

Conclusion

It is, therefore, respectfully submitted that the judgment of the New Jersey Supreme Court, affirming the judgment of the Essex County Circuit Court, should be vacated and set aside and that the judgment of the Essex County Circuit Court should be vacated and set aside and a *venue de novo* granted.

SCHNEIDER & SCHNEIDER,
Attorneys of Defendant Appellant.

JAMES SCHNEIDER,
On the Brief.

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Notice of Appeal.

NOTICE OF APPEAL.

Filed June 29, 1926.

Essex County Circuit Court

THE FIRST NATIONAL BANK OF BELLEVILLE, a corporation of America, <i>Plaintiff,</i> <i>vs.</i> NATIONAL BOX & LUMBER COM- PANY, a corporation of Amer- ica, <i>Defendant.</i>	}	Action at Law. Notice of Appeal.	10
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To Kessler & Kessler, attorneys of plaintiff: 20

PLEASE TAKE NOTICE that the defendant ap-
 peals to the New Jersey Supreme Court from
 the whole of the judgment entered in the above-
 entitled cause.

SCHNEIDER & SCHNEIDER,
 Attorneys of Defendant.

JACOB SCHNEIDER, 30
 Of Counsel.

Due service of within notice of appeal is hereby
 acknowledged this 25th day of June, 1926.

KESSLER & KESSLER,
 Attorneys of Plaintiff.

Grounds of Appeal.

GROUNDS OF APPEAL.

Filed July 27, 1926.

New Jersey Supreme Court

10

FIRST NATIONAL BANK OF BELLEVILLE,

Plaintiff-Appellee,

vs.

NATIONAL BOX & LUMBER Co.,
Defendant-Appellant.

Action at Law.

On Appeal from Essex County Circuit Court.

Grounds of Appeal.

20

The defendant-appellant, National Box & Lumber Co., hereby sets forth the grounds of appeal in the above entitled matter:

(1) The Trial Court, over objection of defendant's counsel, allowed the witness Edwin A. Rung to answer the following question:

Q "At the time of the winding up of the affairs of the Troy Realty Company did you receive any money on account of that claim at all?"

(2) The Trial Court, over objection of defendant's counsel, allowed the witness Edwin A. Rung to answer the following question:

Q "Unpaid, to be paid by the National Box & Lumber Co., \$5,000."

What does that mean?

40

Grounds of Appeal.

(3) The Trial Court refused to grant the motion of defendant's counsel to strike out the following answer by the witness Edwin A. Rung:

"That notation represents a note of the trustees in the amount of \$5,000, which matured on April 10, 1925, but was to be taken up by the National Box & Lumber Co."

10

(4) The Trial Court, over objection of defendant's counsel, allowed the witness Edwin A. Rung to answer the following question:

Q "I also note you have an item of \$13,552.66. That is an item above and it is marked 'Deficiency'."

What does that mean?

(5) The Trial Court refused to grant defendant's motion for a direction of a verdict in favor of the defendant at the close of the case and submitted said case to the jury whereas said Court should have granted said motion and directed a verdict in favor of the defendant.

20

(6) The Trial Court granted plaintiff's motion for a direction of a verdict at the close of the case, to which defendant took exception.

SCHNEIDER AND SCHNEIDER,
Attorneys of Defendant-Appellant.

30

JACOB SCHNEIDER,
Of Counsel.

Consent is hereby given to the filing of the within grounds of appeal as of due time.

KESSLER & KESSLER,
Attorneys of Plaintiff-Appellee.

40

Summons.

SUMMONS AND COMPLAINT.

Filed August 10, 1925.

Essex County Circuit Court to
 National Box & Lumber Company, a
 (SEAL) corporation: YOU ARE SUMMONED to
 10 answer the complaint of First Na-
 tional Bank of Belleville, N. J., a cor-
 poration, in an action at law in the Essex County
 Circuit Court, AND TAKE NOTICE, that unless you
 file your affidavit of merits within ten days, and
 your answer to said complaint with the Clerk of
 the Circuit Court at Newark, N. J., within twenty
 days after service upon you of this writ, and the
 annexed complaint, the plaintiff may proceed to
 20 the suit and judgment may be entered against
 you.

WITNESS, NELSON Y. DUNGAN, Judge of the
 Essex County Circuit Court, at Newark, this 1st
 day of August, nineteen hundred and twenty-
 five.

JOHN H. SCOTT,
 Clerk.

30 KESSLER & KESSLER,
 Attorneys for Plaintiff.

40

Complaint.

ESSEX COUNTY CIRCUIT COURT.

THE FIRST NATIONAL BANK OF BELLEVILLE, a corporation of America, Plaintiff, vs. NATIONAL BOX & LUMBER COM- PANY, a corporation of Amer- ica, Defendant.	}	Action at Law.	10
		Complaint.	

The plaintiff, the First National Bank of Belle-
 ville, a corporation of the United States of
 America, with its principal office in the town of
 Belleville, County of Essex and State of New
 Jersey, says that: 20

1. The plaintiff is the holder of a certain
 bond or obligation made by the defendant, the
 National Box and Lumber Company, a corpora-
 tion organized and existing under the Laws of
 the State of New Jersey, and authorized to do
 business in this State.

Said bond or obligation is made to the plain-
 tiff; the Riverside Box and Lumber Co., a cor-
 poration of New Jersey; Thatcher Furnace Com-
 pany, a corporation of New Jersey; Burkenmeier
 and Kuhn Co., a corporation of New Jersey, and
 Tobias Grunt of the City of Newark, County of
 Essex and State of New Jersey, a copy of which
 bond or obligation is hereto annexed and made
 a part of this complaint and more specifically
 referred to. 30

2. Riverside Box & Lumber Company,
 Thatcher Furnace Company, Burkenmeier and 40

Complaint.

Kuhn Co. and Tobias Grunt have by assignment assigned their interest in said bond to the plaintiff, a copy of which assignments are hereunto attached and made a part hereof.

3. On March, 1924, in the City of Newark, County of Essex and State of New Jersey, the defendant bound itself in the sum of five thousand (\$5,000.00) dollars to the plaintiff and its assignees with the conditions thereunder written and more specifically herewith set out:

1. If the parties of the second part jointly and severally refrain from applying for a receivership for the said Troy Realty Company, and the creditors committee aforementioned will be formed to administer the affairs of the said Troy Realty Company (insofar as it relates to the East Orange Tract) until such time when the respective claims of the parties hereunto shall have been liquidated.

