay bills? A Yes, sir.

Q Just the same as your father could do, absolutely everything? A Yes, sir.

Q If you collected any interest you turned it over to your brother Orville, not your father? A Yes, sir.

Q Did your father keep any bank account of his own or did Orville take care of all his financial matters? A He had a small account of his own.

Q Where was that account? A In the Mutual Trust Company.

Q That was the only account he had? A It was the only one to my knowledge.

Q That did not amount to more than two or three hundred dollars? A I think it was about $200.

Q And that account did not change from 1905 until the time the Mutual Trust Company was closed by the banking examiners, did it? A It was a small account, just a small balance left there.

Q Inactive account; just a small balance left there? A Yes, sir.

Q Mr. Freeman, you were present when that declaration of trust was drawn up? A When it was drawn up?

Q Yes. A. Do you mean by that the actual signing?

Q The general transaction in which the declaration of trust was drawn, executed and signed by the parties. A Yes, sir.

Q Who attended to that, who was the attorney? A I think W. Bradford Smith.

Hermon M. Freeman, cross.

Q Wasn't it Mr. Stetson? A No, Mr. Stetson simply took the acknowledgment.

Q How did you come to insert in that declaration of trust the reference to this 80 shares of stock? A Why, because I felt that it belonged to my father.

Q Your brother Orville was dead at the time, wasn't he? A Yes, sir.

Q A declaration of trust was drawn up some time in 1910? A Yes, sir.

Q As a matter of fact, wasn't that insertion put in there because you found this receipt from Mr. John C. Conover? A No, sir.

Q Where did you find that receipt? A My brother had it in his papers.

Q In Orville's papers? A Yes, sir.

Q Didn't you know that your brother Orville sold his stock in the United Water Supply Company in 1908? A I learned that he had sold it; yes, sir.

Q Did he tell you who he sold it to? A I don't think he knew himself who it was sold to.

Q I see. Did you ask him? At the time that this reference to the stock was inserted in the declaration of trust you knew that Orville's note had been paid? A I knew it had been paid; yes.

Q You knew that this stock had been put up as collateral for it? A It was left in Mr. Conover's possession to sell.

Q You knew at the time that the declaration of trust was signed that this stock had been left with John C. Conover as collateral for it, for that note? A That was not my understanding of it.

Q What was your understanding? A That it was a question of collateral; the stock had been left with Mr. Conover in case an occasion should arise a quick sale could be made and in case my brother was out of town the stock could be transferred.

Q Didn't you testify just a few moments ago that your brother was authorized to pledge the stock with Mr. John C. Conover? A He could have pledged it if he wanted to.

Q Didn't you testify that he was authorized to pledge it? A I do not think I did; I did not intend my testimony to convey the meaning that you seem to have wanted it to convey.

Q Did you say that? A I said he was authorized to transact my father's business.

Q Answer the question. Did you say he was authorized to pledge the stock as collateral? A I don't think so.

The Court. That was your question, but his answer was just as he said, when you asked the question he said he was authorized to transact all my father's business.

Q You said you were present on September 7, 1907, when the transaction was consumated between Williams and Conover and Freeman, did you? A Yes, sir.

Q At that transaction did not Mr. Conover give your brother Orville this receipt that you have introduced in evidence? A Yes.

Q And at that transaction was it agreed that Mr. Conover should hold that stock as collateral for your brother's note? A I did not understand it that way. My recollection is there was no question of collateral raised.

Q (*By the Court.*) Are you familiar with the wording of that receipt? A Fairly so.

Q Just see what it says? A I do not think there is any question of collateral there, your Honor.

Q *By the Court.*) That distinctly states that the stock was not to be delivered until the total note was paid, doesn't it? A It states his note—they wanted it dated September 5th, 1907, four months, in payment for note due him from Isaac M. Williams, and he agreed to turn over to Orville E. Freeman eighty shares of the stock of the United Water Supply Company, and so forth. There is no question of collateral at all, your Honor.

Q (*By Mr. Conover.*) Was there any agreement made at that meeting of the stock to be turned over? A It was to be left in Mr. Conover's possession.

Q You said that you saw the complaint which was filed in this suit by your attorneys, did you? A That I read it.

Q The fifth paragraph of that alleges on July 6, 1908, "The said George C. Freeman paid the said note of $1,000, given by the said Orville E. Freeman, to the said John C. Conover, and thereupon became entitled to the possession of the said eighty shares of the United Water Supply Company's stock." You saw that statement, didn't you? A I think so.

Hermon M. Freeman, cross.

Q You knew that no one was entitled to that stock until the note was paid, didn't you? A I do not know why. Mr. Conover certainly had ample security as far as that went.

Q You knew you were not entitled to that stock until the note was paid? A No, I did not.

Q Why didn't you object to this statement in the complaint then? A Perhaps I did not realize at the time just what the statement signified.

Q When this declaration of trust was delivered to you, Mr. Freeman, what did you do? A Why, I gathered together my father's business in good working shape to have it so I knew where my papers were and have it in business-like form.

Q Were the other securities mentioned in the declaration of trust delivered to you at the time the declaration of trust was executed? A I think they were in my possession at the time.

Q Did you have possession of the certificates of stock? A No, sir.

Q Did you endeavor to locate them in any way? A I did.

Q What endeavor did you make? A I wrote Mr. Conover a letter and also made several oral requests that the stock be turned over to his office, and my father's—

Q Did you make any inquiries of the company? A Not at the time.

Q Didn't you make any inquiries to find out in whose name the stock stood in the books of the company? A No, I do not think I did.

Q Did you make any inquiries of any kind from the company? A No, because I had faith in Mr. Conover.

Q When was the first inquiry that you made of the company or any of its officers other than Mr. Conover? A I made no inquiry. It was made through my attorney. I do not remember the exact date.

Q When did you retain your attorneys? A I should judge in 1914 or 1915, I don't remember the exact dates. He had been my attorney at that time. I hardly considered it the retaining of an attorney.

Q As a matter of fact, that inquiry was made by the attorney, in 1915, wasn't it? A I should judge about that time.

Q In May, 1915, is that correct? A So far as I know.

Q It was not made in 1914? A I don't know. I say the inquiry was made through my attorney.

Q After you made that inquiry of them did you instruct him to write to Mr. Conover in regard to the matter? A I don't know. I haven't any knowledge of when the inquiry was made.

Q Was it a week after or a month? A I say I have no knowledge when the inquiry was made. So I am not able to judge now when the inquiry was made, for I have no knowledge of the inquiry.

Q Did he make the inquiry? A I think my attorney made the inquiry.

Q Did he report to you? A I think he did.

Q What was the report? A That the stock had been transferred on the books; that is, certain stock of Isaac M. Williams; he was not positive in all cases whether it was this stock or not that had been transferred.

Q You did not know what certificates were referred to in the declaration of trust, did you? A That is the actual numbers?

Q Yes. A No.

Q After you got that information what did you do? You knew this stock had been sold, didn't you? A For a while I did not know that these actual shares had been sold, no. Mr. Conover had told me that he had forty shares of stock still in his possession.

Q And the inquiry of the company showed they were not in his possession? A I would have no way, no means of knowing what particular shares of stock had been transferred on the books of the company, only presumably that they were some of Williams' shares.

Q Couldn't you have ascertained if you had gone to Williams? A I don't know, I might have.

Q Could not the company have told you what shares of stock originally stood in Williams' name? A I presume they could.

Q And to whom those shares had been transferred? A Yes; sometimes stock is sold and assigned after the transfer.

Q Didn't you think it was your duty as a trustee to find out what had become of that stock? A I was endeavoring to find out from Mr. Conover.

Q How long after you made the inquiry of the company with no result did you instruct your attorney to write to Mr. Conover? A Well, I am under the impression that the suit was started before this examination of the records and the books was made.

Hermon M. Freeman, cross.

Q You did not inquire of the company until after you started the suit? A I do not believe so.

Q And from 1910, when you got this declaration of trust which referred to this stock, up to the time the suit was started you had not yet found out what had become of the stock? A No, Mr. Conover claimed that he still had it in his possession.

Q And the only person you inquired of was Mr. Conover? A Yes, sir.

Q Didn't you inquire of Mr. Williams? A No, sir.

Q You made no other inquiry except of the company? A No, because I felt Williams had no claim on this stock and he was not interested.

Q Did anyone ever tell you what the numbers of the certificates were?

The Court. You have asked that question.

Q When did you have your first interview with Mr. Conover? A I think shortly after my brother's death.

Q When was that? A Perhaps within a year.

Q Well, what year? A That would be 1909.

Q You inquired of him in 1909, where was he when you spoke to him about it? A I met him right down on Main street, I think. My recollection is I talked with him over the 'phone once or twice.

Q What did you ask him? A Well, I could not give you the exact words, but I asked him what results he had made in regard to the stock?

Q What did you mean by results he had made in regard to this stock? Had you seen him about that? A In regard to his search for it.

Q I am talking about the first interview you had with him. What did he say at that interview? A I asked him for a return of the stock.

Q What evidence did you show him that you were entitled to the stock? A I don't know as I showed him any. He did not demand any.

Q You did not state to him how you had any right to have the stock at all? A I may have explained to him—I think I explained to him how I came by it, because I told him that I had taken over charge of my father's business and I wanted to get it straightened up.

Q Are you sure that you told him? A Not absolutely positive, but that impression is on my mind that I did.

Q But you are not absolutely sure. Did you show him this receipt which he had given to Orville? A I do not think he asked for it.

Q What did Mr. Conover say to you, Mr. Freeman? A When?

Q At the first interview that you had with him? A I could not give his exact words. I can give the purport of it.

Q What did he say in regard to this stock? A That he had it in his possession and that he would search in his safe for it among his papers.

Q As a matter of fact, Mr. Freeman, didn't he tell you at the first conversation that he had with you that he had sold the stock? A He never did.

Q Didn't he tell you that he had sold it to Mr. Hillery? A No, sir.

Q Didn't he tell you that he had sold it without naming the person? A No, sir.

Q Didn't he tell you that he had it? A No, sir; I don't believe that he said absolutely that he had it, but he thought it was still among his papers and that he would look for it.

Q As a matter of fact, didn't he say that he did not think he had it, but he would look and see if he had? A No.

Q Was anyone else present at that meeting? A No, I do not believe so.

Q How many times did you see him before you wrote the letter of February 2nd, 1911? A I do not think I saw him. I think I called him on the telephone once or twice before that time.

Q Mr. Freeman, I want you to think before you answer this question. As a matter of fact, you did not see Mr. Conover until you wrote this letter of February 2, 1911, did you? A Not absolutely see him, no.

Q You did not have any interview with him before February, 1911? A Telephone interview.

Q (*By the Court.*) What did you mean a while ago when you said you had met him on Main street in 1909 and talked with him? That was only about five minutes ago, Mr. Freeman? A You say 1911. I understood you to say 1907, your Honor.

Hermon M. Freeman, cross.

Mr. Davis. I think there is some confusion about the way the question was put, Mr. Conover.

The Court. For what purpose was this offered, Mr. Davis?

Witness. Your Honor, it is in a way very hard for me to recall absolute dates. I am giving them to the best of my knowledge and belief.

Q You do not want to fix dates with certainty? A I think I said I was not positive as to the dates. I am giving it to the best of my knowledge and belief, your Honor.

By Mr. Conover.

Q When did you first see Mr. Conover after February 2nd, 1911? A That is a question I cannot answer.

Q Did you see him within a year after February, 1911? A I could not say positively.

Q (*By the Court.*) Before we go further now. Was it a fact that when you wrote that letter, February 2, 1911, you had not at that time seen Mr. Conover about this matter? A I think I had him on the 'phone once or twice, your Honor. That is my recollection now, but I do not believe I had a personal interview with him, or what I should call a personal interview.

Q (*By Mr. Conover.*) Did you see him within two years after 1911? A I think I did. I would not want to fix the date at this time.

Q Where? A I met him once or twice on Main street in Orange.

Q Was anyone else present but you and he? A No.

Q (*By the Court.*) Now is that the time you testified to which you thought was in 1909? A Let us see. 1909 was the date of my brother's death and it may have been before or after 1911, your Honor. I am not so positive as to the date, but I remember the particular circumstance of meeting him on Main street in Orange.

Q (*By Mr. Conover.*) You testified you were one of the executors of your brother's estate? A I am an executor.

Q At the time of his death you knew that either he or Mr. Conover had possession of this stock that you are suing for in this suit, didn't you? A Yes, sir.

Q Did you find it among his papers? A I did not.

Q Did you look for it any other place? A Well, I had my father's papers. I didn't make any special search for it, for the reason that my brother before his death had told me. I asked him specially before his death if he had it and he said no.

Q Who did he tell you had it? A I do not think he said. My recollection is that I asked him if the stock was still with Conover and he said yes.

Q So you knew it was with Conover. How long before his death was that? A I should say probably a month or two.

Q A month or two before his death? A Yes, sir.

Q And that was after you knew that the note had been paid, wasn't it? A Yes, sir.

Q Did you make any special endeavor to get hold of the stock? A I certainly did.

Q What did you do? A I endeavored to get it from Mr. Conover.

Q Didn't you testify just a few minutes ago that you did not see Mr. Conover until after 1911? A I said I had a telephone conversation with him.

Q Are you absolutely sure that you had telephone conversations with him? A I am quite sure I did.

Q Will you swear to it? A No, I don't think I would want to say positively, but that is my recollection, that I had telephone conversations with him.

Q When was the first telephone conversation? A I should say roughly shortly after my brother's death.

Q Why didn't you inquire before that time? A I had no occasion to inquire before his death.

Q After your brother died who handled your father's business? A I did.

Q You took his place then as a sort of general agent and did everything the same as your father could do it. Is that correct? A Yes, sir; that is the idea.

Q Then you knew you were supposed to look after your father's interests, didn't you? A Yes, sir.

Q Didn't you think it was your duty to inquire about this stock? A Well, I certainly did inquire about it, where I thought it was.

Q How long after your brother's death did you inquire? A I could not say positively.

Q Was it within a year? A I think it was within a year.

Hermon M. Freeman, re-direct.

Q Was it within six months? A I don't know.

Q You would not want to say it was about six months, would you? A No, I would not want to say positively.

Q Didn't you think it was your duty to inquire before six months? A Well, that is a question of circumstances.

Q Mr. Freeman, have you ever rendered any account of your trust under this trust agreement?

Mr. Davis. I object to that question.

The Court. I will sustain the objection.

Mr. Conover. The purpose was to show whether he had treated this stock as an asset or not.

The Court. An exception will be noted.

Q Mr. Freeman, when was the first time that the defendant told you that he had sold the stock? A The first knowledge I had of that was when my attorney informed me of his answer to the suit.

Q When did he inform you? A The attorney or Mr. Conover?

Q I thought you said the information came from the attorney and the answer in the suit? A Yes.

Q Did you ask for information also from Mr. Conover? A No; I did not get any information direct from Mr. Conover.

Q Didn't he ever tell you at all that he had sold this stock? A Mr. Conover, no, sir.

Q As a matter of fact, didn't he tell you a short time after the interview in 1911, that he had sold the stock? A No, sir.

Q Didn't he tell you in any of the interviews that you had with him after you had started this suit that he had sold the stock? A No, sir.

Re-direct examination by Mr. Davis.

Q Mr. Freeman, Mr. Conover asked you on cross examination if you knew that Orville sold his stock in 1908 and you said yes. What did you mean by "his stock"? A Why, my brother Orville had thirty shares of stock in his own personal name.

Q Did that have anything to do with this eighty shares of stock? A No, sir; absolutely nothing. They were his own personal property.

Cyrus G. Freeman, direct.

Q That had nothing to do with the stock that is pledged by Mr. Williams? A No, sir.

Mr. Conover. Will you admit on the record that the note when it became due was charged to the account of Orville Freeman in the Mutual Trust Company?

Mr. Davis. At the proper time I will admit it.

CYRUS G. FREEMAN, sworn in behalf of the plaintiff.

Direct examination by Mr. Davis.

Q Mr. Freeman, you are one of the plaintiffs in this action? A Yes.

Q You are a brother of Orville Freeman? A Yes, sir.

Q And a son of George C. Freeman? A Yes, sir.

Q How old was your father in 1907? A He was about eighty-five.

Q Did he have any business? A He was not capable of taking care of his own business and he had turned it over for Orville Freeman to take care of it.

Q (*By the Court.*) Is your father still living? A No, sir.

Q When did he die? A Five years ago.

Q (*By Mr. Davis.*) Who managed your father's affairs for him? A Orville Freeman, his son.

Q How do you know that? A Why, whenever there was any interest or money to come in it was all turned over to him.

Q To who? A To my brother, to Orville Freeman, as manager for him.

Q Did your father have any mortgages? A Yes, he did.

Q About how many, if you know? A I do not know. There were several of them, quite a number of them; quite a little business to attend to.

Q And anything in connection with those mortgages was handled by your brother? A It was; yes, sir.

Q Did you know anything about this transaction about the Water Company's stock at the time it was made? A I was not present, no.

Not cross examined.

ISAAC M. WILLIAMS, sworn in behalf of the plaintiff.

Direct examination by Mr. Davis.

Q Mr. Williams, are you the Isaac M. Williams who owed John C. Conover about $2,100 in 1907? A My knowledge was a little less than that; I owed him a bill.

Q Did you give him as security for your debt some stock of the United Water Supply Company? A I don't remember that I did give it to him.

Q Did he have in his possession some stock of that company? A I do not believe he did, as I had not paid enough on it.

Q Did you give him any certificates in that company? A I cannot recall it.

Q Mr. Williams, is this your signature? A I think it is; yes, sir.

Mr. Davis. I ask to have this marked for identification.

Marked P. 5 for identification.

Q Mr. Williams, this seems to be a receipt received from John C. Conover for a certain number of notes and it is signed by you, and it is dated September 7, 1907. Do you know under what circumstances you received those notes? A If I knew the contents of that paper perhaps I would know more.

Q Well, look at it. Do you remember the circumstances under which you received these notes? A No, sir; I do not remember.

Q In that year, 1907, did you own eighty shares of the stock of the United Water Supply Company? A I believe I did.

Q Did you have it in your possession? A No, sir; I did not have it in my possession.

Q Where was it? A I owed Mr. George C. Freeman and his son Orville asked me if I would turn it over as security or sell it to him. I told him yes, for a fair figure. That was about the end of the whole matter, you may say, beginning and end.

Q Where was the stock when you made this arrangement with Mr. Freeman? A I cannot recall it now, sir, that is positively. Of course, I will say one thing. I am an older man than I look to be and I have forgotten a great deal.

Q Did you make some arrangements with Mr. Freeman regarding that stock? A I did.

Q Will you detail now what it was? A No more than to turn it over to secure him. He had been a great friend of mine in many matters.

Q Did you owe Orville any money? A Nothing at all. I never had any dealings personally with him.

Cross examination by Mr. Conover.

Q Mr. Williams, did you have all your dealings in regard to the stock with Mr. Orville Freeman? A The principal part was that time when he asked me if I would turn it over to his father. I told him yes.

Q Did you have any dealings with him after that? A Well, I left it right there.

Q You never signed any paper of any kind? A I think I did; I believe I did. It is like a dream to me. I supposed everything was settled up.

Q Do you recall what was in the paper, Mr. Williams? A That paper that I read?

Q No, the paper that you think that you may have signed? A Well, merely turning the stock over at a fair figure.

Q But the figure was not mentioned? A No.

Q When was the price to be agreed upon? A When?

Q Yes. A Oh, I don't remember; it is a good while ago. I have had a good deal in my head since.

Q Did you deliver any certificates of stock to him at the time? A I don't remember. I remember this much. I asked Orville if he had got it and he said he was going to get it. That is about the size of it. This was signed when he asked me if I would turn it over to him.

Q How many shares of stock did you own all together, Mr. Williams? A I believe it was 100 shares.

Q Didn't you own 140? A There was forty to it, but just where it came in I cannot tell now. There is no use of my telling something that I don't know and cannot back up.

RECESS.

ALFRED J. GROSSO, sworn in behalf of the plaintiff.

Direct examination by Mr. Davis.

Q Mr. Grosso, you are a counsellor-at-law of the State of New Jersey? A I am.

Q And you were a counsellor in 1915 and you were a member of the Bar then? A Yes.

Q Did Mr. Hermon Freeman consult you in regard to this matter? A Yes.

Q Did you write to Mr. Conover about the matter? A Yes, I wrote to him.

Mr. Davis. I ask the attorney for the defendant to produce a letter from Mr. Grosso of Perry & Grosso, dated May 14, 1915.

(Letter produced.)

Q Please look at that letter. Did you sign that letter? A Yes.

Q Did you send it to Mr. Conover? A I did.

Mr. Davis. I offer the letter in evidence.

Mr. Conover. I do not know as I have any objection until I know for what purpose it is offered.

Mr. Davis. I want to find out whether he received a communication from Mr. Conover or saw Mr. Conover in response to the letter.

Said letter marked Exhibit P. 6.

(Letter read to the jury.)

Q Was there any result after sending out this letter? A In response to that letter Mr. Conover called at my office to discuss the matter and he said—I cannot remember his exact words, but he said that he remembered the transaction. I show him that agreement of September 5, 1907.

Q (*By Mr. Conover.*) On the telephone? A No. This was at my office. He came to my office. He came to my office and I showed him that agreement of September 5, 1907, and he said that he would look up the stock, that it was somewheres among his papers and he would look it up, and in a short time I would hear from him.

Q (*By Mr. Davis.*) Did you hear from him? A Why, between the date of that letter and the date of commencing suit we had a number of conferences regarding this matter and I wrote him possibly five or six letters. At one of these conferences Mr. Freeman, Hermon Freeman, was present, and he said that in looking over his papers he had come across an envelope in his safe marked "Freeman stock," and that in this envelope

there were forty shares of United Water Supply Company stock. I asked him to let me have those forty shares, and the other forty, he could let me have them later, and he said he was not prepared to turn them over just at that time, because the matters were not quite clear in his mind, and I told him that Mr. Hermon Freeman did not want to start any suit against him; all he wanted was either the stock or the proceeds of the sale of the stock. In the meantime, after having written that first letter, I had written to the United Water Supply Company, Mr. Conover had been in my office and he showed me a letter which he had received from the Water Supply Company regarding this stock and it was then he found out that the stock had been sold and in fact he admitted that it had been sold at the time, although he said he did not know whether all of it had been sold. He said that he was not quite clear in his own mind as to whether or not he had sold the whole eighty shares and he could not understand why it is he still had these forty shares in his possession. I said to him if he could produce a receipt or a check or any evidence of any kind showing that he had paid either Orville or George C. Freeman, or any of the Freemans, that my client had no intention of starting suit against him. So he came in one day—I don't remember at which conference this was, but he said that he had come across a check to Orville for, I think, it was $1,188, and he said that that was in payment of Orville Freeman's personal stock—Orville Freeman had thirty shares altogether, and that it was in payment of Orville's personal stock; that he had deducted a certain per cent. commission, $12, and had given him a check for the difference.

Mr. Davis. I ask the defendant to produce the letters of August 30, 1915, written to Mr. Conover.

Mr. Conover. We have no such letter.

Mr. Davis. And July 14, 1916.

(Letter produced.)

Q I show you a paper and ask you what it is? A It is a carbon copy of a letter written by me and sent to Mr. John C. Conover on August 30, 1915.

Q Was the original of that letter sent out? A Yes.

Mr. Davis. I have asked the defendant to produce it and he has failed to do so. I shall, therefore, have to offer the carbon.

Alfred J. Grosso, cross.

Mr. Conover. May I cross examine?

Mr. Davis. Surely.

Mr. Conover. I do not think there is any exact proof that it was sent, but I have no objection to it.

Letter marked Exhibit P. 7.

Q Is that your signature? A Yes.

Q Did you send that letter up to Mr. Conover? A I did.

Mr. Davis. I offer this in evidence, produced by the defendant.

Marked Exhibit P. 8, July 14, 1916.

Cross examination by Mr. Conover.

Q When were you first retained by Mr. Freeman in connection with this matter, Mr. Grosso? A Well, it was a short time prior to the writing of that first letter.

Q The first letter was May 14, 1915? A Well, it was a short time prior to that date.

Q Some time during that month? A Probably.

Q In May, 1915, you mean? A Yes.

Q Who retained you? A Hermon Freeman and Cyrus Freeman.

Q Who gave you information about the suit? A Why, the first information I received about the suit was from Hermon Freeman. I was up to Millington one evening—

The Court. You have answered the question.

Q Practically all of the facts came from Hermon Freeman? A Yes.

Q In this letter of May 14th—strike that question out. Did Mr. Hermon Freeman give you the information which was in the letter of May 14th? A He gave me all the information which I had pertaining to this matter.

Q And everything put in the letter was information which had been given to you by Mr. Freeman? A I put in my letter the understanding I had of the case, which I had at the time.

Q And your understanding was based on the facts received from Mr. Freeman? A Yes.

Q You say in this letter that your clients, Mr. Cyrus G. Freeman and Mr. Hermon, trustees of George C. Freeman—that some time ago their brother, Orville C. Freeman, pledged eighty

shares of stock of the Boonton Water Company with you to secure the payment of a loan which you had made to Isaac M. Williams. You meant to secure a note of Orville Freeman's didn't you? A No, I did not know anything about the note of Orville Freeman. I never understood that a note of Orville Freeman for this stock had been given as a pledge to secure the note of Orville C. Freeman.

Q Did you understand that Orville C. Freeman had given that eighty shares of stock to secure the payment of Williams' debt? A Yes.

Q It was Williams' stock? A At the time that was my understanding. I subsequently found out that that was not—I did not have the facts clear at the time I wrote that letter.

Q It was based on information you received from Mr. Freeman? A Yes, sir.

Q And you had been advised that Orville Freeman had pledged that stock with John C. Conover? A I would not say that.

Q That is what you said in your letter? A That is what I said in my letter, yes.

Q When did you make the inquiry of the United Water Supply Company as to what had become of this eighty shares of stock? A Shortly after I wrote to Mr. Conover I also wrote to the United Water Supply Company.

Q What did you find out? A Why, the first reply I got from the United Water Supply Company was from the—from the clerk—it was to the effect that Mr. Beam, the secretary of the company, was then out west and I would have to wait until his return before I could receive a reply to my letter. Subsequently I received a reply from Mr. Beam and you have the reply—I don't remember—

Q What was the substance of the reply? A Why, the substance of that reply was to the effect that they thought—that there was still forty shares of stock standing in the name of Isaac M. Williams and that the stock in question had been transferred along with some other stock by John C. Conover to Thomas Hillery in April, 1911.

Q So that you know then that the defendant did not still hold the eighty shares of stock? A Yes, I assumed that.

Q Never mind what you assumed. You knew that? A I knew then that he did not own all of the eighty shares; that

forty of them at least were sold, and I assumed that the other forty was still in the names of Mr. Isaac M. Williams and the forty shares Mr. Conover said he still had in the safe.

Q You did not know that the forty shares were part of the eighty shares that had been brought to the defendant by Orville Freeman? A That was the information I had from Mr. Conover.

Q When you claimed he said he had these eighty shares of stock in his safe you knew that was not so? A Yes, I knew that was not so, as far as the eighty shares were concerned.

Q Now, did you ever make any inquiry of anybody else? A Why, yes. Mr. Conover and I went to the Orange National Bank at one time and Mr. Conover told me that he had pledged forty shares of stock with the Orange National Bank, and we went there together to Mr. Holmes to see if he knew something about the forty shares.

Q So you knew at the time that Mr. Conover did not have the eighty shares in his possession, didn't you? A Yes; I knew that he had forty.

Q Well, you did not know that this forty were part of the eighty, did you? A Only from what Mr. Conover told me.

Q As a matter of fact, Mr. Conover never told you that he had this eighty shares in his possession? A Why, the first conversation I had with him he admitted the transaction and said that he would have to look for the shares.

Q For what shares? A That he had the stock somewheres in his possession and that it would require a little time to look through his papers.

Q As a matter of fact, he said he would look for it and see if he had them, didn't he? A No.

Q You knew if he did say that, he was mistaken when he said he had the eighty shares? A I did not at the time, because this was the first conversation we had.

Q Well, you know now that he was mistaken; that he could not have them there, don't you? Yes or no. A The identical shares, no.

Q What do you mean by "No"? That you did not know or that he could not have them? A I did know that he could not have the identical eighty shares, although I thought he might have some shares of his own which had been substituted for those shares.

Q But they would not have been the original eighty shares, would they? A No.

Q Was anyone else present at any of these interviews when you claim that he said he had these eighty shares? A No, not at that first conversation.

Q Well, at any of them? A The only time at which there was anyone present was that one conference we held in my office when Mr. Hermon Freeman was present, and then we had a conference in the Orange National Bank.

Q At that conference, when Mr. Freeman was present, what was said about those eighty shares? A He said he had found an envelope marked "Freeman stock," with forty shares in it, and I asked him to let us have the forty shares pending his looking up the other forty.

Q Didn't he tell you at that meeting that he had sold the stock? A No.

Q You had an understanding that there were only forty? A Why, he gave a number of reasons. At one time he told me that forty shares of the stock which originally belonged to Isaac M. Williams had been pledged with a man by the name of Harrison in Roseland, to secure a loan, and that when the note came due it was arranged that this note should be paid off at the Second National Bank, and that he had taken forty shares of stock and gone to the Second National Bank to substitute those forty shares temporarily towards the payment of the Harrison loan, and that he may have taken the forty shares out of that envelope.

Q Mr. Hermon Freeman was present at that meeting, you say? A You mean at the meeting in which we spoke about the Harrison affair in Roseland? Is that the meeting you refer to?

Q Yes. A No.

Q Was he present at any meeting at which any statement was made which would show that the stock had been sold? A I do not believe so.

Q After you got this information from the United Water Supply Company which showed that at least forty shares had been sold, did you communicate that fact to Mr. Hermon Freeman? A Yes.

Q When was that? A Well, when I got the information.

Q Well, when was it with reference to the beginning of the suit? A Before the suit.

Q It was before the suit? A Yes, sir.

Q You heard Mr. Freeman testify that he had no knowledge that the stock had been sold until after the defendant filed his answer, did you? A No, sir.

Q Well, if that was the testimony, is that correct? A No, it is not correct.

Q The testimony is not correct? A If that was his testimony it is not correct.

Q Mr. Grosso, you said that at the first meeting he said he would look up the stock. Now, at that first meeting he did say he had it, did he? A I cannot say that he said he had it, in those exact words. He admitted the transaction.

