

## INDEX.

	PAGE
Notice of Appeal of Complainant, Marmon Fanning Company, Filed June 26, 1929	1
Petition of Appeal, Filed July 15, 1929....	2
Answer to Petition of Appeal, Filed July 18, 1929 .....	4
Final Decree, Filed April 9, 1929.....	5
Bill of Complaint, Filed December 21, 1928	6
Answer of Defendant, The Peoples National Bank of Elizabeth, Filed February 11, 1929 .....	11
Replication of Complainant to Answer of De- fendant, The People's National Bank of Elizabeth, Filed February 11, 1929....	13
Decree <i>Pro Confesso</i> , Filed March 7, 1929..	14
Order of Reference, Filed March 13, 1929....	15
Testimony .....	16
Complainant's Opening.....	16
Defendant's Opening.....	18

### COMPLAINANT'S WITNESSES:

Paul V. Allen:

Direct .....	19
Cross .....	25
Re-direct .....	31

William H. Queripel:

Direct .....	32
Cross .....	34

Helen E. Allen:

Direct .....	34
Cross .....	36
Re-direct .....	40

	PAGE
Herbert F. Cox:	
Direct .....	41
Cross .....	45

Frank J. Fanning:	
Direct .....	47

## DEFENDANTS' WITNESSES:

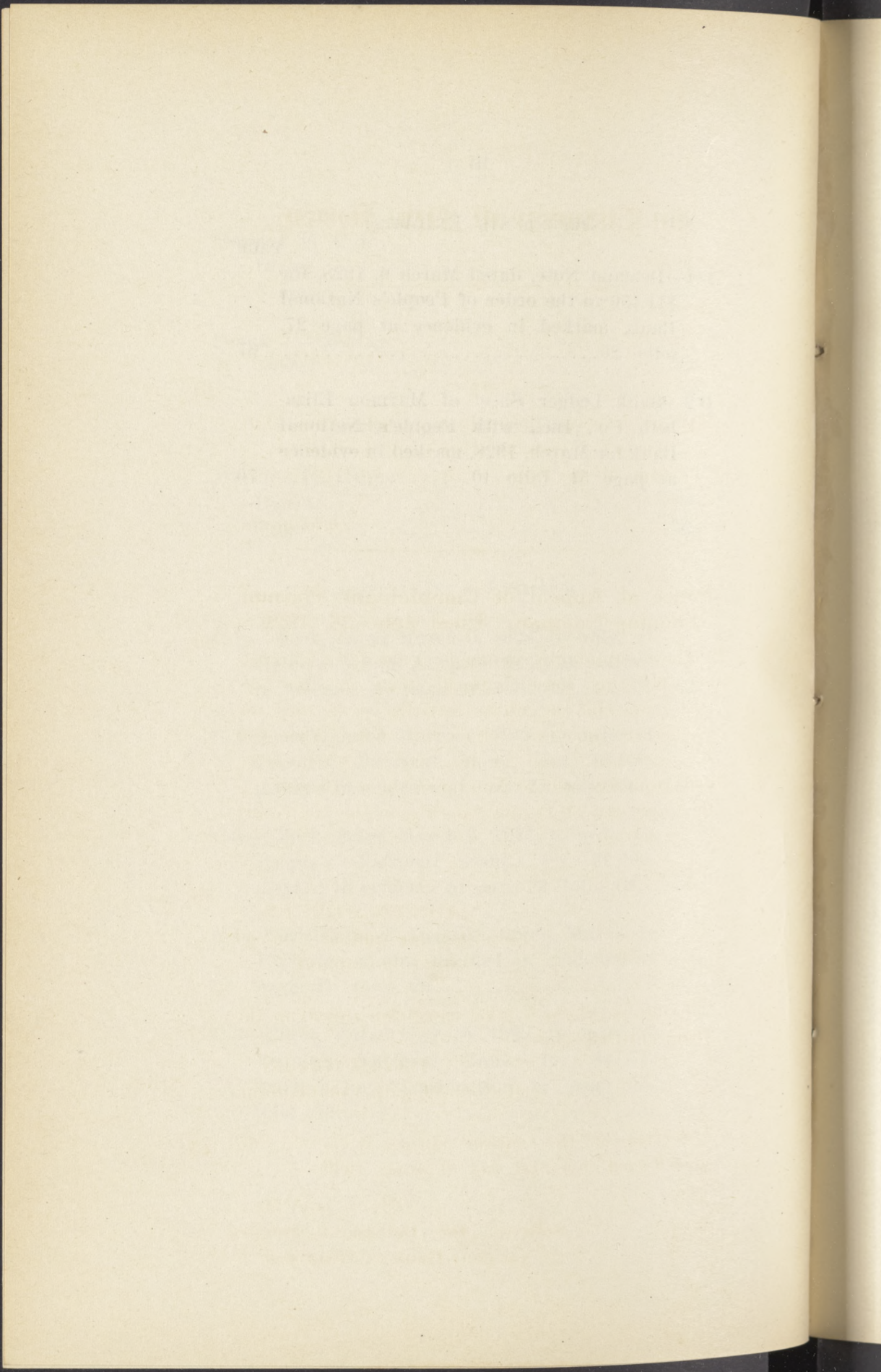
Maurice H. Grape:	
Direct .....	48
Cross .....	52

## COMPLAINANT'S EXHIBITS:

C-1—Check, dated March 6, 1928, to order of Helen and Paul Allen for \$11,450, marked in evidence at page 22, folio 20.....	63
C-2—Check, dated March 6, 1928, to order of People's National Bank, for \$3,950, marked in evidence at page 22, folio 30..	63
C-3—Check, dated March 6, 1928, to order of People's National Bank, for \$2,000, marked in evidence at page 23, folio 10..	64
C-4—Certificate of Deposit, dated March 6, 1928, for \$2,000, marked in evidence at page 23, folio 20.....	65
C-5—Check, dated May 10, 1928, to order of People's National Bank, for \$47.71, marked for identification at page 55, folio 30.....	66

DEFENDANTS' EXHIBITS:

	PAGE
D-1—Demand Note, dated March 6, 1928, for \$11,450 to the order of People's National Bank, marked in evidence at page 27, folio 20.....	67
D-2—Bank Ledger Sheet of Marmon Elizabeth Co., Inc., with People's National Bank for March, 1928, marked in evidence at page 51, folio 40.....	70



# In Chancery of New Jersey,

#70/693.

BETWEEN

MARMON FANNING COMPANY, a corporation,  
Complainant,

—and—

10

MARMON ELIZABETH CO. INC., a corporation, THE  
PEOPLES NATIONAL BANK OF ELIZABETH, a  
corporation, PAUL V. ALLEN and HELEN E.  
ALLEN,

Defendants.

## Notice of Appeal of Complainant, Marmon Fanning Company, Filed June 26, 1929.

20

The complainant, Marmon Fanning Company, a corporation, hereby appeals from the final decree made in the above entitled cause by the Chancellor on the advice of Vice-Chancellor Alonzo Church, on the 9th day of April, 1929, and from the whole and every part thereof, to the Court of Errors and Appeals, in the last resort in all causes.

Dated, June 20th, 1929.

GREEN & GREEN,  
Solicitors for and of Counsel  
with Complainant.

30

I conceive there is good cause for appeal in the above entitled cause.

DAVID GREEN,  
Of Counsel with Complainant.

Service of the within notice is hereby acknowledged this 21st day of June, 1929.

40

ABE J. DAVID,  
Solicitor for Defendant Peoples  
National Bank of Elizabeth.

**Petition of Appeal, Filed July 15, 1929.**

**NEW JERSEY COURT OF ERRORS  
AND APPEALS**

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10 BETWEEN

MARMON FANNING COMPANY, a corporation,  
Complainant-Appellant,

—and—

MARMON ELIZABETH CO. INC., a corporation, THE  
PEOPLES NATIONAL BANK OF ELIZABETH, a  
corporation (Respondent), PAUL V. ALLEN  
and HELEN E. ALLEN,

Defendants.

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*To the Honorable the Court of Errors and Ap-  
peals in the last resort in all causes:*

The petition of Marmon Fanning Company, the  
appellant in the above entitled cause, respectfully  
shows that:

30 1. Petitioner finds itself aggrieved by a final  
decree made in the Court of Chancery, by his  
Honor, Edwin Robert Walker, Chancellor of the  
State of New Jersey, on the advice of Vice-Chan-  
cellor Alonzo Church, bearing date the 9th day  
of April, 1929, in a certain cause in said Court  
of Chancery wherein Marmon Fanning Company  
was complainant and said Peoples National Bank  
of Elizabeth, a corporation, and others were de-  
40 fendants, in this respect, to-wit, that the said  
decree dismisses complainant's bill of complaint

*Petition of Appeal.*

against the defendant, The Peoples National Bank of Elizabeth with costs, including a counsel fee of \$100.00 to be taxed as part of the costs.

And petitioner appeals from the decree of the Chancellor which decrees as aforesaid, upon the ground that same is erroneous in that the Chancellor should have entered a decree in favor of the complainant and against said defendant, The Peoples National Bank of Elizabeth, adjudging that the sum of \$2,000.00 held by said defendant, The Peoples National Bank of Elizabeth, was the property of the defendant, Marmon Elizabeth Co., Inc.; and further adjudging that said sum be subjected to levy made under execution issued on judgment recovered by complainant against the defendant, Marmon Elizabeth Co., Inc., in the New Jersey Supreme Court; and further adjudging that the defendant, The Peoples National Bank of Elizabeth, be directed to pay said sum to complainant, or the Sheriff of Union County.

Petitioner therefore prays that the said decree of the said Chancellor may be wholly reversed, set aside, and for nothing holden, and that petitioner may have such other relief in the premises as to this Court shall seem proper.

GREEN & GREEN,  
Solicitors for and of Counsel  
with Appellant.

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**Answer to Petition of Appeal, Filed July  
18, 1929.**

10 The answer of The Peoples National Bank of Elizabeth, the above named appellee, to the petition of appeal of Marmon Fanning Company, the above named appellant.

20 This appellee, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admits that a decree was, on the 9th day of April, 1929, made and entered in the Court of Chancery of New Jersey, in the above entitled cause, for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said decree, this appellee begs leave to refer there-  
to when the same shall be produced.

This appellee is advised and believes that the said decree is agreeable to equity; and he prays that the same may be affirmed with costs to be taxed in favor of this appellee.

ABE J. DAVID,  
Solicitor for and of Counsel  
with Appellee.

30

40

**Final Decree, Filed April 9, 1929.**

This cause coming on to be heard in the presence of Green & Green, of Counsel with the Complainant, and Abe J. David, Esquire, of Counsel with the defendant, The Peoples National Bank of Elizabeth (the Complainant's bill having been heretofore taken as confessed against the other defendants) and the pleadings having been read and proofs had and the arguments of the respective counsel having been heard and considered, and it appearing to the Court that the complainant is not entitled to the relief sought and prayed for, in its bill of complaint against the defendant, The Peoples National Bank of Elizabeth;

10

IT IS, on this 9th day of April, 1929, ORDERED, ADJUDGED AND DECREED that the complainant's bill against the defendant, The Peoples National Bank of Elizabeth be, and the same is hereby dismissed with costs; and

20

IT IS FURTHER ORDERED AND DECREED that the defendant, The Peoples National Bank of Elizabeth be, and is hereby allowed the sum of \$100.00 as a Counsel fee to be taxed as a part of the costs.

E. R. WALKER,

30

C.

Respectfully advised,  
ALONZO CHURCH,  
V. C.

40

**Bill of Complaint, Filed December 21, 1928.**

## IN CHANCERY OF NEW JERSEY.

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

10       The complainant, Marmon Fanning Company, a corporation, having its principal office in the City of Newark, County of Essex and State of New Jersey, respectfully shows, that:

## FIRST CAUSE OF ACTION.

1. On August 21st, 1928, complainant recovered a judgment in the New Jersey Supreme  
20 Court, against defendant, Marmon Elizabeth Co., Inc. (hereinafter called the "Dealer"), in the sum of \$2,333.73 damages and \$53.78 costs of suit.

2. On or about August 25th, 1928, complainant caused to be issued and delivered to the Sheriff of the County of Union, an execution directed to said Sheriff, commanding him to make and satisfy said judgment and costs of the goods and chattels of the said dealer in the County of Union, where  
30 Dealer had its principal place of business, and all its property and interest, and if sufficient goods and chattels of the said Dealer could not be found, then out of its lands, tenements, hereditaments and real estate.

3. Execution issued was returned unsatisfied by the Sheriff of the County of Union.

4. On or about November 2nd, 1928, complainant  
40 caused to be issued and delivered to the Sheriff

*Bill of Complaint.*

of the County of Union an alias execution directed to said Sheriff, commanding him to make and satisfy said judgment and costs of the goods and chattels of the said Dealer in the County of Union, and if sufficient goods and chattels of the said Dealer could not be found, then out of its lands, tenements, hereditaments and real estate. 10

5. The Sheriff of the County of Union duly made return on said execution that he levied upon all moneys in the hands of The People's National Bank of Elizabeth, N. J., due or to become due Elizabeth Marmon Co.

6. The People's National Bank of Elizabeth, N. J. (hereinafter called "Defendant Bank"), claims and pretends that it has no moneys belonging to Dealer, and that there is no debt owing by it to said Dealer, whereas your complainant charges the contrary thereof to be the truth, and that on or about March 6th, 1928, Dealer delivered its check of that date in the sum of \$2,000.00, to Defendant Bank, in payment of a certificate of deposit in the said sum of \$2,000.00. Certificate of deposit was thereupon issued by Defendant Bank to the order of defendants, Helen E. Allen and Paul V. Allen, officers of Dealer company. Said certificate of deposit was thereupon endorsed in blank by defendants, Helen E. Allen and Paul V. Allen, and delivered to Defendant Bank, with the understanding that when the bank account of defendant became low, and Marmon Elizabeth Co., Inc., required said sum of \$2,000.00, evidenced by certificate of deposit, in its business, then and in that event Defendant Bank would apply the said sum of \$2,000.00 to the bank account of said 20  
30  
40

*Bill of Complaint.*

Dealer company, so that it could meet its obligations.

10 7. During May, 1928, Dealer required the use of the said sum of \$2,000.00 to meet its obligations, and demanded that the Defendant Bank apply said certificate of deposit to its account, as per agreement hereinabove referred to, but Defendant Bank failed, refused, and still refuses to apply said certificate of deposit to the account of defendant, Marmon Elizabeth Co., Inc.

20 8. On or about August 1st, 1928, Defendant Bank pretended, in violation of its aforesaid agreement with Dealer, to credit certificate of deposit in the sum of \$2,000.00 to a personal loan of the defendants, Paul V. Allen and Helen E. Allen, whereas complainant charges that Defendant Bank applied said certificate of deposit without authority from Dealer, and further, that the said sum of \$2,000.00 was, and still is, the property of Dealer.

30 9. The said judgment still remains in full force and effect, and wholly unsatisfied, and an amount remains due thereon exceeding \$100.00, exclusive of costs, to wit: The sum of \$2,333.73 damages and \$53.78 costs, with interest thereon from August 21st, 1928, besides the sum of \$12.91 Sheriff's fees.

10. Complainant is credibly informed and believes it to be true, that Dealer has equitable interest and things in action which might and should be applied to the payment of said judgment.