2. If the said Anthony C. Camarat shall have received the sum of Eleven Thousand Dollars (\$11,000.00) now due on said mortgage together with interest thereon until date of cancellation of said mortgage, and

3. If the parties of the second part jointly or severally shall not be paid their just claims in full at the time the affairs of the said Troy Realty Company will be wound up;

Then, in those events, mentioned in the preceding paragraphs, one, two and three, the party of the first part shall and will truly pay or cause to be paid unto the parties of the second part, in-

Complaint.

dividually, jointly or severally, or their attorneys, executors, administrators, successors or assigns a sufficient amount (the amount not exceeding in total the sum of Five Thousand (\$5,000.00) Dollars, to make the percentage of loss, if any, sustained, by the parties of the second part no greater than if the said party of the first part had not received the sum of Eleven Thousand (\$11,000.00) Dollars on the mortgage hereinabove mentioned, but had shared equally its proportionate loss, together with the parties of the second part, then this obligation to be void, otherwise to remain in full force and virtue."

That in and by said contract the said National Box & Lumber agreed *inter alia* that if the said plaintiff and its assigns would fulfill all the conditions set forth in the said obligation then and those events the said defendant, the National Box & Lumber Company, shall and will truly be and cause to be paid unto the plaintiff and its assigns, individually, jointly or severally or their attorneys, executors, administrators, successors or assigns a sufficient amount not exceeding the sum of five thousand (\$5,000.00) dollars to make up the percentage of loss, if any, sustained by the said plaintiffs.

That after the execution of the said bond the plaintiff and its assigns complied with and fulfilled all the said conditions, to wit:

The said plaintiff and its assignees, jointly and severally did refrain from applying for a receivership for the said Troy Realty Company.

The said plaintiff and its assignees did form a creditors' committee, of which Elmer E. Ross,

Complaint.

the treasurer of the National Box & Lumber Company, was a member. That the said plaintiff and its assignees were not paid their just claims at the time of winding up the affairs of the Troy Realty Company or at any other time. The said plaintiff did not in fact receive any dividends whatsoever in the winding up of the business of the Troy Realty Company.

That the entire sum mentioned in the bond or obligation is now due the plaintiff and for which the defendant is liable to the plaintiff by reason of said bond to the extent of five thousand (\$5,000.00) dollars, and legal interest thereon besides costs of this action.

Plaintiff, therefore, demands as damages from the said defendant the sum of five thousand (\$5,000.00) dollars, with legal interest from March 24, 1924, with costs of this suit to be taxed.

KESSLER & KESSLER,
Attorneys for the Plaintiff.

KNOW ALL MEN BY THESE PRESENTS, that the NATIONAL BOX & LUMBER COMPANY, a corporation, having its principal office in the City of Newark, County of Essex and State of New Jersey, hereinafter known as the party of the first part, is held and firmly bound unto the RIVERSIDE BOX & LUMBER COMPANY, a corporation, the First National Bank of Belleville, a corporation; THATCHER FURNACE COMPANY, a corporation; BURKENMEIER and KUHN, a corporation, and TOBIAS GRUNT, being hereinafter known as parties of the second part, in the sum of Five Thousand (\$5,000.00)

Complaint.

Dollars, lawful money of the United States of America, to be paid to the said parties of the second part individually, jointly or severally or their certain attorneys, executors, administrators, successors or assigns, for which payment, well and truly to be made, the party of the first part binds itself and its successors, firmly by these presents.

IN WITNESS WHEREOF, the said NATIONAL BOX & LUMBER COMPANY has caused these presents to be signed by its TREASURER, attested by its SECRETARY and its common seal to be hereto affixed the 24th day of March, one thousand nine hundred and twenty-four.

THE CONDITION OF THIS OBLIGATION is such, that WHEREAS, on the eleventh day of January, 1924, the said parties herein were creditors of the TROY REALTY COMPANY, a corporation, and

WHEREAS, the affairs of the TROY REALTY COMPANY are now in such condition that there is a possibility that one or more of the parties of the second part may apply for a receivership for the said TROY REALTY COMPANY, and

WHEREAS, on the eleventh day of January, 1924, the said TROY REALTY COMPANY executed a mortgage to ANTHONY C. CAMARATA in the sum of Eleven Thousand (\$11,000.00) Dollars, which sum was paid to the NATIONAL BOX & LUMBER COMPANY, the obligor herein, which guaranteed to the said ANTHONY C. CAMARATA payment of any loss in the event that any such loss were to be sustained on said mortgage by the said ANTHONY C. CAMARATA, and

WHEREAS, the said parties of the second part dispute the priority of the said mortgage to their claims now existing against the TROY REALTY COMPANY, and

Complaint.

WHEREAS, the said parties hereunto are about to form themselves into a creditors' committee for the purpose of taking over the present assets of the said TROY REALTY COMPANY (houses under construction on East Orange tract only), for the protection of their respective claims:

10 Now, THEREFORE, the party of the first part agrees that:

(1) If the parties of the second part jointly and severally refrain from applying for a receivership for the said TROY REALTY COMPANY, and the creditors' committee aforementioned will be formed to administer the affairs of the said TROY REALTY COMPANY (insofar as it relates to the East Orange tract) until such time when the respective claims of the parties here-
20 unto shall have been liquidated,

(2) If the said ANTHONY C. CAMARATA shall have received the sum of Eleven Thousand (\$11,000.00) Dollars now due on said mortgage together with interest thereon until date of cancellation of said mortgage, and

(3) If the parties of the second part jointly or severally shall not be paid their just claims in full at the time the affairs of the said TROY REALTY COMPANY will be wound up;

30 Then, and in those events, mentioned in the preceding paragraphs, one, two and three, the party of the first part shall and will truly pay or cause to be paid unto the parties of the second part, individually, jointly or severally, or their attorneys, executors, administrators, successors or assigns a sufficient amount (the amount not exceeding in total the sum of Five Thousand (\$5,000.00) Dollars, to make the per-
40 centage of loss, if any, sustained by the parties of the second part no greater than if the said

Complaint.

party of the first part had not received the sum of Eleven Thousand (\$11,000.00) Dollars on the mortgage hereinabove mentioned, but had shared equally its proportionate loss together with the parties of the second part, then this obligation to be void, otherwise to remain in full force and virtue.

NATIONAL BOX & LUMBER COMPANY,
By ELMER E. ROSS,
Treasurer.

Signed, sealed and delivered
in the presence of

Attest:

HARRY LUBIN,
(L. S.) Secretary.