Q What do you mean by "he admitted the transaction"? A The first thing he asked me was if I had any papers or anything to help him in this matter, and I showed him that receipt of September 5, 1907, and he said he rememberd the transaction very clearly. He says, "Isaac M. Williams owed me money and this stock was left with me by Isaac M. Williams to secure his loan, and Freeman came down."

Q Which Freeman? A Orville Freeman. I do not know whether he said Orville E. Freeman before that or just Orville. He said he came to him once and paid him the money Williams owed him, partly in check and partly in notes; and he said, "The stock is in my safe somewheres. I will have to look for it."

Q If he knew the stock was in his safe why did he have to refresh his memory about the transaction? A Well, I don't know.

Q As a matter of fact, Mr. Grosso, did he say he did not know whether he had it or not and would look it up? A No.

Q You later testified that the defendant said he had come across an envelope marked "Freeman stock," but did not turn the stock over, as the matters were not quite clear in his mind. That is the substance of what you testified to. What were those matters that were not clear in his mind? A Why, he said he spoke about the substitution of stock in the Second National Bank, that he had taken some stock to the Second National Bank to pay a loan of Isaac M. Williams, for Isaac M. Williams and a man by the name of Harrison in Roseland, he had this stock maybe in mind, for all I know.

Q Then he did not admit that that was Freeman's stock? A No; he said it was in an envelope marked "Freeman's stock." He

said that was just what he could not tell. He said, "I want an opportunity to look over my books and papers and see whether I have it." He wanted a further opportunity to look over his papers.

Q Then at the time he was not sure whether he had it or not, was he? A What is that?

Q At that interview he was not sure whether he had the stock or not, was he? A He was sure he had an envelope marked "Freeman's stock" with forty shares in it.

Q He was not sure it was Freeman's stock, if he said "it may be mine"? A No.

Q Mr. Grosso, you have also said that your clients would not sue the defendant if he could produce a receipt that the money had been paid over to Orville, or any papers showing that the stock had been sold. Why did you say that if the defendant already admitted that he had the stock? A Well, I do not know whether I want to make that statement, whether I was particular enough. What I meant to say was that if he could show any evidence of payment of the proceeds of the stock or of the stock having been turned over to any Freeman, why, there was no intention on their part to start suit.

Q At the time you thought there was doubt, did you, whether he did have the stock or not? A I knew he no longer had the eighty shares. I knew he had forty shares.

Q You knew it was incorrect if he admitted that he had the stock? A At the time, yes.

Q Mr. Grosso, you had charge of this suit, didn't you? A Partly.

Q Who else had charge of it? A Mr. Davis.

Q He came in on the latter stages on some motions, didn't he? A Why, I spoke to him about the case and he came into the case when the matter was transferred from the Court of Chancery to this court.

Q Who got the original information from the Freemans? A I did.

Q The information that you put in this complaint was obtained from the Freemans, wasn't it? A Yes, sir.

Q And you put in the first complaint that the stock had been sold by Williams to Freeman, without stating whether it was an oral or written transfer, didn't you? A Yes.

Q And Mr. Freeman knew that statement was in there, didn't he? A I do not know whether he did or not.

Q It was based on information he gave you anyway, wasn't it? A Yes.

Q And then later you received from the defendant's attorney a demand for a copy of the papers mentioned in the pleadings, didn't you? A Yes.

Q And did you consult your clients then with regard to obtaining that information? A Yes.

Q Did you ask them whether the assignment referred to in the second paragraph, from Williams to George C. Freeman, was oral or in writing? A No, I did not ask them that. I asked Mr. Freeman to let me have any papers that he had in connection with this matter; that you had asked for copies of all papers in connection with the matter, and I told him to let me have all papers that appeared in the matter.

Q Didn't you specifically tell him the things we had asked for referring to those transactions? A I could not say that I did.

Q You would not say that you did not? A I do not think I did.

Q You asked him about the note, didn't you? A I believe I did ask him about the note.

Q Did you ask him whether the assignment from George C. Freeman to the present plaintiff was an oral or written assignment? A I do not remember whether I asked him that.

Q Mr. Grosso, you are an attorney-at-law. Did you answer this demand for copies of papers without consulting your clients? A No.

Q You did consult them and you asked them about these different things? A I asked him, as I said before, for all of the papers that he had in connection with the matter; that you had served us with a notice to produce copies of all documents that we had.

Q Didn't you give him the substance of that demand, telling him what things we wanted? A No, no.

Q You had read this declaration of trust, hadn't you? A Yes, I had read it.

Q And you noticed that it recited another assignment, didn't you? A No.

Q You did not? A No.

Q It says so very plainly right in it, doesn't it? A No, it does not.

Alfred J. Grosso, cross.

Q I ask you to read the first paragraph here where it recites the assignment of the bonds and mortgages, and "has also this day assigned to said trustees eighty shares of the stock of the United Water Supply Company." Does not that refer to another assignment there? A Not in my way of reading it.

Q Read up above here, it refers to separate assignments and also as to "assignments bearing even date herewith." A Yes.

Q And you say, as a counsellor, learned in the law, that that, to your mind, does not convey the idea of a separate assignment? A No; it was my impression that this declaration of trust was the only assignment of those eighty shares of stock.

Q You were not counting on any other assignment except what was in this declaration of trust? A What do you mean? From George C. Freeman to the trustees?

Q Yes. A No.

Q Then you answered our demand for copies, didn't you? A I don't know whether I prepared the answer to the demand for copies or whether it was Mr. Davis.

Q Whose signature is that? A That is my signature.

Q You did not read what you signed? A Yes; that is mine.

Q You prepared that, didn't you? A I guess I did, yes; I believe I did.

Q And that answer says that the assignment referred to in the second paragraph, which is the assignment from Williams to George, was a parole assignment? A Yes, it does.

Q And in March, 1915, some six or seven months at least after the suit was started, you first learned that there was only an oral assignment of that? A That was my impression of it; yes.

Q As a matter of fact, didn't you tell Mr. Freeman to look and see if there was not a written assignment of that? A No.

Q When did you first have any idea that there was anything but an oral assignment? A Why, in preparing for the trial of the matter I looked over the various papers and letters and so forth.

Q (*By the Court.*) You are only asked as to the date. A Several days ago.

Q (*By Mr. Conover.*) Several days ago? A Yes.

Q How did you come to learn of that? Did you ask Mr. Freeman whether there was one or not? A Why, I don't know whether I asked him or whether he volunteered the information. I think it was on our way to the court house here that we were

speaking about this matter, and he said that he had a recollection of their having some kind of a paper signed by Isaac M. Williams pertaining to this stock, and that was the first intimation I had of any assignment other than an oral assignment.

Q Did he tell you at the time what was in the paper? A No; I did not ask him for any particulars as to what the paper contained.

Q Didn't you consider it your duty then to advise the defendant's attorneys that this answer you had given was not correct? A No.

Mr. Davis. The answer admits that the eighty shares of stock was sold to Thomas Hillery for $3,200, so that he may give no proof on that point. I did want to put in the books showing when the transfer took place, if you will admit that.

Mr. Conover. The books will show when the transfer took place.

Mr. Davis. The books of the company, I mean.

Mr. Conover. Will that be sufficient for what you want? I think we can stipulate as to the time when the certificates were issued in place of these others.

Mr. Davis. I would prefer to have the books go in evidence now, as there may be some other features.

Mr. Conover. What do you want to offer them for?

Mr. Davis. For the purpose of showing that these shares of stock were transferred on the books of the company on a certain date.

The Court. What have you there, the stock book or the stock transfer book?

Mr. Conover. The stock book. There is no stock transfer book. There is just the certificate book and all that shows is the old certificates that have been returned, and on the stub is a reference to the certificate which was surrendered when the new certificates were issued and all it shows is the date of the new certificate. The new certificate was issued on April 15, 1911.

The Court. To whom?

Mr. Conover. Thomas J. Hillery.

The Court. For how many shares?

Mr. Conover. For 130 shares, 100 of which formerly stood in the name of Isaac M. Williams and 30 of which formerly stood in the name of Orville C. Freeman. I believe that is part of the certificates which were surrendered.

The Court. What were the numbers of the certificates surrendered?

Mr. Conover. 35 to 38 inclusive; 50 to 52 inclusive, and 25 to 30 inclusive.

The Court. Doesn't it say how many shares in it?

Mr. Conover. No.

Mr. Davis. I offer the stock book in evidence.
Marked Exhibit P. 9.

PLAINTIFF RESTS.

Mr. Conover. If your Honor please, I would make a motion to non-suit on the following grounds—

The Court. Have you a copy of that? Are you making it from a list prepared?

Mr. Conover. On the ground first that the cause of action is barred by the Statute of Limitations.

The Court. That has been argued fully, hasn't it, or was there something else.

Mr. Conover. I do not believe so, but I might state my other grounds and then perhaps go back to that.

In the second place that the plaintiffs have shown no title in themselves. There is no assignment of the stock from Williams to George C. Freeman. The plaintiff's testimony on that phase having been ruled out, I am not quite clear as to just what disposition your Honor made of his testimony.

The Court. I declined to rule that out.

Mr. Conover. You declined to rule out the testimony as to the written agreement by Williams.

The Court. The information upon which his previous testimony had been based was that assignment, so I declined to strike out the testimony. I intimated that it would be stricken out when he said the information came from Orville Freeman. Then subsequently he said that

the information came from this written assignment. Then I declined to strike it out.

Mr. Conover. Thirdly, that there was no assignment from George to the plaintiffs in this suit. Both the plaintiff Hermon and his attorney have said that the assignment was in the declaration of trust.

Your Honor will also bear in mind that the stock was sold before that transfer was made, and all that could have been transferred was a chose in action. The plaintiffs, as assignees, cannot sue in tort in their own names for conversion.

And I also move that same point I spoke of before, about the plaintiffs not having a right to sue in their own name, they are trustees, and there are other parties interested in the trust.

The further point is that Orville C. Freeman was the holder of a certificate of stock endorsed by Isaac M. Williams in blank and that the defendant had the right to deal with him as such owner of that stock; that Orville had possession and ownership, and there has been no proof of any notice to the defendant that he knew that Orville was acting for George.

I would also like to urge upon your Honor again at this time that the plaintiffs cannot be allowed to claim upon that written assignment.

And the last point is that the plaintiffs have failed to prove any damages. There has been absolutely no proof at all as to what was paid for this stock.

(After argument.)

The Court. My inclination about this is to hold your motion for non-suit until the conclusion of this case.

JOHN C. CONOVER, the defendant, sworn.

Direct examination by Mr. Conover.

Q Where do you live, Mr. Conover? A Orange, New Jersey.

Q How long have you lived there? A Twenty-nine years, I think, about.

Q What is your business? A Coal and lumber.

Q Did Isaac M. Williams owe you any money in March, 1906? A He did.

Q And did he give you anything as security for the debt? A Eighty shares of United Water Supply Company stock.

Q Did he deliver the certificates to you? A He did.

Q Did he give you a power of attorney to transfer that stock? A He did.

Q I show you a power of attorney purporting to be signed by Isaac M. Williams, dated March 28, 1906, and ask you if that is Isaac M. Williams' signature? A It is.

Mr. Conover. I understand that plaintiffs' counsel waives proof by the subscribing witness. I offer that in evidence.

Mr. Davis. All right.

Marked Exhibit D. 1.

Q Whose handwriting is that made out in? A The body is made out in my own writing.

Q Whose signature is that? A Isaac M. Williams.

Q Who signed as subscribing witness? A J. Wardley Hunt.

Q Who is Mr. Hunt? A He was at the time bookkeeper in my office.

Q What were the certificate numbers of the 80 shares of stock which Mr. Williams gave you as collateral? A 26, 27, 28, 29, 35, 36, 37 and 38.

Q (*By the Court.*) Ten shares each? A Ten shares each, yes, sir; eight certificates.

Q (*By Mr. Conover.*) Can you just give the Court and jury the agreement under which you held that stock? A It is my memory that he owed me about twenty-one or twenty-two hundred dollars that was secured by this eighty shares which he handed over to me, and these shares were taken in exchange for other shares when it was in the old water company.

Q Never mind about that. That does not apply to this suit. How long were you to hold that stock? A Until the bill was paid.

Q Turn to those certificates which you received and tell me whether the endorsement which is on the back of the certificate now was there when you held them, that is, date of September 7, 1907? A September 7, 1907. The endorsement by Mr. Williams was there.

Q (*By the Court.*) In blank on the back of the certificate? A Yes, sir, in blank.

John C. Conover, direct.

Q (*By Mr. Conover.*) Was that there in 1906? A In 1906.

Q Just look at the date of it and tell us whether it was there in 1906, or whether it was endorsed in 1907? A The endorsement by Mr. Williams was made in 1906.

Q How does it come to bear date September, 1907? A That was when it was transferred by Mr. Williams to Mr. Freeman, Orville E. Freeman; I was the witness to the signature.

Q When did you sign as witness? A On September 7, 1907.

Q When did Isaac M. Williams sign? A Some time before I got that or at the time I got that.

Q Did he sign in September, 1907, or did he sign back here in 1906? A It was signed when I got that.

Q Oh, you mean when you got this power of attorney? A Yes, sir.

Q Subsequent to that time did you have a transaction with Orville E. Freeman? A I did.

Q What was that transaction? A Mr. Williams came in to me and said that he had sold some stock that he held to Orville E. Freeman.

Q Did he tell you what stock? A The stock that I held?

Q And what certificate numbers? A Certificate numbers mentioned in this paper here.

Q Just read them. A 26, 27, 28, 29, 35, 36, 37 and 38.

Q That he had sold to Orville Freeman? A Yes, sir.

Q What arrangements were made about the debt of Mr. Williams, for which you had the stock as collateral? A Well, Orville E. Freeman was to pay it.

Q Himself? A Yes; he was to pay it, and he gave me a check for eleven hundred and some odd dollars, and a note for a thousand.

Q When did he give you that? A September.

Q I show you Exhibit P. 1 and ask you if that is in your handwriting? A That is in my writing, yes, sir.

Q Does that refresh your memory as to the date? A September 5th?

Q And what year? A 1907.

Q What was said, if anything, about what was to become of that stock? A Well, when the debt was paid the stock was to go back to Mr. Freeman.

Q His debt, do you mean? A Yes, the obligation that he incurred. He gave me the check and the note.

Q Do you mean when his note was paid he was to get the stock back? A Yes, sir.

Q Where did that meeting take place? A In my office.

Q Who was present? A Orville E. Freeman.

Q Anyone else? A Nobody else.

Q Was anyone else present in your outer office? A I had two bookkeepers there; then at the time Mr. Hunt and Mr. Arms—Mr. Arms has since died.

Q Mr. Hunt is in court, is he? A Yes, sir.

Q Will you stand up, Mr. Hunt? Is this Mr. Hunt (indicating)? A That is Mr. Hunt.

Q He was an employee of yours at the time? A He was.

Q And he was present in the office on the day when Mr. Orville Freeman gave you his check and note and agreed that you should hold the stock as collateral for the payment of his note or any renewals or extensions under it? He was in the office; yes, sir.

Q And did Mr. Orville Freeman at the time tell you that he was acting for George Freeman? A He never did.

Q Did you know that he was acting for George Freeman? A I did not.

Q Did you ever have any dealings of any kind with George C. Freeman in regard to this stock? A I never did.

Q Now, after that meeting did you later have any dealings with Orville Freeman in regard to the sale of the eighty shares of the stock which you had received from him? A I did.

Q What were those dealings? A I was approached by Mr. Hillery to see whether I could buy some of this stock of the United Water Supply Company, of which he, as well as Mr. Freeman and myself and others were directors, and I told him that I did not care to purchase the stock for the rest of the directors without apprising them of the facts. We were all directors together, so Mr. Freeman was to come downtown and come to the office. Mr. Freeman—Orville E. Freeman—was attending some meeting and I had a talk with him and I called up Mr. Louis Van Duyne and talked to him about it and we talked over the matter as to what price we would be willing—they would be willing to take for the stock, and we said that if Mr. Hillery was a mind to give $40 for the stock, that they were willing to sell, and I so reported that to Mr. Hillery. Mr. Hillery told me to buy it and I spoke to Mr. Van Duyne and Mr. Van Duyne sold

his stock and Orville E. Freeman said to sell his stock and to sell the eighty shares I then held as collateral on the note.

Q Did you sell it? A I did.

Q The eighty shares that you had gotten from Orville E. Freeman? A I sold eighty shares I got from Orville E. Freeman, and I sold thirty shares Mr. Orville E. Freeman originally took when the company was—and twenty shares that Mr. Isaac M. Williams brought to me at the office.

Q How much did you get for the eighty shares that you got from Orville E. Freeman and which you held as collateral? A $3,200.

Q What did you do with that money? A I paid all the money, all the $3,200, to Mr. Freeman.

Q On what date did you sell that eighty shares of stock to Mr. Hillery? A If my memory serves me right, on the 21st day of May.

Q Have you anything in your books that will show the date when you received the money from him? A I received the money and deposited it on the 21st day of May, 1908.

Q How much did you receive at the time? A $5,000.

Q Was that all of the purchase price? A No, sir; $5,200 was the price.

Q Did you receive the $200 later? A I did.

Q Does that $5,000 include the $3,200 for the eighty shares which you received from Orville? A It does.

Q When did you first receive— Strike that out. After you had paid over the money to Orville E. Freeman, did you receive any demand from him for anything in regard to this transaction? A I never did.

Q After the sale of that stock did you ever receive any demand from George C. Freeman, or any of his representatives, in regard to said eighty shares of stock? A I received a letter from Mr. Hermon Freeman.

Q Just one moment. Identify the letter. I show you Exhibit P. 4, dated February 2, 1911, and ask you if that is the letter to which you refer? A It is.

(Mr. Conover reads letter.)

Q Prior to the receipt of that letter had you ever seen Mr. Hermon Freeman in regard to this matter? A No.

Q He had never come to you at all? A Not about that.

Q Did he ever telephone you prior to the recepit of this letter? A No.

Q You heard his testimony that he did telephone you? A I did.

Q Is that correct? A Not correct.

Q After you received this letter how soon did Mr. Hermon Freeman see you? A Oh, it was a few days, a few days after I received it I think I called him up on the telephone.

Q What did you tell him? A I told him if he was coming downtown I would like him to stop.

Q Did he stop? A He did.

Q What was said at that interview? A Why, I asked him what he meant, what stock he meant, certificates in the letter, and he said eighty shares of stock that his brother Orville held, that I held of his brother Orville's as collateral on the note. I told him that that stock had been sold in 1908 some time, but could not tell him at the time just when, but it was in 1908.

Q What did he say, if you remember? A Well, he thought it was strange, because he said they had some paper in which I agreed to turn over to Mr. Orville E. Freeman stock after the obligation had been paid, and the obligation had been paid and the note, and he asked me if I had turned it over and I said "No," I had sold it on Mr. Orville E. Freeman's instructions.

Q And you paid him over the money? A And paid him over the money.

Q Did he say anything further? A Well, I don't remember.

Q Well, did you have any communication with him or interviews after that? A Yes, I think later on, probably a month or two after that, he stopped again and asked me if I had found anything whatever and I said "No," that there was nothing at all, the stock was sold and I sold it to Mr. Hillery.

Q Did you ever tell Mr. Hermon Freeman or Mr. Grosso that you had those eighty shares of stock in your possession somewhere among your papers and had not yet been able to locate them, but that you would look the same up and deliver them to the plaintiffs? A I did not.

Q Did you ever tell Mr. Hermon Freeman that you had been very busy and had not yet had time to look the papers up in your safe; that you felt sure you had them? A I never told him that; I told him this a number of times after those letters of 1915 and 1916. He stopped me and asked me if I had ever

looked the thing up, and I said I had not, that the eighty shares in question had been sold; that I would look up what stock I did have; that is what I did say.

Q Now, did you have any other stock in your possession? A I had stock of my own and stock of one or two other people that I had bought.

Q Did you have stock that you had bought from other people that had not yet been transferred on the books of the company? A I did.

Q From whom did you get those different shares of stock? A I got—

Q Would you like to refer to the stock certificate book? A I can tell you the names; I do not know the quantities, but I can tell you the names; I think John J. Gilroy of New York, I bought his shares, ten shares, and Samuel E. Ayres; I think he was in New York; I am not positive about that, ten shares, and forty shares of Mr. Isaac M. Williams, and that forty shares was the forty shares that was up as collateral with William Henry Harrison.

Q Does William Henry Harrison appear on that particular four certificates for ten shares each? A I think so.

Q Have you the stock book? A Yes, I have the stock book here. It appears on certificate No. 34 for ten shares; on certificate No. 33 for ten shares; on certificate No. 32 for ten shares, and on certificate No. 31 for ten shares.

Q Those were the forty shares that you had purchased and you had in your safe? A Yes, sir.

Mr. Conover. I would like to offer this in evidence, certificate marked D. 2, certificate 34; D. 3, certificate 33; D. 4, certificate 32; D. 5, certificate 31.

Q How did you pay Mr. Orville E. Freeman for his thirty shares of stock? A Thirty shares originally.

Q How did you pay that, by check? A Paid that by check.

Q Is that the check (indicating)? A It is.

Q I notice it is for $1,188. A That is a percentage of one per cent.; that is for the time I was going back and forth to Boonton; they agreed that I charge one per cent., which I did.

Mr. Conover. I offer that check in evidence.

Check marked Exhibit D. 6.

Q How much did you pay to Isaac M. Williams out of the proceeds of this sale? A Well, I paid all together perhaps $2,400, less the one per cent.

Q Did you pay that by check? A That was paid by check.

Q Are these the checks? A Yes, sir; they are.

Mr. Conover. I offer those in evidence. They are checks of John C. Conover drawn on the Orange National Bank and payable to Isaac M. Williams; No. 1582, dated May 28, 1908, $200; No. 1585, dated June 2, 1908, for $300; No. 1587, dated June 3, 1908, for $1,000; No. 1588, dated June 3, 1908, for $600; No. 1593, dated June 8, 1908, for $276.

The Court. I do not quite understand how this amounts to $2,400; I understand it was only forty shares of the Williams stock you had to sell.

Witness. He originally had 140 altogether, of which Mr. Orville Freeman had eighty.

Q You sold twenty to Hillery? A I sold twenty in that lot of 130, eighty of Mr. Orville E. Freeman's, twenty of Mr. Isaac M. Williams'; then I had forty left, which was up as collateral with Mr. William Henry Harrison.

Q That you sold in 1907? A No; that was sold at the same time.

Checks marked Exhibit D. 7.

A Juror. Would it be pertinent for a juror to ask a question here?

The Court. Yes.

A Juror. As I understand it, the defendant has shown checks in which he paid for thirty shares in Orville E. Freeman's own name and also the shares owned by Mr. Williams. Could he show also for the eighty shares which he paid Orville Freeman?

Witness. The eighty shares that were paid to Mr. Orville E. Freeman was paid in cash.

Q Could you show a receipt for that? A I haven't the receipt; I did have; I never had a receipt at the time the thing was consummated; there was a little statement made of the other different payments, of which he got one and I had one, and the

reason for that is this, at the time the stock was sold Orville E. Freeman owed me the note, which did not come due until July 6th, if my memory serves me right, and he told me to get the money and pay him, or keep the money and get the note, and that I intended to do according to his instructions, paying him the other money, which I did, and then between that and the 6th of July, when the note came due, I concluded that it would be a good deal better for him to pay his own note, so I gave him the thousand dollars and the note was paid by him.

Q And you did not take any receipt for the money? A If I did I haven't the receipt; I do not remember now. As I remember it, there was just a little memorandum made at the time I paid him the money, one of which I got and one of which he took with him; the notes were paid and the checks were paid and he got his money, and that settled it.

Mr. Conover. If your Honor please, I would like to introduce at this time the account of Orville E. Freeman with the Mutual Trust Company. That shows on July 6, 1908, the date when the note was payable at the Mutual Trust Company. Perhaps I had better prove that first.

Q Mr. Conover, the note you received from Orville E. Freeman, what was the due date of that note? A July 6th; it was renewed several times.

Q When was the last renewal due? A July 6th.

Q What year? A 1908.

Q What amount was it? A $1,000.

Q Where was it discounted? A Orange National Bank.

Q Where was it payable? A Mutual Trust Company.

Mr. Conover. This account shows that on July 6, 1908, there was a charge against the account of Orville E. Freeman for $1,000.

I want to introduce that in evidence and have it marked as an exhibit. There is no objection, I understand.

Marked Exhibit D. 8.

Mr. Conover. I would also like to introduce in evidence the account of Mr. George C. Freeman in the Mutual Trust Company; the plaintiff has already testified that he had an account there; that is the only one he knew of. It shows no changes, either charges or credits in the account, from September or August 7, 1904, to the date of the closing of

the institution sometime in 1916, except credit of interest, and at no time did the account exceed $213.68. I ask that that be marked as an exhibit.

Marked Exhibit D. 9.

Q Mr. Conover, did you ever tell Mr. Grosso or Mr. Freeman that you had forty shares of the stock that you received from Orville E. Freeman in your possession? A I did not.

Q Was Orville E. Freeman a director in the United Water Supply Company? A He was.

Q Do you know of your own knowledge whether the plaintiffs or their representatives had made any inquiries of the United Water Supply Company as to what had become of this stock, of your own knowledge, not what anyone told you, unless it happened to be the plaintiffs in this suit, or their representatives?

The Court. How would he know that unless he is in charge of the office and there all the time?

Mr. Conover. Well, he is an officer, your Honor; he has been president and also treasurer; it would have to be from inquiries made of him or inquiries of which the plaintiff had told him; I limit it to that.

The Court. Well, if you can answer the question, all right.

Witness. I do not know what the question is now.

(Question read by the stenographer.)

A I was told this.

Q By whom were you told it? A Mr. Beam.

Q Then we do not want that At the time you received the stock from Orville E. Freeman as collateral did he give you any instructions at the time to sell the stock? A When I first received it?

Q Yes. A No.

Cross examination by Mr. Davis.

Q Did you tell Mr. Grosso that you had another forty shares of stock of this company in your possession at the time you spoke to him? A Mr. Grosso asked me if I had any shares of the company and I said yes.

Q Did you tell him that after you found forty shares of the stock in an envelope marked "Freeman stock" in your safe? A I did not; I did tell him I had found forty shares.

Q These are the forty shares that are referred to in this $2,400 proposition? A The forty shares I had got from Mr. Isaac M. Williams?

Q Yes. A That was it.

Q And the forty shares you had in your possession at the time you spoke to Mr. Grosso were sold by you in 1908 when the other sales were made? A It was not. It never has been sold.

Q Then at the time you talked with Mr. Grosso, these forty shares were not yet sold? A They were not yet sold.

Q And the forty shares of Isaac M. Williams were sold? A Eighty shares that Mr. Orville E. Freeman had, twenty shares that Mr. Isaac M. Williams brought in and were sold at the same time that the eighty shares were sold, and the forty shares were the ones Mr. William Henry Harrison held as collateral on the obligation.

Q (*By the Court.*) Then from what you have said you mean you still hold that stock? A I do.

Q (*By Mr. Davis.*) But the forty shares that you have now are not the forty shares that were held by Mr. Harrison as collateral security? A The same shares, only transferred in my name.

Q When did that transfer take place? A Oh, that did not take place until years afterwards. I cannot tell you when.

Q Why did you pay Mr. Williams $2,400 if all that you sold in 1908 were twenty shares of his? A It included those forty shares. In other words, there was thirty shares of Mr. Orville E. Freeman's that were sold, and twenty shares that Mr. Williams brought to me, and eighty shares I held as collateral, a hundred and thirty shares, and that hundred and thirty shares was sold.

Q (*By the Court.*) Do you mean that is what you have sold? A I mean that there were thirty shares of Orville E. Freeman's; that eighty shares of Mr. Orville E. Freeman's that he held through Mr. Williams, and twenty shares Mr. Williams brought to me, makes 130 shares that I sold and received the money on the 21st day of May, 1908.

Q They are the ones that went to Mr. Hillery? A They are. Now, then, Mr. Williams came to me and said, "I can get the shares from Mr. William Henry Harrison providing you will sell them." I told him I would either sell them or would see that they were sold. So when he did not get them at the time he got the twenty, he asked me if I would not call up Mr. William Henry

Harrison and ask him to bring the shares around and I called him up, but we got no response at all, and Mr. Harrison said if he wanted the stock at all to come up and get it.

Q This was all in 1908? A And Mr. Amos R. Harrison at the time was a director in the Second National Bank, if I remember rightly, as well as myself, and I asked Mr. Amos R. Harrison if he would not go to his brother and get the forty shares of stock and deliver them to the Second National Bank, and I would see that he got the thousand dollars that was due to Mr. Harrison. That is the reason that there were two checks made out to Mr. Williams, one for a thousand dollars and one for $600. One check of a thousand dollars was made out to Mr. Isaac M. Williams and another check of $600. The thousand dollar check, I went down with Mr. Isaac M. Williams to the Second National Bank and delivered the thousand dollar check over to the man in charge to turn over and deliver me the forty shares of stock, and I gave him the $600 check which paid for the forty shares at $40 a share.

Q If I understand correctly, Mr. Harrison released the collateral which he was holding on Mr. Williams' indebtedness? A When the bank got the thousand dollars I gave him the check; Mr. Isaac M. Williams endorsed the check and turned it over to the bank.

Mr. Davis. I have the Orange National Bank official here and want to know if we could not do with a certified copy of their entries rather than have the books down here?

Mr. Conover. If they will tell me what they want to prove I may be willing to consent to a certified copy. They do not appear to be willing to do that.

J. WARDLEY HUNT, sworn in behalf of defendant.

Direct examination by Mr. Conover.

Q Were you formerly employed by John C. Conover of Orange? A I was.

Q And when did you enter his employ? A 1898.

Q When did you leave? A May, 1908.

Q And you were in his employ then on September 7, 1907? A Yes.

John C. Conover, cross.

Q Did you ever see Mr. Herman Freeman in the office of Mr. John C. Conover during that period? A No, sir.

Cross examination by Mr. Davis.

Q Are you sure that you never saw Mr. Freeman there? A Yes.

Q Were you there all during the day? A Oh, no.

Q You were not there during all of the day? A No.

Q So he may have been there at a time when you were not present? A Yes.

Q (*By the Court.*) Up to what period was that? A In 1908, May 1st, 1908.

Q And you have not been there since? A Not employed.

Q (*By Mr. Davis.*) You worked there in September, 1907? A Yes.

Q There would be nothing to prevent Mr. Williams being there at a time when you were out? A Oh, no; I was out for a time.

Q Did you know Mr. Hermon Freeman at the time? A Yes, as far as I know him now.