40 11. Complainant has been, and is unable to find any property of said defendant, Marmon

*Bill of Complaint.*

Elizabeth Co., Inc., out of which to satisfy the amount due it, and has exhausted all legal remedies against the said Marmon Elizabeth Co., Inc.

## SECOND CAUSE OF ACTION.

10

1. On or about March 7th, 1928, Defendant Bank represented to complainant that it held the sum of \$2,000.00, in form of a certificate of deposit, which sum of \$2,000.00 would be applied to the bank account of said Marmon Elizabeth Co., Inc., in the event same was required by Dealer to meet its obligations.

2. Complainant relied upon said representations of Defendant Bank, and extended credit to the Marmon Elizabeth Co., Inc. 20

3. Complainant repeats paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 9 of the First Cause of Action hereof.

4. Defendant Bank is therefore estopped from applying the said sum of \$2,000.00 to personal loan to defendants, Helen E. Allen and Paul V. Allen, as it would be inequitable for bank to retain said fund and deprive complainant thereof. 30

Complainant is without adequate remedy in the courts of law, and therefore prays:

1. That Marmon Elizabeth Co., Inc., a corporation, The People's National Bank of Elizabeth, a corporation, Paul V. Allen, and Helen E. Allen, who are the defendants in this suit, may answer this bill of complaint, and each statement therein made.

40

*Bill of Complaint.*

2. That this Court may order the defendant, The People's National Bank of Elizabeth, to make discovery of all property and things in action belonging to the defendant, Marmon Elizabeth Co., Inc., and of any property, money or thing in  
 10 action due or held in trust for said defendant, except such property as is now reserved by law.

3. That the defendant, The People's National Bank of Elizabeth, make full and complete discovery and disclosure as to the manner in which the said sum of \$2,000.00 was applied to the defendants, Helen E. Allen and Paul V. Allen, and all books, papers and records in connection with the same.

20 4. That this Court make an order declaring the sum of \$2,000.00, or any other sum found due by the Court, to the extent of judgment and costs, held by The People's National Bank of Elizabeth, to be the property of defendant, Marmon Elizabeth Co., Inc., that it be subjected to levy hereinbefore alleged, and that The People's National Bank of Elizabeth be directed to pay said sum to  
 30 Union.

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

GREEN & GREEN,  
 Solicitors for Complainant.

HARRY GREEN,  
 Of Counsel.

**Answer of Defendant, The Peoples National  
Bank of Elizabeth, Filed February  
11, 1929.**

The Peoples National Bank of Elizabeth, N. J., a corporation, with its principal office located at #113 Broad Street, answering the bill of complaint, says: 10

ANSWER TO FIRST CAUSE OF ACTION.

1. This defendant has no knowledge as to the allegations in Paragraph #1, and leaves the complainant on its proof.

2. This defendant has no knowledge as to the allegations in Paragraph #2, and leaves the complainant on its proof. 20

3. This defendant has no knowledge as to the allegations in Paragraph #3, and leaves the complainant on its proof.

4. This defendant has no knowledge as to the allegations in Paragraph #4, and leaves the complainant on its proof.

5. As to Paragraph #5, this defendant admits the levy referred to in said paragraph, and as to the remaining allegations has no knowledge, and leaves the complainant on its proof. 30

6. This defendant denies the allegations set forth in Paragraph #6, and alleges the fact to be, that the check for \$2,000.00 mentioned in said paragraph was delivered to this defendant by the 40

*Answer of The Peoples National Bank.*

10 defendants, Helen E. Allen and Paul V. Allen, or one of them, for which at their request, a Certificate of Deposit was delivered by this defendant made and issued payable to their order in the amount of \$2,000.00, which Certificate of Deposit was subsequently endorsed by the said  
20 defendants, Helen E. Allen and Paul V. Allen, and delivered to this defendant to be credited to the amount of indebtedness which they, the said defendants, Helen E. Allen and Paul V. Allen, at that time owed to this defendant, and which said sum of \$2,000.00 was thereupon so credited by this defendant to the account and on account of the said Helen E. Allen and Paul V. Allen, to this defendant.

20

7. Paragraph #7 is admitted.

8. The allegations of Paragraph #8 are denied, and this defendant repeats the allegations set forth in Paragraph #6 of this answer.

9. This defendant has no knowledge as to the allegations in Paragraph #9, and leaves the complainant on its proof.

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10. Paragraph #10 is denied.

11. This defendant has no knowledge as to the allegations in Paragraph #11, and leaves the complainant on its proof.

ANSWER TO SECOND CAUSE OF ACTION.

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1. Paragraph #1 is denied.

*Answer of The Peoples National Bank.*

2. Paragraph #2 is denied.

3. This defendant repeats the answer to Paragraphs Numbers 1, 2, 3, 4, 5, 6, 7, 8 and 9 of the First Cause of Action.

4. Paragraph #4 is denied.

10

ABE J. DAVID,  
Solicitor for and of Counsel with  
the defendant, The Peoples Na-  
tional Bank of Elizabeth, N. J.

**Replication of Complainant to Answer of  
Defendant, The People's National Bank  
of Elizabeth, Filed February 11, 1929.**

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Replication of complainant, Marmon Fanning Company, to answer to its complaint filed by defendant, The People's National Bank of Elizabeth.

1. The complainant, Marmon Fanning Company, joins issue on the answer filed by the defendant, The People's National Bank of Elizabeth, to its complaint.

30

GREEN & GREEN,  
Solicitors for Complainant.

40

**Decree Pro Confesso, Filed March 7, 1929.**

10 This cause being opened to the court by Green & Green, solicitors for the complainant, and it appearing that process of subpoena calling upon the defendants to answer the complainant's bill of complaint filed herein, has been duly issued and returned served upon the defendants, Marmon Elizabeth Co., Inc., a corporation; The People's National Bank of Elizabeth, a corporation; Paul V. Allen, and Helen E. Allen; and

20 It further appearing that the defendant, The People's National Bank of Elizabeth, has filed an answer to said bill of complaint, but that defendants, Marmon Elizabeth Co., Inc., Paul V. Allen, and Helen E. Allen, have not filed an answer to said bill of complaint within the time limited by law, but have wholly failed and neglected so to do:

30 It is thereupon, on this 7th day of March, 1929, on motion of Green & Green, solicitors for complainant, ORDERED, that the complainant's said bill of complaint be, and the same is hereby taken as confessed against the said defendants, Marmon Elizabeth Co., Inc., a corporation, Paul V. Allen, and Helen E. Allen, to the end that such decree may be made against them as the Court shall deem equitable and just.

E. R. WALKER,  
C.

**Order of Reference, Filed March 13, 1929.**

This matter being opened to the court by Green & Green, solicitors for the complainant, and it appearing that Abe J. David, solicitor for the defendant, The People's National Bank of Elizabeth, consents to the following:

10

It is, on this 13th day of March, 1929, on motion of Green & Green, solicitors for complainant, ORDERED, that the above entitled cause be referred to Hon. Alonzo Church, one of the Vice-Chancellors of this court, to hear the same for the Chancellor, and to report thereon to him and to advise what order or decree should be made therein.

E. R. WALKER,

C.

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I hereby consent to the entry of the foregoing order.

ABE J. DAVID,

Solicitor for Defendant,

The People's National Bank of Elizabeth.

30

40

**Testimony.**

IN CHANCERY OF NEW JERSEY

April 3rd, 1929.

10 BETWEEN

MARMON FANNING COMPANY, a corporation,  
Complainant,  
—and—

MARMON ELIZABETH CO. INC., a corporation; THE  
PEOPLES NAT'L BANK OF ELIZABETH, a cor-  
poration; PAUL V. ALLEN and HELEN E.  
ALLEN,

20

Defendants.

Transcript of shorthand notes of testimony  
taken in the above entitled matter before his  
Honor, Alonzo Church, Vice-Chancellor, at the  
Chancery Chambers, Newark, New Jersey, on  
April 3, 1929, in the presence of Green and Green  
(by David Green) for complainant; A. J. David  
for defendant.

30 Mr. Green: In this case, your Honor, the com-  
plainant recovered a judgment at law against  
the defendant, the Marmon Elizabeth Co., and  
proceeded to levy on the right, title and interest  
in any claims which the defendant had at that  
time. They levied on certain funds of the bank  
in which the defendant Marmon Elizabeth Co.  
had an equitable interest. In March of last  
year, Helen E. Allen and Paul V. Allen, who are  
40 The Peoples National Bank of Elizabeth, which

*Opening of Case.*

is the only defendant that has answered in this suit; a decree pro confesso has been entered against the Marmon Elizabeth Co., Helen E. Allen and Paul V. Allen, so the only thing at issue here is the suit against the bank.

Helen and Paul Allen went down to the bank at Elizabeth, on March 6 of last year, obtained a loan of \$11,450; they gave back a mortgage on their home, and the moneys which were received were deposited to the account of the Marmon Elizabeth Co., which was an automobile concern at Elizabeth that sold the Marmon car. 10

The Marmon Elizabeth Co. thereafter paid out certain moneys; they paid the bank some \$3,950 which represents the notes. The automobile concern owed them also the sum of \$2,500 on the mortgage, which left them a net amount in their account of \$5,000. Thereafter the bank requested that the Marmon Elizabeth Co. give them a certificate of deposit for \$2,000, which they could hold and show to the Bank Examiners, if necessary, but which certificate of deposit in the sum of \$2,000 was always to be used to the credit of the Marmon Elizabeth Co. 20

The company was unable to pay its debts and it asked the bank to apply the certificate of deposit to its account, and some time thereafter, about four months thereafter, the bank, instead of applying the certificate of deposit in the sum of \$2,000 to the account of the Marmon Elizabeth Co., elected to apply it to the demand note which they had. Now, we have levied on those moneys in the bank and now we seek discovery in aid of execution; also an accounting, and ask that the bank be compelled to turn over the money to the 30 40

*Opening of Case.*

Marmon Elizabeth Co. so the Sheriff can make a levy on the judgment we have at law.

That is our case.

10 Mr. David: Your Honor please, I represent the bank. The transaction in the bank proceeding was this: On March 6, as counsel has already mentioned, Paul and Helen Allen discounted a note for \$11,450. At that time they got a check for that amount, signed a collateral note, indorsed that money—that check—over to the account of the Marmon Elizabeth Co. The bank took as collateral on this note a second mortgage of \$7,500 and insisted that they retain a balance of not less than \$2,000, for which the bank—not the Marmon company—issued its certificate of deposit to Helen  
20 and Paul Allen. And the note was called in—it was a demand note—the payments were not satisfactory and on August 1 the bank called this loan and at that time Allen indorsed over to the bank the certificate of deposit, which was credited on their loan.

The moneys never belonged to or were part of the moneys of the Marmon company. The transaction was entirely with the Allens. The Allens, incidentally, I think were two of the  
30 three stockholders of the Marmon company, used their funds, and no doubt the company's funds, for the company's business. It was the bank account they got from the bank which was turned over to the bank and the company used their money in running its business.

The Court: Well, then the bank simply took this \$2,000 to satisfy its note?

40 Mr. David: Yes. They credited it on account of the Allen note.

*Paul V. Allen—for Complainant—Direct.*

The Court: Why shouldn't they? I don't see why not.

Mr. David: I don't see anything in the case at all.

Mr. Green: If the original note was granted in part, which was the understanding I have from the representatives of the different concerns—that that was not the understanding at all. The understanding was that the money was the money of the Marmon Elizabeth Co., and a corporation check was given in payment of the certificate of deposit and five months thereafter the bank misappropriated the funds and applied them from one account to another account. Now, we say that money was a corporation fund and not an individual fund. If your Honor allows us to go ahead, we will show it. 10 20

The Court: Of course, I will allow you to go ahead, if there is any question about it. If they were corporation funds, that is one thing.

Mr. Green: That is what I am here to prove, sir.

The Court: All right.

Mr. Green: Mr. Allen.

30

PAUL V. ALLEN, sworn for Complainant.

*Direct examination by Mr. Green:*

Q. Mr. Allen, you are a defendant in this case?

A. Yes, sir.

Q. And what was your official capacity with the Marmon Elizabeth Co., Inc., on March 9, 1928? A. I was President and General Manager. 40

*Paul V. Allen—for Complainant—Direct.*

Q. Were you the person that dealt with The People's National Bank of Elizabeth? A. Yes, sir.

10 Q. Will you tell us the dealings that you had with the bank during the month of March, 1929, with regard to the loan of \$11,450? A. Yes. Why, the finance company that I was doing business with discontinued business in New Jersey and my capital was such that I required financing to finance my cars on the floor plan, which is customary in the automobile business; and I went to the Commercial Credit of Newark—their Newark office, Mr. Queripel, and I showed him a statement of my company as to condition as it stood at that time with the other finance company.

20 Mr. Queripel told me that if I could free my company of the money that I owed the bank and get \$5,000 fresh capital in the business that he, as a representative of the Commercial Finance Co., would finance me on a floor plan, with the recommendation of the Marmon Fanning Co. There were two other people out there that wanted the Marmon agency, and I went up and saw the finance company, and after talking to Mr. Queripel, I went down to the People's National Bank, which at that time I owed \$3,950 to, and I explained my position to Mr. Grape.

30

Q. What is Mr. Grape's position with the company? A. Mr. Grape's position, I understood then—I think he was Vice-President and Cashier, but he was the man who I always did business with in banking, and Mr. Grape asked me how I was fixed financially and I told him all I had was the house, which belonged to my wife, but my wife had put so much money in the business

40

*Paul V. Allen—for Complainant—Direct.*

she was perfectly willing to help me to any extent reasonable, so he suggested that he take a \$7,500-second mortgage on the home and pay back the second mortgage which I owed to Al Bender, which I had just taken out for \$2,500, pay off the bank the \$3,950 which I owed the bank, and taking that—taking those two payments from the \$11,450 which he volunteered to take from my wife and I on a joint note, would leave us a \$5,000 capital and it would comply with the requirements that the Commercial credit insisted that I have in order for them to finance me. So we went down to Judge David's office, my wife and myself, and signed a second mortgage, drawn up by the Judge's office. And on the 6th of March we went down to the People's Bank—my wife and myself—and signed the necessary papers that Mr. Grape presented to us with a—and indorsed a check over and placed it to the Marmon Elizabeth Co. He suggested at that time—it was not mentioned prior to that time—that inasmuch as they anticipated Bank Examiners coming in the bank before the 1st of June, that we take and leave a \$2,000 certificate of deposit with the bank so that, when they came in and saw a note for \$11,450, that they could show a second mortgage and a certificate of deposit for \$2,000 as collateral against that note; but he assured me and assured my wife that, at any time the business required that money, it was available for the Marmon Elizabeth, and on that basis I came over to Newark, notified Mr. Queripel of the Commercial Finance, informed the Marmon Fanning Co., showed them my deposit book with the money in and that they substantiate the fact

10

20

30

40

*Paul V. Allen—for Complainant—Direct.*

that the \$5,000 was there for the Marmon Company to do business with.

10 Q. Now, at the time that you came over to see Mr. Queripel and Mr. Cox of the Marmon Fanning, had the \$2,000 been placed in the form of a certificate of deposit? A. Yes. That was placed in the form of a deposit when we signed the note; everything was done right that morning.

Q. That was \$2,000 in the form of a certificate of deposit and \$3,000 available in cash funds immediately? A. Right.

Q. Mr. Allen, I show you a check of The People's National Bank, dated March 6, 1928, for \$11,450. Is that the amount of the loan that was given to you and Mrs. Allen? A. Yes, sir.