FOR VALUABLE CONSIDERATION, to us in hand paid by the FIRST NATIONAL BANK OF BELLEVILLE, NEW JERSEY, a corporation of the United States, the undersigned, do hereby assign and set over to the FIRST NATIONAL BANK OF BELLEVILLE, a certain bond made by the NATIONAL BOX & LUMBER COMPANY to the RIVERSIDE BOX & LUMBER COMPANY, THE FIRST NATIONAL BANK OF BELLE-
30 VILLE, NEW JERSEY, THE THATCHER FURNACE COMPANY, TOBIAS GRUNT, and BERKENMEIER & KUHN COMPANY, which Bond is in the sum of Five Thousand (\$5,000.00) Dollars and dated the 24th day of March, 1924, and which bond was made in the matter of the Troy Realty Company.

IN WITNESS WHEREOF, the said parties have hereunto caused these presents to be signed by
40 their presidents, attested by their secretaries and

Complaint.

their corporate seals hereto affixed this day of July, A. D. 1925.

Signed, sealed and delivered
in the presence of

10 RIVERSIDE BOX AND LUMBER COMPANY,
By MORRIS H. COHN,
Trustee in Bankruptcy for the said
Riverside Box and Lumber Company.

Witness:

THE THATCHER FURNACE COMPANY,
By MULLIN WAYNE,
President.

20 Attest:

JAS. P. LYON,
Secretary.

BERKENMEIER & KUHN COMPANY,
By A. G. BIRKENMEIER,
President.

Attest:

30 OTTO KUHN,
Secretary.

40 FOR VALUABLE CONSIDERATION, to us in hand paid by the FIRST NATIONAL BANK OF BELLEVILLE, N. J., a corporation of the United States, the undersigned, does hereby assign and set over unto the FIRST NATIONAL BANK OF BELLEVILLE, N. J., a certain Bond made by the NATIONAL BOX AND LUMBER COMPANY to the RIVERSIDE BOX AND LUMBER COMPANY, THE FIRST NATIONAL BANK OF BELLEVILLE, N. J., THE THATCHER FURNACE COM-

Complaint.

PANY, TOBIAS GRUNT, and BERKENMEIER & KUHN Co., which Bond is in the sum of Five Thousand (\$5,000.00) Dollars, and dated the 24th day of March 1924, and which Bond was made in the matter of the Troy Realty Company.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this the 27th day of July, A. D. 10 1925.

(Sgd) TOBIAS GRUNT, (L. s.)

Signed, sealed and delivered
in the presence of

(Sgd) BENJAMIN SINGER.

I hereby appoint and depute William V. Byrne to serve the within writ.

Witness my hand and seal this 3rd day of August, 1925. 20

Harry B. O'Connell,
Sheriff.

By Conrad Deuchler,
Under Sheriff.

Sheriff Fees \$10.78 (L. s.)

Served the within Summons and Complaint August 5, 1925, personally upon Charles Lefkowitz, president of National Box & Lumber Company, a corporation the within named defendant by delivering to him a true copy thereof at their place of business 354 South street, Newark, N. J. 30

Harry B. O'Connell,
Sheriff.

By William V. Byrne,
Special Deputy.

40

Affidavit of Merits.

AFFIDAVIT OF MERITS.

Filed September 10, 1925.

ESSEX COUNTY CIRCUIT COURT.

10	FIRST NATIONAL BANK OF BELLE- VILLE, a corporation, <p style="text-align: right;"><i>Plaintiff,</i></p>	}	<i>Action at Law.</i> <i>Affidavit of Merits.</i>
	<i>vs.</i>		
	NATIONAL BOX & LUMBER COM- PANY, a corporation, <p style="text-align: right;"><i>Defendant.</i></p>		

20 CHARLES LEFKOWITZ, of full age, being duly sworn on his oath, deposes and says:

That he is the president of the National Box & Lumber Company, the defendant in this suit, and that he believes that the said defendant, the National Box & Lumber Company, has a just and legal defense to this action on the merits of the case.

CHARLES LEFKOWITZ.

30 Sworn and subscribed to before me this eighth day of September, 1925.

GLADYS A. SAVAGE,
A Notary Public of New Jersey.

Consent is hereby given to the filing of the within affidavit as of due time.

KESSLER & KESSLER,
Attys. of Plaintiff.

40

Answer.

ANSWER.

Filed Sept. 10, 1925.

ESSEX COUNTY CIRCUIT COURT.

10	THE FIRST NATIONAL BANK OF BELLEVILLE, a corporation of America, <p style="text-align: right;"><i>Plaintiff,</i></p>	}	<i>Action at Law.</i> <i>Answer.</i>
	<i>vs.</i>		
	NATIONAL BOX & LUMBER COM- PANY, a corporation of Amer- ica, <p style="text-align: right;"><i>Defendant.</i></p>		

20 The defendant, a corporation of the State of New Jersey, having its principal office in the City of Newark, in the County of Essex and State of New Jersey, answering the complaint filed herein, says that:

(1) It has no knowledge or information sufficient to form a belief as to the contents of the first section of paragraph 1; it admits the contents of the second section of paragraph 1.

(2) It has no knowledge or information sufficient to form a belief as to the contents of paragraph 2.

(3) It admits paragraph 3 from the beginning thereof to the end of quotation in single-space type, and denies the balance of said paragraph. It specifically denies the legal conclusion set forth therein that the above defendant bound itself to pay a certain sum of money named in said paragraph under said conditions.

40

Judgment.

JUDGMENT.

ESSEX COUNTY CIRCUIT COURT.

10	38635 FIRST NATIONAL BANK OF BELLE- VILLE, a corporation, <i>Plaintiff,</i> <i>vs.</i> NATIONAL BOX & LUMBER COM- PANY, a corporation, <i>Defendant.</i>	} <i>Action at Law.</i> } <i>On Verdict By a Jury.</i>
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JUDGMENT ENTERED FOR PLAINTIFF.

20	Damages	\$5,400.00	Costs	69.21	\$5,469.21

Kessler & Kessler, attorneys of plaintiff.

This action was tried before Judge Worrall F. Mountain with a jury at the Essex County Circuit Court on June 17, 1926.

30 The cause having been heard and submitted to the jury they return their verdict as follows:

They find in favor of the plaintiff First National Bank of Belleville, a corporation, and against the defendant National Box & Lumber Company, a corporation, for the sum of Fifty-four Hundred Dollars damage.