Q What were your duties? A I was a bookkeeper, confidential clerk.

Q Did you have occasion to go to the bank and things like that? A Yes.

Adjourned until January 16, 1920, at 9:30 o'clock in the forenoon.

Friday, January 16, 1920.

Continued pursuant to adjournment.

Counsel present, as before stated.

JOHN C. CONOVER resumes the stand.

Cross examination (continued) by Mr. Davis.

Q Mr. Conover, I think that you spoke of the forty shares of stock of Mr. Williams that had been pledged to Mr. Harrison. You sold those forty shares of stock in 1908; is that right? A No, sir; I bought those forty shares of stock in 1908.

Q Who bought them? A I did.

Q You bought them yourself? A Yes, sir.

Q And you paid the money for it? A I did.

Q That money was paid over to Mr. Williams or to Mr. Harrison? A The $600. The thousand dollar check was endorsed by Mr. Williams in the Section National Bank and that was turned over to cashier for the thousand dollars that was due on the stock and the stock was handed to Mr. Williams and Mr. Williams handed the stock to me. After that was done I handed Mr. Williams the $600 check, the full $1,600 for the forty shares of stock.

Q You then received the forty shares of stock and you kept them in your possession and you had them in your possession up to the time that you had an interview with Mr. Grosso in his office? A I had them in my possession, I think, until they were transferred. I do not just remember when that was. I had them in my possession when Mr. Grosso talked to me.

Q You testified they were not transferred until after you saw Mr. Grosso at his office? A I don't know, but the book would tell when they were transferred.

Q These forty shares, were they in the envelope which you had marked "Freeman's stock"? A No, I do not believe so, but still they may have been. I do not believe so. I do not remember whether they were in the envelope that had marked on it Issac Williams' stock, and I do not remember having them in the envelope marked "Freeman's stock," still Orville E. Freeman's name may have been on some other envelope.

Q Did you tell Mr. Grosso that they were in an envelope marked "Freeman's stock"? A I do not remember that I did.

Q Did you receive money for Orville's thirty shares of stock and the eighty shares of stock that had been pledged by Mr. Williams at the same time? A. The same time.

Q The transaction with Mr. Hillery, as I understand it, included 130 shares of stock? A Yes, sir.

Q Thirty of those were Orville's personal shares? A Yes, sir.

Q Twenty of them were Isaac M. Williams' personal shares? A Yes, sir.

Q And the remaining eighty were shares that had been pledged by Mr. Williams to secure the debt to you? A The eighty shares, yes.

Q And were subsequently assigned to Orville E. Freeman? A Yes, sir.

Q That amounted to $5,200? A Yes, sir.

Q Of which you received $5,000 at the time? A Yes.

Q Paid by check, $5,000? A Yes.

Q What did you do with the money? A Deposited it in the Orange National Bank.

Q Mr. Conover, when was it that you received that money? Do you know? A I think on the 21st of May, 1908.

Q Shortly after that you gave Mr. Orville Freeman a check for $1,188. Is that right? A That is right.

Q Do you know the date when you gave him that money? A I think it was in the early part of June, probably about the 6th.

Q That is within a month after you received the money from Mr. Hillery? A Yes, within that, because I got my check on May 21st, and of course waited until I knew the check was cashed.

Q And this $1,188 represented the sale of thirty shares, minus one per cent. commission? A Yes, sir.

Q About that same time you settled with Isaac M. Williams, gave him the proceeds of his twenty shares? A I settled with Mr. Isaac M. Williams along in June some time, the early part—well, I should say about the 10th of June, I should say.

Q You settled up with Mr. Isaac M. Williams not only for the twenty shares of stock sold to Mr. Hillery, but also for the forty shares of stock that you had bought in the Harrison matter? A Yes.

Q That would amount to $2,400 altogether? A Yes.

Q You have produced checks here to show the payment of that $2,400 to Mr. Williams? A Yes.

Q Why didn't you give Orville the balance of the money due him on the eighty shares at the time you gave him the $1,188? A Well, at the time the reason I did not give him the money was this: We were not sure that we could get—we had tried to get the stock from William Henry Harrison, but it did not come downand we had to wait until it did come and then we settled with Isaac M. Williams and Mr. Orville E. Freeman at the same time told me to hold a thousand dollars to pay the note which we thought was the wisest thing to do and after paying him the difference between the $3,200 and deducting the one per cent. I retained the thousand dollars for settling up with

Mr. Isaac M. Williams. Mr. Freeman was in the office occasionally and I said to him—I said, "Mr. Freeman, I think it would be better to let you pay your own note and it would be a good deal better for me to give you the thousand dollars, and along in the latter part of June or early in July I gave him the thousand dollars and he had the note go through and it was paid. Now that was the last payment I made Mr. Freeman. I had paid him the other amount before that.

Q At the time of the transaction with Mr. Hillery, you had in your possession, didn't you, eighty shares of stock that had been pledged by Mr. Williams? A Yes.

Q And you were able to turn that right over to Mr. Hillery in exchange for the $5,000? A Yes.

Q In other words, you gave Mr. Hillery the 130 shares of stock before you got your check? A Yes.

Q What connection did Mr. Orville Freeman have with the forty shares of stock that Mr. Harrison had? A Well, he and I, before disbursing any of the money—he and I thought it was the wiser thing. Mr. Williams was a relative somehow, I don't know just how, and they were anxious to clear it up and get Mr. Williams out of his money troubles. They were very anxious to get this in and get the stock in and get the money and clear the thing up, and I said at the time that I could not pay him any money until I got all that done.

Q You did clear up then Mr. Williams' matter with Harrison without resorting to any of Orville's money; isn't that correct? A No, I think that this money was deposited in the bank and the $5,000 was in there and out of that $5,000 we checked probably $1,200 or $1,188, and we checked $2,400 besides—well, not all the $1,200, not exactly; but the $2,400 and the $1,200 less one per cent. commission, would amount to $3,600. I had of the $5,000 $1,400 left and we got this stock. I then bought the stock; I had some money, cash money, and I bought the stock and money came in and I paid Mr. Freeman the amount of $3,200 less the $1,000 and the one per cent. in cash somewheres between the time I gave Mr. Williams the last check and —well, I would say the latter part of June. Now I retained the thousand dollars for the note and after retaining the thousand dollars, as I say, Mr. Freeman came down and I said to him, "I think it would be better for you to pay your own note."

And this is the time I turned over the thousand dollars and that was the same time, July 6th.

Q After you had settled with Orville Freeman for his thirty shares of stock you had left $3,200 for eighty shares of stock? A That is right.

Q In the bank? A Yes, sir.

Q And you used part of this $3,200 to settle up with Mr. Harrison after that for his matter? A I think so.

Q And that left you then owing Orville Freeman for the money you had given out of the proceeds of the sale for the forty shares of stock pledged to Mr. Harrison, didn't it? A I suppose you may consider it that way.

Q In other words, if you had given out of the $3,200 in your possession to the credit of Mr. Orville E. Freeman, a certain amount to pay on Mr. Williams' Harrison indebtedness, when you bought that stock it was up to you to make good for the indebtedness? A Yes.

Q Now, did you make good by replacing that money, that amount of the Williams money, that was in your account? A I did not.

Q That left you still under a duty to account to Mr. Orville E. Freeman for $3,200? A Yes, sir.

Q When was the first time you paid any money to Mr. Orville E. Freeman on account of that $3,200 indebtedness? A I would say now that the day I gave a check of a thousand dollars and $600, I think, if I remember, that it was on June 1st.

Q Then you gave a check for a thousand or six hundred dollars, you say? A I made two checks; one of a thousand and one of six hundred, and it was after I got the stock, it was when I made it good.

Q To whom? A The check was made to Mr. Isaac M. Williams for a thousand and another check made for six hundred, and it was after that when I paid Mr. Freeman.

Q You are not able to fix exactly the date? A I cannot; no.

Q Did you pay it by check? A I did not.

Q You paid it by cash? A I did.

Q Did you take a receipt? A That I cannot tell now, because I cannot locate the receipt. I do not believe I took a receipt. We had a little memorandum—I had a little memorandum and he had a little memorandum.

Q How much was the first amount that you paid to Mr. Orville C. Freeman? A That I could not tell you. The total amount was paid; I cannot say just how much the total amount was in either payment.

Q Aren't you able to give the amounts in each payment? A The last one was a thousand dollars.

Q And the other $2,200 was split how? A I do not remember whether it was fourteen hundred and a balance or something else. I could not tell you. I do not remember.

Q And none of these other payments was made by check? A No, sir.

Q And for one or the other did you receive a receipt? A I would not say that I did not. I could not find the receipt.

Q If you did, you have no receipt? A I have no receipt at the present time.

Q Where were those payments made? A These other cash payments I would say in my office.

Q Are you sure about that? A I wouldn't say for sure, but I think so.

Q They were made directly to Orville E. Freeman? A Yes, sir.

Q Was anybody present at the time? A No, sir.

Q Just the two of you? Do your books show anywhere the receipt of the $5,000 from Mr. Hillery? A It does.

Q Will you please show me on your books? A My check book is right under my overcoat there.

(Check book handed to witness.)

Q This then is the stub of the check book? A Yes.

Q Did you keep any other books showing the account? A I did not.

Q The only thing that would show the receipt of $5,000 is the stub of the check book? A That is all.

Q And does the stub of the check book also show the payment to Orville E. Freeman of $1,188? A It does.

Q This was evidenced by the check already produced? A Yes.

Q And it also shows the different checks to Isaac M. Williams which has been produced in evidence? A It does.

Q Was there anything on your books to show the money paid to Mr. Orville Freeman? A In cash?

Q Yes. A No.

Q Where did you get this cash to pay Mr. Freeman? A One thousand of it I borrowed of my brother and the balance I had. I had some money and I had it when I started to buy these shares. I had to go round and find out first whether they would sell, and when I went I went with a check in my pocket, or cash in my pocket, and invariably when I went the first time I did not get anything because they thought I wanted to buy the stock and they wanted more than Mr. Hilery was willing to pay, and in other cases they would not sell the stock without they could sell the bonds they had, and of course I had to find out whether he would take the bonds or not, so I carried anywhere up to a thousand dollars in cash and with a check in my pocket, and where I could not settle by check I settled for cash, and I had probably at the time that much money in my pocket.

Q Did you withdraw the money from the bank in order to have it on your person in cash? A I did not.

Q Then the money that was used did not come out of the account at all? A No.

Q It came from other sources? A It came from other sources.

Q From your brother in one instance? A From my brother in one instance.

Q In other instances was it money that came into the business? A It was cash money that came into the business, and when I took the money I put a slip in.

Q Did you keep books of account in the business? A In fact, that would wholly apply to the business; yes.

Q You kept books of account in the business? A Yes.

Q And those books of account showed all cash received? A Oh, sure.

Q Are you able to show by the books of the business the cash received and which you withdrew and charged to yourself? A It was not charged to myself.

Q What is that? A It was not charged to myself.

Q I understood you to say that this other money that came in was money of the business. I understood you sometimes used that for your personal matters, and when you did you put a little slip in. A Yes, and then when I paid that off the slip was destroyed.

Q You say you kept this little note here so it got in the books? A No, it just laid in the cash drawer, just the same as cash.

Q And that simply showed an obligation on your part to make good to the cash drawer for something that had— A Been taken.

Q Now, do your books show any repayment to the cash drawer for the money used to pay Mr. Orville Freeman? A No; just simply the money was taken out and when I replaced the money it was taken out.

Q Yes, but where did you get that money to replace it? A I sold some stock that I had, other stock that I got, and when I sold it I took the money and paid it.

Q Do the items of the sales of the other stock show on your books? A None of the stock shows on my books at all.

Q Does it show in your check account? A Some would; yes. I don't remember just where now.

Q Are you able to show the record of the sale of any stock on your books that would give you the money that you used to pay Mr. Freeman? A I don't know if I can now, and still I may. I have not hunted it up. Not this minute; no.

Q Didn't it occur to you that it might be important to show where you got money to pay these amounts to Mr. Freeman? A It did not occur to me; no.

Q You say the last thousand dollars that was paid to Mr. Freeman was borrowed from your brother; is that correct? A I would not want to say that the last thousand—one of the thousands was borrowed from my brother.

Q Why did you borrow that thousand dollars when you had already in the account $3,200 from the sale of the stock? A Simply because part of that $3,200 had been paid.

Q You were getting the stock personally. Mr. Freeman was acquiring no interest in those shares? A He said if I would do that—I told him I would take the stock.

Q Then you used part of that with Mr. Freeman's permission? A I did.

Q If I gather it correctly, you used up the balance of his credit in your account to buy your own stock? A Well, it was not my own stock.

Q Were you to buy stock on your own account? A Well, the point was this, I was to get the stock and I had to pay for the

stock; then I took it and to get it I had so much money in the bank and Mr. Freeman deferred payment of his until that was accomplished.

Q You subsequently made it good by cash payments? A I did.

Q But nowhere, in any of your books, you have absolutely nothing in writing to show payment to Mr. Freeman of any part of this $3,200. Is that correct? A I haven't anything in my books to show anywheres. I did have, as I say, a slip.

Q Have you at any time since the transaction was made had a receipt or been able to discover a receipt? A I have not.

Q There were no books which would show further than the entries on this stub of the check book would show? A No. The only money as far as the check book is concerned would be the amount that went into the amount I paid out. That is the only record I kept of that.

Q Was that in a separate book? A Oh, no.

Q The check book is all that would show any of these stock transactions? A So far, yes.

Q Are you able to point to any one single incident where you bought stock from any other person and paid for it in cash? A I could not now, because I haven't the stock.

Q When did you first consult your son for legal advice about this matter? A I think when—I think notice of suit—that you were going to sue.

Q Have you looked at the answer filed for you in this case? A I don't remember that I have.

Q You do not remember that you have or you don't know? A I don't know; it has been so long ago since it was started.

Q This isn't so long ago, this answer to the amended complaint, filed March, 1915.

Q Mr. Conover, was it before or after you remitted to Mr. Orville Freeman the proceeds of his thirty shares of stock that you arranged about the forty shares of the Harrison stock? A I think it was before.

Q At the time you remitted this $1,188, that arrangement was still standing? A Yes, sir.

Q (*By Mr. Conover.*) The Harrison matter had not yet been settled up? A I don't remember about that, but the checks would show.

Q The checks here show Mr. Williams, May 28th, $200; June 2nd, $300; June 3rd, $600; June 3rd, $1,000; and then on June

8th, Isaac M. Williams, $276, and that check is marked in full for United Water Supply Company stock. That would be the balance on the entire stock Do you recall if the Harrison matter had been settled up when you remitted to Mr. Orville Freeman $1,188? A I don't remember; if you have got the check here that will tell you, because the matter was closed when I gave Mr. Williams the last check. (Witness examines check.) The Harrison matter was closed when I gave Mr. Williams this check of $276.

Q And the Harrison matter only included forty shares of stock? A That is all.

Q The forty shares of stock would be $1,600? A Yes, sir.

Q And you had already remitted to Mr. Williams on June 6th, over $1,600, had you not? A I gave Mr. Williams on May 28th, according to these checks, $200, and on June 2nd I gave him $300, under objection.

The Court. You have already gone over that, I think twice, Mr. Conover. These long answers are prolonging this case. I think this question can be answered yes or no, as many of the others can be.

Q And you had already remitted twenty-one hundred? A Yes, sir.

Q And then the balance was only due on his personal twenty shares, is that correct? A Yes, sir.

Q Then when you remitted to Orville Freeman his $1,188, there was no longer any need of retaining any of the balance of $3,200 to protect you in the Harrison matter, was there? A No.

Q Why did you deduct it? A Why, because in the first place I had given him some money in cash and he told me to hold that $1,000 with the note and after that we agreed to have the note go further and I gave him a thousand dollars.

Q Mr. Conover, paragraph 14 of your answer says as follows: "Defendant in the year 1908 paid part of said purchase price at the request and at the direction of said Orville E. Freeman to said Isaac M. Williams, and paid the balance of said purchase price to said Orville E. Freeman"; that is not true, is it? A I think so, yes.

Q But I understand you to say you paid $3,200 completely over to Mr. Orville Freeman? A I did pay $3,200 over to—

first, $1,600 and he paid $1,600 to Isaac M. Williams, and when I got the stock I replaced what I had paid over by an agreement with Mr. Freeman.

Q That is your explanation of this paragraph 14, is it? A Yes.

Q Did you explain to Mr. Freeman or Mr. Grosso that you had made these payments in cash to Mr. Orville Freeman? A I do not remember whether I did or not.

Q You would not say that you did not? A No, I would not, because I do not remember.

Re-direct examination by Mr. Conover.

Q Mr. Conover, do you still follow your business practice of putting slips in the cash drawer when different people take out money?

Mr. Davis. I object to that as immaterial.

The Court. I will sustain the objection.

Mr. Conover. If your Honor please—

The Court. Objection has been sustained.

Mr. Conover. You do not wish to hear me?

The Court. No; I am very clear about that.

Q Mr. Conover, are your personal transactions which appear in your check book written up in any ledger? A No.

Q They are not then written up today in any way? A No.

Mr. Conover. If your Honor please, I neglected to read one entry in the account of Orville E. Freeman and also offer the accompanying book, the debit book of the Mutual Trust Company, which shows that same charge of a thousand dollars against Orville Freeman on July 6, 1908. I would like to offer that at the present time. That is on page 354.

The Court. What does that show?

Marked Exhibit D. 10.

Mr. Conover. This debit book No. 12 covered a period from April 7 to September 5, 1908, and shows under date of July 6, 1908, $1,000.

Q Does it show what it was, whether it was a note charged to his account A That just says Orville E. Freeman, $1,000.

John C. Conover, re-direct.

Q Was a check paid or note charged to his account? A It would not show in here if it was a check. It does not show whether it is a check or a note.

Mr. Conover. I also wish to offer in evidence the answer to the demand made for papers referred to in the pleadings, signed by Perry & Grosso, to which I have already referred.

Marked Exhibit D. 11.

JOHN C. CONOVER resumes the stand.

Q (*By Mr. Conover.*) Mr. Conover, were there two separate corporations which at different times owned the property of what is now the United Water Supply Company?

The Court. He has already said that. He has said that this stock in question had taken the place of the Boonton Water Company stock.

Mr. Conover. That is all; I was not positive he had said that.

If your Honor please, I have another witness here and if there is no objection by Mr. Davis I would like to put him on later. He is merely to substantiate Mr. Conover's statement that he borrowed $1,000 from him.

The Court. Is there any objection to that?

Mr. Davis. I did not understand that.

The Court. He asked permission to put on Mr. Conover's brother from whom he borrowed.

Mr. Davis. That is, the mere fact that he borrowed $1,000. Of course, if the other Mr. Conover can show that that thousand dollars was paid to Mr. Freeman it is relevant.

TESTIMONY CLOSED.

The Court. The case having closed, it becomes the duty of the Court to rule upon motions for non-suit and I will deny the motion and an exception to that ruling will be noted. Do you now desire to move for a direction upon the same grounds?

Mr. Conover. I do, your Honor.

Motion for Direction of Verdict.

Counsel for the defendant moves for the direction of a verdict upon the same grounds upon which the motion for non-suit was based and I have some additional grounds.

The Court. Upon those grounds the Court will deny the motion and an exception will be noted. If there are additional grounds they may be now stated.

Mr. Conover. Will your Honor grant me the privilege of making a further statement in connection with the Statute of Limitations?

The Court. If you think you have a new point to urge.

Mr. Conover. I want to point out first, your Honor, that in the case of—

Mr. Conover. (After argument.) I believe your Honor has already said that the motion for a direction of verdict is considered as made upon the same grounds as the motion for a non-suit and you only wished to hear me on any additional grounds?

The Court. Yes.

Mr. Conover. On the question of title, your Honor, the first assignment which the plaintiff claims under is the one from Isaac M. Williams to George Freeman. In the first complaint there is an allegation, not specifying whether it was oral or in writing; in the second complaint there is an allegation that the assignment was oral. A demand for copies of documents in the pleadings was made. The plaintiff answered that it was in parole. They did not discover or they did not think of this last assignment, according to their testimony, until a few days before the trial. The only evidence to support that assignment was the testimony of Mr. Orville Freeman. He had a co-trustee who was not familiar with the subject at all. I understand it is an established rule that they must produce all the parties who may have custody of the paper. That is, on the question of the proof of its contents. Your Honor will recall that I objected to the admission at the time on the ground that it had not been sufficiently proven that there was any assignment at all. Mr. Hermon Freeman said that he did not know whether the paper was to George or Orville. He did not know whether the paper said eighty shares of stock or not. He did not think the paper mentioned the certificate numbers. On the question of proof of such instruments I would like to refer your Honor—

The Court. Is this a motion to strike out?

Mr. Conover. I would move to strike it out and also on the ground that they have not proved any transfer from Williams to Orville; that there is no testimony showing the stock was transferred. I have been unable to find any New Jersey cases exactly on that point.

The Court. I have already passed on it. It is a matter on which the Court has already ruled and upon which you have your exception.

Mr. Conover. If your Honor please, the evidence was only—

The Court. That question was raised during the trial and the evidence admitted.

Mr. Conover. Will your Honor hear it on the motion to strike out?

The Court. That is the only way I can hear it. That is the reason I asked you whether it was a motion to strike out or on your motion for the direction of a verdict?

Mr. Conover. I am making a motion to strike out.

The Court. (After argument.) The motion will be denied.

Mr. Conover. Your Honor will allow me an exception?

The Court. It will be noted. I might say at this point, if the plaintiff so desires, the pleadings may be amended to show that there was a written assignment between Williams, and also that there was a written assignment from Williams to George Freeman.

Mr. Davis. I ask permission to amend it to that effect.

The Court. It may be done.

Counsel sum up.

THE COURT'S CHARGE.

The Court charged the jury as follows:

DUNGAN, *J.*

Gentlemen: The plaintiffs in this case, Cyrus G. Freeman and Hermon M. Freeman, seek to recover from the defendant, John C. Conover, $3,200.00, with interest, for eighty shares of the capital stock of the United Water Supply Company which, admittedly, was in the possession of the defendant, John C. Conover, but which he sold for that sum of money. Before the plaintiffs are entitled to recover in this suit they must show that they had title to this stock.

The stock originally belonged to Isaac M. Williams. He owed the defendant, John C. Conover, a debt of about $2,100.00 and he turned these eighty shares of stock over to the defendant to secure that debt. It appears that Mr. Williams also owed George C. Freeman, the father of these plaintiffs, and the father of Orville Freeman, who has been many times mentioned in this case, but who is now deceased. Subsequently to the turning over of this stock to Mr. Conover the plaintiffs claim that Williams turned over the stock to George C. Freeman on account of the debt which Williams owed to him and that it was agreed that George C. Freeman should pay the debt due to Mr. Conover and that he should have the stock.

Hermon Freeman, one of the plaintiffs, testified that this stock was turned over to his brother, Orville, for his father. At first when he was testifying nothing was said about a written instrument, and it was not until after it had appeared upon cross examination that this testimony was based upon statements made by his brother, Orville, and the Court had expressed his views that such testimony must be stricken out, that Mr. Freeman testified to a written paper which he had seen in his brother Orville's possession. He said that this written paper, signed by Mr. Williams, said that "I hereby agree to turn over to George C. Freeman certain shares of stock when the debt is paid." Just what debt it was he does not say, whether the debt of Mr. Conover or not. He says that this stock was the stock of the Boonton Water Company, or of the United Water Supply Company, the stock of the latter company being the stock in question. While this is a little indefinite, if there was sufficient

in the paper to denote an intention on the part of Mr. Williams to turn over this stock to Mr. Freeman and it was accepted by him, or in his behalf, and to absolutely transfer the stock upon the payment of the debt, then the defendant in this case could not take advantage of any informality in that paper. If there was sufficient upon the paper, as I have said, to evidence a meeting of the minds of Mr. Williams and George C. Freeman, or one acting in his behalf, that it was the intention of Mr. Williams to turn it over, to sell it, and of Mr. George C. Freeman to purchase it.

Mr. Williams, an elderly gentleman, testifies that there was a debt due from him to George C. Freeman; that there was nothing due from him to Orville, and that Orville asked him if he would turn it over to his father, and he thinks he signed a paper. His memory has failed him on many things and he does not remember just what was in this paper which he thinks he signed. True, whatever there was was turned over to Orville, and Hermon Freeman says that he will not be absolutely sure that it was not Orville's name in this paper which he saw in Orville's possession.

As I have said, it is true that all the transactions were had with Orville, and any papers, if there were any, were actually turned over to Orville, and he transacted all the business with both Mr. Williams and Mr. Conover, and both plaintiffs, his brothers, say that their father was very aged, unable to attend to his own business, and that Orville attended to his affairs, even to the extent of mingling his father's funds with his own; and his father's bank account, which is here produced, shows that there were no changes in that bank account, although he was a man of property, receiving interest, from the year 1904 to the year 1916, except credits of interest, and these dates cover the dates of the transactions in this case.

Gentlemen, if you find that there was a transfer of this stock from Williams to George C. Freeman then, in view of the other testimony in the case relating to a transfer of the stock from George C. Freeman to the plaintiffs that would make good title in the plaintiffs to the stock then in the possession of Mr. Conover. On the other hand, if there was no assignment from Mr. Williams to George C. Freeman, but the assignment was to Orville and it became his own stock and never was the stock of George C. Freeman, then, when he attempted to turn it over to

the plaintiffs he attempted something he could not legally do and the plaintiffs took no title to the stock and hence cannot recover in this suit.

However, the mere fact that Orville acted, in relation to this stock with Mr. Conover as though it were his own, when it was, in fact, his father's, if it was, but without disclosing that fact to Mr. Freeman, would not deprive the plaintiffs of their right of action, because it is a well-known principle of law that an undisclosed principal, or his assignees, may appear and hold the other party to the contract made with the agent even though the agent failed to disclose that he was acting as agent and to disclose his principal. Therefore, if these plaintiffs are otherwise entitled to recover, the mere fact that Orville dealt with Mr. Conover as though this stock were his own, without disclosing to him that the stock was, in fact, his father's does not prevent them from maintaining this suit and recovering from the defendant. However, this rule is tempered by another which is that "Where a person contracts with the agent of an undisclosed principal, payments to such agent prior to notice of his agency is a good defense to an action thereafter brought by the principal, or his assignees, on the contract." And this is precisely what Mr. Conover claims he did. He says, in effect, that he never knew of any interest of George C. Freeman in this stock. He admits that he held this stock. He admits that he was paid off and that the debt for which he held this stock was paid, but he says that it was paid by Orville and that all his dealings were with Orville, and he claims that after Orville had paid in cash eleven hundred and some odd dollars, he gave him a note for $1,000.00, and then requested him to sell this stock; and that he did sell the stock. That is, he sold it in this way: Thomas J. Hillery wanted to purchase some of the stock and he sold him 130 shares which was made up in this manner: Eighty shares were the shares of stock which Williams had assigned to him but the title to which belonged, as he claims, to Orville, after the Williams debt to Conover had been paid; twenty shares additional which Mr. Williams owned; thirty shares of stock which belonged to Orville personally, making one hundred and thirty shares altogether, which he turned over to Mr. Thomas J. Hillery at the rate of $40.00 a share.

He says that the note at that time—this transaction took place, I think, in May or June—that the note given by Orville to him,

and that it is an admitted fact that it was Orville's note, was not due until in July, and because of some other transaction relating to forty shares more of Mr. Williams' stock, Orville agreed with him that he should not pay him at that time but that he should retain that money and pay him later. He says that he did pay Orville all but a thousand dollars and then, in July, when Orville's note became due he gave Orville a thousand dollars to go and pay that note. Gentlemen, if that be true, then, of course, the plaintiffs are not entitled to your verdict and your verdict must be in favor of the defendant.

But it appears that under date of February 2nd, 1911, Mr. Hermon Freeman wrote a letter to Mr. Conover in which he said: "I am very anxious to get father's business into proper shape. I would, therefore, most earnestly request that you get together the eighty shares of stock of the United Water Supply Company which were left in your hands to sell, not later than the 15th of this month." At first he said he had had some conversations before this letter was written. He then says that he does not recall that; that he does not think that he had any conversations until after the letter was written, but that there might have been, but he thinks he had a telephone conversation. Of course, all these discrepancies in the testimony, if there be any, you are to consider in determining what weight you are willing to give to the testimony of various witnesses, not necessarily upon the ground that they are not telling the truth, but, as has been suggested in the argument, these transactions occurred years ago, and it may be that the witnesses are trying to be honest at this time but that their memories have failed them, and that it is because of failing memory and not because of willful untruthfulness that these discrepancies arise. However, you have a right to consider them upon either ground.

Hermon Freeman says that in these conversations, and he thinks there were five or six of them, Mr. Conover never once asserted that he had sold this stock at the request of Orville. That from the very first conversation Mr. Conover asserted that he thought he had that stock; that he thought it was in his safe, and that he would look it up and let him know about it, and that he never knew, he says, until after this suit was brought that Mr. Conover claimed that he had sold this stock and that he had paid Orville the purchase price of the stock.

Mr. Grosso says that this statement of Mr. Hermon Freeman is not strictly correct because he says that Mr. Freeman was present at one interview when Mr. Conover asserted, or suggested, that he had sold a part of the stock. What Mr. Grosso says is that when this matter came to him in May, 1915, he wrote a letter to Mr. Conover. It seems that the plaintiffs, receiving no assurance, or anything satisfactory from Mr. Conover, employed Mr. Grosso as their attorney and that then he wrote a letter to Mr. Conover and in response to that Mr. Conover called at his office and they discussed the matter. At that time Mr. Conover said nothing about having sold the stock; he said he would look the matter up; that it was probably somewhere among his papers and that he would hear from him. He said they had a number of conferences and Mr. Conover said at one of these conferences that he had come across an envelope marked "Freeman Stock" and it had forty shares in it. Mr. Grosso said he asked him to turn the forty shares over and he said he was not quite clear in his mind about it and he was not really ready to turn them over. That he said at another conference, or the same one—the evidence is not quite clear as to that—that he could not understand why he had these forty shares in his possession.

All this is denied by Mr. Conover. Mr. Conover says that when he was first approached by Mr. Hermon Freeman he told him substantially what he said in court, that he had transactions with Orville; that, at Orville's request, he had sold the stock, and that he had paid Orville. He does say that he did say something about forty shares of stock because he says he still held the forty shares of stock, over and above the hundred shares of stock sold to Hillery, which Mr. Williams owned, and that these forty shares were in an envelope marked "Williams"; and he says "Freeman" may have been upon the envelope; he also says these forty shares were discussed, but he denies that he ever said, or intimated, either to Mr. Freeman or Mr. Grosso, that those forty shares were a part of the eighty shares which had been assigned to him by Mr. Williams as security for his debt.