20 Q. And thereafter deposited in the account of the Marmon Elizabeth Co., Inc.? A. Right.

Mr. Green: I would like to offer this in evidence.

Mr. David: No objection.

(Check marked Exhibit C-1.)

30 Q. Mr. Allen, I show you a check dated March 6, for \$3,950, to the order of The People's National Bank. Is this the check that you gave them in payment of the loan—or rather, in payment of the negotiable notes that they had of the Marmon Elizabeth Co.? A. Yes, sir.

Mr. Green: I would like to offer this.

(Check marked Exhibit C-2.)

40 Q. I also show you a check under date of March 6, to the order of The People's National

*Paul V. Allen—for Complainant—Direct.*

Bank, for \$2,000. What was that check for, Mr. Allen? A. That check was for the certificate of deposit.

Mr. Green: I offer it.

(Check marked Exhibit C-3.)

10

Q. Now, I show you a certificate of deposit made by The People's National Bank to Helen Allen and Paul V. Allen, indorsed in blank by Helen and Paul V. Allen. Is that the certificate of deposit that was issued on March 6? A. Yes, sir. That is my signature on it.

Q. Now, with regard to the notation after your signature: was that there at the time? A. No, sir.

20

Mr. Green: I would like to offer this certificate.

Mr. David: I have no objection.

(Certificate marked Exhibit C-4.)

Q. Mr. Allen, at the time you and Mrs. Allen indorsed the back of this certificate, was the notation "Credited to demand note, August 1, 1928" there? A. No.

30

Q. Did you or anybody on behalf of the Marmon Elizabeth Co., authorize the bank to credit this certificate of deposit to any other account than the Marmon Elizabeth Co. account? A. No, sir.

Q. Now, what was the first intimation that you had from the bank that they were not going to credit the amount of the certificate of deposit

40

*Paul V. Allen—for Complainant—Direct.*

to the account of the Marmon Elizabeth Co.? A. When I went there to get it.

10 Q. When was that, may I ask? A. Well, it was about the early part of—the latter part of April or the 1st of May I sold—my men sold—about seven cars in two days, and I needed additional money to put into used cars that I was taking in in trade. And I went down to the bank—I did not want to use all the \$2,000, I just wanted to use about \$1,200 of it—

20 Q. Yes. A. —and I went down to the bank to get the money and Mr. Grape was at a convention in Atlantic City and I saw his assistant—that is, the man who is next in line—and I just can't recall his name offhand—but I had my wife and Mr. Cox with me, Mr. Cox of the Marmon Fanning Co., and that is the first intimation I had that there was any question about where the money was or what it was all about, or anything else. And I wanted to go in and see the President of the bank. The gentleman we were talking to said he had better do that, so he went in to see him and came out and said we couldn't do anything until Mr. Grape came back from Atlantic City, and I wanted to get in touch with  
30 him on the wire, because it was important to me; I had car deliveries to make and in fact I had already obligated myself for the money, because I figured it was there and I had no reason to believe otherwise; but he wouldn't even tell me where Mr. Grape was in Atlantic City so I could get in touch with him, so I had to wait until Mr. Grape came back and, when Mr. Grape came back my wife and I went down again, and  
40 with just no explanation at all he simply said

*Paul V. Allen—for Complainant—Cross.*

the money was not available, we could not have it.

Q. And were you at the office of Mr. Queripel when Mr. Queripel said to Mr. Grape with regard to the sum of \$5,000 being on deposit with the People's National Bank? A. No. 10

Q. Were you with Mr. Cox, of the Marmon Fanning Co., when Mr. Cox spoke to Mr. Grape with regard to the sum of \$5,000 on deposit? A. Absolutely. I brought Mr. Cox over to give Mr. Grape assurance that the money actually was there.

Q. And the conversation took place at the time? A. Yes.

Q. Now, what did Mr. Grape tell Mr. Cox at that time? A. And Mr. Grape told Mr. Cox at that time that there was \$5,000 available for the Marmon account. 20

Q. And did the Marmon Fanning then sell Marmon Elizabeth Company cars? A. Based on that.

Q. Based on the statement? A. Yes. That is the way I got it from Mr. Queripel—based on that statement.

*Cross examination by Mr. David:* 30

Q. Now, as I understand, Mr. Allen, on March 6, 1928, you personally owed the bank some \$3,900? A. My company did; I did not.

Q. The Marmon Elizabeth Co.? A. Yes.

Q. You went to the bank to see what discount you could get yourself from the bank; is that right? A. I don't understand that.

Q. You went to the bank to see what money you could borrow from the bank? A. Correct. 40

*Paul V. Allen—for Complainant—Cross.*

Q. Your wife went with you? A. Right.

Q. You had your negotiations with Mr. Grape?

A. Right.

Q. And he asked you what you were worth?

A. Right.

10 Q. What property you owned? A. Yes.

Q. And after you gave him your financial statement, he said that he would arrange for a discount of \$11,450 for you and your wife? A. Right.

Q. And you signed at that time, in addition to the mortgage a collateral note? A. Yes, sir.

Q. (Showing witness paper.) Is that the note or a copy of the note that you signed? A. That is the amount.

20 Q. Well, is that the collateral note or is that a copy of it? A. Well, if I saw my signature on it, I would say yes.

Mr. David: I am afraid we better get the original. Your Honor please, I introduce instead of the original a duplicate.

30 Q. For the purpose of this—was it a similar note? A. Yes, sir; it was a similar note.

Q. A collateral note which you and your wife signed? A. Right.

Mr. David: Is there any objection to this going in evidence?

Mr. Green: No.

The Court: Mr. Grape—

Mr. David: He has got to go to Elizabeth.

40

Mr. Green: We will save time. This

*Paul V. Allen—for Complainant—Cross.*

note is a similar note, except it is a duplicate. I think for the purpose of the suit we can agree on that.

The Witness Allen: I thought he wanted me to swear that was the note, and I couldn't do that without seeing my signature. 10

Mr. David: Will you say this is a copy of the note?

Mr. Green: Yes, for the purpose of the suit.

Mr. David: I will give you my assurance it is.

The Witness: Well, all right; I won't say it is not.

The Court: We will presume it is and if we find out it is not, then we are all wrong. 20

Mr. David: Shall I have it marked at this time or wait for my case?

The Court: Yes, if there is no objection you may mark it in evidence.

(Note marked Exhibit D-1.)

Q. And at that time Mr. Grape informed you that with a discount of this size a—you would have to have a certain amount remain as a balance in your account, did he not? A. No, he did not. 30

Q. Didn't he tell you you would have to accept a certificate of deposit of \$2,000? A. No, sir, he did not.

Q. When did he say anything about a certificate of deposit? A. He suggested—he asked me if I needed all that money at one time and 40

*Paul V. Allen—for Complainant—Cross.*

I said no, I did not, and he suggested on the basis that the Bank Examiner might come in the bank—and he suggested at the time, after he had given us the check for \$11,450, he suggested then that, for the benefit of the Bank Examiners,  
 10 that we give him a certificate of deposit for \$2,000.

Q. How long after the original note was signed did he say that? A. How long after?

Q. Yes. A. Why, just—we signed them all together right there that morning.

Q. So, then, it was right then and there? A. Right.

Q. But there was nothing said about a certificate of deposit of \$2,000? A. Correct.

20 Q. And you said that Mr. Grape said that you would give him a certificate of \$2,000. Is that what I understood you to say? A. That we would give him, yes.

Q. A certificate of \$2,000? A. Yes, sir.

Q. Now, what do you mean by that, Mr. Allen? A. Why, I mean just what I said, that he suggested that we leave \$2,000 in the form of a certificate of deposit.

30 Q. And a certificate of deposit was really given not by you to the bank, but by the bank to you, at that time, wasn't it? A. Why, no, it could not have been, because we signed the checks on the Marmon Elizabeth account to pay for that certificate.

Q. I show you a certificate of deposit, marked Exhibit C-4, and ask you whether that is not the certificate of deposit— A. No question about it.

40 Q. And that is the certificate of deposit given by the bank to you? A. For \$2,000.

*Paul V. Allen—for Complainant—Cross.*

Q. Yes. A. And we paid the \$2,000 for the certificate of deposit.

Q. You got a check for the full amount— A. Right.

Q. —of the discount? A. Right.

Q. Then you gave a check for \$2,000— A. Correct. 10

Q. —against which the bank issued its certificate of deposit? A. Right.

Q. Is that right? A. Right.

Q. And that certificate of deposit you indorsed, did you not? A. Correct.

Q. When did you indorse it? A. Right there.

Q. And handed it back to Mr. Grape? A. Absolutely.

Q. And it was retained by Mr. Grape from then until now? A. Right. 20

Q. Now, on that loan, nothing was paid off? A. There has been nothing paid on the principal, no, sir.

Q. You paid interest on the loan in the month of April? A. Right.

Q. After that, you paid no interest? A. Right.

Q. And then Mr. Grape sent for you? A. Right.

Q. Is that right? And insisted that something must be done about the loan? A. I don't recall that. 30

Q. Well, did you go back—did you go to the bank any time after April? A. Yes, sir.

Q. The first time you paid? A. Sure. I had an account in the bank for the Marmon Elizabeth Co.

Q. Do you recall, on the 1st of August, being at the bank? A. No, sir.

Q. And at that time Mr. Grape telling you that this \$2,000 which had been kept in the bank would 40

*Paul V. Allen—for Complainant—Cross.*

now have to be credited on your account? A. He never did.

Q. He never said it? A. No, sir. I was not in town in August; I was not in Elizabeth.

10 Q. Now, to whose account was that certificate of deposit supposed to be credited? A. The Marmon Elizabeth Co., Inc.

Q. Do you remember testifying on supplementary proceedings in the case of the Marmon Fanning Co. against the Marmon Elizabeth Co., before William D. Wolfskeil— A. Right.

Q. —on the 22d of November last? A. Right.

20 Q. And at that time being asked by Mr. Venokur, of Green & Green's office, this question: "This \$2,000 credit or certificate of deposit, to whose account was that supposed to be credited?" And you answered, "I don't know." Do you recall that? A. I may have. I do not recall it, no, sir.

Q. You do not recall having answered that? A. I don't say no. I do not recall that one particular answer.

Q. Well, I will show you the question. A. Oh, I probably did, if it is there, I did. I would not say that I did not. I do not see it. Where is it?

30 Q. "Question. This \$2,000 credit or certificate of deposit, to whose account was that supposed to be credited?" And you answered, "I don't know." Do you recall making that answer? A. No, I do not, but I undoubtedly did, if he has got it there. There is only one account it could be deposited to, because I did not have an account in the bank and neither did my wife.

40 Q. Now, who were the stockholders in the Marmon Elizabeth Co.? A. My wife and Joseph Cahill and myself.

*Paul V. Allen—for Complainant—Re-direct*

Q. Was Mr. Cox an officer or a stockholder?

A. He was later, yes.

Q. What position did he hold? A. He was Assistant Treasurer.

Q. When was he made Assistant Treasurer? A. Along about the 1st of May, I would say. 10

Q. And Mr. Cox was also, at that time, an officer of the Marmon Fanning Co.?

Mr. Green: I object to it.

A. No, sir.

Mr. Green: I will withdraw it.

The Witness: No, sir, he was not an officer of the Marmon Fanning Co.

Q. Well, was he subsequently? Did he subsequently become an officer of the Marmon Fanning Co.? A. Not to my knowledge. I don't think he is today. 20

Q. Well, he is in the employ of the Marmon Fanning Co.? A. Yes, sir.

Q. And was in May, 1928? A. Yes, sir.

Mr. David: That is all.

*Re-direct examination by Mr. Green:*

Q. Mr. Allen, with regard to the collateral note that has been offered in evidence, which you say is a copy, did you ever see the change of it from \$11,450 to \$9,450? A. No, sir. 30

Q. You never saw it at all? A. No, sir.

Q. And with regard to the testimony that was taken, to which Mr. David has referred, you testified at that time that Mrs. Allen had no account at the bank and you did not have an account? A. No, sir. 40

*William H. Queripel—for Complainant—Direct.*

Q. And you did not have a personal account, just the corporation and some funds for the kiddies? A. That is all.

10 Q. And it could not have been any of those accounts? A. I opened three savings accounts for my kiddies with a couple of dollars and I was trustee for those accounts.

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WILLIAM H. QUERIPEL, sworn for complainant:

*Direct examination by Mr. Green:*

20 Q. Mr. Queripel, with whom are you connected at the present time? A. Commercial Credit Corporation.

Q. And, during the year 1928, were you still connected with the Commercial Credit Corporation? A. Yes, sir.

Q. In what capacity? A. Manager.

Q. Of— A. Newark branch.

Q. —Newark branch. And does the Newark branch take in Elizabeth and vicinity? A. It does.

30 Q. Now, did you have occasion to deal with the Marmon Elizabeth Co., having its place of business in Elizabeth? A. We did.

Q. Whom did you deal with in the Marmon Elizabeth Co.? A. Mr. Paul Allen.

Q. And, during the early part of 1928, did you have occasion to deal with the company? A. Marmon Elizabeth?

Q. Yes. A. Yes.

Q. Will you tell us the dealings which you had at that time? A. Mr. Allen—

Mr. David: I object.

*William H. Queripel—for Complainant—Direct.*

Q. In January——

Mr. David: I object on the ground that the dealings of a commercial company in January, 1928, would have no binding effect on the defendant, The Peoples Bank. 10

The Court: I do not see what effect it could have.

Mr. Green: I just wanted to show——

Q. Mr. Queripel, in March, 1928, did you have occasion to speak to Mr. Grape, of The Peoples National Bank of Elizabeth? A. I did.

Q. Now, will you tell us what brought about the conversation that you had with Mr. Grape? A. The financial situation of the Marmon Elizabeth Co. was such that we could not—(interrupted). 20

Mr. David: I object to the question.

The Court: I think you ought to confine yourself to the conversation of Mr. Grape.

Q. Will you tell us what the conversation was with Mr. Grape? A. I called Mr. Grape on the telephone, merely to verify that the Marmon Elizabeth Co. had \$5,000 available for their account, and was informed that they had, and, on the strength of that, we proceeded to do business. 30

Q. Mr. Queripel, before you 'phoned the bank, did Mr. Allen advise you to 'phone the bank? A. He did.

Q. And that was during the month of March? A. March, 1928.

Q. 1928. Now, what did Mr. Grape advise you in the conversation that you had? A. That there 40

*Helen E. Allen—for Complainant—Direct.*

was available \$5,000 for the account of the Marmon Elizabeth Co., Inc.

Q. And, relying on that, you dealt with the Marmon company? A. Absolutely, and together with Mr. Allen's new statement.

10 Q. I see. And did the statement show anything with regard to a loan? A. \$5,000.

Mr. Green: \$5,000. Cross examine.

*Cross examination by Mr. David:*

Q. You represented, at that time, whom, Mr. Queripel? A. The Commercial Credit Corporation.

20 Q. The Commercial Credit Corporation? A. That is right.

Mr. David: That is all.

Mr. Green: That will be all, Mr. Queripel, thank you. Mrs. Allen.

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HELEN E. ALLEN, sworn for complainant:

*Direct examination by Mr. Green:*

30 Mr. Green: Your Honor, I just want to say, for the purpose of the record, that the judgment that we have is admitted, is a matter of record, the judgment and the execution, but don't admit the allegation, our first cause of action—an allegation with regard to the levy and an allegation finally with regard to the levy made by the Sheriff of the County of Union.