40 Whereupon it is adjudged that the plaintiff recover of the defendant the sum of Fifty-four Hundred Dollars (\$5,400.00) and Costs, which are taxed at Sixty-nine Dollars and twenty-one cents,

Judgment.

making in the whole the sum of Fifty-four hundred sixty-nine dollars and twenty-one cents.

Judgment entered and signed June 17, 1926.

WILLIAM S. GUMMERE,
Judge.

Book 101 Circuit Court Judgments, page 287. 10

20

30

40

Edwin A. Rung, direct.

ESSEX COUNTY CIRCUIT COURT.

June 17, 1926.

10	FIRST NATIONAL BANK OF BELLE- VILLE,	}	<i>Plaintiff,</i>	<i>Action at</i>
	<i>vs.</i>			
	NATIONAL BOX & LUMBER COM- PANY,		<i>Defendant.</i>	<i>Law.</i>

Before Worrall F. Mountain, J., and a jury.

20 For the plaintiff appear Kessler & Kessler
(by Samuel I. Kessler.)

For the defendant appear Schneider &
Schneider (by Jacob A. Schneider.)

(A jury is called and sworn.)

Mr. Kessler opens for the plaintiff.

Mr. Schneider opens for the defendant.

(Argument.)

30 EDWIN A. RUNG, sworn in behalf of plain-
tiff.

Mr. Kessler: I offer the bond in evi-
dence.

Mr. Schneider: No objection.

(The bond is marked Exhibit P. 1.)

40 Mr. Kessler: I offer in evidence the as-
signment of the various persons in the bond
to the First National Bank of Belleville.

Edwin A. Rung, direct.

Mr. Schneider: No objection.

(Two papers are marked Exhibit P. 2.)

Direct examination by Mr. Kessler.

Q I suppose you are the cashier of the First
National Bank of Belleville? A Yes, sir. 10

Q As such did you become acquainted with
the Troy Realty Corporation of New Jersey? A
Yes, sir.

Q Did your bank have any dealings with the
Troy Realty Company? A It did.

Q How much was due to the bank against the
Troy Realty Company at the time that this bond
was entered into between yourself and others
and the First National Bank of Belleville? A
Our claim with the other creditors? 20

Q Your own claim? A \$38,000.

Q At the time of the winding up of the affairs
of the Troy Realty Company did you receive any
money on account of that claim at all?

Mr. Schneider: I object. I think the
accounting should be introduced in evidence.
There was an accounting submitted to us and
I think it should go in evidence so that
could speak for itself. 30

The Court: I will admit it.

Defendant's counsel prays an exception
to this ruling of the Court.

Exception noted as ground of appeal.

Q Did you receive any money on account of
this bond? A I did not.

Q I mean on account of the claim? A No,
we did not.

Q The full amount of \$38,000 with accrued in-
terest is due on that claim? A Yes, sir. 40

Edwin A. Rung, cross.

Cross examination by Mr. Schneider.

Q Is this your signature? A Yes, sir.

Q You signed it? A Yes, sir.

Q And swore to it? A Yes, sir.

Q Before a notary public of New Jersey on
10 June 13, 1925? A Yes, sir.

Q This paper shows the final winding up of
the Troy Realty Company's affairs as adminis-
tered by the trustee? A Yes, sir.

Q Mr. Romer and Mr. Ross were the other
trustees? A Yes, sir.

Q How was this compiled, from records you
kept of your trusteeship? A Yes, sir.

Q Is this a true and exact record of the af-
fairs of the trusteeship from the beginning to
the end until they were wound up?

20 Mr. Kessler: I object as not proper
cross examination.

The Court: I will admit it.

Plaintiff's counsel prays an exception to
this ruling of the Court.

Exception noted as ground of appeal.

A It is a copy of the final statement of the
30 trusteeship.

Q Is it a correct, exact statement of the
trustees of the winding up of the affairs of the
Troy Realty Company? A Yes, sir.

Q Do you want to look it over before you
answer that? A No, I have a copy.

Q You have a copy? A Yes, sir.

Q Whom was this drawn up by?

40 Mr. Kessler: I object as improper cross
examination. This witness was only pro-
duced as to the amount of the claim.

August G. Berkenmeier, direct.

The Court: Yes.

Mr. Schneider: I think I will be willing
to call him as my witness, but I think it
would be more orderly to call him at the
proper time. Will your Honor instruct the
witness to come back at two o'clock.

Q Will you be back at two o'clock P. M. and
stay until the trial is finished? A Yes, sir.

Mr. Schneider: I ask that the report of
the Troy Realty Company be marked for
identification.

(Same is marked D. 1 for identification.)

AUGUST G. BERKENMEIER, sworn in behalf
of the plaintiff. 20

Direct examination by Mr. Kessler.

Q You are connected with Berkenmeier, Kuhn
Company? A Yes, sir.

Q Was Berkenmeier, Kuhn Company a credi-
tor of the Troy Realty Company about the time
that this bond, offered in evidence, was entered
into? A Yes, sir. 30

Q Do you know how much the amount of
your claim was at that time? A \$4,726.33.

Q Has any part of that claim ever been paid?
A No, sir.

Q Did you participate in the winding up of
the business of the Troy Realty Company by
the trustees? A I was one of the supervising
men to finish the work on the premises.

Cross examination waived.

40

Edwin A. Rung, direct—cross.

EDWIN A. RUNG, recalled in behalf of the plaintiff.

Direct examination by Mr. Kessler.

10 Q Do you know the claim of the Riverside Box & Lumber Company at the time this trusteeship? A \$14,900.

Q And the Thatcher Furnace Company? A \$7,537.78.

Q And of Grunt? A \$5,900.

Q You were one of the trustees, were you not? A Yes, sir.

20 Q Do you know whether they received any dividends of the trustees on account of this money? A The Grunt claim was adjusted before the trustees wound up their affairs; the others had not received any money.

Q No money at all? A No.

Cross examination by Mr. Schneider.

Q These amounts of these creditors you mentioned, those are amounts due before the trusteeship commenced? A Yes, sir.

30 PLAINTIFF RESTS.

EDWIN A. RUNG, recalled in behalf of the defendant.

Direct examination by Mr. Schneider.

40 Q Exhibit D. 1 for identification which I showed you before you say is a final statement of the expenditures and receipts of the trustees of

Edwin A. Rung, direct.

the Troy Realty Company of March 28, 1924, to February 11, 1925? A That's right.

Q You have a copy of that? A Yes, sir.

Q All the creditors were given a copy of it including the National Box & Lumber Company?

A Yes, sir.