But, gentlemen, while Mr. Conover appears to have a returned check to Orville for the thirty shares of stock which he sold to Mr. Hillery for Orville, a check for $1,188.00, which is less one per cent., which he said it was agreed he should

charge for commission;—he produces that check and it is in evidence; he appears to have a check, which he produces for the sixty shares of stock of Mr. Williams, amounting to $2,400.00, less his commissions; twenty assigned with one hundred and thirty to Hillery, and forty assigned to himself individually; he has those checks. He produces here no receipt, no check, no paper of any kind, evidencing any payments to Orville for the stock in question. He says that the reason he has no return check is that he paid Orville in cash, and that he does not recall whether Orville gave him any receipt or not.

Gentlemen, where testimony differs, or where you have cause, have reason from the inherent improbabilities of the situation, to doubt a statement, you have a right to consider the probabilities and to consider whether or not these statements of Mr. Conover relative to the payment in cash to Orville are true; whether or not, in view of the character of his transactions with these other people, he would have been likely to have dealt in that way with Orville. If he has convinced you, as I have already said, that he has paid Orville and that the transaction was solely with Orville, and that it was not disclosed to him that Orville was acting for his father, then, your verdict must be for the defendant. Otherwise, it may be for the plaintiffs, unless you find that this action on behalf of the plaintiffs is barred by the Statute of Limitations.

The defendant claims that even though you should find that this transaction was a transaction between George C. Freeman and him, that is, the stock transaction, in the first place, even though you should find that Orville was acting as the agent for his father, George C. Freeman, and even though you should find that he has not, in fact, paid this money to Orville as the proceeds of the sale of that stock, yet you cannot render a verdict against him because the suit of the plaintiffs is barred by the Statute of Limitations. And that statute provides that in a case of this kind the plaintiffs must bring their action within six years after the cause of action shall have accrued. He says this stock was sold in 1908. This action was not brought until 1916, eight years after the sale of the stock. If that be true, then, even though you find that Orville was acting for his father, and even though you find that the defendant has never paid one penny to Orville as the proceeds of the sale of that stock, or to his father, your verdict must be for the defendant, unless you

find that by his own actions he is estopped from asserting the Statute of Limitations and interposing it in a case of this kind.

The mere concealment of an act does not serve to stay the running of the Statute of Limitations. If Mr. Conover said nothing, did nothing, to deceive the plaintiffs except to remain silent; if he said nothing at all to them and they had let this time go by, then they cannot maintain their action, but the rule of law is that where the conduct of a person has induced the other to take such a position that he will be injured if the first be permitted to repudiate his acts, then this principal of estoppel is applicable and he is estopped from asserting this Statute of Limitations; he is estopped from saying he did not have the stock at the time when he said he had it, and he is estopped from saying that it had been sold at a time so remote that the Statute of Limitations applies.

The facts, as claimed by the plaintiffs, I have already recited to you. Mr. Hermon Freeman says, and so does Mr. Grosso, that as to forty shares of this stock the defendant claimed he had it in his possession as late as 1911, and that these forty shares were a part of the eighty shares which Mr. Williams put up as collateral for his debt, and which, admittedly, were the property either of Orville or of George C. Freeman. If you find that he did that; that the plaintiffs relief upon it; if you find from the testimony that that induced the plaintiffs in this case to take a position, to refrain from bringing suit at that time—and in 1911 the statute had not run—if you find that they relied upon that, and they did, or refrained from doing, something which they might have done to protect their interests, and that they were injured by that statement, then the defendant is estopped from pleading the Statute of Limitations.

However, the burden of proof is upon the plaintiffs to establish this estoppel. It is upon them to establish by the greater weight of the evidence that the defendant did say things to them which led them astray, which deceived them, and which led them to take a course other than they would have taken to protect their own interests. The defendant says that he never made such statements. He says that it was shortly after the sale of this stock, or shortly after the death of Orville—he thinks in 1908 or 1909—that a conversation took place in which he told them that he had sold this stock and paid the money to Orville. Gentlemen, if that be true, then there has been no bar to his

pleading the Statute of Limitations; there has been nothing which should act as an estoppel, and the defendant has the right to interpose the Statute of Limitations and to rely upon that, and to your verdict upon that ground. But it will be for you to say whether or not he is estopped by his own acts and words from asserting it. If you find that he is, then the plaintiffs should not be barred from their action because of the lapse of time.

The question of damages then arises. The stock admittedly was sold for $3,200.00, and interest is claimed at the rate of six per cent. from the date of this demand, April 15, 1911, and whatever sum you find due from the defendant to the plaintiffs, if you find anything due, should bear interest at the rate of six per cent. from April 15, 1911. However, the defendant says, you will recall that when he received the $3,200.00 the note of Orville was not then due, and that he gave him $1,000.00 of this $3,200.00 to pay that note. Of course, if that be true, whether Orville was acting for a disclosed or an undisclosed principal would make no difference. Even though the transaction by Orville was for George, the agreement was that the defendant's whole debt should be paid and it appears that it was paid, partly in cash and partly by this $1,000.00 note, so that if from the proceeds of the sale of the stock $1,000.00 was used to pay a debt which admittedly was due to the defendant, then, he is entitled to be credited with that $1,000.00 upon the proceeds of the sale of the stock, and in that event, the plaintiffs would be entitled only to $2,200.00 with interest, as aforesaid.

I have here several requests to charge. First: "If the jury find that the defendant received the money from the sale of the 80 shares of the capital stock of the United Water Supply Company mentioned in the complaint more than six years prior to September 28, 1916, the date when this action was started, the plaintiffs cannot recover anything from the defendant and your verdict should be for the defendant." I charge you that, with the qualification I have already made in my main charge. That is true, unless you find that the defendant is estopped by his own acts and statements from setting up the Statute of Limitations.

Second: "If the jury find that the defendant sold said 80 shares of the capital stock of the United Water Supply Company more than six years prior to September 28, 1916, the plain-

tiffs cannot recover anything from the defendant and your verdict should be for the defendant." I charge you that, with the same qualifications.

The third, "A simple power conferred by one person upon another to sell property does not create an express trust which suspends the Statute of Limitations as to the proceeds of the sale," and fourth, "The holder of a certificate of shares of stock, accompanied by an irrevocable power of attorney to transfer them, is the apparent owner, and when he is a holder for value without notice his title cannot be impeached," are mere statements of law which are not made applicable at all to this case and I decline to charge them.

Fifth: "If you find that the certificates of stock mentioned in the complaint were assigned to plaintiffs by George C. Freeman after defendant had sold said stock to Thomas J. Hillery, your verdict should be for the defendant." I charge you that, unless, as I said with reference to the Statute of Limitations, the defendant made the statements which the plaintiffs said that he made and hence is estopped from setting that up as a defense in this case.

Sixth: "If you find that Isaac M. Williams did not assign the stock mentioned in the complaint to George C. Freeman, your verdict should be for the defendant." I have already charged you that.

The seventh, eighth and ninth I decline to charge except as I have charged.

"Seventh. If you find that Isaac M. Williams did not deliver to George C. Freeman the certificate or certificates of stock representing said 80 shares of stock, or execute and deliver to George C. Freeman a written assignment and power of attorney to transfer said shares, your verdict should be for the defendant."

"Eighth. If you find that George C. Freeman did not deliver to plaintiffs the certificates of stock representing said 80 shares of stock, or execute and deliver to plaintiffs a written assignment and power of attorney to transfer said shares, your verdict should be for the defendant."

"Ninth. If you find that George C. Freeman, or his alleged representatives, the plaintiffs in this suit, for over two years after discovering that Orville E. Freeman had transferred the

stock mentioned in the complaint, refrained from suing to recover it or the proceeds thereof, you are warranted in inferring that the transfer of the stock was within his authority. (53 N. J. L. 189.)"

Tenth. "Any knowledge of the alleged agent, Orville E. Freeman, is chargeable upon his alleged principal, George C. Freeman, whenever the principal, if acting for himself in place of the agent, would have received notice of the matter known to the agent." I charge you that.

Eleventh. The plaintiffs allege that the certificates of stock mentioned in the complaint were delivered to the defendant by Isaac M. Williams endorsed in blank. The holder of such a certificate is the apparent owner. He is clothed with all the indicia or evidence of ownership. His muniments of title were evidence of absolute ownership. If you find that Isaac M. Williams later sold and transferred said stock to Orville E. Freeman, or if you find that Isaac M. Williams sold said stock to some third person who allowed said Orville E. Freeman to have possession of said certificates of stock endorsed in blank, and that said Orville E. Freeman pledged said certificates of stock with the defendant to secure the note of said Orville E. Freeman to said defendant, together with any renewals thereof, and that said Orville E. Freeman later authorized and directed defendant to sell said stock for $3,200 or any other sum, and that the defendant did sell said stock for the amount so authorized and paid over the proceeds thereof to said Orville E. Freeman before said defendant received any notice that said George C. Freeman claimed any right or interest in said stock, then your verdict should be for the defendant."

I have already said that substantially to you and I charge you that.

The twelfth and thirteenth are mere statements of law. I decline to charge them.

"Fourteenth: "Plaintiffs admit that George C. Freeman allowed said Orville E. Freeman to have possession of the certificate for said 80 shares of stock endorsed in blank and authorized him to authorize defendant to sell said stock. If you find that Orville E. Freeman instructed defendant to sell said stock for $3,200, or any other sum, without disclosing that George C. Freeman claimed any right or interest in said stock, and if you

find that defendant sold said stock for $3,200, or any other authorized amount, and paid said sum to Orville E. Freeman before said defendant received any notice that George C. Freeman claimed any right or interest in said stock, such payment is a complete defense to this action and your verdict should be for the defendant." I have already charged you that in substance and that is a correct statement of the law of the case.

Fourteen-a-b-c. These are mere statements of law without making them applicable to this case and I decline to charge them.

I decline to charge the fifteenth. The plaintiff admittedly sold this stock for $3,200 for which he must now account unless he is excused from doing so by the bar of the statute, to which attention has already been called.

Sixteenth: "In regard to the question of notice you should remember that the alleged principal, George C. Freeman, is chargeable with any notice of the alleged conversion which his agent may have received, if said principal, acting for himself in place of the agent, would have received the notice of the alleged conversion which the agent received." I charge you that.

Seventeenth: "The burden of proof is upon the plaintiffs to establish by preponderance of the proof the facts which will entitle him to a verdict." I charge you that.

(Jury retires.)

Mr. Conover. If your Honor please, I object to one statement in regard to the testimony that was not correct. I want either to ask your Honor to correct your charge or take exception to that part where you were referring to the assignment from Williams to George C. Freeman and said that if they found that there was such an assignment, that the plaintiff had showed title because the latter testimony showed a transfer from George to the trustees. As I recall it there was no such testimony; there was only the declaration of trust.

The Court. I have my exact words upon that and I can tell you exactly what I did say. I put it that way purposely.

Mr. Conover. I ask an exception to the ruling of the Court that if you find there was a transfer of this stock from Williams to George C. Freeman, then in view of the other testimony in the case relating to a transfer of stock from George C. Freeman

to the plaintiffs that would make good title in the plaintiffs to the stock then in the possession of Mr. Conover.

I also ask for an exception to that part of your Honor's charge where you said in substance that even though Orville dealt with Mr. Conover without disclosing his principle the plaintiff can recover. I think that was erroneous.

The Court. You may take an exception.

Mr. Conover. Also to that part of your Honor's charge in which you said that at the time the note was given that the defendant claims that Orville requested him to sell the stock. That was the contention of the defendant and not of the plaintiff. He contended there was no such request and that he held it as collateral. Your Honor said that the defendant claims that Orville requested the defendant to sell at the time he received from Orville the note.

The Court. What difference does that make? Tell us what difference that makes.

Mr. Conover. It might have an effect upon the jury upon the question of credibility. I do not believe it has any bearing except on that point.

Also to that part of your Honor's charge where your Honor said if you find that the defendant by his own action induced the plaintiff to take the position of refraining from bringing suit, that then he would be barred from setting up the Statute of Limitations.

The Court. To what the Court said on the question of estoppel an exception will be noted.

Mr. Conover. Also an exception to the proviso as to the estoppel which your Honor added to the first and second requests to charge. Also an exception to the refusal to charge the fourth request; also as to the charge as to the estoppel in the fifth request.

The Court. Suppose you cover it all by taking an exception to the Court's refusal to charge the various requests specifically as requested. Doesn't that cover it in a few words?

Mr. Conover. It does.

DEFENDANT'S REQUESTS TO CHARGE THE JURY.

1. If the jury find that the defendant received the money from the sale of the 80 shares of the capital stock of the United Water Supply Company mentioned in the complaint more than six years prior to September 28, 1916, the date when this action was started, the plaintiffs cannot recover anything from the defendant and your verdict should be for the defendant.

2. If the jury find that the defendant sold said 80 shares of the capital stock of the United Water Supply Company more than six years prior to September 28, 1916, the plaintiffs cannot recover anything from the defendant and your verdict should be for the defendant.

3. A simple power conferred by one person upon another to sell property does not create an express trust which suspends the operation of the Statute of Limitations as to the proceeds of the sale.

4. The holder of a certificate of shares of stock, accompanied by an irrevocable power of attorney to transfer them, is the apparent owner, and when he is a holder for value without notice his title cannot be impeached.

5. If you find that the certificates of stock mentioned in the complaint were assigned to plaintiffs by George C. Freeman after defendant had sold said stock to Thomas J. Hillery, your verdict should be for the defendant.

6. If you find that Isaac M. Williams did not assign the stock mentioned in the complaint to George C. Freeman, your verdict should be for the defendant.

7. If you find that Isaac M. Williams did not deliver to George C. Freeman the certificate or certificates of stock representing said 80 shares of stock, or execute and deliver to George C. Freeman a written assignment and power of attorney to transfer said shares, your verdict should be for the defendant.

8. If you find that George C. Freeman did not deliver to plaintiffs the certificates of stock representing said 80 shares of stock, or execute and deliver to plaintiffs a written assignment and power of attorney to transfer said shares, your verdict should be for the defendant.

9. If you find that George C. Freeman, or his alleged representatives, the plaintiffs in this suit, for over two years after

discovering that Orville E. Freeman had transferred the stock mentioned in the complaint, refrained from suing to recover it or the proceeds thereof, you are warranted in inferring that the transfer of the stock was within his authority. (54 N. J. L. 189.)

10. Any knowledge of the alleged agent, Orville E. Freeman, is chargeable upon his alleged principal, George C. Freeman, whenever the principal, if acting for himself in place of the agent, would have received notice of the matter known to the agent.

11. The plaintiffs allege that the certificates of stock mentioned in the complaint were delivered to the defendant by Isaac M. Williams endorsed in blank. The holder of such a certificate is the apparent owner. He is clothed with all the indicia or evidence of ownership. His muniments of title were evidence of absolute ownership. If you find that Isaac M. Williams later sold and transferred said stock to Orville E. Freeman, or if you find that Isaac M. Freeman sold said stock to some third person who allowed said Orville E. Freeman to have possession of said certificates of stock endorsed in blank, and that said Orville E. Freeman pledged said certificates of stock with the defendant to secure the note of said Orville E. Freeman to said defendant, together with any renewals thereof, and that said Orville E. Freeman later authorized and directed defendant to sell said stock for $3,200, or any other sum, and that defendant did sell said stock for the amount so authorized and paid over the proceeds thereof to said Orville E. Freeman before said defendant received any notice that said George C. Freeman claimed any right or interest in said stock, then your verdict should be for the defendant.

12. The person who holds stock as collateral security for a debt is a bona fide holder for value to the same extent as though he were a purchaser for value.

13. By commercial usage, as universally acknowledged by the business community as the law of negotiable paper, and sanctioned by repeated adjudications in our courts as well as in those of other states, a certificate of stock accompanied by an irrevocable power of attorney, either filled up or in blank is, in the hands of a third party, presumptive evidence of ownership in the holder. And where the party in whose hands the certifi-

cate is found is a holder for value, without notice of any intervening equity, his title cannot be impeached. The holder of the certificate may fill up the letter of attorney, execute the power, and thus obtain the legal title to the stock and such a power is not limited to the person to whom it was first delivered, but enures to each bona fide holder into whose hands the certificate and power may pass. Under these well recognized principles large amounts of property daily pass from hand to hand; are sold and re-sold, or hypothecated for loans without an actual transfer on the books of the corporation, and without other evidence of ownership than the possession by the holder of a certificate and power of attorney. *Prall* v. *Tilt,* 28 N. J. L. 479, 483, Court of Errors and Appeals.

14. Plaintiffs admit that George C. Freeman allowed said Orville E. Freeman to have possession of the certificate for said 80 shares of stock endorsed in blank and authorized him to authorize defendant to sell said stock. If you find that Orville E. Freeman instructed defendant to sell said stock for $3,200, or any other sum, without disclosing that George C. Freeman claimed any right or interest in said stock, and if you find that defendant sold said stock for $3,200, or any other authorized amount, and paid said sum to Orville E. Freeman before said defendant received any notice that George C. Freeman claimed any right or interest in said stock, such payment is a complete defense to this action and your verdict should be for the defendant.

14a. Fraudulent concealment of a cause of action will not avoid the running of the statute of limitations.

14b. Fraudulent concealment of a cause of action will not justify the inference of a new promise which will take the action out of the operation of the statute at law.

14c. Fraudulent concealment of a cause of action does not estop defendant from setting up the bar of the statute.

15. If you first find that the plaintiffs are entitled to recover anything from the defendant, you then come to the question of the amount of such recovery. The general rule that the measure of damages for conversion is the market value of the property at the time of the conversion is not applicable to the conversion of stock which is a commercial security of a fluctuating value in the market. The true measure of damages in an action

for conversion of stock is the highest intermediate market value between the time of the conversion and a reasonable time after notice of conversion within which to replace the securities. *Dimock* v. *U. S. Bank,* 55 N. J. L. 296, 302-304; *Galigher* v. *Jones,* 129 U. S. 193.

16. In regard to the question of notice you should remember that the alleged principal, George C. Freeman, is chargeable with any notice of the alleged conversion which his agent may have received, if said principal, acting for himself in place of the agent, would have received the notice of the alleged conversion which the agent received.

17. The burden of proof is upon the plaintiffs to establish by preponderance of the proof the facts which will entitle him to a verdict.

EXHIBITS

EXHIBIT P. 1.

Orange, N. J. Sept 5/07

Rec'd of Orville E. Freeman check for ($1198 67/100) One Thousand One Hundred Ninety-eight and 67/100 dollars and his note for One Thousand Dollars $1000.00 dated Sept 5/07 for Four months in payment for note due me from I. M. Williams and I agree to turn over to Orville E. Freeman Eight Thousand Dollars of stock of The United Water Supply Co., held by me of I. M. Williams.

John C. Conover

EXHIBIT P. 3.

GEORGE C. FREEMAN
TO
CYRUS G. FREEMAN ET AL
TRUSTEES

THIS INDENTURE, Made this 19th day of January, Nineteen hundred and ten, Between George C. Freeman of the Town of West Orange, in the County of Essex and State of New Jersey, of the first part, and Cyrus G. Freeman of the Township of Passaic in the County of Morris and State of New Jersey and Hermon M. Freeman of the Town of West Orange,

Exhibit P. 3.

County of Essex and State of New Jersey, of the second part, who, and the survivor of them, and the heirs, executors or administrators of said survivor, are hereinafter called the Trustees. WITNESSETH:— That whereas the said George C. Freeman desires to convey to the said Trustees all his lands and real estate and to assign, transfer and set over unto the said trustees all his bonds and mortgages and certain shares of stock and coupon bonds hereinafter mentioned, upon certain trusts hereinafter set forth and declares: and whereas, the said George C. Freeman by his deed of conveyance bearing even date herewith has conveyed to the said Trustees all his lands and real estate lying, situate and being in the County of Essex and the State of New Jersey and has by three Deeds of Assignment bearing even date herewith, assigned to the said Trustees all his bonds and mortgages one of which said Deeds of Assignment assigns a mortgage upon land in County of Union in the State of New Jersey, another of which said Deeds of Assignment assigns a mortgage upon lands in the County of Morris, in the State of New Jersey, and the other of which said Deeds of Assignment assigns various mortgages upon lands in the County of Essex in the State of New Jersey, and has also this day assigned to the said Trustees eighty shares of the stock of United Water Supply Company, and ten shares of the stock of Mountainside Realty Company and three coupon bonds (Nos. 83, 84 and 85) of the said United Water Supply Company.

NOW THEREFORE, it is hereby agreed, set forth and declared, that the said Trustees, hold all the said lands and real estate and all said bonds and mortgages, shares of stock and coupon bonds upon the following trusts; to lease, rent, care for, hold and possess the said lands and real estate, to tear down, remove, make changes, alterations and additions in or to the buildings or any of them, now upon said lands or hereafter to be erected or placed thereon, and to contract for, erect and construct and to place new or other buildings upon the said lands to keep the buildings erected or to be erected or placed upon said lands insured against loss or damage by fire to receive the rents and incomes from said lands and real estate, to mortgage, sell, grant and convey the said lands and real estate and any part or parts thereof and any right, interest, license or easement therein, to barter grant and convey the said lands and real estate or any part or parts thereof for any other lands and

Exhibit P. 3.

real estate or for any security, property, or thing of value, whether real or personal, to receive the principal and interest moneys and dividends due and to become due upon the said bonds and mortgages, shares of stock and coupon bonds, to sell, assign, transfer and set over the said mortgages, shares of stock and coupon bonds and any of them, for any money or property, real or personal, to release any part or parts of the mortgaged premises for or without any consideration therefor to institute and prosecute any suits, actions or proceedings at law or in equity for the enforcement of any right, interest, claim or demand incident to the said lands and real estate or arising out of the ownership thereof, and for the collection, enforcement or foreclosure of the said bonds and mortgages or any of them and to defend against any suit, actions or proceedings in relation to the said lands and real estate or the said bonds and mortgages, shares of stock and coupon bonds to pay out of the trust estate all taxes, assessments, charges, premiums for insurance, mortgages and interest upon mortgages, charged, imposed, a lien, or due and owing or to be charged, imposed or a lien, or to become due and payable upon or against any of the said lands and real estate or the said bonds and mortgages, shares of stock and coupon bonds, to pay, satisfy, compound for, settle, perform, secure and renew, the just debts, obligations, suretyships, guarantyships, endorsements, and liabilities now due, owing or existing of the said George C. Freeman, until the same shall be wholly paid and satisfied and to mortgage, pledge, convey and assign any of the said lands or real estate and the said bonds and mortgages, shares of stock and coupon bonds, to pay and satisfy or to secure the payment of the same to invest and re-invest any moneys coming to the hands of the said trustees and not necessary to be used for any of the purposes aforesaid in any of the securities in which, for the time being, trust funds are by law permitted to be invested, to pay over to the said George C. Freeman from time to time, during his lifetime, so much of the income from the trust estate as shall remain in the hands of the said trustees after the payment of such moneys as in their absolute discretion it shall have been needful, necessary or to the best interests of the said trust estate to pay thereout, and to pay over from time to time to the said George C. Freeman, during his lifetime any sum or sums of money out of the principal of the said trust estate, whenever

Exhibit P. 3.

in the absolute discretion of the said trustees the surplus of income in the hands of the said trustees available for payment to the said George C. Freeman shall be insufficient for his comfortable support and maintenance.

And upon the decease of the said George C. Freeman, the said trustees shall pay the expenses of his funeral and shall hold the surplus of the trust estate in their hands whether lands and real estate, bonds and mortgage, shares of stock, coupon bonds, moneys, income or investments, remaining after the payment and satisfaction of all the charges, liens and encumbrances thereon, the funeral expenses of the said George C. Freeman, and all the debts and obligations, suretyships, guarantyships, endorsements and liabilities of the said George C. Freeman now due, owing or existing and to be paid and satisfied as aforesaid by the said trustees and the necessary expenses and outlays incident to the administration of the said trust of the said trustees upon the following trusts: to sell, convey, assign, call in and collect the surplus of the said trust estate and to divide the same into five equal parts or shares, and to pay over, convey or assign one of said five equal parts or shares to Horace N. Freeman, a son of the said George C. Freeman, his heirs, executors, administrators or assigns, another of said equal parts or shares to the said Cyrus G. Freeman, his heirs, executors, administrators or assigns, another of said five equal parts or shares to the said Hermon M. Freeman, his heirs, executors, administrators or assigns, another of said equal parts or shares in equal shares to the children living at the time of the decease of the said George C. Freeman of Orville E. Freeman, a deceased son of the said George C. Freeman, and the other of said equal parts or shares in equal shares to such of the grandchildren of the said George C. Freeman, now living or hereafter to be born who shall be living at the time of the decease of the said George C. Freeman.

And it is hereby further declared, agreed and set forth that every purchaser from and every grantee or assignee of the said Trustees for any of the lands and real estate, mortgages, shares of stock, coupon bonds, moneys, securities or other property or thing, the subject of said trust shall take and hold the same freed, cleared and discharged of and from the said trusts and it is hereby further declared, agreed and set forth that the said trustees shall be entitled to take and shall receive as compensation for their services, commissions at the rate of three per

Exhibit P. 3.

cent. upon all sums that shall come to their hands in the administration of the said trust.

In Witness Whereof, the said parties have hereto set their hands and seals the day and year first above written.

Signed, sealed and delivered
in the presence of
Horace Stetson

George C. Freeman L.S.
Cyrus G. Freeman L.S.
Hermon M. Freeman L.S.

State of New Jersey, }
County of Essex. } ss.

Be It Remembered, That on this Nineteenth day of January in the year of Our Lord One Thousand Nine Hundred and Ten (1910) before me, the subscriber, a Master in Chancery of said State, personally appeared George C. Freeman, Cyrus G. Freeman and Hermon M. Freeman, who I am satisfied are the grantors mentioned in the within annexed Indenture and to whom I first made known the contents thereof and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed.

Horace Stetson, M. in Ch. N. J.

Received in the Office September 8, A. D., 1911 at 3:41 P. M.

Exhibit P. 3.

ESSEX COUNTY REGISTER'S OFFICE

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

I, Walter A. Evans, Register of the County of Essex, do hereby certify that the foregoing is a true and correct copy of the record of a certain Deed made by George C. Freeman to Cyrus G. Freeman et al Trustees and also of the certificate of acknowledgment thereto annexed, as the same may be found recorded in my office in book R 49 of Deeds for said County on pages 480-483.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal this 14th day of January A. D. 1920.

(SEAL)

WALTER A. EVANS,
Register.

CERTIFIED COPY OF DEED

George C. Freeman
To
Cyrus G. Freeman
et al, Trustees.

The original Deed, of which this is a copy, was received in the Register's Office, of the County of Essex, State of New Jersey, on the 8th day of September, A. D., 1911, at 3:41 o'clock in the afternoon and recorded in Book R 49 of Deeds for said County on pages 480-483.

THOMAS P. ALWORTH,
Register.

Exhibits P. 4—P. 5.

EXHIBIT P. 4.

Feb 2, 1911

Mr. J. C. Conover,
Dear Sir:—

I am very anxious to get father's business put into proper shape.

I would therefore most earnestly request that you get together the 80 share of stock of the United Water Supply Co., which were left in your hands to sell, not later than 15th of this month.

Yours truly,
H. M. Freeman

EXHIBIT P. 5.

Sept 7, 1907

Rec'd of I. M. Williams Twenty One Hundred, Ninety-eight and 71/100 dollars in full for what he owes Conover Bros and John C. Conover.

April 30, 1900	Note	982.96
Oct 26, 1901	"	133.84
Jan 20, 1902	"	65.53
April 25, 1902	"	65.67
Conover Bros. a/c		564.31
John C. Conover a/c		386.40—$2198.71

John C. Conover

Received the above notes from
John C. Conover
Isaac M. Williams

Exhibits P. 6—P. 7.

EXHIBIT P. 6.

May 14th, 1915.

Mr. J. C. Conover,
51 Lincoln Ave.,
Orange, N. J.

Dear Sir:

Our clients, Messrs. Cyrus G. and Hermon M. Freeman, trustees of George C. Freeman, have advised us that some time ago their brother Orville E. Freeman pledged eighty shares of the stock of the Boonton Water Company with you to secure the payment of a loan which you had made to Mr. Isaac M. Williams. We are advised that the loan for which this stock was pledged was paid off some time ago, and that you have on numerous occasions promised to send Mr. Freeman his stock. We believe that it will be unnecesary for us to commence suit against you for the recovery of this stock.

Will you kindly call at this office with the stock at your earliest convenience, and oblige,

AG/AL

Yours very truly,
Alfred J. Grosso.

EXHIBIT P. 7.

Aug. 30th, 1915.

Mr. J. C. Conover,
51 Lincoln Ave.,
Orange, N. J.

Dear Sir:

Will you kindly let us know when you will be ready to turn over the stock in the Freeman matter, and oblige.

AG/AL

Yours very truly,

Exhibits P. 8—P. 9.

EXHIBIT P. 8.

July 14th, 1916

Mr. John C. Conover,
51 Lincoln Ave.,
Orange, N. J.

Dear Sir:

Mr. Freeman has requested me to arrange to have the meeting which we spoke about some time ago, He desires to know what night next week would be convenient for you. This matter has been pending for a long time and it is absolutely essential that we dispose of it as soon as possible.

Will you kindly bring with you whatever papers you have in relation to this matter, and also the forty shares of stock which you still hold, and which you have admitted belong to the Estate of George C. Freeman.

AG/AL

Yours very truly,
Alfred J. Grosso.

EXHIBIT P. 9.

(This exhibit consisted of certificates No. 35, No. 36, No. 37, No. 38, No. 50, No. 51, No. 52, No. 25, No. 26, No. 27, No. 28, No. 29 and No. 30 of United Water Supply Company and respective stubs to which they were annexed in the stock certificate book.)

Abstract of certificate #35.

Dated May 20, 1902
Issued to Isaac M. Williams
For 10 shares
From Whom Transferred Isaac M. Williams
Certificate Surrendered #7
Received above Certificate Isaac M. Williams, Nov. 26, 1902

Certificates No. 36, 37 and 38 are the same as number 35 except as to the certificate number.

Abstract of certificate #50.

Dated May 20, 1902
Issued to Orville E. Freeman

Exhibit P. 9.