Mr. David: All admitted.

40 Mr. Green: Matters of record.

*Helen E. Allen—for Complainant—Direct.*

Q. Mrs. Allen, you were—during March, 1928, were you an officer of the Marmon Elizabeth Co.?

A. I was.

Q. What was your office? A. Treasurer.

Q. And were you the one that owned the home in Elizabeth? A. Yes.

10

Q. And will you tell us the negotiations that you and Mr. Allen, as officers of the Marmon Elizabeth Co., had with The Peoples National Bank with regard to a loan? A. Well, I really can't say anything else other than what Mr. Allen said.

Q. Well, just tell us your story, Mrs. Allen.

A. Well, we wanted this money and we went down to the bank and got this loan and they took back the second mortgage and paid off the other mortgages we had taken from Mr. Bender and we paid off the notes and we signed the certificate of deposit that they wanted to hold until the Bank Examiners came, and then, I understood, any time after that we were able to use the money.

20

Q. Mrs. Allen, at the time——

The Court: Were you told that or——

The Witness: Yes, I was told that.

The Court: Who told you that?

The Witness: Mr. Grape.

30

Q. Now, after the \$3,950 was paid over to the bank and the money paid to Mr.—how much remained in the account? A. Well, we were to get \$5,000, but they only gave us three and they kept the \$2,000 certificate of deposit.

Q. On certificate of deposit? A. Yes, sir.

Q. For which you, as an officer, paid a corporation check, marked Exhibit C-3? A. Yes. I signed that.

40

*Helen E. Allen—for Complainant—Cross.*

Q. You signed that? A. Yes.

Q. That was for the certificate of deposit? A. Yes.

Q. Now, Mrs. Allen, this is the check that was given on account of that loan to you and Mr. Allen individually? A. Yes.

Q. And then indorsed over to the Marmon Elizabeth Co.? A. Yes. That is my signature.

Q. Now, I show you certificate of deposit, Exhibit C-4, and ask you to look at the indorsement on the back. A. Yes. That is my signature.

Q. Now, did you or Mr. Allen write "Credited to demand note August 1"? A. No.

Q. Did you or Mr. Allen authorize that be written? A. No.

Q. What was the understanding with regard to the certificate of deposit? A. That we could use it at any time we needed it.

Q. For individual use? A. No, for the business.

Q. For the business? A. Yes.

Q. Well, as a matter of fact, was the entire transaction for the use of the business? A. Business entirely, nothing personal.

Q. Did you have a personal account— A. No.

Q. —with the bank? A. No, I did not.

Q. Did Mr. Grape, at any time, tell you that the certificate of deposit was to be applied on account of the demand— A. No.

Q. —loan? A. No.

Mr. Green: Cross examine.

*Cross examination by Mr. David:*

Q. Now, when did you have your first talk with Mr. Grape concerning the borrowing of the money

*Helen E. Allen—for Complainant—Cross.*

from the bank? A. I believe it was in March, some time the early part of March.

Q. And where? A. In Mr. Grape's—in the bank.

Q. You and your husband in the bank? A. Yes. 10

Q. With Mr. Grape? A. Yes.

Q. Now, will you just tell me what was said by your husband, by yourself and Mr. Grape, at that time? A. (Witness laughs.) It is a long time to remember everything.

Q. Tell us. Tell me what you remember. A. Well, I can't remember anything other than I have just said and what Mr. Allen has said; nothing else transpired.

Q. Repeat to me now what you remember now. 20  
A. Well, I remember we borrowed the money, the note for \$11,450, and the bank took back a second mortgage against our home, and paid off the second mortgage, which we had taken with Mr. Bender for \$2,500, and paid off the notes which we owed The Peoples Bank, leaving a balance of \$5,000 which we had to have in order to continue business with the Marmon Elizabeth Co. and this Commercial Credit Co.

Q. But you have not told me one thing that 30  
was said. My question is—(interrupted). A. My dear man, I can't remember a conversation exactly word for word that took place a year ago.

Q. I don't ask you to. I ask you to tell me what you remember was said at the bank at that time. A. Well, I remember that the money was to be given to us, \$5,000; we were trying to get \$5,000, that was our purpose, our business there, which we never received. They only gave us \$3,000, and we have never to this day received the 40

*Helen E. Allen—for Complainant—Cross.*

other \$2,000. The bank still holds it and it is our money.

Q. Will you now answer my question as to what you remember was said at that time at the bank? A. I remember Mr. Grape telling me—  
 10 describing the affair and giving me different checks to sign and telling me what they were for, that this was a certificate of deposit. That seems to be the thing that is causing the most trouble, is this certificate of deposit. Mr. Grape explained it to me and told me that certificate of deposit they had to hold until the Bank Examiners came, because the loan was large and that \$7,500 second mortgage did not seem to be quite enough to balance the loan and they wanted this other \$2,000  
 20 for a short time while the Bank Examiners—until the Bank Examiners came, and after that it was ours to use any time we needed it.

Q. Now, is that all that you remember of the conversation? A. That is all I remember. I cannot remember, because at that time I did not think anything was going to happen to this extent and I did not memorize the conversation.

Q. Of course, you have talked the matter over since? A. Not to any great extent; not to any  
 30 great extent, because I was in business and I knew practically everything that went on.

Q. You have talked it over since with your husband? A. Why, naturally.

Q. Often? A. No.

Q. Recently? A. No.

Q. How recently? A. Well, I did not know that this thing was to come up until I received a summons, I think it was a week or ten days ago, and Mr. Allen has been very busy, he is not home  
 40 very often. When he is home, we are out, and I

*Helen E. Allen—for Complainant—Cross.*

have not conversed with him much about the thing.

Q. During the last ten days, you have conversed with Mr. Allen about it? A. We have conversed about it, but very slightly.

Q. What do you mean by that? A. Just that the case was coming up and that we would have to be here. 10

Q. You talked about the certificate of deposit? A. Not very much, no.

Q. Well, you talked some about it? A. Yes.

Q. Now, at that time, you say Mr. Grape told you you could use the certificate of deposit at any time? A. The money, yes, if we needed it.

Q. Did you have the certificate of deposit? A. It was kept in the bank. 20

Q. He told you you could use it at any time? A. And he kept it, yes.

Q. Is that right? Now, you say you were to get \$5,000 and they only gave you three thousand? A. Three, yes.

Q. What do you mean by that? A. They gave us the three and kept the two thousand in the form of a certificate.

Q. What do you mean, they gave you three? A. They credited it to our account. 30

Q. Credited what? A. \$3,000.

Q. Well, you had no account there. A. No, the Marmon Elizabeth Co.

Q. Oh, they credited \$3,000 to the Marmon Elizabeth Co.? A. Yes.

Q. Who told you that? A. Mr. Grape.

Q. That they were going to credit \$3,000 to the Marmon Elizabeth Co. account? A. And the 2,000—no, we were supposed to get \$5,000.

Q. And you say that they only credited \$3,000 40

*Helen E. Allen—for Complainant—Re-direct.*

to the Marmon Elizabeth account? A. Then, at that time, yes.

Q. Well, don't you know that you deposited the check for \$11,450 to the Marmon account, and didn't you indorse that check? A. That is my  
10 signature.

Q. Well, but didn't you receipt "For deposit, Marmon Elizabeth account"? You signed that? A. Uh, huh.

Q. So at that time you deposited that \$11,450 to the Marmon Elizabeth account? A. Well, I am not a business woman; I have never been in business and I really don't understand an awful lot about this. This is all new to me.

Q. That is what I thought. And what you are  
20 really testifying to now is what your husband told you about the transaction? A. No, no; I wouldn't say that. I signed the papers and I naturally have intelligence enough to know what I signed.

*Re-direct examination by Mr. Green:*

Q. This was a check for \$2,000—on March 6, you signed a number of checks, didn't you? A. Yes, I did.

30 Q. And this check for 2,000— A. Yes.

Q. —that was for the certificate of deposit? A. Yes.

Q. And then this other check for \$3,950 was for money— A. To pay off the notes.

Q. At the bank? A. Yes.

Q. But you do recall the conversation—but you do recall the conversations with Mr. Grape? A. Yes, I do.

40 Q. With regard to the certificate of deposit? A. Yes.

*Herbert F. Cox—for Complainant—Direct.*

Q. Now, I want to ask you—(interrupted). A. I cannot recall the conversation exactly, because it happened, you know, a year ago, and I never thought this was going to come up. I naturally thought the money would be there.

Mr. Green: That will be all. 10

The Court: That is all.

Mr. Green: Mr. Cox.

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HERBERT F. COX, sworn for complainant.

*Direct examination by Mr. Green:*

Q. You are connected with the Marmon Fanning Company, the complainant in this suit? A. 20  
Yes, sir.

Q. In what capacity? A. Sales manager.

Q. And were you the person that dealt with the Marmon Elizabeth Co., of Elizabeth? A. Yes, sir.

Q. Now, in March, 1926, did you have occasion to speak to Mr. Grape, of the Peoples National Bank, the defendant in this suit? A. Yes, sir.

Q. With regard to what?

Mr. David: March what? 30

Mr. Green: March, 1928.

A. With regard to the bank balance that Mr. Allen was supposed to have, after he discounted a note.

Q. Will you tell us the conversation that you had with Mr. Grape, and what you did? A. Well, the reason I called Mr. Grape first was that Mr. Allen came and told me had a party—(interrupted). 40

*Herbert F. Cox—for Complainant—Direct.*

Mr. David: I object.

The Court: All we want to know is the conversation between you and Mr. Grape.

10 The Witness: I asked Mr. Grape if Mr. Allen had on deposit with his bank, at that time, \$5,000. Mr. Grape told me that he did: \$3,000 could be used immediately, but there was a certificate of deposit for \$2,000. I asked Mr. Grape if that two thousand could be used, if it were necessary to finance used cars traded in on new cars.

Mr. David: Just a moment. May I have the last part read?

20 (Part of answer read as follows: "\$3,000 could be used immediately, but there was a certificate of deposit for \$2,000. I asked Mr. Grape if that two thousand could be used if it were necessary to finance used cars traded in on new cars.)

The Witness: Mr. Grape told me it could.

Q. Did you have occasion to speak to him again with regard to the certificate of deposit?

30 A. Yes. I went to Mr. Grape's office with Mr. Allen and Mrs. Allen.

Mr. David: Will you fix the time, please?

The Witness: Can I fix the time?

Mr. David: Yes.

The Witness: No, I cannot.

Q. Was it before or after March 6? A. It was after I 'phoned to Mr. Grape.

40 Q. Well, how long after? A. I can't say. I am not certain of the date.

*Herbert F. Cox—for Complainant—Direct.*

Q. What transpired at that time, Mr. Cox? A. I went down to Mr. Allen to see if they could use that \$2,000 at that time, and Mr. Grape told me that they could not use it at that time, that the \$2,000 was necessary to show a balance in it, of course, to the Marmon Elizabeth Co. of \$2,000—to show a daily balance of that amount. And he mentioned something about having to have that on deposit in case the books were examined by the Bank Examiners. 10

Q. And, after the conversation that you had with Mr. Grape, when he informed you that there was \$5,000 on deposit, \$3,000 of which was available immediately and \$2,000 in the form of a certificate of deposit, did you extend credit to the Marmon Elizabeth Co.? A. Yes, we did. 20

Q. And what was the reason for your inquiry, in the first place?

Mr. David: Objected to.

Q. What credit did you extend to Mr. Allen or the Marmon Elizabeth Co.? A. Well, we allowed him to buy parts on time, to go ahead and continue as a dealer for the sale of Marmon cars under the Marmon Fanning Co. We are the distributors for the State and unless he had had that money there we would not have allowed him to continue with the agency. 30

Q. Then, as a result of that \$2,000 not being available, and so forth, you thereafter had a certain account against the Marmon Elizabeth Co., which they were unable to pay; is that so? A. Yes. We gave Mr. Allen an automobile to deliver to one of his customers, with the belief in mind that that \$2,000 would be available eventually to pay for it. 40

*Herbert F. Cox—for Complainant—Direct.*

Q. And that claim and the others thereafter resulted in your obtaining the judgment against the Marmon Elizabeth Co.; that is so, isn't it?

10 The Witness (to reporter): Will you read that, please?

(Questions read as follows):

"Q. And that claim and the others thereafter resulted in your obtaining the judgment against the Marmon Elizabeth Co.; that is so, isn't it?"

A. Yes.

20 Q. Mr. Cox, there has been testimony to the effect you were made an officer of the Marmon Elizabeth Co. Will you tell us just when that took place and where it took place? A. Why, Mr. Allen's affairs were in a bad financial condition.

Q. That was some time after the refusal to credit the certificate of deposit? A. I believe it was, yes.

30 Q. And then what happened? A. I went to Mr. Allen's office and Mr. Allen said—Mr. Cahill, who was, I was told, was an officer of the Marmon Elizabeth Co., and Mr. Cahill, Mr. and Mrs. Allen and I talked it over. Mr. Cahill said he would not be available at all times to sign checks and that Mrs. Allen would not be down there at all times, and they suggested that they make me an assistant treasurer, in order that I could sign checks for Mr. Allen, so that we could have two signatures. That was only a temporary arrangement. I had absolutely nothing to do with the management of the Marmon Elizabeth Co.

40 Q. It was just to permit the Marmon Fanning Co. another renewal of credit, the certificate of

*Herbert F. Cox—for Complainant—Cross.*

deposit? A. Yes, to the best of my knowledge. I had a talk with Mr. Grape and told him what I had done, so I would be in a position to watch the account there. We, from time to time, loaned Mr. Allen a car to put on his floor to show, when he did not have even sufficient money to purchase it wholesale. 10

Q. If this \$2,000 in the form of a certificate of deposit had not been there to apply to the credit of the Marmon Elizabeth Co. when required, would the Marmon Fanning Co. have extended the credit it did extend? A. No. I would strongly have advise closing out the account.

*Cross examination by Mr. David:*

Q. The first time you were down, you say, was on March 6—I mean down to the bank and saw Mr. Grape? A. No, sir. 20

Q. When was it? A. I don't recall the exact date. It was after I had 'phoned to Mr. Grape and I— (interrupted).

The Court: He 'phoned to him the early part of March, called him up by 'phone.

Q. What was the date of it? A. I cannot recall the exact date. 30

Q. That was in March? A. It was after this mortgage transaction, yes.

Q. Do you know how long after? A. A few days, I should say. It was not a very long time.

Q. How long after that did you go down to the bank and see Mr. Grape? A. I have just told you I cannot recall dates. It was all around— (interrupted). 40

*Herbert F. Cox—for Complainant—Cross.*

Q. Well, was it six months? A. No, sir.

Q. Six weeks? A. It might have been six weeks; yes, sir.

Q. It might have been six days? A. No. It was longer than that.

10 Q. Well, give me your best recollection of how long after. A. Well, it was before Mr. Grape went to the Bankers' Convention in Atlantic City.

Q. Well, when was that? A. I don't recall, but I know it was before that, because I was there when Mr. Allen went there at the time Mr. Grape was in Atlantic City at the Bankers' Convention.

Q. So you cannot give us any better idea than it may have been six weeks after the telephone call? A. Yes, it may have been.

20 Q. That is the best answer you can give to that question? A. Yes, that is the best answer I can give to it.

Q. Now, at the time you had the talk over the 'phone, you asked Mr. Grape if they had a deposit and if the Allens had a credit of \$2,000, is that right—\$5,000? A. I asked him to confirm Mr. Allen's statement to me.