10 Q This copy marked D. 1 for identification, a copy of which was given to the National Box & Lumber Company is an authentic copy of the account? A Yes, sir.

Q Mr. Camarata was paid his \$11,000? A Yes, sir.

Q Can you find in that account just when it was paid?

Mr. Kessler: Counsel admitted in his opening an answer that he received the \$11,000. 20

Mr. Schneider: The dates I wish to get. The Court: You admitted receiving it.

Mr. Schneider: Yes, but I want to get the date; it might make a little difference.

Q (By Mr. Kessler.) Here is a check; read the date from the check. A October 25th.

30 Q (By Mr. Schneider.) What year? A We paid \$7,495.40 and July 12th, 1924, we paid \$3,990.

Q What was the beginning date of the trusteeship? A March 28th.

Q What year? A 1924.

Q And the end of the date of the trusteeship? A February 11, 1925.

Q And these two checks were paid to Camarata during the pendency of the trusteeship?

A Yes, sir. 40

Edwin A. Rung, cross.

Mr. Schneider: I offer in evidence the report of the trustees which has been marked D. 1 for identification.

Mr. Kessler: No objection.

(Same is marked Exhibit D. 1.)

10 Mr. Schneider: By consent the check of Levy, Fenster & McCloskey dated July 12, 1924, to Mr. Camarata and certified check dated October 25, 1924, of the First National Bank of Belleville to Anthony Camarata signed by Mr. Edwin A. Rung, are marked in evidence Exhibit D. 2.

Cross examination by Mr. Kessler.

Q Do you know Mr. Ross? A Yes, sir.

20 Q Is he one of the trustees under this arrangement? A Yes, sir.

Q Did he participate in the completion of these buildings and the carrying on of the contract for the sale of the property? A Yes, sir.

Q Did he participate in the sale of this property? A There was no sale.

Q He signed the deed as one of the trustees? A Yes, sir.

30 Q I observe from this statement here which was offered in evidence by the defendant a notation on the statement, "Trustees note due 4-10-25," I suppose that means April 10, 1925, or October 4, 1925. A April 10, 1925.

Q "Unpaid, to be paid by the National Box & Lumber Company \$5,000." What does that mean?

40 Mr. Schneider: I object to that. In the first place the National Box & Lumber Company is not bound by any notation made by

Edwin A. Rung, cross.

the trustees, and in the second place even if there was a notation the witness cannot be asked what it means.

The Court: Was this offered in evidence?

Mr. Kessler: Yes, by the defendant, and we have a right to have explained what it is on the paper. 10

Mr. Schneider: It is incompetent and immaterial and furthermore a self-serving document of the trustees' account, and not binding on us, and furthermore the witness cannot explain anything in writing that way, it has to be construed by the Court and it would not be binding on us. This is a suit on a bond and not on a note.

The Court: You have put it in evidence and I do not see how you can preclude counsel from asking about it. 20

Mr. Schneider: It is incompetent and immaterial in this case and not binding on us; the writing speaks for itself.

(Argument.)

The Court: I will admit it.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal. 30

Q What was that notation in your account?
A That notation represents a note of the trustees in the amount of \$5,000 which matured on April 10, 1925, but was to be taken up by the National Box & Lumber Company.

Mr. Schneider: I ask that that be stricken out on the ground that it is totally irrelevant to the issues in this case, incompetent and immaterial as the writing speaks for itself. 40

Edwin A. Rung, cross.

The Court: I will not strike it out.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

10 Q Who of the National Box & Lumber Company agreed to take up that note of \$5,000? A Mr. Ross.

Q He was also one of the trustees? A Yes, sir.

Q That was at the time of the settlement of the account he agreed to pay the \$5,000? A Yes, sir.

20 Q I also note you have an item of \$13,552.66. That is an item above that and it is marked "deficiency;" what does that mean? A That means—

Mr. Schneider: I object to the witness being asked to explain. The paper writing speaks for itself and is primary evidence and is their paper.

The Court: It is your paper, you offered it in evidence. I will admit it.

Defendant's counsel prays an exception to this ruling of the Court.

30 Exception noted as ground of appeal.

Q Explain that. A That represents a deficiency that existed after the trustees completed the houses.

40 Q So, if I understand you correctly, the operation of the trustees resulted in a loss to the trustees and the difference between what they received for the houses and the difference between what they expended in completing them resulted in the two figures of \$13,552.66 and

Edwin A. Rung, direct.

\$5,000 you intended to receive from the National Box & Lumber Company? A Yes, sir.

Q Who advanced the money whereby there was a deficiency of that \$18,552.66? A The First National Bank of Belleville.

10 Q So that at the time of the conclusion of the business of the Troy Realty Company there was not only no money to be paid to the creditors, but as a matter of fact the creditors had a deficiency of \$18,000? A Correct.

Q Did you have any agreement between the trustees and if so, whether it included Mr. Ross as to what was to become of this deficiency of \$18,000?

Mr. Schneider: I object as not being within the issues of this case and incompetent, irrelevant and immaterial. 20

(Argument.)

The Court: Do you not think it should follow as rebuttal?

Mr. Kessler: I will not press it.

DEFENDANT RESTS.

Mr. Kessler: I desire to offer that testimony on my case. 30

The Court: Proceed.

EDWIN A. RUNG, recalled in behalf of the plaintiff, in rebuttal.

Direct examination by Mr. Kessler.

40 Q This loss of eighteen thousand and some odd hundred dollars that were sustained by the

Discussion.

trustees as shown by this report which is in evidence, was there any agreement between the trustees and Mr. Ross of the National Box & Lumber Company, who was also one of the trustees? A You mean in the apportionment of that deficiency?

10 Q Yes.

Mr. Schneider: I object as incompetent, irrelevant and immaterial, and having nothing to do with the issues in this case. This suit is on a bond and it is entirely extraneous to this matter.

(Argument.)

The Court: I will admit it.

20 Mr. Schneider: I object to the evidence on the further ground they are trying to show proof of an oral agreement, and as illegal under the statute of frauds and they are not suing us on a suretyship or on a guarantee, they are suing on a bond.

30 The Court: Before I rule on this I wish you would explain how you can avert a verdict, Mr. Schneider. Perhaps, if I can get what your defense is I may be able to rule more intelligently. These people come in and say these claims were not paid and on their own operation they lost \$5,000 and \$13,552, and your client who was a party to this bond received this \$11,000 and I am a little doubtful as to what defense you have here. If you will tell me I can rule on it more intelligently.