For 10 shares
From Whom Transferred Orville E. Freeman
Certificate Surrendered #12
Received above Certificate Orville E. Freeman, Nov. 25, 1902

Certificates number 51 and 52 are the same as number 50 except as to the certificate number.

Abstract of certificate #25.

Dated May 20, 1902
Issued to Isaac M. Williams
For 10 shares
From Whom Transferred Isaac M. Williams
Certificate Surrendered #7
Received above Certificate I. M. Williams, Nov. 25, 1902
per O. E. Freeman 1

Certificate number 30 is the same as number 25 except as to the certificate number.

Abstract of certificate #26.

Dated May 20, 1902
Issued to Isaac M. Williams
For 10 shares
From Whom Transferred Isaac M. Williams
Certificate Surrendered #7
Received above Certificate I. M. Williams, Nov. 25, 1902
by John C. Conover

Certificates number 27, 28 and 29 are the same as number 26 except as to the certificate number.

Exhibits D. 1—D. 2.

EXHIBIT D. 1.

Know All Men by These Presents, That I, Isaac M. Williams
For Value Received have bargained, sold, assigned, and transferred, and by these presents do bargain, sell, assign, and transfer unto John C. Conover shares of the Capital Stock of the United Water Supply Company standing in my name on the books of the said United Water Supply Company represented by Certificate Nos. 26, 27, 28, 29, 35, 36, 37, 38 herewith And I do hereby constitute and appoint him my true and lawful attorney, IRREVOCABLY, for me and in my name and stead but to his use, to sell, assign, transfer, and make over all or any part of the said stock, and for that purpose to make and execute all necessary acts of assignment and transfer thereof, and to substitute one or more persons with like full power, hereby ratifying and confirming all that said Attorney or his substitute or substitutes shall lawfully do by virtue hereof.

In Witness Whereof, I have hereunto set my hand and seal at Orange, N. J. the 28th day of March, 1906.
Signed, Sealed and Delivered in
the presence of J. Wardley Hunt.

Isaac M. Williams, L.S.

EXHIBIT D. 2.

(This exhibit consisted of certificate #34 of United Water Supply Company and the stub to which it was annexed in the stock certificate book.)

Abstract of certificate #34.

Dated May 20, 1902
Issued to Isaac M. Williams
For 10 shares
From Whom Transferred Isaac M. Williams
Certificate Surrendered #7
Received above Certificate I. M. Williams, Nov. 25, 1902
per W. H. Harrison

Blank power of attorney to transfer said stock, dated May 20, 1908, signed by Isaac M. Williams and witnessed by Amos W. Harrison.

Exhibits D. 3—D. 4.

EXHIBIT D. 3.

(This exhibit consisted of certificate #33 of United Water Supply Company and the stub to which it was annexed in the stock certificate book.)

Abstract of certificate #33.

Dated May 20, 1902
Issued to Isaac M. Williams
For 10 shares
From Whom Transferred Isaac M. Williams
Certificate Surrendered #7
Received above Certificate I. M. Williams, Nov. 25, 1902
W. H. Harrison

Blank power of attorney to transfer said stock, dated May 20, 1908, signed by Isaac M. Williams and witnessed by Amos W. Harrison.

EXHIBIT D. 4.

(This exhibit consisted of certificate #32 of United Water Supply Company and the stub to which it was annexed in the stock certificate book.)

Abstract of certificate #32.

Dated May 20, 1902
Issued to Isaac M. Williams
For 10 shares
From Whom Transferred Isaac M. Williams
Certificate Surrendered #7
Received above Certificate I. M. Williams, Nov. 25, 1902
per W. H. Harrison

Blank power of attorney to transfer said stock, dated May 20, 1908, signed by Isaac M. Williams and witnessed by Amos W. Harrison.

Exhibits D. 5—D. 6.

EXHIBIT D. 5.

(This exhibit consisted of certificate #31 of United Water Supply Company and the stub to which it was annexed in the stock certificate book.)

Abstract of certificate #31.

Dated May 20, 1902
Issued to Isaac M. Williams
For 10 shares
From Whom Transferred Isaac M. Williams
Certificate Surrendered #7
Received above Certificate I. M. Williams, Nov. 25, 1902
per W. H. Harrison

Blank power of attorney to transfer said stock, dated May 20, 1908, signed by Isaac M. Williams and witnessed by Amos W. Harrison.

EXHIBIT D. 6.

ORANGE NATIONAL BANK

No. 1591 Orange, N. J., June 6, 1908

PAY TO THE ORDER OF Orville E. Freeman

Eleven Hundred and Eighty Eight DOLLARS

$1188.00 JOHN C. CONOVER

Orange National Bank)
) Endorsed—Pay to the order of
) MUTUAL TRUST COMPANY
P A I D) Orville E. Freeman.
)
Jun 9 1908) —Received payment
) Jun 9, 1908
Orange, N. J.) Mutual Trust Company.

Exhibit D. 7.

EXHIBIT D. 7.

(This exhibit consisted of the following 5 checks, No. 1582, 1585, 1587, 1588, and 1593.)

ORANGE NATIONAL BANK

No. 1582 Orange, N. J. May 28, 1908

PAY TO THE ORDER OF I. M. Williams

Two Hundred #.....DOLLARS

$200.00 JOHN C. CONOVER

Orange National Bank)
)
P A I D)
)
May 28, 1908)
)
Orange, N. J.)

Endorsed—Isaac M. Williams

ORANGE NATIONAL BANK

No. 1585 Orange, N. J., June 2, 1908

PAY TO THE ORDER OF I. M. Williams

Three Hundred #.....DOLLARS

$300.00 JOHN C. CONOVER

Orange National Bank)
)
P A I D)
)
Jun 2 1908)
)
Orange, N. J.)

Endorsed—Isaac M. Williams

Exhibit D. 7.

ORANGE NATIONAL BANK

No. 1587 Orange, N. J. June 3, 1908
PAY TO THE ORDER OF I. M. Williams
One Thousand Dollars #.....DOLLARS
$1000.00 JOHN C. CONOVER

Orange National Bank)
)
P A I D)
)
Jun 4, 1908)
)
Orange, N. J.)

Endorsed—Isaac M. Williams
Paid through the Exchanges
Second Nat'l Bank, Orange.
Jun 4, 1908.

H. D. Williams
Cashier

ORANGE NATIONAL BANK

No. 1588 Orange, N. J. June 3, 1908
PAY TO THE ORDER OF I. M. Williams
Six Hundred #.....DOLLARS
$600.00 JOHN C. CONOVER

Orange National Bank)
)
P A I D)
)
Jun 4, 1908)
)
Orange, N. J.)

Endorsed—Isaac M. Williams
Paid through the Exchanges
Second Nat'l Bank, Orange.
Jun 4, 1908.

H. D. Williams
Cashier

(In full for United Water Supply Co's Stock of six thousand par

ORANGE NATIONAL BANK

No. 1593 Orange, N. J. June 8, 1908
PAY TO THE ORDER OF I. M. Williams
Two Hundred and Seventy Six #.....DOLLARS
$276.00 JOHN C. CONOVER

Orange National Bank
PAID
Jun 9 1908
Orange, N. J.

Endorsed—Isaac M. Williams

Exhibits D. 8—D. 9—D. 10.

EXHIBIT D. 8.

Sheet #12 of the account of Orville E. Freeman in the Mutual Trust Company of Orange, New Jersey shows that on July 6, 1908 there was a charge of $1000 against said account of Orville E. Freeman.

EXHIBIT D. 9.

Sheet 1 of the account of George C. Freeman in the Mutual Trust Company of Orange, New Jersey, shows that there were no debits against said account from August 8, 1905, to July 24, 1916; that the balance on August 8, 1905, was $196.32; that there were no credits between August 8, 1905, and July 24, 1906, except interest, and that the balance on July 24, 1916 was $213.68.

EXHIBIT D. 10.

The following is a true copy of an entry appearing under date of July 6, 1908, on page 354, of debit book No. 12 of

The Mutual Trust Company, of Orange, N. J.

Which books covers a period from April 7, 1908 to September 5, 1908.

"Freeman, O. E. $1,000.00"

Exhibit D. 11.

EXHIBIT D. 11.

ESSEX COUNTY CIRCUIT COURT.

CYRUS G. FREEMAN, and HERMON M. FREEMAN, *Paintiffs,*		*Action at Law.*
vs.		*Answer to Demand.*
JOHN C. CONOVER, *Defendant.*		

To Pitney, Hardin & Skinner, Attorneys of Defendant.

The plaintiffs herein answering the demand of the defendants say:

1. That the assignment referred to in the second paragraph of the complaint was a parole assignment.

2. The agreement referred to in the third paragraph of said complaint was an oral agreement.

3. The note referred to in the fourth paragraph of complaint is not in plaintiffs' possession.

4. A copy of the declaration of trust referred to in the sixth paragraph of complaint is hereto annexed.

5. The assignment referred to in the seventh paragraph of complaint is contained in the declaration of trust hereto annexed.

6. The agreement referred to in the eighth paragraph of complaint was a parole agreement.

PERRY & GROSSO,
Attys. for Plaintiffs.

Exhibit D. 11.

THIS INDENTURE, made this 19th day of January, Nineteen hundred and ten, between GEORGE C. FREEMAN, of the Town of West Orange, in the County of Essex and State of New Jersey, of the first part, and CYRUS G. FREEMAN, of the township of Passaic, in the County of Morris, and State of New Jersey, and HERMON M. FREEMAN, of the Town of West Orange, county of Essex and State of New Jersey, of the second part, who, and the survivor of them, and the heirs, executors or administrators of said survivor, are hereinafter called the Trustees,

WITNESSETH:—

That, whereas, the said George C. Freeman, desires to convey to the said Trustees all his lands and real estate, and to assign, transfer and set over unto the said trustees all his bonds and mortgages, and certain shares of stock and coupon bonds hereinafter mentioned, upon certain trusts hereinafter set forth and declared; and whereas, the said George C. Freeman, by his deed of conveyance bearing even date herewith, has conveyed to the said Trustees, all his lands and real estate, lying, situate and being in the County of Essex, and the State of New Jersey, and has by three Deeds of Assignment bearing even date herewith assigned to the said Trustees all of his bonds and mortgages one of which said Deeds of Assignment assigns a mortgage upon land in the county of Union, in the State of New Jersey, another of which said Deeds of Assignment assigns a mortgage upon lands in the County of Morris, in the State of New Jersey, and the other of which said Deeds of Assignment assigns various mortgages upon lands in the County of Essex, in the State of New Jersey, and has also this day assigned to the said trustees eighty shares of the stock of United Water Supply Company, and ten shares of the stock of Mountainside Realty Company, and three coupon bonds (Nos. 83-84 and 85) of said United Water Supply Company.

Now Therefore, it is hereby agreed, set forth and declared, that the said Trustees hold all the said lands and real estate and all said bonds and mortgages, shares of stock and coupon bonds, upon the following trusts: to lease, rent, care for, hold and possess the said lands and real estate, to tear down, remove, make changes, alterations and additions, in or to the buildings, or any of them, now upon said lands or hereafter to be erected or placed thereon, and to contract for, erect and construct and

Exhibit D. 11.

to place new or other buildings upon the said lands, to keep the buildings erected or to be erected or placed upon said lands insured against loss or damage by fire, to receive the rents and incomes from said lands and real estate, to mortgage, sell, grant and convey the said lands and real estate, and any part or parts thereof, and any right, interest, license or easement therein, to barter, grant and convey the said lands and real estate or any part or parts thereof, for any other lands and real estate or for any security, property or thing of value, whether real or personal; to receive the principal and interest moneys and dividends due and to become due upon the said bonds and mortgages, shares of stock and coupon bonds, to sell, assign, transfer and set over the said mortgages, shares of stock and coupon bonds, and any of them, for any money, or property real or personal, to release any part or parts of the mortgaged premises, for or without any consideration therefor, to institute and prosecute any suits, actions or proceedings at law or in equity for the enforcement of any right, interest, claim or demand incident to the said lands and real estate or arising out of the ownership thereof, and for the collection, enforcement or foreclosure of the said bonds and mortgages, or any of them, and to defend against any suit, actions or proceedings in relation to the said lands and real estate or the said bonds and mortgages, shares of stock and coupon bonds, to pay out of the trust estate all taxes, assessments, charges, premiums for insurance, mortgages, and interest upon mortgages, charged, imposed, a lien, or due and owing or to be charged, imposed or a lien or to become due and payable, upon or against any of the said lands and real estate or the said bonds and mortgages, shares of stock and coupon bonds, to pay, satisfy, compound for, settle, perform, secure and renew, the just debts, obligations, suretyships, guarantyships, endorsements and liabilities, now due, owing or existing, of the said George C. Freeman, until the same shall be wholly paid and satisfied, and to mortgage, pledge, convey and assign, any of the said lands or real estate and the said bonds and mortgages, shares of stock and coupon bonds, to pay and satisfy or to secure the payment of same; to invest and re-invest any moneys coming to the hands of the said trustees, and not necessary to be used for any of the purposes aforesaid in any of the securities in which, for the time being, trust funds are by law permitted to be invested; to pay over to the said George C. Free-

Exhibit D. 11.

man from time to time during his lifetime, so much of the income from the trust estate as shall remain in the hands of the said trustees after the payment of such moneys as in their absolute discretion it shall have been needful, necessary or to the best interest of the said trust estate to pay thereout, and to pay over from time to time to the said George C. Freeman, during his lifetime, any sum or sums of money out of the principal of the said trust estate, whenever, in the absolute discretion of the said trustees, the surplus of income in the hands of the said trustees available for payment to the said George C. Freeman shall be insufficient for his comfortable support and maintenance.

And upon the decease of the said George C. Freeman, the said trustees shall pay the expenses of his funeral, and shall hold the surplus of the trust estate in their hands, whether lands and real estate, bonds and mortgages, shares of stock, coupon bonds, moneys, income or investments, remaining after the payment and satisfaction of all the charges, liens and encumbrances thereon, the funeral expenses of the said George C. Freeman, and all the debts and obligations, suretyships, guarantyships, endorsements and liabilities of the said George C. Freeman, now due, owing or existing, and to be paid and satisfied as aforesaid by the said trustees, and the necessary expenses and outlays incident to the administration of the said trust of the said trustees, upon the following trusts; to sell, convey, assign, call in and collect the surplus of the said trust estate, and to divide the same into five equal parts or shares, and to pay over, convey or assign one of said five equal parts or shares, to Horace N. Freeman, a son of the said George C. Freeman, his heirs, executors, administrators or assigns, another of said equal parts or shares to the said Cyrus G. Freeman, his heirs, executors, administrators or assigns, another of said five equal parts or shares to the said Hermon M. Freeman, his heirs, executors, administrators or assigns, another of said equal parts or shares in equal shares to the children, living at the time of the decease of the said George C. Freeman, of Orville E. Freeman, a deceased son of the said George C. Freeman, and the other of said equal parts or shares in equal shares to such of the grandchildren of the said George C. Freeman, now living or hereafter to be born, who shall be living at the time of the decease of the said George C. Freeman.

And it is hereby further declared, agreed and set forth, that every purchaser from and every grantee or assignee of the said

Exhibit D. 11.

trustees, for any of the lands and real estate, mortgages, shares of stock, coupon bonds, moneys, securities, or other property or thing, the subject of said trust, shall take and told the same freed, cleared and discharged of and from the said trusts.

And it is hereby further declared, agreed and set forth, that the said trustees shall be entitled to take and shall receive, as compensation for their services, commissions at the rate of three per cent. upon all sums that shall come to their hands in the administration of the said trust.

IN WITNESS WHEREOF, the said parties have hereto set their hands and seals the day and year first above written.

Signed, Sealed and Delivered in the presence of
HORACE STETSON

GEORGE C. FREEMAN (L. S.)
CYRUS G. FREEMAN (L. S.)
HERMON M. FREEMAN (L. S.)

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

Be it remembered, that on this Nineteenth day of January, in the year of our Lord One Thousand Nine Hundred and Ten (1910), before me, the subscriber, a Master in Chancery of said State, personally appeared George C. Freeman, Cyrus G. Freeman and Hermon M. Freeman, who, I am satisfied, are the grantors mentioned in the within annexed Indenture, and to whom I first made known the contents thereof, and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

HORACE STETSON,
M. in C. of N. J.

Exhibit D. 11.

Declaration of Trust

George C. Freeman
and
Cyrus G. Freeman and
Hermon M. Freeman.

Dated January 19, 1910

Received in Regester's
office of Essex Co., N. J.,
on the 8th day of Sept. 1911
at 3:41 o'clock in the
afternoon and rec'd in Bk.
R 49 of deeds for said
county on pages 480-483.

Thomas P. Alworth
Register

Orange, N. J. Sept 5/07

Rec'd of Orville E. Freeman check for ($1198.67) One Thousand One Hundred Ninety Eight and 67/100 dollars and his note for One Thousand dollars $1000.00 dated Sept 5/07 for Four months, in payment for note due me from I. M. Williams and I agree to turn over to Orville E. Freeman Eight Thousand dollars of stock of The United Water Supply Co. held by me of I. M. Williams.

John C. Conover

New Jersey Court of Errors and Appeals

CYRUS G. FREEMAN AND HERMON M. FREEMAN, *Plaintiffs-Respondents,* vs. JOHN C. CONOVER, *Defendant-Appellant.*	*Action at Law. On Appeal from Essex County Circuit Court.*

BRIEF FOR PLAINTIFFS-RESPONDENTS
STATEMENT OF FACTS

On September 5, 1907, the defendant, John C. Conover, had in his possession eighty shares of stock of the United Water Supply Company which had been pledged with him by Isaac M. Williams as security for a loan. At the same time Williams was also indebted in a considerable amount to George C. Freeman. George C. Freeman was a man at that time over eighty years of age and all his business was transacted by his son, Orville E. Freeman. The stock was believed by the parties to be worth more than the amount due Conover, and on September 5, 1907, the paper, Exhibit P. 1, S. C., page 108, was entered into, by which Conover agreed that if Freeman would pay to him the amount owed by Williams that he would turn over to Freeman the stock in his possession which Williams had pledged him. This stock was in Conover's hands by virtue of an assignment, Exhibit D 1, S. C., page 118, which seems to be a complete assignment without any reservations. Freeman subsequently did pay off the

indebtedness of Williams to Conover, and thereupon became entitled to possession of the stock. He left it, however, in the hands of Conover with the request that Conover try and dispose of the same.

On January 19, 1910, George C. Freeman made a trust deed to Hermon M. Freeman and Cyrus G. Freeman, the plaintiffs-respondents, Exhibit P-3, S. C., page 108, by which he assigned among other things these eighty shares of stock; that this paper constituted such an assignment is denied.

The agreement of Conover to turn the stock over upon payment of the Williams indebtedness is made to Orville E. Freeman, but the testimony shows that Williams did owe George C. Freeman money and also that Orville E. Freeman managed his father's affairs to the extent of mingling their funds. In 1908 Conover sold the eighty shares of stock to Thomas J. Hillery, receiving therefor thirty-two hundred dollars. Conover's testimony that he paid this money to Orville E. Freeman is the only proof of payment.

Some time prior to February 2, 1911, both Orville E. Freeman and George C. Freeman died. On that date the present plaintiffs wrote to Mr. Conover asking him to get together the eighty shares of stock left in his hands to sell. Conversations and interviews followed this letter at various times down to the commencement of this suit. The testimony of Hermon Freeman and Alfred J. Grosso shows that statements were made by Mr. Conover to the effect that he had the stock; that it was somewhere in his safe; that he would look it up and let them know about it; that at no time until shortly before the commencement of this suit did he state that the stock had been sold. Acting upon these representations the plaintiffs refrained from bringing suit until Conover finally told them that he did not have the stock in this possession, whereupon they commenced action.

BRIEF OF ARGUMENT

1-a and 8-a.

This ground is covered by the discussion on the other grounds.

1-b, 1-j, 2, 3, 4, 8-b, 8-j, 8-k.

These relate to the assignment from Isaac M. Williams to George C. Freeman. Counsel for respondents insist that it is immaterial whether or not any assignment from Williams to Freeman existed. Conover by his express written agreement as shown by Exhibit P-1, S. C. 108, has said, "I agree to turn over to Orville E. Freeman Eight Thousand Dollars of stock of the United Water Supply Co., held by me of I. M. Williams." He cannot now come into court and say that he will not do this. The other evidence shows clearly that Orville was acting for George C. Freeman. Apparently Conover had the right to do this, regardless of any assignment from Williams to Freeman. See Exhibit D-1, S. C. p. 118, which is an assignment of stock from Isaac M. Williams to John C. Conover of the very shares in question. The evidence on this point was accurately summarized by the Court in its charge to the jury, as shown on pages 93 and 94 of the case.

"Hermon Freeman, one of the plaintiffs, testified that this stock was turned over to his brother, Orville, for his father. At first when he was testifying nothing was said about a written instrument, and it was not until after it had appeared upon cross examination that this testimony was based upon statements made by his brother, Orville, and the Court had expressed his views that such testimony must be stricken out, that Mr. Freeman testified to a written paper which he had seen in his brother Orville's possession. He said that this written paper, signed

by Mr. Williams, said that "I hereby agree to turn over to George C. Freeman certain shares of stock when the debt is paid." Just what debt it was he does not say, whether the debt of Mr. Conover or not. He says that this stock was the stock of the Boonton Water Company, or of the United Water Supply Company, the stock of the latter company being the stock in question.

* * * * * * * * *

"Mr. Williams, an elderly gentleman, testifies that there was a debt due from him to George C. Freeman; that there was nothing due from him to Orville, and that Orville asked him if he would turn it over to his father, and he thinks he signed a paper. His memory has failed him on many things and he does not remember just what was in this paper which he thinks he signed. True, whatever there was was turned over to Orville, and Hermon Freeman says that he will not be absolutely sure that it was not Orville's name in this paper which he saw in Orville's possession.

"As I have said, it is true that all the transactions were had with Orville, and any papers, if there were any, were actually turned over to Orville, and he transacted all the business with both Mr. Williams and Mr. Conover, and both plaintiffs, his brothers, say that their father was very aged, unable to attend to his own business, and that Orville attended to his affairs, even to the extent of mingling his father's funds with his own; and his father's bank account, which is here produced, shows that there were no changes in the bank account, although he was a man of property, receiving interest, from the year 1904 to the year 1916, except credits of interest, and these dates cover the dates of the transactions in this case."

The examination of Mr. Hermon Freeman on this point is contained in the State of the Case, from line 30, page 31 to line 15, page 34. There was further

examination of Mr. Freeman on the fact that he had testified to a written assignment whereas the papers filed in the case alleged an oral one, but counsel for the defendant did not allege surprise or ask for an adjournment on that ground, and the Court permitted an amendment to set up the assignment as written instead of oral.

State of Case, page 92, lines 25 to 31.

Mr. Isaac M. Williams, who originally owned the stock, confirms Mr. Freeman's testimony as to a written assignment.

State of Case, page 54, lines 18 to 23.

This evidence of Mr. Freeman and Mr. Williams, taken in conjunction with the other facts testified to as to the agency of Mr. Orville Freeman for his father, George C. Freeman, certainly justifies a fair and reasonable inference that this stock was transferred either to George C. Freeman or to Orville Freeman on behalf of George C. Freeman, and if the jury drew that inference, then as a matter of fact, this Court cannot interfere with its finding. Counsel for appellant seems to regard the proof required of this lost instrument to be as clear as in the case of an instrument under seal. No formal assignment, or even a written assignment being required, the case comes within the ruling of

Sullivan v. Visconti, 68 N. J. L. 543,

more fully discussed in another portion of this brief.

The case of Johnson vs. Arnwine, 42, N. J. L. 451 accurately reviews the authorities and discusses the degree of diligence required. On page 454 the Court says:

"The value of a paper is a circumstance entering into the degree of diligence required. If the docu-

ment be an important one, such as that the owner would have an interest in preserving it, diligent search will be required, but if the paper be of little or no value, a presumption of its loss or destruction will arise from that circumstance of the party's inability to produce it. 1 Taylor on Evidence, 399: A greater degree of diligence would be expected in the search for an important paper, such as a deed or a subsisting agreement, than would be required in the effort to produce a paper of comparatively little importance, which there would be no special interest in preserving, such as a letter, an envelope, or a satisfied agreement, or an expired lease, or indenture of apprenticeship." Also on page 458:

"The proof of loss being a matter of preliminary to the admission of evidence in the cause, the question of its sufficiency is for the Court. * * * The onus is on the plaintiff in error, of showing that the result reached was erroneous."

What would constitute importance would probably be the light in which the parties themselves regarded the document rather than the importance which counsel at the trial placed upon it. The degree of care with which a man would keep a paper would depend considerably upon the importance which he attached to it. It seems clear that the Freemans did not consider Williams' assignment of great importance. The fact that the stock was in Conover's possession and that they had his written assignment and have taken care of it, would indicate that they regarded the Williams paper as merging in the Conover paper, and of no further consequence. As to the search made, Mr. Freeman said that he searched through "All the papers I know of." The fact remains that all the papers which were binding on Conover are in evidence, and in the face of his written agreement, he has no right to say that a paper binding another person should have been produced.

It is absurd to insist that a copy of this assign-

ment should have been served in response to the demand for copies of documents, when the plaintiffs had nothing in their possession from which to make a copy.

But after all, is it important that there should have been an assignment from Williams to George C. Freeman? Conover's duty to turn over to Freeman these shares of stock was absolute. In Exhibit P-1, S. C. p. 108, he explicitly says, "I agree to turn over to Orville E. Freeman Eight Thousand Dollars of stock of the United Water Supply Co. held by me of I. M. Williams." As soon as Freeman had paid off Williams' obligation, it was up to Conover to deliver the stock, and having expressly agreed to do so, he cannot now be permitted to say that Williams never agreed to assign it or never did assign it. He is estopped from denying Freeman's right to the stock, regardless of whether an assignment existed or not.

1-c, 1-e, 8-c, 8-e, 9-a, 10-f.

These grounds of appeal are all directed to the assignment of the shares from George C. Freeman to the plaintiffs. It is claimed that the declaration of trust was not sufficient to assign this stock or the right to this stock.

The case of Sullivan v. Visconti, 68 N. J. L. 543, discusses the history of assignments of choses in action very thoroughly. It is stated on page 550:

"But it was long ago held by this court that an assignment of a chose in action, in order to be valid at law, does not even require to be in writing."

If this be true, and there appears to be no authority to the contrary, then the statement of the declaration of trust was unnecessary. The gist of the decision is stated on page 551 to be:

"Given a chose in action, legal in its nature and coming within the purview of the act, and an instru-

ment in writing which sufficiently describes that chose in action and authoritatively makes known to all persons concerned that the subject matter has been or is thereby transferred and made over by the owner to a designated assignee, accompanied by delivery of that instrument and notice to the debtor, the assignment is as complete at law as in equity."

Now have these requirements been complied with by the declaration of trust, dated January 19, 1910, and marked Exhibit P-3? The language of the instrument is perhaps not as accurate as it should be, but it certainly indicates an intention on the part of George C. Freeman to transfer this stock by that declaration. It says, "that whereas the said George C. Freeman desires to convey to the said trustees all his lands and real estate and to assign, transfer, and set over unto the said trustees all his bonds hereinafter mentioned, upon certain trusts," etc., and then goes on to say that "whereas the said George C. Freeman by his deed of conveyance bearing even date herewith has conveyed to the said trustees all his lands and real estate," etc., and has by three deeds of assignment bearing even date herewith assigned to the said trustees all his bonds and mortgages," etc., "and has also this day assigned to the said trustees eighty shares of the stock of United Water Supply Company," etc., that the said trustees hold all this property under certain trusts. This instrument "sufficiently describes that chose in action and authoritatively makes known to all persons concerned that the subject matter has been" if not "is thereby transferred."

1-d, 8-d, 9c, 10-a, b-d-j-k & 1.

These objections are made to the sending of the case to the jury on the evidence as to whether or not the defendant made the statements alleged to have been made, and which statements induced the plain-

tiffs to delay action. The law on the situation seems to have been well settled in the case of

Crawford v. Winterbottom, 96 Atl. 497.

which case reversed a finding of Judge Dungan's and made him more than usually cautious in his consideration of the present case. There "the plaintiffs were induced to refrain from beginning suit within the time required by the statute, and from filing notice of intention to begin such suit in accordance with statutory requirements, in the belief that the defendants were making every effort to carry out such offer and proposal. The said defendants acted falsely and fraudulently and with a corrupt intent of misleading the said plaintiffs to defer their suit until the statutory time had expired. The law on the question was stated as follows:

"(1-3) The question for solution then is, admitting the truth of the plaintiffs' allegations and every inference of fact which can be legitimately drawn therefrom in law; are the plaintiffs precluded from maintaining their action, or have the defendants waived or been estopped from their right to plead the statute of limitations to such action?

"(4) A waiver is an intentional abandonment or relinquishment of a known right. The intention may be shown by conduct as well as by express words. Mere silence at a time when there was no requirement to speak is not a waiver, nor evidence from which a waiver may be inferred. Armstrong v. Insurance Co., 130 N. Y. 560, 29 N. E. 991. Waiver belongs to the family of estoppel, and often they are convertible terms. Maloney v. Northwestern Masonic Aid Ass'n, 8 App. Div. 575, 40 N. Y. Supp. 918, 921. In strictness, however, the term "waiver" is used to designate the act, or consequence of the act, of one side only, while the term "estoppel" (in pais) is applicable, where the conduct of one side has induced the other to take such a position that he will be in-

jured if the first be permitted to repudiate his acts. McCormick v. Orient Ins. Co., 86 Cal. 260, 24 Pac. 1004.

"The requisites of an estoppel are pointed out in the case of Richman v. Baldwin, 21 N. J. Law, 403, and it is there said that the doctrine of equitable estoppel has been adopted and applied to courts of law in relation to personal property, in which cases no technical formalities intervene to prevent its application. So in Phillipsburg Bank v. Fulmer, 31 N. J. Law, 55, 86 Am. Dec. 193, to constitute an estoppel in pais there must be an admission intended to influence, or of such a nature as will naturally influence the conduct of another, and so change his condition as materially to injure him if the party making it is allowed to retract it. For other illustrative cases in our common-law courts, see Quick v. Corlies, 39 N. J. Law 11; Freeholders of Somerset v. Veghte, 44 N. J. Law, 509.

"We think the ruling of the trial court in striking out the plaintiffs' complaint and entering judgment for the defendants was error. The allegations made in the complaint, if proved to be true, would make a jury question, and it would then be for the jury at the trial, under proper instructions by the court, to determine whether there was a waiver by, or an estoppel of, the defendants."