30 Q. That he had on deposit \$5,000? A. That they had loaned Mr. Allen sufficient money to clean up what they owed him and still retain \$5,000.

Q. And at that time Mr. Grape told you that they had \$3,000 of it available at once? A. Yes.

Q. And \$2,000 could be used later? A. \$2,000 on a certificate of deposit which could be used, if it were absolutely necessary. And I told Mr. Grape, if Mr. Allen wanted to use it, I would assure him it was necessary and being used for good purposes.

40 Q. And, at that time, of course, you were under

*Frank J. Fanning—for Complainant—Direct.*

the impression that the Allens—the Marmon Elizabeth Co.—was going along swimmingly with its business and there would not be any worry about the credit you were extending? A. I did not think there would be any worry about the credit we were extending and I did not think it was going to be any bed of roses. I knew he had a hard pull, but I believed that he could pull it through. 10

Q. Yes. And, if the \$2,000 had been applied to the account of the Marmon Elizabeth Co., do you think it would have pulled through?

The Court: No, no, no!

Q. Mr. Cox, when you referred to “them”, you meant the Marmon Elizabeth Co., did you not? A. Yes. I had no dealings with Paul V. Allen nor Helen E. Allen, personally. 20

Q. Just the company? A. Yes.

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FRANK J. FANNING, sworn for complainant.

*Direct examination by Mr. Green:*

Q. What is your connection with the Marmon Fanning Co.? A. I am president of the Marmon Fanning Co. 30

Q. Now, are very familiar with the account you had with the Marmon Elizabeth Co.? A. Yes, I am.

Q. Now, with regard to the certificate of deposit involved in this suit, will you tell us what you know?

Mr. David: Oh, no. I object to that.

40

*Maurice H. Grape—for Defendant—Direct.*

The Court: No. That is entirely too general.

Mr. Green: No. I will reframe that, your Honor.

- 10 Q. Was Mr. Cox's interview with the Marmon Elizabeth Co. in accord with your instructions?  
A. Yes.

The Court: Did this witness have any conversation with Mr. Grape?

Mr. Green: No. Well, I will withdraw him, your Honor.

The Court: I do not think there is any materiality in it. Is that all?

- 20 Mr. Green: That is the complainant's case, your Honor.

Mr. David: Mr. Grape, be sworn.  
I desire to move to dismiss.

The Court: Of course, you know the Chancery rule: if I decide the motion, you are precluded from putting in any defense.

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MAURICE H. GRAPE, sworn for defendant.

- 30 *Direct examination by Mr. David:*

Q. Mr. Grape, you are the cashier of the People's National Bank of the city of Elizabeth?

A. I am.

Q. And have been for how long? A. Fifteen months.

Q. And you were in March, 1928? A. I was.

- 40 Q. Do you recall a transaction with the Allens on March 6, 1928? A. Yes.

*Maurice H. Grape—for Defendant—Direct.*

Q. Will you tell us what that transaction was?

A. The Marmon Elizabeth Co. had been in very bad financial position and wanted additional money. Mr. Allen made numerous visits to the bank—some days two and three visits—after additional money, claiming he could not get credit from certain places without this money. I told him we could advance no more credit to him, as his statement did not justify it; that the bank had given him all he was going to get and the only way he could get additional money was to have somebody outside advance money to the business or give us collateral in some form. After numerous conversations, Mr. Allen came to me with his own suggestion that he mortgage his house and put the money into the business, so he could have a statement that would justify his credit on the outside. And after a conversation with him, this was agreed upon: that we take a mortgage and loan him \$11,450 with which to pay off a second mortgage, to pay up some notes made by the Marmon Elizabeth Co. which were indorsed by Paul Allen and Helen Allen, personally; and the Marmon Elizabeth Co. had to use that to clean those up and two or three past (due) notes of customers' paper that had been laying past due in the bank several weeks.

At that time, I told him we would have to have a balance in the bank, that we could not make a loan of that size, unless he had sufficient balance to compensate the loan, and I suggested that he would have to leave some balance in the bank in some way.

I knew, the way Mr. Allen had used his money, that we could not put it in an open account; so

*Maurice H. Grape—for Defendant—Direct.*

we suggested a certificate of deposit form to be used, to be placed in that way—as deposit against that loan of Helen and Paul Allen; no other interest in the matter whatever. That was done.

10 The certificate of deposit, notes and mortgage were all signed on March 6, and the \$11,450 was placed to the Marmon Elizabeth account, after Mr. Allen and his wife had indorsed the check which was given for the notes. We gave a cashier's check payable to Paul and Helen Allen. They indorsed it and they in turn took that check and deposited it to the credit of the Marmon Elizabeth. They then paid up the \$3,900-worth of notes that were past due and owing, indorsed by Mr. and Mrs. Allen, and paid the second mortgage, 20 gave a check for the \$2,000 to apply on this certificate of deposit, and nothing was paid down on the notes. Mr. Allen promised to reduce that note and get it in some kind of shape so it would not be of a greater amount than for the collateral in the note. No payments were made on this. I had Mr. Allen in the office on one or two occasions and he kept promising to make payment, but he always had some hard-luck story, that somebody got in the concern or a car smashed up or 30 no insurance—or something of that kind.

And, finally, when he did not make payments and did not pay the interest when it was due, I applied the \$2,000-certificate of deposit which was made payable to Paul and Helen Allen, against the note, which was also signed by Paul and Helen Allen, as our collateral note gives us power to apply any funds in that particular way, which was done. That was done on August 1.

40 I had Mr. Allen in there about a week prior to that time and told him that something would

*Maurice H. Grape—for Defendant—Direct.*

have to be done or we would make that adjustment and apply the \$2,000 to the note. That was—and on August 1 that was done.

Q. Now, did you tell Mr. Queripel that there was \$5,000 available in March to the Marmon Elizabeth account? A. I did not. Some one from the Commercial Credit Co. called up and asked me what their balance was. I told them the balance, and, as I recall it, the balance was over \$5,000 on that particular day. I said nothing about any certificate of deposit or anything held out. 10

Q. Can you tell me what the balance of the Marmon Elizabeth Co. was on March 8? A. On the morning of March 8 it was \$5,108.40. 20

Q. With reference to that time, do you recall when the telephone conversation was had with Mr. Queripel? A. I think it was only a half an hour or so after the transaction went through. 20

Q. What was the balance on March 6? A. On March 6 it was \$5,634.40, after those transactions went through.

Q. Now, did you tell Mr. Queripel or Mr. Allen or Mr. Cox, or anybody else, at any time, that the \$2,000-certificate of deposit held by the bank was available for the Marmon Elizabeth Co? A. Absolutely not. 30

Q. At any time? A. At no time whatever.

Mr. David: I offer the bank balance—statement of the bank balance.

The Witness: No, that is the original ledger sheet, Judge.

The Court: Let it be marked and returned to Mr. Grape.

(Ledger sheet marked Exhibit D-2). 40

*Maurice H. Grape—for Defendant—Cross.*

*Cross examination by Mr. Green:*

10 Q. Mr. Grape, Mr. Allen had spoken to you, during the early part of 1928, with regard to refinancing the Marmon Elizabeth Co., had he not? A. Yes, sir; two or three times a day for months.

Q. And, before you granted the loan of \$11,450, he also informed you that he had to have a certain amount to continue the business, didn't he? A. No, he did not. He said—(interrupted).

Q. Didn't he tell you he had to have \$5,000— A. No, he specified—

Q. —to continue the— A. No. He specified no amount.

20 Q. —business? A. He did not.

Q. Will you tell us how the loan of \$11,450 was made up, why you picked an uneven sum like that? A. Why, he picked it himself.

Q. I mean— A. Because we had to fix up the second mortgage.

Q. Yes. A. The certificate of deposit—the money he wanted in his account, and also the thirty-nine hundred and some odd dollars of notes that he wanted to pay off.

30 Q. And Mr. Allen had a number of conversations with you, before the amount of the loan was fixed, didn't he? A. Oh, no, not a number, as far as that was concerned. He had about general business only.

Q. But you did not discuss the amount of the loan? A. Before the time?

Q. Yes. A. Most certainly. We had to do that.

40 Q. And, at that time, he told you that two particular items had to be paid, didn't he? A. Two particular items?

*Maurice H. Grape—for Defendant—Cross.*

Q. Yes. A. No.

Q. The \$3,950— A. No. I told him he would have to take care of those notes because they were notes on the Marmon Elizabeth indorsed by Paul and Helen Allen and they had to come out of the bank before this other note would come through. 10

Q. But you do know this second mortgage had to be paid up and the \$3,950 worth of notes, and that left a balance of \$5,000, didn't it? A. Yes. Sixty-five from eleven thousand leaves five thousand.

Q. When the loan was first made the Marmon Elizabeth Co. account—they had very little in the account at all times? A. Over drawn the best part of the time.

Q. And you insisted that they keep a balance in the bank? A. A balance in the bank. 20

Q. And then you told them that out of the \$5,000, the Marmon Elizabeth Co. had to keep \$2,000— A. No, I did not. I told him the deposit certificate was against the \$11,450-loan.

Q. Didn't you, on direct examination, testify to the effect that they had to keep a certain deposit, a certain amount on deposit? A. Against his personal loan, which is the loan signed by Paul and Helen Allen. 30

Q. Did Helen or Paul Allen have a personal account at your bank? A. They did not. They had a loan only.

Q. The only account in connection with this loan was the firm account, wasn't it? A. No. The \$2,000-certificate was against that loan.

Q. You do say that Helen and Paul Allen did not have personal accounts in the bank? A. That is right. 40

*Maurice H. Grape—for Defendant—Cross.*

Q. The only account with which they were connected and for which this loan was directly given was the Marmon Elizabeth Co.? A. It was not. It was not given to the Marmon Elizabeth Co. It was given to Paul and Helen Allen—direct,  
10 personally—and nobody else.

Q. Mr. Grape, you do know that a cashier's check was given— A. (Interposing) to Paul and Helen Allen.

Q. —to Paul and Helen Allen? A. Yes.

Q. But was it to be deposited to the Marmon? A. I did not know what he was going to do with the check. He could have gone and got cash for it and thrown it away, for all I cared.

Q. Do you want us to understand that you  
20 would have allowed Mr. Allen to take that check for \$11,450 out of your bank in its entirety? A. Unless he had paid us on our \$3,900; that is the point.

Q. That is what you want us to understand? A. Had he paid off his \$3,900 and given us the mortgage of forty-five and paid off the thirty-nine.

Q. There were certain restrictions, then; Mr. Allen could not take that check directly out of the bank unless he did certain things? A. Those  
30 two things, just as you specified.

Q. Now, ordinarily, when people obtain a loan from your bank, instead of giving a cashier's check, don't you open up the account and credit it immediately? A. Not always.

Q. But that is the practice, isn't it? A. In some cases where they have an account there, where they have an account we give a cashier's check and they can do what they please.

Q. Where they have not an account— A.  
40

*Maurice H. Grape—for Defendant—Cross.*

Where they have not an account we give a cashier's check.

Q. But you knew the \$11,000 was to be deposited in the Marmon Elizabeth account? A. He didn't tell me that at all.

Q. The Marmon Elizabeth Co. was the company that owed the bank thirty-nine hundred? 10  
A. That is true, with Paul and Helen Allen's personal indorsement.

Q. You charged them interest on the full amount of the loan, didn't you? A. We did.

Q. \$11,450? A. We charged it, but it was never paid.

Q. Wasn't any interest paid on it? A. I don't think any of it was ever paid. I am not positive about that. 20

Q. Did you write "47" in there, Mr. Grape? A. "4771"?

Q. Yes. A. That is my writing.

Q. And wasn't that in payment of interest? A. I don't know what that was for.

Q. Do you know what else that could have been for? A. No, I do not.

Mr. Green: I ask to have this marked for identification. 30

(Paper marked Exhibit C-5 for Identification.)

Q. As I understand, the certificate of deposit was not credited to the personal loan until August 1, 1928? A. That is right; first of August.

Q. And, before that was done, no notation had been made on the certificate of deposit? A. Up until that time, not until it was put through— 40

*Maurice H. Grape—for Defendant—Cross.*

Q. Now, before August 1, there was no notation "Credited to demand note"—"to demand loan", was there? A. It was the entire—but it was credited to the note.

Q. That was on August 1? A. August 1.

10 Q. And not before? A. Not before.

Q. And this note was indorsed in blank, was it not? A. That certificate of deposit?

Q. Yes. That certificate of deposit was indorsed in blank.

Q. And held by the bank? A. Held by the bank.

Q. And August 1 was the first time it was credited to the demand loan?

20 The Court: Is this certificate of deposit in the name of Paul and Helen Allen?

Mr. Green: Yes, sir. And indorsed in blank and held by the bank.

The Court: All right.

Q. Now, during the period from March 1 to August 1, you sent the Allens an interest bill for the full amount, didn't you? A. Each quarter they received it.

30 Q. The full amount, for \$11,450? A. That is correct.

Q. Where was this certificate of deposit at the time? A. Up to August 1?

Q. Yes. A. Held by the bank.

40 Q. Held by the bank. Well, how was it held, then, Mr. Grape? A. We have a particular envelope to keep those in. Held by the bank? What do you mean? There is only one way to hold it; to have it in a box. We used it to apply against a note at any time, as our collateral note gives us a right to.

*Maurice H. Grape—for Defendant—Cross.*

Q. Do you recall the conversation with Mr. Cox, when Mr. Cox asked you whether they could not have the use of that certificate of deposit and you told them they could? A. I never told Mr. Cox that or any— (interrupted).

Q. During April, 1928, you attended the American Bankers Association convention in Atlantic City? A. I did not. I attended one the 20th of May. 10

Q. And Mr. Binger is the gentleman immediately under you in the bank? A. Assistant cashier.

Q. And, when you are away, he, being next in line, takes care of the business you would have handled ordinarily? A. Unless there was something special I was to handle.

Q. But this account was one of the special accounts that you handled, was it not? A. That is right. 20

Q. And how long were you gone? A. About three days.

Q. About how many days? A. Three days.

Q. Two days? A. Three days.

Q. Now, was Mr. Binger instructed that the certificate of deposit should not be applied— A. He knows that—

30

Mr. David: Just a minute. I object to it as not cross examination.

The Court: I will allow it.

(Question and answer read.)

The Witness: He knows—applied how?

Q. Never mind. Mr. Binger would not have to consult the president of your bank? A. Mr. Binger and any other vice-president knows that those 40

*Maurice H. Grape—for Defendant—Cross.*

deposit certificates are not applied to any other account except the account the names are made out in.

10 Q. But there was no account by the name of Allen? A. No, there was nobody's account against the loan. We would not credit Paul Allen or Helen Allen; we would not credit the certificate of deposit made out in Paul and Helen Allen's names to any other note or account.

Q. And, at the time you were going, in May, you had not applied this certificate against their personal account, had you? A. I said August 1 it was applied.

20 Q. So that in May, during your absence at the Bankers' Convention, no instructions were left with Mr. Binger, as I understand? A. No. Certainly not. I did not leave any instructions.

Q. So the records would not show just how it was to be applied; is that what you want me to understand? A. No. It is common banking practice to apply nothing against what applies to the particular loan against that loan. That is common practice. You do not have to have any instructions for that.

30 Q. When a certificate is indorsed in blank, it can be applied to any account, can it not? A. Yes; but Mr. Allen and Mr. Binger, as an officer of the bank, knows that that is only to go to that account. If it had been anything else, I would have given him instructions.