Mr. Schneider: It will get to be a legal matter and I will move for a verdict for the defendant.

40 The Court: You have \$11,000 and they have nothing. Tell me why you think you should have a verdict?

Discussion.

Mr. Schneider: The bond says at the end here, "We shall pay or cause to be paid to the party of the second part a sufficient amount, an amount not exceeding a total of \$5,000 to make up the percentage of loss, if any, sustained by the parties of the second part, and so forth." We do not admit that the mortgage was anything but a good mortgage.

10

The Court: That has nothing to do with it. I assume the \$11,000 has not been paid to the National Box & Lumber Company by the National Bank of Belleville.

Mr. Schneider: That is the meat in the cocanut. There is a deficiency of \$18,000.

The Court: You are trying to argue yourself in the position of a preferred creditor and they assigned that bond to avoid that very thing.

20

(Argument.)

Mr. Schneider: My argument will be that under their own account, which we have here, Exhibit D. 1, and as just brought out by the witness in a very clear and illuminating manner, the deficiency of the trusteeship proofs is shown to have been \$18,552.66. Taking our \$11,000 and throwing it in, in spite of putting our \$11,000 in the pot, there still would have been a deficiency of ~~\$11,552.66~~ ^{18,552.66} ~~\$8,000~~. The creditors get nothing now with the deficiency of ~~\$8,000~~ ^{18,552.66}; they would have gotten nothing with our \$11,000 in because there still would have been a deficiency and in simple arithmetic nothing from nothing leaves nothing, because there is no difference in their standing.

30

40

Motion for Direction of a Verdict.

The Court: It would not have helped the creditors out to have had their debts lessened by \$11,000?

Mr. Schneider: Not one cent, because they paid our Camarata judgment later on.

10 Mr. Kessler. I will withdraw this witness in view of the argument and rest my case.

PLAINTIFF RESTS.

DEFENDANT RESTS.

Mr. Kessler: The motion is to direct a verdict for the plaintiff on the bond.

The Court: I will grant the motion.

Mr. Schneider: May I make a motion?

20 The Court: I will grant that and hear yours afterward.

Mr. Schneider: I want to join both motions so as to make it a matter of the Court.

The Court: I cannot join them, but I will wait a minute before I decide the first one while you make yours.

30 Mr. Schneider: I make a motion for the direction of a verdict in favor of the defendant on the same grounds as I advanced in my argument to the Court, so as not to take up the time. On the further ground I will state for fear I did not get it in right that the bond demands the defendant pay the sum of \$5,000, or whatever sum will be necessary to make up the percentage of loss sustained by the party of the second part, no greater than if said party of the first part, the defendant, did not receive \$11,000; my point being that under the proof
40 the deficiency as shown by the trustees' re-

Motion for Direction of a Verdict.

port, and even by Mr. Rung was \$18,552.66 and if we had not received the \$11,000 the deficiency would have been \$7,552.66, therefore the creditors percentage of loss would have been 100 per cent, with our \$11,000 and would have been 100 per cent. without our \$11,000 and therefore, under the bond there was no loss, and therefore, under the bond we are not obligated to pay anything. 10

The Court: Can you agree upon the date of the interest?

Mr. Kessler: October 31, 1924.

Mr. Schneider: I object to interest on the ground that where demand is for an unliquidated sum no interest can be assessed with the judgment. 20

The Court: That might not be on the entire \$5,000.

Mr. Kessler: We are entitled to interest from the time that the damages or the amount became due under the bond for whatever amount is proven.

It was admitted between counsel and we offer the date as February 19, 1925, as the date when we demanded the \$5,000.

30 Mr. Schneider: I object to interest because it is on an unliquidated sum.

The Court: Can you agree on the date if I agree on the interest, otherwise I will have to submit the question to the jury.

40 Mr. Kessler: We made a demand for \$5,000 on February 19, 1925, and we will not ask for interest in back of that and I think it also appears that the business was wound up on October 14, 1924, in accor-

Motion for Direction of a Verdict.

dance with the statement, but we are not asking for interest back of February 19, 1925.

The Court: I should think you would figure it from the time the business wound up.

10 Mr. Kessler: It seems so in accordance with the condition of the bond, but I am not sure of the dates.

The Court: What are the dates?

Mr. Kessler: October 14, 1924, was the closing of the business.

The Court: The demand was made when?

Mr. Kessler: February 19, 1925. Do you agree to those dates?

20 Mr. Schneider: I agree you demanded the money on February 19, 1925.

Mr. Kessler: Do you also agree to the dates of the winding up of the business in accord with the statement of October 14, 1924.

It appears that this business wound up in accordance with this statement on February 11, 1925. I was reading from the wrong paper.

30 The Court: Then the demand was only a few days later.

I will ask one of the jurors to be kind enough to figure interest on \$5,000 at 6 per cent. from February 19, 1925, until today, June 17, 1926.

Mr. Schneider: May I have your Honor rule on the two motions so I can have the record clear on that?

40 The Court: I will in a minute as soon as I hear what the interest is.

Motion for Direction of a Verdict.

The Foreman: \$400 interest for the sixteen months.

The Court: If that interest calculation is satisfactory to you I will grant the motion for the plaintiff and direct that you bring in a verdict in the amount of \$5,400 in favor of the plaintiff and against the defendant. 10

Mr. Schneider: I respectfully pray an exception to your Honor's refusal to grant the defendant's direction of a verdict, and also to your Honor's granting the plaintiff's motion for the direction of a verdict.

The Court: You may have those exceptions.

20

30

40

Exhibit D. 1.

EXHIBIT D. 1.

FINAL STATEMENT EXPENDITURES AND RECEIPTS TRUSTEES TROY REALTY
COMPANY, MARCH 28, 1924, TO FEBRUARY 11, 1925.