The distinction between one who fraudulently conceals a cause of action and thus prevents suit being brought before the statute has run and one who actively induces the plaintiff to refrain until after the statute has run, is clearly pointed out in

> Freeholders of Somerset v. Veghte, 44 N. J. L. 509, at 515.

"The doctrine of estoppel has been applied to prevent a resort to the defence of the statute of limitations, even at law. In the case of Quick v. Corlies, 10 Vroom, 11, this court held that one who had

agreed with his creditor to waive the defence of the statute, was estopped, after the agreement had been acted upon, from availing himself of that defence at law. It will be observed that the conduct of the debtor, in that case, induced the belief of the continued existence of the contract, and its availability in an action, and that belief was acted upon. We was, therefore, held to be estopped from denying what his conduct had induced the other party to believe and act upon.

"But, in this case, the conduct of the debtor is not such as to raise this estoppel. What he did never induced his creditor to believe that a new promise had been made, or that the old obligation was continuing, and intended to be unaffected by the statute."

In the present case the plaintiffs knew something of their rights. They had asked the defendant Conover for the stock. Even if the jury had not so found, the fact is clear and is not disputed by Conover. Since the jury found for the plaintiffs, for the purposes of this argument it must be assumed that their version of what Conover said is correct. And what Conover said is that he had the stock, that it was somewhere in his safe, and that he would look it up and turn it over. A statement which lulled the plaintiffs and prevented them from taking the action which would assuredly have resulted if Conover had told them what he says actually took place, that he did not have the stock, and had settled up with Orville Freeman for it. The case comes exactly within the scope of Crawford v. Winterbottom, and the distinction pointed out in Freeholders v. Veghte.

1-f, 8-f.

These objections attack the right of the plaintiffs, as trustees, to sue in a law court in their own name. This objection in addition to being merely technical is not meritorious.

39 Cyc. p. 446.

"The trustees are the parties in whom the fund is vested, and whose duty it is to maintain and defend it against wrongful attacks or injury tending to impair its safety or amount. The title to the fund being in them, neither the cestuis qui trustent nor the beneficiaries can maintain an action at law in relation to it, as against third parties."

Rue v. Meirs, 43 N. J. E. 377.
And again on p. 452 of 39 Cyc.

"An action at law for the protection of the legal ownership should be brought in the name of the trustee."

And on page 455.

"On the same ground, it has been laid down that where the only object of the suit is to transfer the trust property into the hands of the trustees, the cestuis que trustent need not be parties." This is in equity cases.

Quoting Stevens v. Bosch, 54 N. J. E. 59, and Smith v. Gaines, 39 N. J. E. 545.

There is no suggestion in this case that the interest of the cestuis is adverse to that of the trustees. In fact, the trust declaration shows them to be two of the principal cestuis. The purpose of the suit is only to obtain the proceeds of the sale of this stock.

1-g, 8-g.

"There was no conversion of the stock subsequent to plaintiff's alleged acquisition of the title thereto." As the plaintiffs were not confined by their complaint to proof of conversion of the stock, but might claim also the proceeds of the sale thereof, they would ac-

quire whatever rights George C. Freeman had at the time of the assignment. We deem it sufficient to quote only

5 Corpus Juris, p. 951, p. 133:

"As the right to the chose and its incidents passes to the assignee thereof, so does the right to the remedies which the assignor had for the enforcement of the same." And again on

p. 961, par. 149:

"The assignee acquires as against the debtor all rights to which the assignor was entitled against him at the time the assignment became effective as to the debtor, that is, from the time of notice to the debtor of the assignment. Likewise all remedies which were open to the assignor for the enforcement of the obligation are now available to the assignee. * * * And the debtor can interpose against the assignee only such defenses as existed in his favor against the assignor before notice of the assignment."

1-h, 8-h, and 10-m.

These objections relate to the question of damages. Appellant complains that no proof of the value of the stock was given. The defendant showed by his own testimony that he actually received $3200 for the stock. His counsel seems to regard the case as one of conversion of the stock alone. Reference to paragraphs 9 and 10 of the Amended Complaint, at page 16 of the State of the Case, will show that the action is not brought for the value of the stock but for the amount received for it. This money was obtained for the use of George C. Freeman. If through his representations the plaintiffs or their predecessor in title were deceived into believing that the stock

was still in his possession, then he cannot now be heard to deny it, and the same principle of estoppel that prevents the statute of limitations from running estops him from asserting that it was the proceeds of the stock that he converted.

1-i, 8-i, 9-b.

These grounds of appeal attack the right of an undisclosed principal or his assigns to sue in his or their own name. It is almost elemental law that such a right exists. We deem it sufficient to quote the rules of law as laid down in

2 Corpus Juris, 873

with the numerous authorities therein cited.

"As a corollary to the principle that the rights of the other contracting party are not affected by the disclosure of a theretofore unknown principal, it is a well established general rule that, where an agent on behalf of his principal, enters into a simple contract as though made for himself, and the existence of the principal is not disclosed, the contract inures to the benefit of the principal who may appear and hold the other party to the contract made by the agent. By appearing and claiming the benefit of the contract, it thereby becomes his own to the same extent as if his name had originally appeared as a contracting party, and the fact that the agent has made the contract in his own name does not preclude the principal from suing thereon as the real party in interest; nor does the fact that the identity of the principal has been concealed because of the belief that, if it were disclosed, the contract would not be made, authorize an exception to the rule."

And again on page 876:

"The rule that an undisclosed principal may maintain an action on a contract made by his agent in his

name alone, on proof that in making the contract the agent was acting for the principal, is not varied by the fact that such contract was in writing."

5and 7.

These relate to the admission of the Exhibits P-1 and P-4. They were connected up with the case by the testimony of both plaintiffs that Orville was agent for his father, and by the testimony of Williams that the debt, for which the assignment was given, was due to George C. Freeman and not Orville, though the business was transacted through Orville. The testimony of the lost written assignment also connects up the interests of the parties so as to establish their right to introduce these two exhibits into evidence.

8-1.

The whole testimony of Mr. Hermon Freeman and of Mr. Grosso shows that the delay in the matter was caused by the statements and excuses of Mr. Conover that he needed more time to locate the stock.

Testimony of Freeman: S. C., p. 28, l. 12 to p. 30, l. 15.

Testimony of Grosso: S. C. p. 55, l. 9 to p. 57, l. 12, and p. 59, l. 14 to p. 60, l. 30.

10-c, 10-h, and 10-i.

The Court very properly refused to charge these requests on the ground stated that they were mere abstract questions of law.

Transp. Co. v. Tiers, 24 N. J. L. 697.

Fath v. Thompson, 58 N. J. L. 180.

Consolidated Traction Co. v. Haight, 59 N. J. L. 577.

Mehkanyies v. N. J. St. R. Co., 52 Atl. 280.

10-e, 10-f, and 10-g.

These requests were completely covered by other portions of the Court's charge. "It is not error to refuse to give further instructions, although correct, where the jury have been fully instructed on every phase of the case, both law and fact, and the same has been properly submitted to them.

Smith v. Irwin, 51 N. J. L. 507.

Christensen v. Lambert, 67 N. J. L. 341.

Gottlieb v. North Jersey St. R. Co., 72 N. J. L. 480.

Daggett v. North Jersey St. R. Co., 75 N. J. L. 630.

Schreiner v. N. Y. & N. J. Telephone Co., 82 N. J. L. 743.

Armstrong v. Lehigh, 82 N. J. L. 704.

DAVIS, PERRY & GROSSO,
Attorneys for Respondents.

New Jersey Court of Errors and Appeals

CYRUS G. FREEMAN and HERMON M. FREEMAN, *Plaintiffs-Respondents,* *vs.* JOHN C. CONOVER, *Defendant-Appellant.*	*Action at Law.* *On Appeal from Essex County Circuit Court.*

BRIEF FOR JOHN C. CONOVER, Defendant-Appellant.

Statement of the Case.

The appeal in this case is taken from the judgment entered on January 16, 1920, in the Essex County Circuit Court, in favor of the plaintiffs-respondents (hereinafter called the plaintiffs), as individuals, and not as trustees of George C. Freeman, and against the defendant-appellant (hereinafter called the defendant) for the sum of forty-eight hundred eighty dollars damages, and eighty-one dollars and forty-nine cents costs (case, p. 19). The said sum of forty-eight hundred eighty dollars is made up of an item of thirty-two hundred dollars, as the principal sum, and the item of sixteen hundred eighty dollars for interest on said thirty-two hundred dollars from April 15, 1911 (case, p. 100).

These amounts were allowed as damages alleged to have been sustained by the plaintiffs by reason of the defendant's alleged conversion of eighty shares of stock of the "United Water Supply Company" alleged in the complaint to be the property of Cyrus G. Freeman and Hermon M. Freeman *as trustees of George C. Freeman.*

Isaac M. Williams originally owned, among others, eighty shares of capital stock of the "United Water Supply Company" represented by certificates numbers 26, 27, 28, 29, 35, 36, 37, and 38 for ten shares each. In March, 1906, Williams delivered said stock to defendant as collateral security for a debt of twenty-one hundred ninety-eight dollars and seventy-one cents which he owed defendant (case, pp. 10, 15, 17, 67, 68 and 118). The power of attorney to transfer said stock on the back of each of said certificates of stock was endorsed in blank by Williams before their delivery to defendant (case, pp. 10, 15, 68, and 69).

Plaintiffs alleged in their pleadings that Williams assigned eighty shares of the capital stock of "United Water Supply Company" to George C. Freeman without specifying the certificate numbers; that, in consideration thereof, George C. Freeman orally agreed with Williams to pay to defendant the amount which Williams owed defendant; that on September 5, 1907, Orville E. Freeman (son of George C. Freeman and a brother of plaintiffs) on behalf of George C. Freeman paid the defendant eleven hundred ninety-eight dollars and sixty-seven cents in cash and delivered to him his (Orville's) note for one thousand dollars in satisfaction of Williams' said debt; that on July 6, 1908, George C. Freeman paid said note and *"thereupon became entitled to possession of said eighty shares of the 'United Water Supply Company stock'"*; that on January 19, 1910, George C. Freeman appointed plaintiffs as trustees by a written declaration of trust; that on January 19, 1910, said George C. Freeman assigned, by instrument in writing, to said trustees eighty shares of the capital stock of "United Water Supply Company which were then in defendant's possession (without specifying certificate numbers); that plaintiffs learned since May 18, 1915, that on or about April 15, 1911, that defendant sold eighty shares of stock to one, Thomas J. Hillery, without the knowledge of said George C. Freeman or said plaintiffs; that on May 14, 1915, and on numerous occasions since then plaintiffs applied to said defendant for the delivery to them of the said shares of stock or of the proceeds thereof, and that defendant neglected, failed and refused to deliver said stock, giving as an excuse for such neglect and refusal that he had such certificates in his possession, somewhere among his papers and had not yet been able to locate them, that he would look them up and give them to plaintiffs (case, pp. 10-12, 15-16).

The first complaint did not specify whether the assignment from Williams to George C. Freeman was a written or an oral assignment (case, p. 10, par. 2,) nor whether the agreement in paragraph 3 was written or oral (case, p. 11). The plaintiffs written answer to the defendant's demand for copies of all agreements and documents referred to in complaint (case, pp. 13-14) and the plaintiffs' amended complaint (case, p. 15, par. 2 and 3) stated that said assignment and such agreement were oral. Hermon Freeman, one of the plaintiffs, first testified to an oral arrangement, namely, that Mr. Williams had made the proposition to give his father, George C. Freeman, any equity,

at another place he said any balance, that might be in this stock over and above what he owed the defendant, and that his father would have the amount which Williams owed Conover paid to Conover (case, pp. 21, 35, 37, 38, and 64 l 28, 29). There was no evidence that George C. Freeman or any one on his behalf paid said debt (p. 27, ll. 2-4). On cross examination he admitted that he was not present at the interview at which he claimed that said arrangement was made, and testified that his information was obtained from his brother, Orville. It was not until after the Trial Judge stated that he would strike out the testimony in regard to the stock arrangement as hearsay that Hermon Freeman shifted his ground and testified as to the contents of an alleged lost written assignment and a written agreement to pay said debt (case, pp. 31-34, 35-42, 66-67, and 93).

Plaintiffs relied upon the declaration of trust to prove the transfer to them of the eighty shares of stock claimed by them (case, p. 25, ll. 11, 17-19; p. 38, l. 39; p. 63, l. 39 to p. 64, l. 19). The declaration of trust did not purport to assign the stock in question. It merely recited and assumed the existence of a separate assignment (case, p. 109, ll. 4-29). There was no testimony or other evidence of any oral assignment or other transfer of said stock from George C. Freeman to plaintiffs, although the Court erroneously stated that there was in his charge to the jury (case, p. 94, ll. 36-40; p. 103, ll. 30-39).

The plaintiffs' pleadings and testimony are also at variance in regard to the time when they demanded the stock from the defendant and when he made the alleged excuses set forth in paragraph 10 of the amended complaint (case, p. 16). They alleged in the complaint that the demands and excuses were made *on and after May* 14, 1915. Hermon Freeman on this point testified that he had not had a personal interview with the defendant until after February 2, 1911 (case, p. 48, l. 38 to p. 49, l. 30).

The plaintiffs proved, among others, the following facts by testimony and evidence which was not contradicted or impeached in any way; that on or about the month of September, 1907, said Isaac M. Williams assigned to Orville E. Freeman, all of his right, title and interest in eighty shares of the capital stock of said "United Water Supply Company" represented by certificates numbers 26, 27, 28, 29, 35, 36, 37, and 38, of ten shares each; that in consideration of said transfer, said Orville E. Freeman on September 5, 1907, delivered to defendant his check for eleven hundred ninety-eight dollars and sixty-seven cents and

his (Orville's) note for one thousand dollars in discharge of Williams' indebtedness to defendant; that it was mutually agreed between defendant and Orville E. Freeman at the same time that said defendant should continue to hold said stock as collateral security for the payment of said note of said Orville E. Freeman or any renewal or extension thereof in whole or in part and that upon the payment of said note said stock should be immediately returned to said Orville E. Freeman; that defendants had his dealings with Orville E. Freeman; that he never had any dealings with George C. Freeman; that he never received any notice or knew that Orville E. Freeman was acting as agent for George C. Freeman; that on or about May 20th, 1908, defendant at the request and upon the express authorization of said Orville E. Freeman sold eighty shares of stock represented by certificates numbers 26, 27, 28, 29, 35, 36, 37 and 38, to Thomas J. Hillery for thirty-two hundred dollars; that defendant paid said thirty-two hundred dollars to Orville E. Freeman in June or July, 1908 (case, p. 71, l. 17; p. 81, ll. 40-45; p. 82, ll. 1-10, 38 to page 83, l. 2; p. 83, l. 28 to 30, p. 84). The plaintiffs did not deny that defendant paid thirty-two hundred dollars (case, p. 56, ll. 21-25; p. 62, ll. 22-25).

The judgment was entered on the verdict of the jury after trial in the Essex County Circuit Court on January 14 to January 16, 1920.

The questions on this appeal are:

(a) Whether there should have been a non-suit.

(b) Whether there should have been a direction of a verdict in favor of the defendant.

(c) Whether there was legal error in the refusal of the Trial Judge to strike out testimony referred to in the second ground of appeal.

(d) Whether there was legal error in the admission of the evidence referred to in the third ground of appeal.

(e) Whether there was legal error in the refusal of the Trial Judge to strike out testimony referred to in the fourth ground of appeal.

(f) Whether there was legal error in the ruling of the Trial Judge admitting in evidence the paper referred to in the fifth ground of appeal.

(g) Whether there was legal error in the ruling of the Trial Judge admitting in evidence the written instrument referred to in the sixth ground of appeal.

(h) Whether there was legal error in the ruling of the Trial Judge admitting in evidence the letter referred to in the seventh ground of appeal.

(i) Whether there was legal error in the charge of the Trial Judge and in the refusals to charge as requested.

GROUNDS OF APPEAL.

The grounds of appeal which the defendant asserts and intends to urge are as follows:

I.

Defendant's motion for a non-suit should have been granted for one or more of the following reasons:

a. The plaintiffs failed to prove facts sufficient to constitute a cause of action.

b. There was no proof of any assignment from Isaac M. Williams to George C. Freeman.

c. There was no proof of any assignment, either oral or written, from George C. Freeman to plaintiffs, either as individuals or as trustees. The recitation in the declaration of trust is not enough. There was no testimony of any oral assignment.

d. The alleged cause of action did not accrue within six years before this action was commenced.

e. The stock was converted before the alleged assignment from George C. Freeman to Cyrus G. Freeman and Hermon M. Freeman, as trustees. The alleged assignment does not purport to assign a chose in action. Such an assignment confers no right to sue.

f. Plaintiffs have no right to sue in their individual names. The alleged assignment was to plaintiffs as trustees.

g. There was no conversion of the stock subsequent to plaintiff's alleged acquisition of the title thereto.

h. There was no proof of the value of the stock alleged to have been converted.

i. Plaintiffs, as the trustees of an alleged undisclosed principal, cannot claim under the receipt (Exhibit P. 1, given to Orville E. Freeman.

j. Plaintiffs cannot claim under said alleged lost written assignment from Isaac M. Williams. They failed to serve a copy of said assignment upon defendant in answer to his demand for a copy of the same.

II.

The Trial Court refused to strike out testimony of Hermon M. Freeman concerning an alleged assignment of stock from Isaac M. Williams to George C. Freeman, even though it appeared on cross examination that the witness was not present at the meeting at which he testified the assignment was made and that he derived his information from what his brother, Orville E. Freeman, had told him.

III.

The Trial Judge erroneously admitted in evidence certain oral testimony as to the contents of an alleged lost written assignment of stock from Isaac M. Williams to George C. Freeman, without sufficient proof as to the execution, existence and delivery of said assignment or as to the search for the original thereof.

IV.

The Trial Judge refused to strike out testimony of Hermon M. Freeman concerning the contents of a certain alleged lost written assignment of stock from Isaac M. Williams to George C. Freeman.

V.

The Trial Court erroneously admitted in evidence a certain paper alleged to have been signed by defendant, dated September 5th, 1907 (marked Exhibit P. 1) without any connection having been shown between plaintiffs and the person to whom said receipt was alleged to have been given.

VI.

The Trial Judge erroneously admitted in evidence a certain written instrument from George C. Freeman to Cyrus G. Freeman and Hermon M. Freeman, as trustees, dated January 19th. 1910, and recorded in Book R 49 of Deeds, page 480, (marked Exhibit P. 3).

VII.

The Trial Court erroneously admitted in evidence a certain letter, dated February 2nd, 1911, from Hermon M. Freeman to John C. Conover (marked Exhibit P. 4).

VIII.

Defendant's motion for a direction of verdict should have been granted for one or more of the following reasons:

a. The plaintiffs failed to prove facts sufficient to constitute a cause of action.

b. There was no proof of any assignment from Isaac M. Williams to George C. Freeman.

c. There was no proof of any assignment, either oral or written, from George C. Freeman to plaintiffs, either as individuals or as trustees. The recitation in the declaration of trust is not enough. There was no testimony of any oral assignment.

d. The alleged cause of action did not accrue within six years before this action was commenced.

e. The stock was converted before the alleged assignment from George C. Freeman to Cyrus G. Freeman and Hermon M. Freeman, as trustees. The alleged assignment does not purport to assign a chose in action. Such an assignment confers no right to sue.

f. Plaintiffs have no right to sue in their individual names. The alleged assignment was to plaintiffs as trustees.

g. There was no conversion of the stock subsequent to plaintiffs' alleged acquisition of the title thereto.

h. There was no proof of the value of the stock alleged to have been converted.

i. Plaintiffs, as the trustees, of an alleged undisclosed principal, cannot claim under the receipt (Exhibit P. 1) given to Orville E. Freeman.

j. Plaintiffs cannot claim under said alleged lost written assignment from Isaac M. Williams. They failed to serve a copy of said assignment upon defendant in answer to his demand for a copy of the same.

k. The proof of the substantial parts of the alleged lost written assignment from Isaac M. Williams to George C. Freeman was so vague, uncertain and indefinite, that no jury would be justified in finding that such an alleged

assignment transferred the title to the stock involved in this action to George C. Freeman, and the Trial Judge should have directed a verdict to defendant.

l. There was no evidence from which the jury could have found that the plaintiffs relied upon, and refrained from suing defendants because of the alleged statements of the defendant as to his possession of the stock, and the Trial Judge should have directed a verdict for defendant.

IX.

That the Trial Judge erroneously charged the jury in one or more of the following respects:

a. "Gentlemen, if you find that there was a transfer of this stock from Williams to George C. Freeman, then in view of the other testimony in the case relating to a transfer of the stock from George Freeman to the plaintiffs, that would make good title in the plaintiffs to the stock then in the possession of Mr. Conover."

There is no testimony of a transfer of the stock from George C. Freeman to the plaintiffs. The only evidence offered as to said transfer was the introduction of the declaration of trust.

b. "However, the mere fact that Orville acted, in relation to this stock with Mr. Conover as though it were his own, when it was, in fact, his father's, if it was, but without disclosing that fact to Mr. Freeman, would not deprive the plaintiffs of their right of action, because it is a well-known principle of law that an undisclosed principal, or his assignees, may appear and hold the other party to the contract made with the agent even though the agent failed to disclose that he was acting as agent and to disclose his principal. Therefore, if these plaintiffs are otherwise entitled to recover, the mere fact that Orville dealt with Mr. Conover as though this stock were his own, without disclosing to him that the stock was, in fact, his father's does not prevent them from maintaining this suit and recovering from the defendant."

c. "If that be true, then, even though you find that Orville was acting for his father, and even though you find that the defendant has never paid one penny to Orville as the proceeds of the sale of that stock, or to his father, your verdict must be for the defendant, unless you find that by his own actions he is estopped from asserting the statute of limitations and interposing it in a case of this kind.

The mere concealment of an act does not serve to stay the running of the statute of limitations. If Mr. Conover

said nothing, did nothing, to deceive the plaintiffs except to remain silent; if he said nothing at all to them and they had let this time go by, then they cannot maintain their action, but the rule of law is that where the conduct of a person has induced the other to take such a position that he will be injured if the first be permitted to repudiate his acts, then this principle of estoppel is applicable and he is estopped from asserting this statute of limitations; he is estopped from saying he did not have the stock at the time when he said he had it, and he is estopped from saying that it had been sold at a time so remote that the statute of limitations applies.

The facts, as claimed by the plaintiffs, I have already recited to you. Mr. Hermon Freeman says, and so does Mr. Grosso, that as to forty shares of this stock the defendant claimed he had it in his possession as late as 1911, and that these forty shares were a part of the eighty shares which Mr. Williams put up as collateral for his debt, and which, admittedly, were the property either of Orville or of George C. Freeman. If you find that he did that; that the plaintiffs relied upon it; if you find from the testimony that that induced the plaintiffs in this case to take a position, to refrain from bringing suit at that time—and in 1911 the statute had not run—if you find that they relied upon that, and they did, or refrained from doing something which they might have done to protect their interests, and that they were injured by that statement, then the defendant is estopped from pleading the statute of limitations.

However, the burden of proof is upon the plaintiffs to establish this estoppel. It is upon them to establish by the greater weight of the evidence that the defendant did say things to them which led them astray, which deceived them, and which led them to take a course other than they would have taken to protect their own interests. The defendant says that he never made such statements. He says that it was shortly after the sale of this stock, or shortly after the death of Orville—he thinks in 1908 or 1909—that a conversation took place in which he told them that he had sold this stock and paid the money to Orville. Gentlemen, if that be true, then there has been no bar to his pleading the statute of limitations; there has been nothing which should act as an estoppel, and the defendant has the right to interpose the statute of limitations and to rely upon that, and to your verdict upon that ground. But it will be for you to say whether or not he is estopped by his own acts and words from asserting it. If you find that he is, then the plaintiffs should not be barred from their action because of the lapse of time."

X.

That the Trial Court refused to charge one or more of the following requests submitted on behalf of the defendant, or charged them with erroneous qualifications. (The numbers in brackets correspond with the numbers of the requests as submitted):

a. (1). "If the jury find that the defendant received the money from the sale of the 80 shares of the capital stock of the United Water Supply Company mentioned in the complaint more than six years prior to September 28, 1916, the date when this action was started, the plaintiffs cannot recover anything from the defendant and your verdict should be for the defendant. 'I charge you that, with the qualification I have already made in my main charge. That is true, unless you find that the defendant is estopped by his own acts and statements from setting up the statute of limitations.' "

b. (2). "If the jury find that the defendant sold said 80 shares of the capital stock of the United Water Supply Company more than six years prior to September 28, 1916, the plaintiffs cannot recover anything from the defendant and your verdict should be for the defendant. 'I charge you that, with the same qualifications.' "

c. (3 and 4). The third, "A simple power conferred by one person upon another to sell property does not create an express trust which suspends the operation of the statute of limitations as to the proceeds of the sale."

And fourth,

"The holder of a certificate of shares of stock, accompanied by an irrevocable power of attorney to transfer them, is the apparent owner, and when he is a holder for value without notice his title cannot be impeached, 'are mere statements of law, which are not made applicable at all to this case, and I decline to charge them.' "

d. (5). "If you find that the certificates of stock mentioned in the complaint were assigned to plaintiffs by George C. Freeman after defendant had sold said stock to Thomas J. Hillery, your verdict should be for the defendant. 'I charge you that, unless, as I said with reference to the statute of limitations, the defendant made the statements which the plaintiffs said that he made, and hence is estopped from setting that up as a defense in this case.' "

e. (7). "If you find that Isaac M. Williams did not deliver to George C. Freeman the certificate or certificates of stock representing said 80 shares of stock, or execute and deliver to George C. Freeman a written assignment

and power of attorney to transfer said shares, your verdict should be for the defendant."

f. (8). "If you find that George C. Freeman did not deliver to plaintiffs the certificates of stock representing said 80 shares of stock, or execute and deliver to plaintiffs a written assignment and power of attorney to transfer said shares, your verdict should be for the defendant."

g. (9). "If you find that George C. Freeman, or his alleged representatives, the plaintiffs in this suit, for over two years after discovering that Orville E. Freeman had transferred the stock mentioned in the complaint, refrained from suing to recover it or the proceeds thereof, you are warranted in inferring that the transfer of the stock was within his authority."

h. (12). "The person who holds stock as collateral security for a debt is a bona fide holder for value to the same extent as though he were a purchaser for value."

i. (13). "By commercial usage, as universally acknowledged by the business community as the law of negotiable paper, and sanctioned by repeated adjudications in our courts as well as in those of other states, a certificate of stock accompanied by an irrevocable power of attorney, either filled up or in blank is, in the hands of a third party, presumptive evidence of ownership in the holder. And where the party in whose hands the certificate is found is a holder for value, without notice of any intervening equity, his title cannot be impeached. The holder of the certificate may fill up the letter of attorney, execute the power, and thus obtain the legal title to the stock and such a power is not limited to the person to whom it was first delivered, but enures to each bona fide holder into whose hands the certificate and power may pass. Under these well recognized principles large amounts of property daily pass from hand to hand; are sold and re-sold, or hypothecated for loans without an actual transfer on the books of the corporation, and without other evidence of ownership than the possession by the holder of a certificate and power of attorney."

j. (14 A). "Fraudulent concealment of a cause of action will not avoid the running of the statute of limitations."

k. (14 B). "Fraudulent concealment of a cause of action will not justify the inference of a new promise which will take the action out of the operation of the statute at law."

l. (14 C). "Fraudulent concealment of a cause of action does not estop defendant from setting up the bar of the statute."

m. (15). "If you first find that the plaintiffs are entitled to recover anything from the defendant, you then come to the question of the amount of such recovery. The general rule that the measure of damages for conversion is the market value of the property at the time of the conversion is not applicable to the conversion of stock which is a commercial security of a fluctuating value in the market. The true measure of damages in an action for conversion of stock is the highest intermediate market value between the time of the conversion and a reasonable time after notice of conversion within which to replace the securities."

XI.

The judgment below is in divers other respects illegal, unjust and improper.

BRIEF OF ARGUMENT.

I.

The Trial Judge erroneously admitted in evidence secondary oral testimony as to the contents of the alleged lost written assignment of stock from Isaac M. Williams to George C. Freeman before clear and satisfactory proof had been made of the former existence, proper execution, genuineness, and loss of said lost assignment. This proof was not supplied by later admission or testimony.

Before a party can be permitted to introduce secondary evidence of the contents of a written contract, deed or other instrument stated to have been lost or destroyed, clear, satisfactory and convincing proof must first be made of the former existence, proper execution, genuineness, and loss of the instrument. *Borstelman* v. *Brohan,* 81 N. J. E. 401, 403; *Wills* v. *McDole,* 5 N. J. L. 589, 590-591; *Maryott* v. *Swain,* 28 N. J. E. 489, 590, 592 (Errors and Appeals); *Maddoch* v. *Connolly,* 82 N. J. E. 533, 534, affirmed 82 N J. E. 609; *Wyckoff* v. *Wyckoff,* 16 N. J. E. 401, 405-406; *Coddington* v. *Jenner,* 57 N. J. E. 528, 530; *Corbo* v. *East Orange and Ampere Land Company,* 86 N. J. L. 563, 566 (Errors and Appeals); L. R. A. 1918 B, p. 879 note; 17 Cyc. 536; 25 Cyc. 1624; *Large* v. *Van Doren,* 14 N. J. E. 208, 210; *Denn* v. *Pond,* 1 N. J. L. star page 379, 380; *Culver* v. *Culver,* 31 N. J. E. 448, 451.

As a foundation for the introduction of secondary evidence the loss, destruction, or inaccessibility of the instrument must be proved by clear, satisfactory, and convincing evidence. The rule to justify the admission of secondary evidence of the contents of a paper, on an allegation of the loss or destruction of the original, as a general rule, is that the party is expected to show that he has in good faith exhausted in a reasonable degree, all sources of information and means of discovery which the nature of the case would naturally suggest and which were accessible to him. *Longstreth* v. *Korb,* 64 N. J. L. 112, 114-115; *Johnson* v. *Arnwine,* 42 N. J. L. 451, 454-458; *Gordon* v. *State,* 48 N. J. L. 611 (Errors and Appeals); *Roll* v. *Red,* 50 N. J. L. 264; *Smith* v. *Axtell,* 1 N. J. E. 494, 498, 499; *Wills* v. *McDole,* 5 N. J. L. star page 501-502; *Sterling* v. *Potts,* 5 N. J. L. star page 773; *Maryott* v. *Swaine,* 28 N. J. E. 590, (Errors and Appeals); *Wyckoff* v. *Wyckoff,* 16 N. J. E. 401, 405-406; *Coddington* v. *Jenner,* 57 N. J. E. 528, 530.