Q. There were not any instructions on the certificate except what appears on the face and on the back, except what was inserted there on August 1, "Credited to a demand loan"? A. That is right.

40 Q. So that an ordinary person who looked at

*Maurice H. Grape—for Defendant—Cross.*

the certificate would not know in what account—  
(interrupted)? A. I am not talking about an  
ordinary person, I am talking about Mr. Binger or  
an official of the company.

Q. Was there anything else attached to it to  
show how it should be applied? A. No, but when 10  
it came in the bank, the note department knew  
how it would be applied.

Q. Would it be necessary for Mr. Binger to  
consult the president on how to apply this certifi-  
cate of deposit? A. Any other way than stated  
on the purposes for which it was left there.

Q. You as a banker know that a note indorsed  
in blank—a certificate indorsed in blank—can be  
applied to any account. A. Yes. But I as a  
banker would not apply it to John Smith's ac- 20  
count unless I had instructions.

Q. But you know the Marmon Elizabeth's agent  
paid for this certificate \$2,000? A. That makes  
no difference. We had a loan against Paul and  
Helen Allen for that purpose.

Q. But this corporation check was given for the  
certificate of deposit? A. That is correct.

Q. And this other check was for \$3,950 and was  
to take up— A. The past due notes and some other  
notes indorsed by Helen and Paul Allen. 30

Q. Didn't Mr. Allen tell you that he had to have  
the sum of \$5,000 in business to continue? A. He  
did not.

Q. He did not. Mr. Grape, was any interest al-  
lowed them on the \$2,000 between March and  
August? A. No, sir.

Q. No interest was deducted? A. No.

Q. And no interest applied at all? A. The  
banks do not make eleven thousand dollar loans  
unless a man has some form of balance, which 40

*Maurice H. Grape—for Defendant—Cross.*

we drew that as a balance against Paul and Helen Allen's account; we can open an account in their name and put that on a ledger.

Q. Will you refer to your account which you have there, the bank account? A. Yes, sir.

10 Q. I understood you to testify that on March 8 there was a sum of \$5,108.40 to their credit. Now, had the check for \$2,500 cleared then—\$2,573?

A. That evidently came in on the afternoon of the 8th. I have no way of telling what time that was.

Q. That reduced the account? A. \$2,477.

Q. And will you tell us how much of that balance the Marmon Elizabeth had on April 1?

A. April 1, \$522.63.

20 Q. How about April 15, Mr. Grape? A. April 15, that was a holiday—a Sunday or a holiday.

Q. Well, the 16th? A. The 16th, \$12.17.

Q. That is small, isn't it? A. That is nothing. It might have been overdrawn in the meantime. It was quite often.

Q. That was within a month of the date of the loan, was it not? A. That is right.

30 Q. And that is rather a small deposit for a loan of \$11,450, isn't it? A. That is the reason we took a deposit certificate of \$2,000 against Paul and Helen Allen's loan.

Mr. David: We rest.

Mr. Green: We rest.

The Court: It does not seem to me there is any case here at all. This man went to borrow this money from the bank in order to put it into his business and the bank evidently thought that it was not proper to take the credit of the company.  
40 They wanted more substantial security and they

*Maurice H. Grape—for Defendant—Cross.*

evidently thought that Mr. Allen and his wife would pay the security and naturally they kept this certificate of deposit as some guarantee of the payment of the \$11,450. I do not see why this Marmon Fanning Company should get it at all. That is my opinion about it.

10

Mr. Green: Well, your Honor, if your Honor would like me to, I would like to submit some law to your Honor on this matter.

Here is my contention—I shall be very brief—our contention is the loan of \$11,450 was given to the Allens with the understanding it was to go to the Marmon Elizabeth account. Twenty-five hundred dollars was to be paid off on the mortgage—

The Court: I have heard all the testimony, and my understanding of the testimony is that they were to get—Paul and Helen Allen were to get \$11,450, if they paid certain obligations.

20

Mr. Green: Yes.

The Court: And then they must leave a deposit. Now, your point, that there was no bank account, amounts to nothing, because people go to the bank and borrow, when they do not have any account there, and this certificate of deposit business is just to avoid that and Mr. Grape says, as an additional reason, that he did not want to have an open account with Mr. Allen because he was afraid he would draw it all out.

30

Mr. Green: And for that reason that two thousand dollars was to be a reserve in the bank on the Marmon Elizabeth Company's account.

The Court: No. I think it was to be a reserve for the note, and I am going to so decide it.

I do not think there is any necessity for me to study the law, and my decision, I suppose, will result in a dismissal of the bill, will it not?

40

*Maurice H. Grape—for Defendant—Cross.*

Mr. David: Yes, your Honor.

The Court: I haven't the papers, so I don't know.

Mr. David: The Allens—the bank filed the only answer.

10 The Court: There is a decree pro confesso entered against the Marmon Elizabeth Co., Helen Allen and Paul V. Allen.

(To Mr. David): You and the Judge fix up the proper decree. You see, I haven't the papers, and I don't know whether I am dismissing a bill or what.

Mr. David: You are dismissing as to the People's National Bank; and I ask for a counsel fee.

The Court: Who is the complainant?

20 Mr. Green: The Marmon Fanning Company, of Newark, your Honor.

The Court: I think that Mr. David is entitled to a counsel fee.

How much do you think you ought to have, Mr. David?

Mr. David: One hundred dollars, I think would be a modest amount.

The Court: I will allow it.

30 Mr. Green: May I note an exception to your Honor's decision dismissing the bill?

The Court: You do not have to do that in Chancery.

**Exhibit C-1.**

Elizabeth, N. J., March 6, 1928.

**THE PEOPLES NATIONAL BANK**

Pay to the order of Helen and Paul Allen <sup>9352</sup>  
 \$11,450.00 exactly Eleven Thousand Four Hundred 10  
 and Fifty Dollars exactly.  
 Cashier's Check.

M. H. GRAPE,  
 Cashier.

(On reverse side)

Helen E. Allen (~~in typewriter~~)  
 Paul W. Allen (~~in typewriter~~)  
 For Deposit (~~in typewriter~~)  
 Marmon Elizabeth Co. Inc. (~~in typewriter~~)  
 Paul W. Allen Pres. (~~in typewriter~~) 20

} IN WRITING

**Exhibit C-2.**

No. 734

MARMON ELIZABETH CO., INC.  
 250 Union Street

Elizabeth, N. J., March 6th, 1928.

Pay to the order of Peoples National Bank 30  
 \$3,950.00 Three Thousand Nine Hundred and  
 Fifty Dollars.

MARMON ELIZABETH CO., INC.  
 HELEN E. ALLEN,  
 Treasurer.

To THE PEOPLES NATIONAL BANK  
 Elizabeth, N. J.

(On reverse side)

William D. Wolfskeil (in writing) 40  
 Supreme Court Commissioner (in typewriter)

**Exhibit C-3.**

No. 733

MARMON ELIZABETH CO., INC.  
250 Union Street

10 Elizabeth, N. J., March 6th, 1928.

Pay to the order of Peoples National Bank  
\$2,000.00 Two Thousand Dollars even.

MARMON ELIZABETH CO., INC.  
HELEN E. ALLEN,  
Treasurer.

20 To THE PEOPLES NATIONAL BANK  
Elizabeth, N. J.

(On reverse side)

William D. Wolfskeil (in writing)  
Supreme Court Commissioner (in typewriter)

30

40

Exhibit C-4.

NOT SUBJECT TO CHECK

THE PEOPLES NATIONAL BANK

2,000.00 Elizabeth, N. J. March 6, 1928

Helen Allen and Paul Allen have deposited in this Bank Two Thousand Dollars payable on demand to the order of themselves on return of this Certificate properly endorsed with no % interest.

M. H. GRAPE,  
Cashier.

Stamp—The bank reserves the right to require thirty days notice for the payment of this certificate.

10  
20

#615  
Certificate of Deposit

(On reverse side)

Helen E. Allen (~~in typewriter~~)  
Paul ~~W.~~ Allen (~~in typewriter~~) } IN WRITING  
Credited to Demand Note Aug. 1, 1928 (in writing)

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**Exhibit C-5.**

No. 922

MARMON ELIZABETH CO., INC.  
250 Union Street

10

Elizabeth, N. J., May 10th, 1928

Pay to the order of The Peoples National Bank  
\$47.71 Forty-seven 71/100 Dollars.

MARMON ELIZABETH CO., INC.  
PAUL W. ALLEN,  
President.

20

To THE PEOPLES NATIONAL BANK  
Elizabeth, N. J.

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## Exhibit D-1.

\$9450

Elizabeth, N. J., March 6th, 1928

On Demand after date, without grace, FOR VALUE RECEIVED the undersigned promises to pay to the order of THE PEOPLES NATIONAL BANK of Elizabeth, N. J., at its Banking Office in the City of Elizabeth, N. J., Eleven Thousand Four Hundred & Fifty 00/100 Dollars with interest from the date hereof at the rate of \_\_\_\_\_ per cent, per annum, in United States gold coin or its equivalent, having deposited with the said Bank as collateral security for the payment of this note, or any note given in extension or renewal thereof, as well as for the payment of any other liability or liabilities of the undersigned to the said Bank, due or to become due, whether now existing or hereafter arising, the following property, viz.:

2nd Mtg of 7500 (Value of property 18,500—1st Mtg 5900.) of a market value estimated by the undersigned at \$ \_\_\_\_\_ and the undersigned agree to deliver to the Bank additional securities to its satisfaction, should the market value of the said securities, as a whole, suffer any decline, and also hereby give to the said Bank a lien for the amount of all said liabilities upon all the property or securities given unto or left in the possession of the said Bank by the undersigned, and also upon any balance of the deposit account of the undersigned with the said Bank.

On the non-performance of this promise, or upon the non-payment of any of the liabilities above mentioned or upon the failure of the undersigned, forthwith, with or without notice, to fur-

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*Exhibit D-1.*

nish satisfactory additional securities in case of decline, as aforesaid, or in the case of insolvency, bankruptcy or failure in business of the undersigned, then and in any such case, this note and all other liabilities of the undersigned or any

10 of them, shall forthwith become due and payable, without demand or notice, and full power and authority are hereby given to said Bank to sell, assign, and deliver the whole of the said securities, or any part thereof, or any substitutes therefor, or any additions thereto, or any other securities or property given unto or left in the possession of the said Bank, by the undersigned, for safekeeping or otherwise, at any broker's board or at public or private sale, at the option of the said

20 Bank or of its President or Cashier without either demand, advertisement or notice of any kind, which are hereby expressly waived. At any such sale, the said Bank may itself purchase the whole or any part of the property sold free from any right of redemption for collection, sale or delivery, the said Bank may apply the residue of the proceeds of the sale or sales so made, to pay one or more or all of the said liabilities to the said Bank, as it or its President or Cashier shall deem

30 proper, whether then due or not due, making proper rebate for interest on liabilities not then due, and returning the overplus if any to the undersigned, who agree to be and remain liable to the said Bank for any deficiency arising upon such sale or sales. The undersigned do hereby authorize and empower the said Bank, at its option at any time to appropriate and apply to the payment and extinguishment of any of the above-named obligations or liabilities, whether now ex-

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*Exhibit D-1.*

isting, or hereafter contracted, any and all moneys now or hereafter in the hands of the said Bank, on deposit or otherwise, to the credit of or belonging to the undersigned whether the said obligations or liabilities are then due or not due.

HELEN E. ALLEN  
PAUL V. ALLEN

10

Due  
No. 2027  
Aug. 1/28—on a/c 2000

In consideration of one dollar paid to the undersigned and of the making at the request of the undersigned, of the loan evidenced by the within note, the undersigned hereby jointly and severally guarantee to THE PEOPLE'S NATIONAL BANK OF ELIZABETH, N. J., its successors endorsees or assigns, the punctual payment, at maturity, of the said loan, and hereby assent to all the terms and conditions of the said note and consent that the securities for the said loan may be exchanged or surrendered from time to time, or the time of payment of the said loan extended, without notice to or further assent from the undersigned, who will remain bound upon this guarantee, notwithstanding such changes, surrender or extension, hereby waiving demand, protest and notice thereof.

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## Exhibit D-2.

#6032

Safe Deposit Boxes \$5.00 and up

MARMON ELIZABETH CO., INC.  
In Account With  
THE PEOPLES NATIONAL BANK  
Elizabeth, N. J.

10

Kindly notify the bank immediately of change of address

## Key

IN—Interest  
EC—Error Corrected  
RT—Returned Item  
CC—Certified Check  
DM—Debit Memo.  
CM—Credit Memo.  
LST—List of Checks

	Date	Checks in Detail			Date	Deposits	New Balance 1928
	Mar 1	15.00 —			Mar 1	33.62	Mar 1 33.62 s
	Mar 5	12.50 —			Mar 1		Mar 1 18.62 s
20	Mar 6	42.60 —	100.00 —	750.00 —	Mar 5		Mar 5 6.12 s
	Mar 6	57.82 —	200.00 —		Mar 6	995.00	
	Mar 6	2,000.00 —	16.30 —	3,950.00 —	Mar 6	300.00	
	Mar 7	400.00 —	51.00 —	25.00 —	Mar 6	11,450.00	Mar 6 5,634.40 s
	Mar 7	50.00 —	1,257.30 —			1,257.30	Mar 7 5,108.40 s
	Mar 8	25.00 —	1,348.28 —	2,522.50 —	Mar 8	684.10	Mar 8 1,896.72 s
	Mar 9	16.50 —	50.00 —	34.50 —			
	Mar 9	50.00 —	18.00 —				Mar 9 1,727.72 s
	Mar 10	49.94 —	16.36 —	15.00 —			
	Mar 10	50.00 —	25.00 —		Mar 10		Mar 10 1,571.42 s
	Mar 12	50.00 —	50.00 —	50.00 —			
	Mar 12	15.00 —	50.00 —				Mar 12 1,356.42 s
	Mar 13	50.00 —	134.48 —	85.66 —			
	Mar 13	118.00 —					Mar 13 968.28 s
	Mar 14	25.00 —	14.77 —	10.00 —	Mar 14		Mar 14 918.51 s
30	Mar 14	25.00 —	14.77 —	10.00 —	Mar 15	1,300.00	Mar 15 3,262.00 s
	Mar 15	4.00 —	10.00 —		Mar 15	1,057.49	Mar 15 3,505.50 s
	Mar 17	6.25 —	1,257.30 —	75.00 —	Mar 16	243.50	Mar 16 3,505.50 s
	Mar 17	30.00 —	15.00 —				Mar 17 2,121.95 s
	Mar 17	133.24 —	50.00 —				Mar 17 1,938.71 s
	Mar 19	2.16 —	69.98 —				Mar 19 1,866.57 s
	Mar 19	754.96 —					Mar 19 1,429.66 s
	Mar 20	48.00 —	45.00 —	66.00 —	Mar 19	318.05	Mar 19 1,429.66 s
	Mar 20	10.00 —	44.25 —	44.35 —		ec 44.35	Mar 20 1,216.41 s
	Mar 21	10.00 —					Mar 21 1,206.41 s
	Mar 22	1,006.15 —	152.00 —		Mar 22	898.05	Mar 22 946.31 s
	Mar 23	20.00 —	25.00 —				Mar 23 901.31 s
	Mar 23				Mar 23	701.90	Mar 23 1,603.21 s
	Mar 24	25.00 —	700.00 —	10.00 —	Mar 24	750.15	
	Mar 24	25.00 —		8.00 —			
40	Mar 24	30.00 —	15.00 —	50.00 —	Mar 24		Mar 24 1,490.36 s
	Mar 26	25.00 —	100.00 —	100.00 —	Mar 24	1,758.64	Mar 24 3,249.00 s
	Mar 27	44.00 —	1,312.68 —	17.96 —	Mar 26	1,000.00	
	Mar 27	25.00 —			Mar 26	50.00	Mar 26 4,274.00 s
	Mar 28	13.20 —	1,375.14 —	50.00 —		ec 100.00	
	Mar 28	255.00 —	25.00 —			ec 100.00	Mar 27 2,874.36 s
	Mar 28	10.00 —	10.00 —		Mar 28	4.70	Mar 28 in 1,160.72 s
	Mar 28	10.00 —	10.00 —			ec 10.00	Mar 28 1,150.72 s
	Mar 29	11.88	25.00 —	4.50 —			
	Mar 29	15.00 —			Mar 29	958.90	Mar 29 2,053.24 s

New Jersey Court of Errors and Appeals.