		<i>Expenditures.</i>		
3-28-24	Sheridan & Milko (tile)			1,000.00
"	Decker Building Material Co.			1,000.00
"	A. Miller (painter)			2,000.00
"	Cook & Genung Co.			1,000.00
"	R. K. Flooring Co.			2,000.00
"	Spinelli (laborer)			350.00
"	American Hardware Co.			300.00
"	Tobias Grunt			4,700.00
"	Atlas Mosaic Tile			720.00
"	Pay-Rolls Ending	2-15-24	2,079.00	
		2-22-24	2,353.00	
		2-29-24	2,782.55	
		3- 7-24	2,870.25	
		3-14-24	2,168.25	
		Int.	260.45	
				12,513.50
"	Pay Roll	3-28-24		1,191.50
4- 3-24		4- 4-24		898.40
4- 3-24	McClory Roofing Co.			875.00
"	Schwartz	bal. due McClory Roof. Co.		300.00
4-10-24	Pay Roll	4-11-24		1,085.49
"	N. Y. Phone Co.	March		20.50
"	A. Miller	(painter)		1,000.00
"	E. O. Bldg. Dept.	garage permits		35.00
4-17-24	Pay Roll	4-18-24		1,321.68
"		"	addition	14.25
"	Troy Realty Co.		Franchise Tax	54.00
4-24-24	City of E. Orange		Water Connection	794.55
"	Pay Roll	4-25-24		953.51
"	A. Miller	painter		600.00
4-26-24	A. Birkenmeier	a/c garages		150.00
5- 1-24	Pay Roll	5- 2-24		899.59
5- 1-25	A. Miller	painter		300.00
"	A. G. Berkenmeier	a/c garages		100.00
5- 7-24	Morris Metz	final pay roll 5-7		200.00
5-12-24	Pay Roll	5- 9-24		411.47
5-12-24	Ashes			27.00
5-14-24	Composite B. & L.	fee		10.00
5-16-24	Atlas Mosaic Tile Co.	a/c contract		1,500.00
5-16-24	Pay Rolls	5-16-24		565.84
5-15-24	" "	5-10-24	Watchman & H. Meltz	50.00
5-17-24	N. Y. Phone Co.	Phone		22.00
5-17-25	Decker Bldg. Co.	Concrete Block		313.53
5-23-24	Pay Roll	5-23-24		624.50
5-28-24	Int.	10M renewal note & St.		102.00
"	Pay Roll	5-28		547.00
				40,550.31

Exhibit D. 1.

STATEMENT TRUSTEES TROY REALTY COMPANY—EXPENDITURES (Continued)

		Forward	40,550.31
5-28-24	Ashes		60.00
6- 3-24	Gas & Electric Service	Grove Street	15.30
6- 6-24	Ashes		72.00
6- 6-24	A. Miller	Painter	500.00
6- 6-24	Pay Roll	6-6-24	769.20
6- 7-24	Decker Bldg. Co.	a/c	500.00
6-10-24	Watchman	final	25.00
6-12-24	Investment B. & L.	fees 2 mort.	18.00
6-13-24	Pay Roll	6-13-24	939.37
6-17-24	Sewerage Conn.	Springdale Ave.	45.00
6-13-24	A. Birkenmeier	re Wurtzel steam fitter	300.00
6-19-24	Pay Roll	6-20-24	842.87
6-19-24	A. Miller	painter	650.00
6-23-24	Interest	5 M renewal note & stamps	51.00
6-23-24	Interest	20 M note renewal & stamps	204.00
5-29-24	Taxi	Ampere	3.75
6-21-24	Ashes		36.00
6-10-24	Int.	5 M note & stamps	51.00
4-11-24	City of E. O.	sewerage connection	1,509.00
6-23-24	Driveway permits		33.00
6-27-24	A. Miller	pay roll ending 6-27-24	784.00
6-27-24	E. J. Kern	a/c paint contract	500.00
6-27-24	Decker Bldg. Material Co.	plumbing Knowles houses	622.57
6-28-24	Trustees Notes & Int.	a/c	1,000.00
6-28-24	First Nat'l Bank	2nd Mort. & Int.	35,125.00
7- 1-24	Belby Co. Ashes		20,148.26
7- 3-24	Pay Roll Ending	7-5-24	35.00
"	Lippman & Lowy	Ins. Pre.	535.50
"	John Fischer	"	332.55
"	Richard Rooney	Ins. Pre.	222.39
7- 3-24	Atlas Mosaic Tile Co.	a/c contract	87.50
"	Columbia Lighting F. Co.	"	1,500.00
7- 8-24	Newark Const. Co.	a/c loan	300.00
7- 9-24	E. J. Kern	a/c plumbing contract	18,000.00
7- 8-24	1923 & 1st half 1924	taxes	1,000.00
7-11-24	Newark Cons. Co.	bal. mtge.	1,964.11
7-10-24	Pay Rolls ending	7-11-24	6,666.49
7-12-24	B/L application for	# 43 R.	490.00
7-16-24	Ashes		9.00
7-17-24	Recording B. & L.	Assignment	12.00
7-17-24	B. Singer	Sundry Disbursements	4.00
7-18-24	Pay Roll ending	7-19-24	100.00
7-18-24	Wurtzel Steam Fitter	a/c contract	584.00
7-18-24	Birkenmeier & Kuhn (280.00
	Ranges & Material (3,463.28
7-18-24	S. & S. Supply Co.	wire contract	1,680.67
7-18-24	Geo. Snyder	plumber	1,035.00
7-18-24	Riverside Box & Lbr. Co.		3,700.00
7-18-24	Columbia Lighting F. Co.		500.00
7-19-24	Dippel Shade Co.	contract	412.50
7-19-24	E. J. Kern Gas Lines	Grove St.	42.11
7-19-24	Bischoff-Haugh	screens	148.00
7-19-24	R. R. Walter	garage contract	513.00
			148,971.73

Exhibit D. 1.

STATEMENT TRUSTEES TROY REALTY COMPANY—EXPENDITURES (Continued)