In *Johnson* v. *Arnwine,* 42 N. J. L. 451, 454-455, Judge Depue after stating the rule given above said at page 454 and 455:

> "If any suspicion hangs over the instrument, or there are circumstances tending to excite a suspicion that it is designedly withheld, the most rigid inquiry should be made into the reasons for its non-production, but where there is no such suspicion, all that ought to be required is reasonable diligence in the efforts to obtain the original. Minor *v.* Tillotson, 2 Pet. 99. * * * The degree of diligence which shall be considered necessary, in any case, will depend on the circumstances of the particular case, the character and importance of the paper, the purposes for which it is proposed to use it, and the place where a paper of that kind may naturally be supposed to be likely to be found. * * * If the document be an important one, such as that the owner would have an interest in preserving it, diligent search will be required. * * * A greater degree of diligence would be expected in the search for an important paper, such as a deed or a subsisting agreement. * * *
>
> If the document be a private paper, in which the party offering secondary evidence of its contents has a personal interest, and it be an important paper, such as, in the usual course of business, would be likely to be in his possession, or in the possession of another, for his benefit—as, for instance, articles of agreement to which he is a party—pursuit of it in every direction in which the original can be traced, may reasonably be required, before secondary evidence of its contents will be received. Smith *v.* Axtell, 1 N. J. E. 494."

In *Smith* v. *Axtell,* 1 N. J. E. 494, the question before the court was whether the proper foundation had been laid for the admission of secondary evidence as to the contents of an original agreement relating to the subject matter of the suit which was alleged had been lost. At page 498-499 Chancellor Vroom said:

> "The complainant's testifying that he has searched for it among his papers, and the papers of the deceased, is not sufficient. He had before stated that he left it with the arbitrators, and had not seen it since. *The search he made must have been merely for the sake of form, and not with any view of finding the instrument.*"

The Chancellor also placed his decision upon the point that the search was insufficient upon the ground that some of the arbitrators with whom the paper was left by complainant were not examined in regard to any search that they may have made for the agreement and again at page 419, the Chancellor said:

> "Nor is the case aided by the complainant's stating he had searched for it wherever he supposed it probable it might be found. He should have stated where he searched, that the court might judge whether it was in good faith. If such general allegations were admitted, it would supercede the necessity of pointing out any particular places, and a salutary rule of law would be easily evaded, if not wholly destroyed."

In *Wills* v. *McDole,* 5 N. J. L. 589, 590-591 star page 501, Justice Southard reversed the judgment of the court below on the sole ground that a paper purporting to be a copy of the original agreement on which the action was founded, was illegally received in evidence without satisfactory proof of the loss and search for the original copy. At star page 502 he said:

> "This article was an important paper; it was the foundation of the plaintiff's claim and the defendant's liability. It was necessary that it should have been before the court on the hearing, or that a copy should be furnished about the correctness of which no doubt could exist. No rule of law should be disregarded in order to insure its admission. Now, the law as to the admission of copies of writings is clear, and has been violated in this instance in two respects.
>
> 1. It was not satisfactorily shown that the original could not be produced. No proof was given that it was not in the plaintiff's possession, or that it had been lost. It was only "*believed* to be in Forsyth's possession." * * * This is not sufficient. The law is very explicit; the original must be accounted for."

In *Maryott* v. *Swaine,* 28 N. J. E. 589, 590, 592, the Court of Errors and Appeals affirmed the opinion of Vice-Chancellor Van Fleet which held that the proof of the loss of the original agreement was not sufficient to satisfy him that an agreement of the nature alleged ever existed. At page 590 he said:

> "The justice says three papers were offered in evidence; he does not think the agreement was among them, but whatever they were, they were sent to the clerk with the other papers. The defendant obtained at the clerk's office the papers offered in evidence, but not the agreement. It is not shown how a loss of one was possible without the others sharing the same fate. The proof fails to satisfy me that an agreement of the nature alleged ever existed."

The question of the sufficiency of proof of loss, and the diligence of the search for it, is for the court since it is a matter preliminary to the admission of evidence in the cause; the facts found are exclusively for Trial Court and the holding, as manner of law, cannot be set aside unless it clearly appears that it was error since there was no rational support for such finding. *Longstreth* v. *Korb,* 64 N. J. L. 112, 115-116; *Johnson* v. *Arnwine,* 42 N. J. L. 451, 458, 459; *Voorhis* v. *Terhune,* 50 N. J. L. 147, 159; *Koehler* v. *Schilling,* 70 N. J. L. 585, 586-588.

It is not necessary that there be an entire absence of testimony which seems to support the finding of the Trial Judge of the sufficiency of the proof of loss and the diligence of the search in order to have that finding set aside as an abuse of discretion amounting to an error in law. This is clearly pointed out by Justice Garrison in *Koehler* v. *Schilling,* 70 N. J. L. 585, where he reversed the judgment of the District Court where there was testimony upon said preliminary inquiry to the effect that a witness who had given the missing writing to his attorney to bring suit upon it, had made an effort to find his lawyer which was unsuccessful. At page 587 he said:

> "So that the circumstance that Wilcox had given up Wolf as lost after an effort to find him conducted upon *undisclosed lines* could not aid the trial court in determining that a rational search for Wolf had been instituted, still less that it had been pursued with reasonable diligence."

And again at 588 he said:

> "If all of these presumptions (that the contracts were in the possession of the plaintiff) be considered to be rebutted by the fact that Wilcox had entrusted the contracts

> to Wolf as his attorney, then it was incumbent upon the plaintiff to show what had been done to find Wolf, to which end the only witness, as we have seen, was Wilcox, *whose testimony did not aid the court in ascertaining what had been done, and hence could not enable it to reach a valid conclusion that what had been done was all that reasonable diligence required of the plaintiff.* This conclusion fully sustains the proposition of which the appellant had the burden, namely, that at the time of the oral proof was admitted over his objection the existence of a state of facts that would justify the admission of secondary evidence was unsupported by any testimony."

The same rule is stated in *Smith* v. *Axtell,* 1 N. J. E. 494, where Chancellor Vroom at page 499 says:

> "Nor is the case aided by the complainant's stating he had searched for it wherever he supposed it probable it might be found. He should have stated where he searched that the court might judge whether it was in good faith. If such general allegations were admitted, it would supercede the necessity of pointing out any particular places, and a salutary rule of law would be easily evaded, if not wholly destroyed."

Hermon M. Freeman, one of the plaintiffs, and Isaac M. Williams were the only witnesses to testify in regard to the existence, execution and loss of said alleged lost written assignment. Hermon M. Freeman testified, that at the time his brother Orville had a writing from Mr. Williams to that effect; that he had seen the writing; that he did not know where it was at the time of the trial (case, p. 31, ll. 32-40); that he saw it in his brother Orville's possession (case, p. 34, l. 11); that he did not know how his brother Orville got possession of the paper (case, p. 42, l. 10).

The other plaintiff, Cyrus G. Freeman, gives no testimony at all in regard to said alleged lost assignment.

Mr. Williams' testimony can hardly be dignified by the name of evidence. He said that he thinks he signed a paper at the time when Orville E. Freeman asked him if he would turn over the certificate of stock as security or sell it to him. He said that was about the end of the whole matter, the beginning and the end. He did not give any testimony that the agreement to pledge or to sell had been carried out. He said "It was like a dream to me" (case, p. 53, l. 30; p. 54, l. 38).

Hermon Freeman testified that he had searched for the alleged lost assignment among his father's and brother Orville's papers;

that he had searched pretty carefully through all the papers he knew of. There was no testimony that any search was made among his own papers, although he testified that he aided his brother Orville in taking care of his father's business (case, p. 31, l 40; p. 24, l. 3; p. 41, ll. 30, 40), and that after the death of his brother Orville, he, himself, acted as general agent for his father in all of his business matters (case, p. 50, ll. 33-40). No testimony was given that any search had ever been made among the papers of Cyrus G. Freeman, the other plaintiff and trustee. Testimony should have been given as to the places where the search had been made so that the Court could determine whether it was made in good faith and whether the plaintiffs had exhausted in a reasonable degree all sources of information and means of discovery which the nature of the case would naturally suggest. Even testimony in regard to the search among his father's and brother's papers was in its nature vague and indefinite. He did not testify where he had searched.

The most rigid search in every direction in which the original could have been traced should have been required before the secondary evidence of its contents were received. It was an important paper. The plaintiffs' right of action depended upon it. There were suspicious circumstances surrounding the testimony in regard to this paper. The plaintiff, Hermon Freeman. testified that he regarded it as the important paper in the suit to establish his claim (case, p. 39, ll. 16, 19). The first complaint did not specify whether the assignment from Williams to George C. Freeman was a written or an oral one (case, p. 10, par. 2). The plaintiffs' answer to defendant's demand for all the copies of the agreements and documents referred to in said complaint (pp. 13 and 14) and paragraph 2 of the plaintiffs' amended complaint (p. 15, par. 2) stated that said assignment was an oral one. Hermon Freeman first testified to an oral assignment whereby he stated Mr. Williams made a proposition to give his father, George C. Freeman, any equity, and in another place he said any balance, that might be in said stock over and above what he owed the defendant (case, pp. 21, 36, 37, 38, 64). It was not until after the Trial Judge stated that he would strike out the testimony that Hermon Freeman shifted his ground and testified as to the contents of said alleged lost written assignment (case, pp. 31-34, 35-42, 93). He admitted on cross examination that he had personally retained Davis, Perry and Grosso,

that he gave them the facts of the cause of action; that he did not think they had asked him if said assignment was written or oral; that he never told them whether it was written or oral; that the attorneys had consulted him when they received the defendant's demand for copies of the documents and agreements mentioned in the complaint; that they had asked him specifically in regard to some of the papers mentioned therein and that he doesn't remember whether they asked him specifically whether the agreement to Williams was in writing; that he saw the amended complaint stating that said assignment was an oral one.

The plaintiffs offered no testimony to explain why the other papers in the case such as Exhibit P. 1 (case, p. 108) did not share the same fate as said assignment. Both papers would naturally be kept in the same place. It is improbable that one should be lost and the other found.

The testimony which was given did not comply with the rules which were established in the cases which were cited. It was not clear, satisfactory and convincing. It did not aid the Court in ascertaining what was done, and hence could not enable it to reach a valid conclusion that what had been done was all that reasonable diligence required of the plaintiffs. This conclusion fully sustains the proposition of which the appellant has the burden, namely, that at the time the oral proof was admitted over his objection the existence of a state of facts that would justify the admission of secondary evidence was unsupported by any testimony.

II.

There was no proof of any assignment of said stock from Isaac M. Williams to George C. Freeman. Even if the Court concludes that there was some vague, uncertain and indefinite testimony as to the contents of the said alleged lost written assignment, there was no such clear, satisfactory and convincing proof of the substantial parts (the parties, consideration, stock transferred, and date) of said alleged assignment as would justify a jury in reasonably concluding that the assignment sought to be proved had been established, and the Trial Judge should have directed a verdict for defendant.

Paragraph 1 of plaintiffs' written answer to defendant's demand for copies of all agreements and documents referred to

in the first complaint and paragraph 2 of plaintiffs' amended complaint alleged that said assignment was an oral assignment (case, pp. 14, 15). Hermon Freeman first testified to an oral arrangement whereby Williams proposed to give George C. Freeman any equity or balance in certain stock if George C. Freeman settled the debt Williams owed defendant (case p. 21, l. 35, to p. 22, l. 14). He admitted on cross examination that this testimony was based on information derived from his brother Orville. After the Court said that this testimony must be stricken out as hearsay, he testified to a lost written paper and said that was the source of his information (case, pp. 31, 93). The Court erred in submitting the question to the jury as to whether there was sufficient in the paper to transfer the stock to George C. Freeman upon payment of the debt (case, p. 93. l. 30, to p. 95, l. 4).

The defendant asked for the non-suit and for the direction of verdict on the ground, among others, that there was no proof of any assignment from Isaac M. Williams to George C. Freeman (grounds of appeal, 1 b, 8 b, and 8 k, case, pp. 3 and 5; motion for non-suit, pp. 66, 67 and 90; and motion to direct verdict, pp. 90, 91, 92).

As to Proof of Lost Paper.

When Hermon Freeman was testifying as to the oral arrangement, he said:

> "Q Under what circumstances was this paper given? A Isaac M. Williams owed my father certain sums of money for loans that had been made him and Mr. Williams had made the proposition to give my father any equity that might be in this stock over and above what he owed Mr. Conover and that my father would have the amount which Williams owed Conover paid to Conover. In other words, if my father settled the debt that Williams owed Conover, he was entitled to have any balance remaining in the stock.
>
> Q Where was this stock? A In the possession of John C. Conover.
>
> Q What was the stock? A Stock of the United Water Supply Company; I think that is the official title, of Boonton, New Jersey.
>
> Q How many shares of the stock? A Eighty shares were in that.
>
> Q And that stock is already in Mr. Conover's possession? A Yes, sir.
>
> Q As security?" (case, p. 21, l. 36, to p. 22, l. 14).

The Court refused to strike out this testimony even after the witness admitted it was based on hearsay information from his brother, Orville, on the ground that the witness subsequently stated that the information came from the lost written assignmen (case, p. 31, ll. 10, 11, 35, 36; case, pp. 34, 35, 66, 67 and 92). An examination of the testimony as to the contents of the alleged lost paper demonstrates that his first testimony was not based on the contents of the lost paper. In his first testimony, quoted above, he testified as to a proposition which he later admitted, was not mentioned in the written paper (case, p. 41, ll. 1-20); in the former testimony he stated that it was stock of the United Water Supply Company, and in the latter that it was stock of the Boonton Water Company (p. 22, l. 44; p. 33, l. 19); in the former he stated the agreement was with George C. Freeman, in the latter that it might have been with either Orville E. Freeman or George C. Freeman (case, p. 21, l. 40; p. 33, ll. 37, 38); in the former it was eighty shares of stock in the latter he stated he did not believe the paper specified the exact number of shares (case, p. 22, l. 10; p. 34, l. 13); in the former he said the stock was in possession of the defendant, in his testimony as to the contents of the lost paper he said nothing about its containing any reference to the location of the stock (case, p. 22, ll. 2, 12, 13; pp. 31-34, 35-42). Testimony which was not based upon the contents of the alleged lost written paper should have been stricken out (case, pp. 31, 34; p. 35, l. 30; p. 66, l. 31; p. 67, l. 2) .

Hermon Freeman gave the following testimony as to the contents of the lost paper:

> "Q That is what your brother told you? A At the time my brother Orville had a writing from Williams to that effect.
>
> Q (By Mr. Davis.) Had you ever seen that writing? A Yes, sir. (Case, p. 31, ll. 31-34.)
>
> Q In that statement is that your recollection of the contents of the paper? A It is my recollection of the contents of the paper; that is my source of knowledge upon the agreement.
>
> Q Mr. Freeman, was there any other statement in that paper that Williams owed your father a certain sum of money? A Yes, sir.
>
> Q What amount did it state? A I do not think it stated any specific amount, but it was certainly more than the equity in the stock would be; that is, the amount that was owed, was more than that.

Q Just what did the paper state? A Well, it is pretty hard to recall the exact words.

The Court. You are not asked to do that.

Witness. I hereby agree to turn over to George C. Freeman certain shares of stock upon his payment of my indebtedness to Conover. I think the approximate amount of his indebtedness to Conover was stated there; I would not be positive of that.

Q Well, you have not told us that. A I said certain shares of stock; I think the name of the stock was specified in that; that is my recollection of it; it was United Water Supply Company stock.

Q Well, that is what you were asked, but the paper from your recollection of it was United Water Supply Company stock? A Yes, sir. (Case, p. 32.)

Q Was it signed by anybody? A It was signed by Isaac M. Williams.

Q Was the signature attested by anybody? A Any witness?

Q As a matter of fact, do you know whether it said stock of the United Water Supply Company or was it stock of the Boonton Water Company? A Well, as far as those facts go, that is identical, although the names are not—it was ordinarily known as the Boonton Water Company, although the official title was the United Water Supply Company.

The Court. You are asked now what the agreement said, whether it was Boonton Water Company or United Water Supply Company.

A I am not *absolutely positive* of that; reference was to Boonton Water Company, we would ordinarily call it.

Q Have you told us everything you can recollect that that paper said? A I do not recall anything further at this time, sir.

* * * * * *

Q Who was this paper directed to? Was it directed to anybody? A I am *not so positive* as to just who it was directed to.

Q Who wrote it? In whose handwriting was it? A I think the writing was in my brother's handwriting, signed by Isaac M. Williams.

Q (By the Court.) Did you know Mr. Williams' signature? A Yes, sir; quite familiar with it.

Q Was it signed by him? A Yes, sir; it was signed by him. (Case, p. 33.)

Q You said a paper. Is that what he agreed to turn over to you? A Well, I am not positive of the exact name in there; either *Orville or George C. Freeman.*

Q It might have been drawn to either? A Yes, sir; it might have been drawn to either.

Q In whose possession was that paper at the time you saw it? A In my brother Orville's possession.

Q Did it mention certificate numbers? A No, sir.

Q Did it mention the number of shares of stock? A I do not believe it specified the exact number." (Case, p. 34.)

The proof of the contents, that is, the substantial parts of the lost instrument upon which the plaintiffs based their right of action must be clear, satisfactory and convincing. *Wyckoff* v. *Wyckoff,* 16 N. J. E. 401, 405, 406; *Wills* v. *M'Dole,* 5 N. J. L. 589, 590, 591; *Borstelman* v. *Brohan,* 81 N. J. E. 401, 403, 406; *Margott* v. *Swaine,* 28 N. J. E. 589, 590, 592; *Maddock* v. *Connolly,* 82 N. J. E. 533, 534, aff., 82 N. J. E. 609; *Coddington* v. *Yenner,* 57 N. J. E. 528, 530; *Renner* v. *Bank of Columbia,* 9 Wheaton 581, 597; *Edwards* v. *Noyes,* 65 N. Y. 125; L. R. A. 1918, b. p. 879 note; 17 Cyc. 778; 25 Cyc. 1626, 1627.

In *Wyckoff* v. *Wyckoff,* 16 N. J. E., Chancellor Green held at page 405-406 that:

"The true rule is, that the will may be established upon satisfactory proof of the destruction of the instrument, and of its contents or substance. Whether the proof be by one witness, or by many, it must be clear, satisfactory, and convincing."

The rule is stated in the same words in *Coddington* v. *Yenner,* 57 N. J. E. 528. Vice-Chancellor Emery, after quoting this rule, said at page 530:

"This rule was declared in a case where the execution and the destruction of the will were not contested, and the question was as to the proof of the contents, but the same principle is applicable as well to the points of execution and loss as of contents." Affirmed in 60 N. J. E. 447.

In *Borstelman* v. *Brohan,* 81 N. J. E. 401, complainants sought to establish a lost deed. Vice-Chancellor Howell said at page 403:

"Whether a complainant seeks to establish a lost instrument, such as a deed of conveyance, or a will, or seeks recover upon a lost instrument, such as a mortgage or a promissory note, the burden is on him in the first instance to prove that a document of the sort alleged in the bill once existed, and that it was properly executed and delivered and so became a valid instrument as between the parties. This rule manifestly casts the burden of proof on the party claiming under the lost instrument, and it is

> quite consonant with reason that the burden of proof should not only be sustained by him, but that the evidence as to the existence, execution and delivery of the lost instrument should be clear and cogent."

He stated that the authorities on the point in this State were very meager but that it had received attention in other jurisdictions. He reveiwed most of the cases to which we shall now refer.

In *Connar* v. *Pusher,* 86 Maine 300, the Court dealt with the question of the proof of the contents of a lost deed. It held that the proof must be clear and convincing.

In *Moses* v. *Morse,* 74 Me. 472, the Court of last resort held that oral evidence of the lost deed must be strong, clear and convincing, that it must be clear and strong, satisfactory and convincing, or it will not preponderate. A similar ruling was made in *Day* v. *Philbrook,* 89 Me. 462.

Court of Appeals in New York in *Edwards* v. *Noyes,* 65 N. Y. 125 said:

> "Parol evidence to establish the contents of a lost deed should be clear and certain. It should show that the deed was properly executed with the formalities required by law, and should show all the contents of the deed, not literally, but substantially."

In *Curry* v. *Seattle,* 56 Washington 1, the Court said:

> "To prove the contents of the lost instrument there was only one witness, the husband of one of the appellants, and his memory of the language in which the agreement was stated—although he testified that he prepared it himself—was so indistinct as to scarcely rise to the dignity of proof. While he stated with clearness his understanding of the legal effect of the instrument, *he did not relate even the substance of the contents of the writing itself.* In order to establish a lost instrument on behalf of the party asserting rights under it, the case must be clear and positive, and of such a character as to leave no reasonable doubt as to terms and conditions of the instrument. It is not enough that it be established that an instrument containing some form of limitation at some time existed, *nor is it enough that some witness is able to state his understanding of the legal effect of the instrument; the contents of the instrument must be substantially proven,* and with such clearness that the court can determine its legal effect from the language used therein."

Citing *Tayloe* v. *Riggs,* 1 Pet. 591, a case upon a lost instrument where Chief Justice Marshall applied this doctrine in the following words:

> "When a written contract is to be proved, not by itself but by parol testimony, no vague, uncertain recollection concerning its stipulations ought to supply the place of the written instrument itself. *The substance of the agreement ought to be proven satisfactorily, and if that cannot be done, the party is in the condition of every other suitor in court who makes a claim that he cannot support.* When parties reduce their contract to writing the obligations and rights of which are described and limited by the instrument itself, the safety which is expected from them will be much impaired if they could be established upon uncertain and vague impressions made by conversation antecedent to the reduction of the agreement."

Renner v. *Bank of Columbia,* 9 Wheaton 581, was an action upon a lost note. One of the points on appeal was that the contents of the note were not proved by competent evidence. At page 597 Justice Thompson of the United States Supreme Court said:

> "Proof of the contents of a lost paper ought to be the best the party has in his power to produce, and, at all events, such as to leave no reasonable doubt as to the substantial parts of the paper."

It is well established in New Jersey that it is the duty of the Trial Court to order a non-suit or direct a verdict for the defendant whenever there is no evidence from which the jury can reasonably conclude that the facts sought to be proven are established. The power of the Court to order a non-suit or direct a verdict does not depend upon the absence of all testimony in opposition to the case in favor of which the direction is given. The view that a mere scintilla of evidence was sufficient to carry a case to the jury is completely exploded in the English courts. The rule established in England and in this State is that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which the jury can properly proceed to find a verdict for the party producing it upon whom the burden of proof is imposed. *Baldwin* v. *Shannon,* 43 N. J. L. 596, 601 to 603; *McCormack* v. *Standard Oil Company,* 60 N. J. L. 243, 245; *Regan* v. *Pilo,* 62 N. J. L. 30, 31, head note 4; *Lippincott* v. *Royal Arcanum,* 64 N. J. L. 309, 311;

Haines v. *Merrill Trust Company,* 56 N. J. L. 312, 314; *Collins* v. *West Jersey Express Company,* 76 N. J. L. 551-552; *Belcher* v. *Manchester B. & L. Association,* 74 N. J. L. 833, 839; *Fritz* v. *Sayre & Fischer Co.,* 77 N. J. L. 236 and 239. It is also well settled that it is the duty of the Trial Judge to order a non-suit or direct a verdict for the defendant whenever the testimony will support no other verdict than that which is directed, and when any verdict if found otherwise than as ordered would be set aside as without sufficient evidence to support it. *Crue* v. *Caldwell,* 52 N. J. L. 215, 218; *Loper* v. *Somers,* 71 N. J. L. 657, 662; *Anderson* v. *Central R. R. Co.,* 68 N. J. L. 269, 270; *Vanderift Construction Company* v. *Camden Construction Company,* 74 N. J. L. 669-672; *Hartman* v. *Alden,* 34 N. J. L. 518, 520; *Crosby* v. *Wells,* 73 N. J. L. 790, 800. It is also the duty of the Trial Court to order a non-suit or direct a verdict for the defendant where the plaintiff has conclusively failed to sustain the burden cast upon him by the issue. *Breintnall* v. *Sadler,* 82 N. J. L. 405, 410, or where the unimpeached testimony in the case is conclusive of a point in issue, and a verdict for the plaintiffs cannot be supported without disregarding it, it is the duty of the Trial Court to direct a verdict for the defendant. *Lippincott* v. *Royal Arcanum,* 64 N. J. L. 309-311; *Collins* v. *West Jersey Express Company,* 76 N. J. L. 551-552; *Polhemus* v. *Prudential Realty Company,* 74 N. J. L. 570, 582; *Daug* v. *North German Lloyd,* 73 N. J. L. 770, 772; *Hammill* v. *Penn. R. R. Co.,* 56 N. J. L. 370, 374, 376.

In thus ordering a non-suit or directing a verdict the Court acts strictly within its province and declares the law arising from the clearly settled or uncontroverted facts. *Central R. R. Co.* v. *Moore,* 24 N. J. L. 824 and 830 (E. & A.).

Under these rules the plaintiffs were not entitled to go to the jury. The Trial Judge should have directed a verdict for the defendant. There was no evidence from which the jury could reasonably have come to the conclusion that the plaintiffs had sustained the burden of proof which was cast upon them to prove the substantial parts of the alleged lost written assignment by clear, satisfactory and convincing testimony.

Testimony of Hermon Freeman.

He testified that he had seen the writing. There is no testimony that he had read it (case, pp. 31-35, 41-42). The conclusion is irresistible that his testimony was based on what his brother told him. He stated that his former statement (case, pp. 21-22) as to the oral arrangement was his recollection of the contents of the paper (case, p. 32, ll. 1-3). We have already pointed out that he later admitted that most of the substantial facts to which he testified were not mentioned in the writing or he was not positive as to such things as the name of the stock and of the assignee.

The witness was not positive as to the subject matter of the agreement. He *thinks* the name of the stock was specified and that it was United Water Supply Company. He is not positive whether the agreement said Boonton Water Company or United Water Supply Company (case, p. 32). He does not identify the shares of stock as those held by defendant. He says the certificate numbers were not mentioned in the paper (case, p. 34, l. 12). He testified in one place that the agreement stated that Williams was to turn over "certain shares of stock" (case, p. 32, l. 32), and in another that it did not specify the exact number (case, p. 34, ll. 13 and 14). He was not positive as to whom the agreement stated the certain shares of stock were to be turned over (case, p. 33, ll. 37 and 38). He says it might have been drawn to either Orville Freeman or George C. Freeman (case, p. 34, ll. 1-5). He does not testify whether there was any witness, and if so, excuse his non-production (case, p. 33, l. 3).

The testimony of Isaac M. Williams, the alleged assignor, does not help the plaintiffs or clarify the vagueness and uncertainty of the proof of the lost paper. He says that he does not remember giving any such stock of the United Water Supply Company to defendant as security for Williams' debt; that he does not believe defendant had any of his (Williams') stock in his possession. This would, on the contrary, warrant the conclusion that if George C. Freeman purchased any shares they were not the ones which were in the possession of the defendant. Williams testified *he believed* he owned eighty shares of stock of United Water Supply Company in 1907; that Orville E. Freeman asked him if he would turn it over *as security or sell it to him;* that he told him yes, for a fair figure; that that was about the end of the whole matter, beginning and end (case, p. 53, ll.

31-45; p. 54, l. 1); that he thinks he signed a paper; that it is like a dream to him (case, p. 54, ll. 18-20).

Williams admitted that his knowledge of both the existence and contents of said agreement was as vague, uncertain and indefinite as a dream, a mere creature of his imagination. The Court, in its charge to the jury, characterized the testimony as *"a little indefinite"* (case, p. 93, l. 45); the witness Hermon Freeman admitted that the agreement did not specify the number of shares of stock or the stock certificate numbers, and that he was not positive as to the name of the stock or the other party to the agreement. This testimony is so indistinct as scarcely to rise to the dignity of proof. It is not enough that some witness is able to state his understanding of the legal effect of the instrument; the substantial parts of the instrument must be proved by clear, satisfactory and convincing evidence. As was said by Chief Justice Marshall in *Tayloe* v. *Rigge*, 1 Peter 591, when a written contract is to be proved, not by itself but by parol testimony, no vague, uncertain recollection concerning its stipulations ought to supply the place of the written instrument itself. The substance of the agreement ought to be proved satisfactorily, and if that cannot be done the party is in the condition of every other suitor in court who makes a claim that he cannot support.

We submit the plaintiffs did not make out a *prima facie* case and where the degree of proof which is required in a case of this sort is considered, it must be quite apparent that there was no evidence from which the jury could have reasonably concluded that the substantial parts of said alleged agreement had been established. The Court should have directed a verdict for defendant.

III.

There was no proof of any assignment of said stock, either oral or written, from George C. Freeman to plaintiffs, either as individuals or as trustees.

The original and amended complaint alleged that said stock was assigned to said trustees by a written instrument, dated January 9, 1910 (paragraph 7 of both complaints, case, p. 11, l. 30; p. 16, l. 11). Plaintiff's' written answer to defendant's demand for a copy of said assignment stated that said assignment was in the declaration of trust (case, p. 14, l. 21). The

plaintiffs relied upon the declaration of trust to prove a transfer of the eighty shares of stock of United Water Supply Company from George C. Freeman to plaintiffs. The offer was as follows:

> "*Mr. Davis.* I offer it in evidence to show the transfer of 80 shares of stock upon which we are suing, from George C. Freeman to the present complainants" (case, p. 25, l. 16).

It was admitted in evidence over defendant's objection, which was noted (case, pp. 25, 26, l. 11). The plaintiff, Hermon Freeman, testified that said assignment was in the declaration of trust (case, p. 38, ll. 36-44), and that he never had possession of the certificates of stock (case, p. 45, l. 20). Mr. Grosso, one of the plaintiffs' attorneys, testified that he had read the declaration of trust, that it did not refer to a separate assignment, that the declaration of trust was the only assignment of those eighty shares of stock, and that plaintiffs were not counting on any other assignment except what was in said declaration of trust (case, p. 63, l. 40, to p. 64, l. 19). There was no testimony or other evidence of any other assignment (case, pp. 25, 26, 27, 38, 45, 63, 64).