On Appeal from the Court of Chancery.

BETWEEN

MARMON FANNING COMPANY, a corporation,  
*Complainant-Appellant,*  
and

MARMON ELIZABETH CO., INC., a corporation,  
THE PEOPLES NATIONAL BANK OF ELIZABETH,  
a corporation,  
*Respondent,*

PAUL V. ALLEN and HELEN E. ALLEN,  
*Defendants.*

**APPELLANT'S BRIEF.**

**Statement.**

This is an appeal from the final decree made in the above entitled matter on the 9th day of April, 1929, by the Chancellor (advised by Vice-Chancellor Church), dismissing bill of complaint and allowing a counsel fee of \$100 to solicitor for the defendant, The Peoples National Bank of Elizabeth.

**Facts.**

The facts in this matter may be briefly stated as follows:

On March 6th, 1928, the defendant, Marmon Elizabeth Co., Inc. (hereinafter referred to as

Dealer), was indebted to The Peoples National Bank of Elizabeth (hereinafter referred to as Bank), in the approximate sum of \$3,950 representing notes delivered by purchasers of motor vehicles to Dealer and discounted with Bank.

At this time, Dealer required additional moneys in its business to bolster its credit with Marmon Fanning Company (hereinafter referred to as complainant), the distributor of Marmon automobiles, also from companies which purchased commercial paper received by Dealer from retail sale of automobiles. Complainant and said companies refused to do business with Dealer unless the sum of \$5,000 in cash was brought into Dealer's business. (Case, pp. 21, ll. 12 to 15; Case, p. 22, ll. 1 to 25.)

Defendant, Paul V. Allen, president of Dealer, made several visits to Bank to obtain said additional money for the business but was told by the cashier of the Bank that it would be necessary to obtain collateral in view of the fact that Dealer had exhausted its borrowing capacity with Bank (Case, p. 49, ll. 1 to 30). Allen thereupon suggested to Bank that a mortgage be taken on his wife's home as such collateral, as Dealer required the use of said money in its business. This was agreeable to Bank and loan of \$11,450 was arranged. The Bank insisted that Dealer pay off \$3,950 due it and also pay off a second mortgage of \$2,500 thereby leaving balance of \$5,000 required by Dealer to continue its business as aforesaid.

The cashier of Bank informed Dealer that it would be necessary to keep a sufficient balance because of the size of loan and for that purpose it was suggested that a certificate of deposit be used. It was distinctly understood and agreed

between the parties, that in the event Dealer required the use of said \$2,000 in its business, that Bank, at Dealer's request, would apply the sum of \$2,000 to Dealer's account. Bank delivered cashier's check of \$11,450 (Case, p. 63, Exhibit C-1), to Helen E. Allen and Paul V. Allen, which check was immediately endorsed by Helen E. Allen and Paul V. Allen as agreed, for deposit to Dealer's account and deposited in Dealer's account at Bank. Helen E. Allen as treasurer of Dealer made Dealer's check No. 734, for \$3,950 to the order of The Peoples National Bank of Elizabeth (Case, p. 63, Exhibit C-2), and thereupon made check No. 733 to the order of Bank in payment of certificate of deposit (Case, p. 64, Exhibit C-3). in accordance with aforesaid arrangement. Bank thereupon issued certificate of deposit (Case, p. 65, Exhibit C-4) to Helen E. Allen and Paul V. Allen, which certificate was endorsed in blank and delivered to Bank in accordance with aforesaid agreement between the Allens acting for Dealer, and the Bank.

Said certificate of deposit had endorsed thereon "*not subject to check*" and same further provided for the payment of no interest.

Commercial Credit Corporation, which purchased commercial paper from Dealer, upon being informed that Dealer had met requirement of introducing \$5,000 additional money in its business, communicated with the Bank to ascertain whether Dealer had in fact, added said \$5,000 and whether same was available for its account. It was informed by the Bank that same was done (Case, p. 33, ll. 28 to 40). Complainant, by its representative, Mr. Cox, also communicated with Bank to verify the fact that \$5,000 in cash was available and was informed by Mr. Grape,

that \$3,000 was available in cash and \$2,000 in form of a certificate of deposit which could be used when and as required by Dealer (Case, p. 42, ll. 8 to 16).

Commercial Credit Corporation and complainant, relying on representations of Bank, did business and extended credit to Dealer.

During May, 1928, Dealer required the use of the sum of \$2,000 represented by certificate of deposit to meet its obligations and demanded that Bank apply sum represented by certificate of deposit, to its account as per agreement. The Bank refused and failed to do so. This allegation appears in paragraph 7 of the bill of complaint (Case, p. 8, ll. 7 to 16). Bank does not deny, but on the contrary admits same in its answer (Case, p. 12, l. 21).

This is further borne out by the testimony of Paul V. Allen (Case, p. 24, ll. 2 to 40; Case, p. 25, ll. 1 to 2).

In August, 1928, Bank, in violation of agreement with Dealer and without authority from Dealer and after Dealer made demand upon it to apply certificate of deposit to Dealer's account, applied said certificate of deposit to individual loan of the Allens.

On August 21st, 1928, complainant recovered a judgment in the New Jersey Supreme Court against Dealer in the sum of \$2,333.75 damages and \$53.78 costs of suit.

On November 2nd, 1928, complainant caused to be issued and delivered to the Sheriff of the County of Union, an alias execution directed to said Sheriff, commanding him to make and satisfy said judgment and costs of the goods and chattels of the said Dealer in the County of Union. The Sheriff duly made return on said execution that

he levied upon all moneys in the hands of The Peoples National Bank of Elizabeth, due or to become due to Marmon Elizabeth Co., Inc. Bank refused to pay over said moneys to Sheriff, as a result of which bill of complaint was filed in the Court of Chancery.

The defendants, Marmon Elizabeth Co., Inc., Paul V. Allen and Helen E. Allen, did not contest suit and as a result, decree *pro confesso* was entered against them (Case, p. 14).

Vice-Chancellor Church, sitting for the Chancellor at final hearing, found as follows:

"The Court: It does not seem to me there is any case here at all. This man went to borrow this money from the Bank in order to put it into his business and the Bank evidently thought that it was not proper to take the credit of the company. They wanted more substantial security and they evidently thought that Mr. Allen and his wife would pay the security and naturally they kept this certificate of deposit as some guarantee of the payment of the \$11,450. I do not see why this Marmon Fanning Company should get it at all. That is my opinion about it" (Case, p. 60, ll. 35 to 40 and p. 61, ll. 1 to 10).

"The Court: I have heard all the testimony, and my understanding of the testimony is that they were to get—Paul and Helen Allen were to get \$11,450 if they paid certain obligations" (Case, p. 61, ll. 20 to 23).

"The Court: No. I think it was to be a reserve for the note, and I am going to so decide it. I do not think there is any necessity for me to study the law, and my decision I suppose, will result in a dismissal of the bill, will it not?" (Case, p. 61, ll. 24 to 33).

Request was made upon the Vice-Chancellor to write an opinion in accordance with Article VI, Section II, paragraph 5 of the New Jersey Constitution, but Vice-Chancellor, after examining state of case, declared oral opinion set forth above, was sufficient.

### POINT I.

**Certificate of deposit was evidence of a special deposit between Dealer and Bank and Bank could not apply said certificate to individual loan without authority from Dealer.**

Dealer's check for \$2,000 (Case, p. 64, Exhibit C-3), was delivered to Bank in payment of certificate of deposit (Case, p. 65, Exhibit C-4), in accordance with agreement between Bank and Dealer. Said agreement is alleged in paragraph 7, of the bill of complaint (Case, p. 8, ll. 7 to 16), and admitted in Bank's answer (Case, p. 12, l. 21). Said certificate of deposit had endorsed thereon "*not subject to check*", and same provided for payment of no interest.

Said sum of \$2,000 evidenced by certificate of deposit was to represent balance in Bank for Dealer's account (Case, p. 49, ll. 32 to 38), and was to be applied to Dealer's account when required by Dealer in its business.

A deposit of this character is a special deposit as held in *Smith v. Fuller*, 88 Ohio St. 57, and reported in L. R. A. 1916 C, page 6.

Justice Spears, speaking for the Ohio Supreme Court, at page 8, states as follows:

*"The fact that the account was not sub-*

ject to check itself indicates that the deposit lacked one feature usually to be found present in case of a mere general deposit, and the fact that no interest was to be paid negatives in a measure the idea that it was the purpose of the trustees to loan out the money \* \* \*. This conclusion, we think, justifies the holding that these parties must be held to have understood that the deposits were to be in the nature of special deposits. The bank thus became itself, by its voluntary action, a trustee; not a trustee of the trustees, because they did not own the money, but a trustee for the trust which those trustees represented. If so, such deposits imposed upon the bank the duty to treat the money as trust funds, and to fulfil its contract with the trustees accordingly." (Italics ours.)

The following cases in point are annotated and reported in footnotes, 39 L. R. A. (N. S.) 848:

*"And money deposited in a bank by a prospective purchaser of a machine, to be paid over to the vendor provided the machine fulfils the guaranty, after trial, and for which the bank cashier executes a certificate of deposit payable to the vendor, provisionally, which certificate is retained by the Bank, the depositor receiving no deposit slip, certificate of deposit, or other writing for the money deposited is a special deposit which may be recovered as a preferential claim, in case of the appointment of a receiver for the Bank. Shopert v. Indiana Nat. Bank, 41 Ind. App. 474, 83 N. E. 515. (Italics ours.)"*

Likewise, money or checks for a part payment on the purchase price of real estate, placed by the depositor in a bank for safe-keeping until the approval of the abstract of title, or the happening of some other contingency, and not to be checked

out by him; or placed in the bank under an agreement that it shall act as bailee or agent, and deliver the money to the seller under certain conditions, or apply it to some special purpose—is a special deposit, which the bank, as agent or bailee, has no right to use or mingle with its own funds. *Covey v. Cannon*, (Ark.) 149 S. W. 514.

And a fund placed in a trust company to the credit of a bank for the sole purpose of paying drafts drawn by a construction company on the bank in payment of items of construction in connection with a certain railway, the bank having agreed that the fund shall be used for no other purpose, constitutes a special deposit, to which the holders of such drafts for construction work are entitled, to the extent of the amount of their respective drafts, upon the failure of the bank. *McBride v. American R. & Lighting Co.*, (Tex. Civ. App.) 127 S. W. 229."

The learned Vice-Chancellor therefore erred in holding as follows (Case, p. 61, ll. 37 to 41):

"The Court: No. I think it was to be a reserve for the note, and I am going to so decide it. I do not think there is any necessity for me to study the law, and my decision, I suppose, will result in a dismissal of the bill, will it not?"

## POINT II.

**Bank violated agreement with Dealer by applying certificate of deposit to personal loan of Allens instead of Dealer account.**

Certificate of deposit was delivered to Bank, according to agreement between the parties, and besides being a special deposit, agreement between

the Dealer and Bank was in the nature of a bailment, and Bank, in applying said certificate other than as agreed, violated said agreement between Dealer and Bank.

At this point, we desire to refer your Honors to the long line of decisions annotated and reported in footnotes, 30 L. R. A., New Series, 517 and 518:

*"All the authorities are agreed upon the rule of law declared in the above case, that a bank which accepts a deposit of money made by a depositor for a special purpose, under an agreement that it will pay the amount when needed for that purpose, cannot rightly appropriate such deposit to discharge the depositor's indebtedness to it. Re Davis, 119 Fed. 956; Bank of Commerce v. Franklin, 90 Ill. App. 91; Carter v. Martin, 22 Ind. App. 445, 53 N. E. 1066; Winfield Nat. Bank v. Railroad Loan & Sav. Asso., 71 Kan. 584, 81 Pac. 202; Murdock v. Citizens' Bank, 23 La. Ann. 113; Lynam v. Belfast Nat. Bank, 98 Me. 448, 57 Atl. 799; Judy v. Farmers' & T. Bank, 81 Mo. 404; Deal v. Mississippi County Bank, 79 Mo. App. 262; Straus v. Tradesmen's Nat. Bank, 122 N. Y. 379, 25 N. E. 372, affirming 13 N. Y. S. R. 407; Straus v. Tradesmen's Nat. Bank, 36 Hun 451; Shawnee Nat. Bank v. Wootten, (Okla.) 103 Pac. 714; Bank of United States v. Macalester, 9 Pa. 475; Parker v. Hartley, 91 Pa. 465; Wagner v. Citizen's Bank & T. Co., (Tenn.) 28 L. R. A. (N. S.) 484, 122 S. W. 245. (Italics ours.)*

*Thus, in Wilson v. Dawson, 52 Ind. 513, it was held to be the general rule that funds deposited in a bank for a special purpose known to the Bank could not be withheld from that purpose by the Bank, and appropriated to pay a debt due the Bank from the depositor. (Italics ours.)*

And in *First Nat. Bank v. Barger*, (Ky.) 115 S. W. 726, it was declared to be the law that while a bank had the right to appropriate a general deposit to discharge the indebtedness of the depositor to it, it had no right to make such appropriation of a deposit which it had received with notice that it was made for the purpose of meeting certain checks drawn by the depositor, so as to defeat the holder of such checks in the collection of same. The Court added that this rule applied only when the bank had notice of the previous appropriation of the sum deposited.

In *Masonic Sav. Bank v. Bangs*, 84 Ky. 135, 5 Am. St. Rep. 197, cited by the Court in *Smith v. Sanborn State Bank*, the specific holding was that where securities were pledged to a bank for the payment of a particular debt, it had no lien on the securities for a general balance or for the payment of other claims."

It is apparent that it was the intention of both the Bank and Dealer that Dealer have the sum of \$5,000 available for its business.

This is clearly brought out by testimony of cashier of Bank on cross examination (Case, p. 54, ll. 19 to 30) and this is further apparent from the fact that there remained just \$5,000 from total of \$11,450 after the loan of \$3,950 and mortgage of \$2,500 was deducted. If this had not been the intention, then a total loan of only \$9,450 would have been made.

The learned Vice-Chancellor therefore erred in finding as follows (Case, p. 60, ll. 34 to 40; Case, p. 61, ll. 1 to 10):

"The Court: It does not seem to me there is any case here at all. This man went to borrow this money from the bank

in order to put it into his business and the bank evidently thought that it was not proper to take the credit of the company. They wanted more substantial security and they evidently thought that Mr. Allen and his wife would pay the security and naturally they kept this certificate of deposit as some guarantee of the payment of \$11,450. I do not see why this Marmon Fanning Company should get it at all. That is my opinion about it."