The Trial Judge erroneously assumed that there was other testimony, and charged the jury as follows:

> "Gentlemen, if you find that there was a transfer of this stock from Williams to George C. Freeman, *then in view of the other testimony in the case relating to a transfer of the stock from George C. Freeman to the plaintiffs that would make good title in the plaintiffs* to the stock then in the possession of Mr. Conover" (case, p. 94, ll. 37-42).

The defendant asked for a non-suit and for a direction of verdict on the ground, among others, that the plaintiffs failed to prove any assignment from George C. Freeman to the plaintiffs either as individuals or as trustees (grounds of appeal, 1c, 1f, 8c, 8f, 9a; case, pp. 3, 5 and 6; motion for non-suit, p. 67; motion to direct verdict, pp. 90, 91; charge, pp. 94, 103, 104). The point was raised by an objection made and exception noted to the admission of the declaration of trust (case, p. 25 to p. 26, l. 19).

The declaration of trust does not contain any apt and proper words to transfer said stock from George C. Freeman to Cyrus G. Freeman and Hermon M. Freeman as trustees. It does not

purport to assign said stock. It merely recites or assumes the existence of said assignment in the following words:

> "And whereas, said George C. Freeman by his deed of conveyance bearing even date herewith, has conveyed to the said trustees all his lands and real estate * * * and has by three deeds of assignment, bearing even date herewith, assigned to the said trustees all his bonds and mortgages * * * *and has also this day assigned to the said trustees 80 shares of the stock of the United Water Supply Company* * *.
>
> Now, therefore, it is hereby agreed, set forth and declared that the said trustees hold all the said lands and real estate and all said bonds and mortgages, shares of stock and coupons bonds upon the following trusts" (case, p. 109, ll. 13-33).

The instrument then proceeds to define the trusts and the rights which the parties of the second part thereof are to exercise in regard to the property which it is recited has already been conveyed to them by the separate instruments therein recited.

It is settled that where the suit is brought by the assignee in his own name he must prove that the cause of action was in fact assigned to him. *Sullivan* v. *Visconti,* 68 N. J. L. 543, 545, 546, 550, affirmed on the opinion below in 69 N. J. L. 452; *Cullen* v. *Wolverton,* 63 N. J. L. 644, 645, 646; *Lindsay* v. *McInerny,* 62 N. J. L. 524; *Gaskill* v. *Barber,* 62 N. J. L. 530-531; *Stevens* v. *Bowers,* 16 N. J. L. 16, 19; *Simpson* v. *Anderson,* 70 Atl. Rep. 696, 698.

In the construction of the instrument the question is not what did the party intend to do, but what has he done by apt and proper words. No expression of intent, no amount of recital will supply the omission of the operative words to transfer said stock. *Adams* v. *Ross,* 30 N. J. L. 505, 509, 513; *Lindsay* v. *McInerny,* 62 N. J. L. 524; *Vennatta* v. *Brewer,* 32 N. J. E. 268, 269; *Melick* v. *Pidock,* 44 N. J. E. 525, 540; *Kimble* v. *Newark,* 91 N. J. L. 251, 252; *Lounsberry* v. *Locander,* 25 N. J. E. 554, 558; *Kaleialii* v. *Sullivan,* 242 Fed. 452.

Even if the Court should conclude that the recital in the declaration of trust was binding upon the parties thereto on the ground of estoppel, it is not operative as against the defendant. Said recitals bind only the parties to the instrument or their privies. *Wooling* v. *Camp,* 19 N. J. L. 148, 155; *Hudson* v. *Windslow,* 34 N. J. L. 437, 441, 443; *Griggs* v. *Smith,* 12 N. J. L. 22, 24, 25; *Osborne* v. *Tunis,* 25 N. J. L. 633, 655, 656; *Coleman* v.

Barklew, 27 N. J. L. 357, 359; *Breintnall* v. *Sadler,* 82 N. J. L. 405, 407, 16 Cyc. 710, 711.

Recitals in instruments are operative and binding only by way of estoppel against the parties to the instrument or their privies who claim under the instrument. The recital of said assignment, therefore, was not even evidential of such fact as against the defendant. *Breintnall* v. *Sadler,* 82 N. J. L. 405, 407. The Court, therefore, should have directed a verdict for the defendant.

The Trial Judge erred when he stated to the jury that if they found that there was a transfer of the stock from Williams to George C. Freeman, then in view of *the other testimony in the case relating to a transfer of the stock from George C. Freeman to the plaintiffs that would make good title to the stock then in the possession of Mr. Conover.* He stated to the jury that there was a material fact (other testimony relating to a transfer of the stock, and that such testimony established a transfer from George C. Freeman to plaintiffs) in proof when there was no evidence at all to support his statement. *Camden R. R. Co.* v. *Williams,* 61 N. J. L. 646, 650, 652; *Gerety* v. *N. Y. & N. J. R. R. Co.,* 98 Atl. Rep. 400, 401; *Cavanagh* v. *Borough of Ridgefield,* 109 Atl. Rep. 515, 517; *Smith and Bennett* v. *State,* 41 N. J. L. 370; *Heindel* v. *Hetzel,* 82 Atl. Rep. 511.

A verdict which cannot be supported upon a theory of law upon which the case was submitted to the jury must be set aside. *Fritz* v. *Sayre & Fischer Co.,* 77 N. J. L. 236, 237.

IV.

The alleged cause of action did not accrue within six years before this action was commenced and it is barred by the Statute of Limitations. The defendant is not estopped from setting up the bar of the statute.

This action was started on September 28, 1916 (case, p. 98, l. 39; p. 100, l. 35). The eighty shares of stock which defendant held as collateral security for the payment of Orville E. Freeman's note were sold on May 20, 1908 (case, p. 18, l. 17; p. 20, l. 32; p. 71, ll. 19-30; p. 72, ll. 20 to 35; p. 77, l. 38; p 81, l. 12; p. 84, ll. 27-32). No proof was made on behalf of plaintiffs as to the date of the sale of the stock which they alleged had been sold. The defendant's testimony was uncontradicted and unim-

peached. It was the only proof on this point and no attempt was made to shake it. The note of Orville E. Freeman, for the payment of which defendant held said stock as collateral, was paid on July 6, 1908. The amended complaint alleges that George C. Freeman "thereupon became entitled to the possession of the said eighty shares of the United Water Supply Company stock" (case, p. 15, l. 43; p. 26, l. 40; p. 75, ll. 20-40; p. 89, l. 30, to p. 90, l. 12; p. 69, l. 29, to p. 70, l. 2). The cause of action accrued on May 21, 1908, *Board of Chosen Freeholders* v. *Veghte,* 44 N. J. L. 509, 512, 516, 525; or in any event not later than the payment of the note on July 6, 1908. *Lance* v. *Bonnell,* 58 N. J. E. 259, 277, 278.

Motions for non-suit and for direction of verdict in favor of the defendant were made on the ground, among others, that the alleged cause of action did not accrue within six years before this action was commenced (grounds of appeal, 1d, 8d, case, pp. 3 and 5; motion for non-suit, p. 66, l. 24; motion for direction, pp. 90, 91).

The same point was raised by appropriate requests to charge (grounds of appeal, 10a, b, j, k, l. case, pp. 7-9; case, p. 5; charge, case, pp. 100, 103, l. 12; exception to charge, case, p. 104, ll. 32-41).

The point was also raised by certain exceptions to the charge of the Court as to the conduct and statements which would estop defendant from setting up the bar of the statute (ground of appeal, 9c, case, pp. 6 and 7; charge, p. 98, l. 40, to p. 100, l. 11; exceptions to charge, p. 104, ll. 25 to 41).

Section 1 of the Statute of Limitations provides:

> "1. *Six years limitations.*—That all actions of trespass, *quare clausum fregit,* all actions of trespass, detinue, trover, and replevin for taking away of goods and chattels, all actions of debt, founded upon any lending or contract without specialty, or for arrearages of rent due on a parol demise, and all actions of account and upon the case, except actions for slander, and except also, such actions as concern the trade or merchandise between merchant and merchant, their factors, agents, and servants, shall be commenced and sued within six years next after the cause of such action shall have accrued, and not after." (Rev. 1877, p. 594.) 3 Comp. Stat. 3162, Sec. 1.

The evasion of the benefits intended by the statute, and the enormous increase in perjury, which resulted from the construction of the statute which allowed actions in assumpsit to be

taken out of the operation of the statute upon the inferences of a new promise, resulted in the adoption of section 10 of the Statute of Limitations, which provides as follows:

> "10. *New promise; requisites and validity.*—That in actions of debt or upon the case, grounded on any simple contract, no acknowledgment or promise, by words only, shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of this act, or to deprive any person of the benefit thereof, unless such acknowledgment or promise shall be made or continued by or in some writing to be signed by the party chargeable thereby; and that where there shall be two or more joint contractors or executors, or administrators of any contractor, no such joint contractor, executor, or administrator shall lose the benefit of this act so as to be chargeable in respect, or by reason only of any written acknowledgment or promise, and signed by any other or others of them; * * * ." 3 Comp. Stat. 3167, Sec. 10.

The words of this statute are too plain for construction. The essential inquiry is when did the cause of action accrue, not when did defendant discover he had a cause of action. The accrual of the cause of action is the prescribed event from which the period of limitation is to be computed. By the accrual of the cause of action is meant the right to institute and maintain a suit. *Larason* v. *Lambert,* 12 N. J. L. 247, 248; *Stone* v. *Todd,* 49 N. J. L. 274, 282; *Ely* v. *Norton,* 6 N. J. L. 187, 189; *Lance* v. *Bonnell,* 58 N. J. E. 259, 277-278; *Board of Chosen Freeholders* v. *Veghte,* 44 N. J. L. 509, 512-516; *Somerset Bank* v. *Veghte,* 42 N. J. E. 39, 41; *De Raisines* v. *De Raisines,* 70 N. J. L. 15, 18-19; affd. on opinion below, 71 N. J. L. 680; *Dunham* v. *Adams,* 88 Atl. Rep. 696, 698; *Cummingham* v. *Sandford,* 68 N. J. L. 7-8; *Wallace* v. *Coward,* 79 N. J. E. 243, 246; *Gogolin* v. *Williams,* 91 N. J. L. 266, 267.

The Statute of Limitations makes the lapse of six years a positive and legal bar. When once it has begun to run against a person under no legal disability, it pursues its course, uninterrupted by any subsequent events. *Quick* v. *Corlies,* 39 N. J. L. 11, 12; *Board of Chosen Freeholders* v. *Veghte,* 44 N. J. L. 509, 512-514; *Church of Holy Communion* v. *Paterson R. R. Co.,* 63 N. J. L. 470, 474, reversed on another point in 66 N. J. L. 218; *Somerset Bank* v. *Veghte,* 42 N. J. E. 39, 41; *Lincoln* v. *Judd,* 49 N. J. E. 387, 389; *Holloway* v. *Appelget,* 55 N. J. E. 583, 585.

The Trial Judge erred in submitting the question to the jury whether the defendant was estopped by his own acts and words from setting up the bar of the Statute of Limitations. He charged the jury in substance that if defendant said he had the stock after he had sold it, that plaintiffs relied upon it, that the statements induced plaintiffs to refrain from bringing suit, and that they were injured by the statement, then the defendant is estopped from pleading the Statute of Limitations.

Many of the difficulties in the cases upon the Statute of Limitations have arisen from losing sight of the words of the statute and looking to what appeared to be just and right. *Miles* v. *Berry*, 1 Hill (S. C.) 296, 297.

The general rule is that the language of the act must prevail, and no reasons based on apparent inconvenience or hardship can justify a departure from it at law. *Freeholders of Somerset* v. *Veghte*, 44 N. J. L. 512, 513, 519; *Somerset Bank* v. *Veghte*, 42 N. J. E. 39, 41; *Lincoln* v. *Judd*, 49 N. J. E. 387, 389; *Holloway* v. *Appelget*, 55 N. J. E. 583, 585; *Church of Holy Communion* v. *Paterson*, 63 N. J. L. 470, 474; *Everett* v. *Williams*, 45 N. J. L. 140, 142, 143; *Amy* v. *Watertown*, 130 U. S. 320, 324; *Engel* v. *Fischer*, 102 N. Y. 400, 403, 404; *Troup* v. *Smith*, 20 Johns. (N. Y.) 33, 47, 48.

It is a benign statute of great public benefit which in many cases is a shield against antiquated and stale demands. Any attempt to prevent the operation of the alleged fraud of defendants in concealing the cause of action by allowing the plaintiffs to set that up as an estoppel to reliance upon the statute would increase fraud by the temptations it would offer for plaintiffs to evade the statute by pretenses and false testimony. The legislature has written in it all the exceptions which sound policy dictated to it. *Engel* v. *Fischer*, 102 N. Y. 400, 403, 404; *Troup* v. *Smith*, 20 Johns. (N. Y.) 33, 47, 48; *Clarke* v. *Reeder*, 1 Spears (S. C.) 398, 407; *Bank of Hartford* v. *Waterman*, 26 Conn. 324, 329.

Statutes of limitations are binding on courts of law. None of the exceptions of the New Jersey statute cover the case of the avoidance of the statute by the fraudulent concealment of the fact upon the existence of which the cause of action accrues whether by express statements or conduct, or by mere silence where duty, candor and fair dealing require the defendant to speak. Courts of law cannot engraft an exception on the Statute of Limitations. Our statute was taken from 21 James 1c 16,

which contained an express exception in cases of concealed fraud. Many of our sister states have expressly excepted the case of a fraudulent concealment of the cause of action from the operation of the statute. It is manifest that an exception of this kind was not within the legislative intent. The adoption of section 10 of our statute in the revision of 1877 strengthens our view that the legislature did not deem it wise to allow the statute to be avoided by questionable oral testimony except in the case of payments on account. Fraudulent concealment of the fact upon the existence of which the cause of action accrues does not estop defendant from setting up the bar of the statute at law. *Board of Chosen Freeholders* v. *Veghte,* 44 N. J. L. 502, 511-525; *Church of Holy Communion* v. *Paterson,* 63 N. J. L. 470, 474; *Somerset Bank* v. *Veghte,* 42 N. J. E. 39, 41; *Holloway* v. *Appelget,* 55 N. J. E. 583, 585; *Lincoln* v. *Judd,* 49 N. J. E. 387, 389; *Everett* v. *Williams,* 45 N. J. L. 140, 142-143; *Sun Dredging & Construction Co.* v. *Othens,* 87 Atl. Rep. 1003-1008; *Troup* v. *Smith,* 20 Johns. (N. Y.) 133, 46-48; *Leonard* v. *Pitney,* 5 Wend. 30; *Bridgewater* v. *Ocean City Ass'n,* 85 N. J. E. 379-387; *Ruckelschaus* v. *Olhine,* 48 N. J. E. 451; *Bigelow on Estoppel* (5th Ed.) 570; 16 Cyc. 760; *Allen* v. *Mille,* 17 Wend. 202, 203; *Humbert* v. *Trinity Church,* 24 Wend. 587, 606; *Engel* v. *Fischer,* 102 N. Y. 400, 403-404; *Miller* v. *Wood,* 116 N. Y. 351; *Amy* v. *Watertown,* 130 U. S. 320, 321; *Atchison R. Co.* v. *Atchison Grain Co.,* 68 Kan. 585, 75 Pac. 1051; *Fee's Adm.* v. *Fee,* 10 Ohio 469, 36 Am. Dec. 103; *Bucker* v. *Calcote,* 28 Miss. 432, 468; *Dozier* v. *Ellis,* 28 Miss. 730, 736; *Cook* v. *Reves,* 13 Smedes & Marshall 328 (Miss.), 53 Am. Dec. 88; *Fears* v. *Sykes,* 35 Miss. 633, 636; *Miles* v. *Berry,* 1 Hill (S. C.) 296; *Clarke* v. *Reeder,* 1 Spears (S. C.) 398; *Baines* v. *Williams,* 25 N. C. 481, 484; *Blount* v. *Parker,* 78 N. C. 128, 130; *Hamilton* v. *Shepperd,* 6 N. C. 115; *Calis* v. *Waddy,* 2 Munf. (Va.) 511; *Smith* v. *Bishop,* 9 Vt. 110, 115; *Pyle* v. *Beckwith,* 1 J. J. Marsh (Ky.) 445; *Cocke* v. *McGinnis,* 1 Mart. & Y. (Tenn.) 361, 364, 17 Am. Dec. 809; *Yniestra* v. *Tarlton,* 67 Ala. 126; *Chemical National Bank* v. *Kissane,* 32 Fed. 429, 430; *Miller* v. *Lesser,* 1 Iowa 147; *Phalen* v. *Clark,* 19 Conn. 324; *Bank of Hartford* v. *Waterman,* 26 Conn. 324-329; *Lippett* v. *Ashley,* 94 A, 995, 1005; *Wood on Limitations* (4th Ed.), Sec. 41, p. 145; 25 Cyc. 1214.

The same rule was followed in England before the passage of the Judicature Act. *Imperial Gas Light Co.* v. *London Gas Light Co.,* 10 Exch. 39; *Hunter* v. *Gibbons,* 1 H. & N. 459.

If you exclude the jurisdictions in which there is an express exception in the statute itself, and where law courts administer equitable remedies because there is no separate system of equity, the weight of authority is in favor of this rule.

Our own court of equity recognizes that fraudulent concealment of the cause of action does not suspend the operation of the statute at law. Its own jurisdiction over such cases has been sustained on the ground that there is no remedy at law. *Lincoln* v. *Judd,* 49 N. J. E. 387, 389; *Holloway* v. *Appelget,* 55 N. J. E. 583, 585; *Richman* v. *Baldwin,* 21 N. J. L. 395, 403; *Somerset Bank* v. *Veghte,* 42 N. J. E. 39, 41; *Clark* v. *Augustine,* 62 N. J. E. 689, 694.

The case of *Quick* v. *Corlies,* 39 N. J. L. 11, has been relied upon as authority for the rule that the doctrine of *estoppel in pais* may be applied to prevent a resort to the defense of the Statute of Limitations even at law. This was not a case of *estoppel in pais* but of a waiver. The action was based upon the sealed agreement of defendant to pay plaintiff $500, which contained this clause, "and it is not to outlaw by the Statute of Limitations." Justice Scudder, after reviewing several cases which held that the statute might be waived, and if for a valuable consideration *or* acted upon by others, the stipulation would be enforced, and would answer the plea of the statute, said that the Circuit Court erred in deciding that this agreement was not sufficient evidence of a *waiver* of the Statute of Limitations. This was a voluntary relinquishment of the protection of the statute. It was part of the original contract and the consideration for it was the loan of money. It was based on what the defendant did and not on what he caused his adversary to do. 40 Cyc. 252, 255, 263; *Crawford* v. *Winterbottom,* 88 N. J. L. 588. Confusion has arisen in some of the cases by using waiver and estoppel as convertible terms. There was no evidence that the defendant refrained from suing because of this agreement, nor was it necessary, since there was a valid consideration for the agreement. The agreement in this case was in writing and also arose before the adoption of section 10 in the revision of 1877.

The Trial Judge relied largely upon the decision of the Supreme Court in *Crawford* v. *Winterbottom,* 88 N. J. L. 588, in which he had been reversed. It was an action on a bond for a deficiency resulting from the foreclosure of a mortgage. Plaintiffs failed to bring suit on the bond within six months (C. S. 3421,

Sec. 2). They alleged that defendant was estopped to set up the six months' limitation, saying that they did not start suit within that period because defendants, when threatened with suit, started negotiations to settle the claim, and thus prevented suit; that the offer of defendants was accepted and the plaintiffs were thereby induced to believe that defendants would pay and satisfy the deficiency.

Justice Black reversed the ruling of the Trial Court in striking out the complaint and entering judgment for the defendant. He said that the allegations, if true, would make a jury question, under proper instructions from the Court, to determine whether there was a waiver by, or an estoppel of, the defendants.

This Statute of Limitations (C. S. 3421, Sec. 2) has no provision similar to section 10 (C. S. 3167, Sec. 10), providing that no acknowledgment or promise by words only shall take the case out of the operation of the statute. The original action was barred. The moral obligation to perform it remained and may be the basis of a new promise. The new promise to pay the debt was made and revived the original cause of action. This was a sufficient ground for the reversal of the judgment without resort to either waiver or estoppel. This case was overruled in *Neu* v. *Rogge,* 95 Atl. Rep. 632, on the ground that the bar of that statute could not be waived. Justice Black cited *Freeholders of Somerset* v. *Veghte,* 44 N. J. L. 509, with evident aproval and evidenced no intention to change the rule there laid down.

Plaintiffs knew they had a cause of action.

The amended complaint alleged that George C. Freeman "*became entitled* to the possession of the said eighty shares of the United Water Supply Company stock" on the payment of Orville E. Freeman's note (case, p. 15, l. 43). Said note was paid on July 16, 1908, by Orville E. Freeman (case, p. 26, l. 40; p. 75, ll. 20-40; p. 89, l. 30, to p. 90, l. 12). Plaintiffs must establish that he was the agent for George C. Freeman in order to recover. The knowledge of the agent is chargeable upon the principal. The plaintiffs claim under him and are chargeable with his knowledge that his cause of action accrued on July 6, 1908. The plaintiff, Hermon Freeman, testified he knew before his brother died that said note had been paid. It was stipulated his brother, Orville Freeman, died March 15, 1909. One of the plaintiffs, therefore, also had personal knowledge that he had

a cause of action one or two months prior to March 15, 1909, and was chargeable with such knowledge as of July 6, 1908. This action was not started until September 28, 1916 (case, p. 98, l. 39; p. 100, l. 35). It was barred in either event.

The rule adopted in many courts of equity and some law courts that concealment of the facts upon the existence of which the cause of action depends will suspend the operation of the statute, is based upon the ground that such concealment prevents a party from knowing that he has been injured and has a cause of action. He cannot take any steps to obtain redress. But even in these courts it is held that there can be no concealment which will interfere with the operation of the statute if there is a known cause of action. The plaintiff, Hermon Freeman, knew he had a cause of action one or two months prior to March 15, 1909. It was his own fault if he did not avail himself of those means which the law provided for prosecuting his claim, or for instituting such proceedings as the law regards sufficient to preserve it. *Amy* v. *City of Watertown,* 130 U. S. 320; 25 Cyc. 1217.

Assuming that defendant said that he *thought* he had the stock among his papers and that he would look for it (case, p. 48, l. 24; p. 96, l. 40), that fact could not excuse plaintiffs from bringing suit. Plaintiff, Hermon Freeman, first said that this statement was made one or two months after February 2, 1911 (case, p. 28, ll. 20-26; p. 27, l. 19), then said in 1909 (case, p. 47, ll. 21-24), then admitted that he was wrong and that it was not made until after February 2, 1911 (case, p. 48, l. 31), and then said he wasn't positive it was within a year, but thought it was made within two years after 1911 (case, p. 49, ll. 20-30). Plaintiff knew before this statement that he had a cause of action, that the note had been paid and that the stock should be delivered to him. Said statement did not prevent him from bringing an action either before or after it was made. *Ragland* v. *Owen,* 84 Va. 227, 5 S. E. Rep. 91. The balance of his statement, to wit, that he would look further (case, p. 48, l. 25), was a mere promise concerning the future and could not form the basis of an estoppel, 16 Cyc. 752. If it could be regarded as an acknowledgment of the debt it was within section 10 of the Statute of Limitations.

There is no evidence that plaintiffs relied upon defendant's alleged statements.

There was no testimony or other evidence that the plaintiffs refrained from bringing an action against the defendant because of their reliance upon the alleged statements (case, pp. 27-30, 47-50, 55).

It is well settled that one of the essential elements of an estoppel is that there was in good faith a reliance upon the representation whereby the person deceived was induced to adopt a course of conduct prejudicial to himself if the other party be permitted to repudiate the representation. *Musconetcong Iron Works* v. *D. L. & W. R. R. Co.,* 78 N. J. L. 717, 719 (E. & A.); *Central R. R. Co.* v. *MacCartney,* 68 N. J. L. 165, 175; *Martin* v. *Lamb,* 40 N. J. E. 669, 671 (E. & A.); *O'Donnell* v. *McCaim,* 77 N. J. E. 188, 200.

Before an estoppel can be raised there must be certainty to every intent, because it concludes a man from alleging the truth, and the facts alleged to constitute it are not to be taken by argument or inference. *Coke's Litt* 352b, 16 Cyc. 748; *Vanbibber* v. *Beirne,* 6 W. Va. 168; *Keith* v. *Lynch,* 19 Ill App. (19 Bradw.) 574; *Fletcher* v. *McGill,* 110 Ind. 295, 10 N. E. 651, 11 N. E. 779; *Ware* v. *Cowles,* 26 Ala. 612; *Miller* v. *Hampton,* 37 Ala. 342; *Merritt* v. *Am. Dock & T. Co.,* 59 N. Y. Sup. Ct. 83, 13 N. Y. S. 234; *Glizen* v. *Farrangton,* 7 R. I. 277; *Carter* v. *Carter,* 63 N. J. E. 726, 743, 745, affd. on opinion below, 65 N. J. E. 766.

The Trial Court erred in submitting the question of estoppel to the jury, as there was no proof that plaintiffs refrained from bringing suit against defendant because of their reliance upon the alleged statements.

V.

Assuming that stock sold by defendant was the stock of George C. Freeman, said stock was sold before the alleged assignment from George C. Freeman to Cyrus G. Freeman and Hermon M. Freeman, as trustees. Said declaration of trust did not purport to assign a chose in action and conferred no right to sue.

Plaintiffs relied upon the written declaration of trust to show a transfer of said stock, not a transfer of a chose in action, from George C. Freeman to Cyrus G. Freeman and Hermon M. Freeman (case, p. 14, l. 21, par. 7, of both complaints; case, p. 11, l.

30; p. 16, l. 11; p. 25, l. 16; p. 38, ll. 36-44; p. 45, l. 20; p. 63, l. 40, to p. 64, l. 19; p. 108). The stock was sold on May 20 or 21, 1908. The plaintiffs offered no proof as to the date of sale. The defendant's testimony and other evidence was uncontradicted and unimpeached (case, p. 18, l. 17; p. 20, l. 32; p. 71, ll. 19-30; p. 72, ll. 20 to 35; p. 77, l. 38; p. 81, l. 12; p. 84, ll. 27-31).

The Judge modified defendant's fifth request to charge as follows:

"If you find that the certificates of stock mentioned in the complaint were assigned to plaintiffs by George C. Freeman after defendant had sold said stock to Thomas J. Hillery, your verdict should be for the defendant. I charge you that, unless, as I said with reference to the Statute of Limitations, the defendant made the statements which the plaintiffs said that he made, and hence is estopped from setting that up as a defense in this case" (case p. 101).

The plaintiff, Hermon Freeman, gave the only testimony as to the statements prior to May 14, 1915. He first said they were made one or two months after February 2, 1911 (case, p. 28, ll. 20-26; p. 27, l. 19); then said in 1909 (case, p. 47, ll. 21-24); later admitted to the Court that they were not made until after February 2, 1911 (case, p. 48, l. 31); then said he wasn't positive they were made within one year, but thought they were made within two years after February 2, 1911 (case, p. 49, ll. 20-30). It is admitted that they were not made before January 19, 1910, the day on which the declaration of trust was executed (case, p. 45, l. 23; p. 27, ll. 19-28; pp. 114, 108). George C. Freeman or the other parties to the declaration of trust could not have relied on these statements in drawing said instrument, since it was executed before the statements were made. There is an entire absence of proof that they did rely on them. Such reliance cannot be inferred. (See cases on this point under last sub-heading under point 4.)

The declaration of trust did not purport to assign a chose in action. It merely recites or assumes the existence of a prior assignment of eighty shares of stock. (See discussion under Point 3.)

The defendant asked for a non-suit and a direction of verdict on this ground among others (grounds of appeal, 1e, 8e, case, pp. 3 and 5; motion for non-suit, p. 67, l. 10; motion for direction, p. 91; request to charge 5, pp. 105, 101; exception to charge, p. 104, l. 35).

It should be noted that even if the declaration of trust were an assignment of said stock, or of a chose in action, the title would be vested in the plaintiffs as trustees. The verdict was rendered and the judgment entered in favor of the plaintiffs as individuals (case, p. 19).

The Court erred in submitting the question of estoppel to the jury and should have directed a verdict for defendant.

VI.

Plaintiffs cannot claim under said alleged lost written assignment from Williams to George C. Freeman. They failed to serve a copy of said assignment upon defendant in answer to his demand for a copy of the same.

Paragraph 1 of plaintiffs' written answer to defendant's demand for a copy of said assignment stated that said assignment was a parol assignment (case, p. 14). They later filed an amended complaint in which they made the same allegation. The Trial Judge admitted proof of the written assignment over the objection of the defendant, although the objection does not appear to have been noted (case, pp. 34 and 35). A motion for a non-suit and a direction of a verdict in favor of defendant was made on this ground (grounds of appeal 1j and 8j, case, pp. 4 and 5; motion for non-suit, p. 67, l. 27; pp. 90 and 91).

This instrument was the foundation of plaintiff's claim. They failed to furnish a copy. It was error to admit the evidence as to the contents of the written assignment. *Cullen* v. *Woolverton*, 63 N. J. L. 644.

VII.

Proof of payment was uncontradicted and unimpeached.

Plaintiffs did not testify or produce any proof that defendant had not paid the proceeds of the sale of the stock to Orville E. Freeman, who they claimed was the general agent of George C. Freeman, their alleged assignor. They did not attempt to prove that defendant knew or had knowledge of that agency. Defendant denied that he knew of the agency (case, p. 70, ll. 22-27). Defendant's testimony that he paid the proceeds of the sale of the stock to Orville E. Freeman is uncontradicted and unim-

peached. There was no evidence from which the jury could reasonably conclude that the money had not been paid.

The Trial Judge should have directed a verdict for defendant.

VIII.

As all the facts essential to the determination of the controversy are established, the Court should give the same judgment for the defendant which the Trial Court ought to have rendered. *Sullivan* v. *Visconti,* 68 N. J. L. 543, 551, aff'd 69 N. J. L. 452; *Reischmann* v. *Masker,* 69 N. J. L. 353, 357; *National Bank of N. J.* v. *Berrall,* 70 N. J. L. 757, 761; *Meeker* v. *East Orange,* 77 N. J. L. 623, 639; *Eatontown* v. *Mon. Co. El. Co.,* 78 N. J. L. 493, 498; *Frank* v. *Daily,* 106 A. 24, or

For these reasons, the judgment entered in favor of the plaintiffs, and each of them, should be reversed and a new trial ordered.

PITNEY, HARDIN & SKINNER,
Attorneys of Defendant-Appellant.

J. Howard Conover,
Of Counsel.

Southern Road