Said finding was contrary to the evidence before the Vice-Chancellor and to the law hereinabove referred to.

### POINT III.

**Bank is estopped from denying that certificate of deposit represented corporation funds and from applying said certificate to personal loan.**

Complainant and Commercial Credit Corporation communicated with Bank immediately after loan of \$11,450 was made and were informed by Mr. Grape, the cashier, that the required sum of \$5,000 was added to the assets of said Dealer. Mr. Cox, of complainant, was informed that \$3,000 was available in cash and \$2,000 in form of certificate of deposit which could be used when required by Dealer.

It is also of interest to note that paragraph 7 of bill of complaint, which states as follows: During May, 1928, Dealer required the use of \$2,000, represented by certificate of deposit, to meet its obligations, and demanded that Bank apply sum, represented by certificate of deposit, to its account *as per agreement*, but Bank refused and

failed to do so. This is alleged in paragraph 7 of bill of complaint (Case, p. 8, ll. 7 to 16), and admitted in Bank's answer (Case, p. 12, l. 21).

Complainant relied on representations of Bank that said moneys represented by certificate of deposit were held to the credit of Dealer, and did business with Dealer, as a result of which complainant suffered a loss, for which it recovered judgment of \$2,333.75 in the New Jersey Supreme Court. As a result, Bank is estopped from denying that fund was available for use of Dealer and complainant.

In *Phillipsburgh Bank v. John Fulmer*, 31 N. J. L. 52, Mr. Justice Elmer, speaking for the Supreme Court, at page 55, states:

“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. And the estoppel must not be carried beyond the limits of the injury, so as instead of preventing a fraud, the enforcement of it will produce a greater injury than it was intended to prevent. *Den v. Baldwin*, 1 Zab. 433; *Pickard v. Sears*, 6 Ad. & El. 469; *Gregg v. Wells*, 10 Ad. & El. 90; *Daxell v. Odell*, 3 Hill 219; *Dewey v. Bordwell*, 9 Wend. 65; *Preston v. Mason*, 25 Conn. R. 118; *Taylor v. Ely*, Ib. 251; *Johns v. Church*, 12 Pick. 307; *Bursley v. Hamilton*, 15 Pick. 42; *Deweys v. Field*, 4 Metc. 384.”

In *Martin v. Righter*, 10 N. J. E. 510, at page 526, Mr. Justice Potts, speaking for the Court of Errors and Appeals in case reversing decree of

Chancellor Williamson, quoting from *Den v. Baldwin*, states:

“An ‘equitable estoppel’, says Mr. Justice Carpenter, in *Den v. Baldwin*, 1 Zab. 403, rests upon the principle, that when any one has done an act or made a statement which it would be fraud on his part to controvert or impair and such act or statement has so influenced any one that it has been acted upon, the party making it will be estopped and cut off from the power of retraction. It must appear, first, that he has done some act or made some admission inconsistent with his claim; secondly, that the other party has acted on such conduct or admission; and thirdly, that such party will be injured by allowing such conduct or admission to be withdrawn.”

### **Summary.**

Agreement between Bank and Dealer with regard to certificate of deposit was one of a special deposit, and Bank, acting as bailee of said certificate, violated the terms of said agreement in applying same to personal loan of the Allens, and not to Dealer account as required.

Bank is estopped from denying that certificate of deposit represented corporation funds and from applying same to personal loan of the Allens, in view of the representations made by Bank, which were relied upon by complainant, to its damage.

### **Conclusion.**

Appellant therefore respectfully submits that the decree of the Chancellor in dismissing bill of complaint against the defendant, The Peoples Na-

tional Bank of Elizabeth, with costs, including a counsel fee of \$100, is inequitable and erroneous and that the Chancellor should have entered a decree in favor of the complainant and against said defendant, adjudging that the sum of \$2,000 held by said defendant was the property of the defendant, Marmon Elizabeth Co., Inc., and further adjudging that said sum be subjected to levy made under execution issued on judgment recovered by complainant against the defendant, Marmon Elizabeth Co., Inc., in the New Jersey Supreme Court, and further adjudging that the defendant, The Peoples National Bank of Elizabeth, be directed to pay said sum to complainant or the Sheriff of Union County, and for the above reasons, decree of the Chancellor should be reversed and for nothing holden and that a decree be entered in accordance with prayer of complaint.

GREEN & GREEN,  
*Solicitors for and of Counsel*  
*with Complainant-Appellant.*

DAVID GREEN,  
*Of Counsel.*

The Henry Cook Printshop, Elizabeth, N. J.

## New Jersey Court of Errors and Appeals

*Between*

MARMON FANNING COMPANY,  
a corporation,

*Complainant-Appellant,*

*and*

MARMON ELIZABETH CO., INC.,  
a corporation, THE PEOPLES  
NATIONAL BANK OF ELIZA-  
BETH, a corporation (Re-  
spondent), PAUL V. ALLEN  
and HELEN E. ALLEN,

*Defendants.*

*On Bill, etc.*

*On Appeal*

*from the  
Court of  
Chancery.*

**The Brief of Defendant-Respondent,  
The Peoples National Bank of Elizabeth.**

### STATEMENT.

The complainant, Marmon Fanning Company, a corporation, a judgment creditor of the defendant Marmon Elizabeth Co., Inc., a corporation, filed this bill against the Marmon Elizabeth Co., Inc., a corporation, The Peoples National Bank of Elizabeth, a corporation (respondent), Paul V. Allen and Helen E. Allen, for the purpose of declaring a certain certificate of deposit, Exhibit C. 4 (S. C., p. 65), and corrected by a stipulation annexed hereto, to be the property of the defendant Marmon Elizabeth Co., Inc., and to have the defendant The Peoples National Bank of Elizabeth pay said sum to the complainant as a judgment creditor of the Marmon Elizabeth Co., Inc., by virtue of a levy made by such judgment creditor against all the moneys in the hands of The Peoples National Bank due or to become due the defendant Marmon Elizabeth Co., Inc. The

Peoples National Bank of Elizabeth was sole defendant to file an answer. After final hearing Vice-Chancellor Church advised that the complaint be dismissed, from which decree the complainant appeals.

### FACTS.

The defendant, Marmon Elizabeth Co., Inc., on or about March 1, 1928, was indebted to the defendant The Peoples National Bank of Elizabeth for certain notes discounted at said bank in the sum of \$3,950.00 endorsed by Paul V. Allen and Helen E. Allen, individually (S. C., 53, ll. 4 and 5;) (S. C., 55, ll. 11 and 12) Paul V. Allen, who was president and manager of the Marmon Elizabeth Co., Inc. (S. C., 19, l. 40), endeavored to secure an additional loan for his company. The Peoples National Bank of Elizabeth refused this credit to the Marmon Elizabeth Co., Inc. (S. C., 49, l. 15), but finally arranged to give a personal loan to Paul V. Allen and Helen E. Allen, his wife, in the sum of \$11,450.00, upon the conditions that the Allens secure the loan by a mortgage of \$7,500.00 on their home and pledge with the bank a certificate of deposit in the sum of \$2,000.00 (S. C., 21, l. 29) as collateral against the note, Exhibit D. 1 (S. C., 21, l. 30;) (S. C., 50, ll. 1 and 2;) (S. C., 49, ll. 38 and 39). It was also understood and agreed that the present indebtedness of the Allens as individual endorsers of the Marmon Elizabeth Co., Inc., discounts (S. C., 53, ll. 1, 2, 3 and 4) were to be paid before this new credit was to be extended. This was agreed upon and mortgage executed (S. C., 21, l. 19). On March 6, 1928, The Peoples National Bank of Elizabeth gave Paul V. Allen and Helen E. Allen a cashier's check, payable to the order of Paul V. Allen and Helen E. Allen in the sum of \$11,450.00,

Exhibit C. 1 (S. C., 63). At the same time Paul V. Allen and Helen E. Allen executed a collateral note to The Peoples National Bank of Elizabeth in the sum of \$11,450.00, Exhibit D. 1, page 67. The cashier's check, Exhibit C. 1, was endorsed in blank by Paul V. Allen and Helen E. Allen, Exhibit C. 1, page 63, and corrected by stipulation, and was deposited to the account of the Marmon Elizabeth Co., Inc. Checks were drawn against the Marmon Elizabeth Co., Inc., account for \$3,950.00, Exhibit C. 2, page 63, to the order of The Peoples National Bank of Elizabeth for payment of the notes of the Marmon Elizabeth Co., Inc., which were endorsed by Paul V. Allen and Helen E. Allen, individually, also a check for \$2,000.00, Exhibit C. 3, page 64, was drawn to the order of The Peoples National Bank, for which the bank issued certificate of deposit, Exhibit C. 4, to the order of Helen E. Allen and Paul V. Allen which said certificate was endorsed in blank by Helen E. Allen and Paul V. Allen and left with the bank (S. C., 21, l. 29;) (S. C., 49, ll. 39 and 40;) (S. C., 50, ll. 1, 2 and 3) as collateral for the loan of \$11,450.00 in accordance with the collateral note, Exhibit D. 1. On August 1, 1928, the bank credited the \$2,000.00 certificate of deposit to the loan by virtue and according to the terms of the collateral note Exhibit D. 1 (p. 56).

### ARGUMENT.

It is the contention of the complainant that the certificate of deposit, Exhibit C. 4 was the property of the defendant Marmon Elizabeth Co., Inc., and The Peoples National Bank was not authorized to apply it to the indebtedness of Paul V. Allen and Helen E. Allen. This contention is wholly unsupported by the testimony.

The entire transaction was an individual loan and credit to Paul V. Allen and Helen E. Allen which is clearly evidenced by the exhibits in this case. Exhibit D. 1, page 67, is the note executed by Paul V. Allen and Helen E. Allen and upon which they received a credit or loan of \$11,450.00; the name of the Marmon Elizabeth Co., Inc., in no manner appearing on said note, for which Paul V. Allen and Helen E. Allen received a cashier's check to their order as payee for \$11,450.00, Exhibit C. 1; which they endorsed in blank and deposited in the account of the Marmon Elizabeth Co., Inc. Neither Paul V. Allen nor Helen E. Allen having a checking account in their names (S. C., 31, l. 38), deposited this money in the account of the Marmon Elizabeth Co., Inc., and drew checks to pay off the company's notes of \$3,950.00, such notes being endorsed by Paul V. Allen and Helen E. Allen, individually (check, Exhibit C. 2), and drew a check for \$2,000.00, Exhibit C. 3, to obtain the certificate of deposit to pledge as collateral against the loan. The Marmon Elizabeth Co., Inc., account was merely used as a convenient medium of splitting up the \$11,450.00 cashier's check and paying off the notes and obtaining the certificate of deposit. When The Peoples National Bank issued its certificate of deposit to Paul V. Allen and Helen E. Allen the relation of creditor and debtor was established between the parties, the bank being the debtor and the Allens being the creditors. This is substantiated by the law as set forth in 7 Corpus Juris, page 650, section 342: "Where a certificate of deposit recites that the depositor has placed a certain sum in the bank payable in current funds on the return of the certificate properly endorsed, the deposit is a general one and the relation between the bank and the depositor

is merely that of debtor and creditor." Under the following terms of the collateral note, Exhibit D. 1 (S. C., 69), The Peoples National Bank of Elizabeth had a right to apply against the loan, "any and all monies now or hereafter in the hands of said bank on deposit or otherwise to the credit or belonging to the undersigned whether said obligations or liabilities are then due or not." Paul V. Allen and Helen E. Allen, having a credit in the form of a certificate of deposit, endorsed in blank and left with The Peoples' National Bank so that it could not be negotiated to an innocent party for value, the bank had an absolute right under the terms of the collateral note, Exhibit D. 1, such terms being set forth above, to apply this credit to the Allens' indebtedness. Aside from this it is an elementary principal of law that: "The relation between a bank and its general depositors is that of debtor and creditor, and the bank may set off against a general deposit a debt due to it from the depositor—*Tufts v. Peoples Bank and Trust Co.*, 59 N. J. L. 380."

The complainant also contends that The Peoples National Bank is estopped from applying the \$2,000.00 certificate of deposit, Exhibit C. 4, to the indebtedness of Paul V. Allen and Helen E. Allen, claiming the bank held out to the complainant that the certificate was the property of the Marmon Elizabeth Co., Inc. This is wholly unsupported by the testimony. Mr. Queripel, a witness for complainant, testified (S. C., 33, l. 30) that he called Mr. Grape, cashier of The Peoples National Bank on the telephone and asked for the balance of Marmon Elizabeth Co., Inc., account and was informed it was \$5,000.00. Mr. Cox, another witness for the complainant on cross examination (S. C., 46,

l. 30) admitted that the substance of his inquiry was whether or not Marmon Elizabeth Co., Inc., had a balance of \$5,000.00. This is substantiated by the testimony of Mr. Grape, cashier of The Peoples National Bank of Elizabeth (S. C., 51), who testified that he gave Queripel and Cox the balance of the Marmon Elizabeth Co., Inc., account, which at the time of their inquiry was \$5,000.00 or over, and also that in his conversation with both Queripel and Cox nothing was mentioned by him or them about a certificate of deposit.

There is attached hereto a copy of a stipulation entered into correcting the exhibits as set forth in the State of Case, which stipulation is on file with the clerk of the Court of Errors and Appeals.

It is respectfully submitted that for these reasons the decree dismissing the bill of complaint should be affirmed.

ABE J. DAVID,  
Solicitor for Defendant-Respondent.

## STIPULATION.

NEW JERSEY COURT OF ERRORS AND  
APPEALS.*Between*MARMON FANNING COMPANY,  
a corporation,  
*Complainant-Appellant,**and*MARMON ELIZABETH CO., INC.,  
a corporation; THE PEOPLES  
NATIONAL BANK OF ELIZ-  
BETH, a corporation (re-  
spondent); PAUL V. ALLEN  
and HELEN E. ALLEN,  
*Defendants.**On Bill.**On Appeal  
from the  
Court of  
Chancery.**Stipulation.*

It is stipulated and agreed between the parties hereto by their respective attorneys that the printed State of Case in the above-entitled cause is incorrect in certain respects and should be changed, as follows:

1. On page 63, with reference to Exhibit C. 1, which is a cashier's check, the number of the check is omitted, said number being 9352, also in referring to reverse side of Exhibit C. 1 it sets forth after the words Helen E. Allen, Paul W. Allen, the words "in typewriter," this is incorrect since the signatures of Helen E. Allen and Paul V. Allen are in ink and are the signatures of the respective parties thereto on the original exhibit.

2. With reference to Exhibit C. 4, on page 65 of State of Case, the words "not subject to check" are omitted which said words are on the original exhibit, also referring to reverse

side of certificate, after the words of Helen E. Allen, Paul W. Allen are the words "in typewriter" in parenthesis. This is not correct, since on the original certificate the signatures Helen E. Allen and Paul V. Allen are in ink and written by the respective parties.

3. Wherever the words Paul W. Allen appear should be Paul V. Allen, which is the signature of said person on all exhibits.

Dated, October 1, 1929.

GREEN & GREEN,  
Solicitors for Complainant-Appellant.

ABE J. DAVID,  
Solicitor for Defendant-Respondent,  
The Peoples National Bank of Elizabeth.