		Forward	148,971.73
7-24-24	H. Hager	Surveyor	20.00
7-25-25	Pay Roll ending	7-25-24	515.00
7-26-24	Belbey Co.	ashes	12.00
8- 5-24	Pay Roll ending	8-2-24	289.00
8- 8-24	" " "	8-9-24	216.50
8-12-24	Master B. & L. Assn.	August dues	200.00
8-12-24	Peerless B. & L. Assn.	" "	86.00
8-13-24	Anchor B. & L. Assn.	" "	100.00
8-14-24	Columbia Lighting Fixture Co.		1,175.00
8-14-24	Decker Bldg. Co.	mason material	614.17
8-14-24	Pay Roll to	8-15-24	289.45
8-15-24	Watchman to	8-13-24	30.00
8-16-24	Merchants & Bankers B/L		100.00
8-16-24	West End B. & L.	Ins. Pre.	90.00
8-16-24	W. A. Eichhorn I	Whelves & Doors	41.45
8-13-24	W. H. Barkhorn Co.		323.48
8-18-24	Birkenmeier & Kuhn		77.67
8-18-24	Dippel Shade Co.		33.00
8-21-24	Watchman		30.00
8-22-24	A. Miller	a/c paint contract	500.00
8-22-24	Pay Roll ending	8-22-24	184.18
8-22-24	For Sale signs		10.00
8-29-24	Pay Roll ending	8-29-24	396.00
8-29-24	Watchman		39.00
"	Geo. Snyder	bal. contract	300.00
"	Atlas Tile Co.	" "	347.00
9- 2-24	W. G. Jordan Window Glass		51.50
9- 3-24	Anchor B. & L. Assn.		100.00
9- 3-24	Peerless B. & L.		86.00
9- 3-24	Master B. & L. Assn.	Adjustment	12.50
9- 3-24	Merchants B. & L. Assn.		100.00
9- 3-24	Master B. & L. Assn.		100.00
9- 3-24	West End B. & L. Assn.		90.00
9-23-24	Dippel Shade Co.		48.00
9-23-24	Varnishing Floors	4 houses	200.00
9-23-24	Riverside Box & Lbr.	bal. due	356.08
9-23-24	Birkenmeier & Kuhn		41.07
9-23-24	Decker Bldg. Mat. Co.		51.29
9-23-24	E. J. Kern	bal. contract	388.30
9-23-24	B. Singer	atty. fees	1,500.00
10- 6-24	Decker Bldg. Mat. Co.		49.50
10- 6-24	Nat'l Cement Block Co.		18.75
10- 8-24	Anchor B. & L. Assn.		100.00
10- 8-24	Brokerage Sale	6 houses a/c	1,000.00
10- 8-24	R. P. Walters	carpenters	61.50
10-10-24	Peerless B. & L. Assn.		86.00
10-10-24	Master B. & L. Assn.		100.00
"	" " " " "		100.00
10-10-24	Birkenmeier & Kuhn	ranges	133.67
10-15-24	Keys		2.00
10-18-24	Merchants & Bankers B. & L.		100.00
10-18-24	West End B. & L.		90.00
10-23-24	Victory B. & L. Assn.	prepaid stock	1,000.00
10-22-24	D. W. Litwin	fees	50.00
10-22-24	M. J. Quigley	fees	100.00
10-23-24	Fire Ins. premium		43.75
10-24-24	M. Krasner	bal. construction loan	35,000.00
			196,150.54

Exhibit D. 1.

STATEMENT TRUSTEES TROY REALTY COMPANY—EXPENDITURES (Continued)

		Forward	196,150.54
10-24-24	M. Krasner	int. to 10-24	606.84
10-25-24	A. C. Mamarota	Mortgage & Int.	7,495.40
10-30-24	Payment a/c	\$25,000 note	5,000.00
10-29-24	Surveyors		108.00
10-29-24	Lippman & Lowy, Inc.		43.56
10-31-24	Advertising		99.21
10-30-24	West End B. & L. transfer fee		1.00
9-30-24	Demand note int. 9-30		62.50
7-11-24	David Litwin, Atty.		
	Payment a/c Cons. loan (32,254.00
7-15-24	Lum, Tamblyn & Colyer (Retained from Knowles a/c (250.00
7-15-24	J. J. Quinn, Atty.		15.00
7-15-24	Lum, Tamblyn & Colyer		26.50
9-19-24	Pay Roll		225.00
9-4-24	Pay Roll		266.00
6-30-24	Note		10,055.00
7-15-24	"		2,525.00
8-13-24	Adjust B. & L. Mtge. 462 N. Grove St. See Cr. 6-28-24		2,000.00
		(See Schedule A)	
10-27-24	B. & L. Mtge. payments #34-42-43 Rutledge Ave. See Cr. 6-28		24,500.00
11-8-24	Investment B. & L. Assn.	transfer fee	4.00
11-8-24	M. J. Quigley	Recording Release	22.80
11-8-24	Peerless B. & L. Assn.	Nov. dues 36 R. Ave.	86.00
10	Harray A. Higginson	Painting Repairs	15.00
10	Anchor B. & L. Assn.	Nov. dues 462 N. Grove St.	100.00
"	Master B. & L. Assn.	" " #37 R. Ave.	100.00
"	do	" " #41 R. Ave.	100.00
"	Int. on 20M	Trustee note	100.00
13	A. Miller	a/c Paint contract	200.00
14	Connolly & Connolly	cleaning cellar	12.00
14	Onyx B. & L.	transfer fee	8.80
17	Merchants & Bankers B. & L.	Nov. dues 40 R. Ave.	100.00
17	West End B. & L. Assn.	" " 46 R. Ave.	90.00
17	Henry Haar	Mason work Knowles	42.80
19	A. Miller	Bal. paint contract	300.00
21	Ben. Singer	Atty. fees a/c	1,000.00
21	E. J. Kern	Sundry plumbing repairs	377.25
21	Composite B. & L. Assn.	Nov. dues 206 S. Ave.	130.00
22	Investment B. & L. Assn.	" " 34 R. Ave.	80.00
22	Onyx B. & L. Assn.	" " 35 R. Ave.	90.00
22	Investment B. & L. Assn.	" " 42 R. Ave.	80.00
22	Onyx B. & L. Assn.	" " 43 R. Ave.	85.00
26	Percy Penn	Rev. Stamps Cayer transfer.	47.00
Dec. 1	Re: Sale 6 Houses	sold to E. Cayer	1,325.62
2	Dippel Shade Co.	shades 206 S. Ave.	16.20
2	Connolly & Connolly	glazing & cleaning	17.58
2	E. J. Kern	plumbing repairs	62.40
2	C. A. Price	brokerage sale of 6 houses	505.00
2	Connolly & Connolly	" " " "	975.00
6	Percy H. Penn	adjustment	4.70
8	Anchor B. & L. Assn.	Dec. dues 462 N. G. St.	100.00
8	Master B. & L. Assn.	" " 41 R. Ave.	100.00
9	Columbia Lighting F. Co.	Bal. Contract	75.00
10	Int. 20M	Trustee note	110.00
11	W. E. Clapp Coll.	1924 Taxes 4 houses	307.90
12	"	" 206 Spgdale	163.58
19	B. Beyer Co.	screens "	235.00
31	Int.	B. Singer loan to 12-31	75.00
			<u>288,927.18</u>

Exhibit D. 1.

STATEMENT TRUSTEES TROY REALTY COMPANY—EXPENDITURES (Continued)

		Forward	288,927.18
1-8-25	Connolly & Connolly	glazing & Ref.	23.10
8	C. A. Price	moving expenses	40.00
10	Connolly & Connolly	snow removal	8.60
12	Anchor B. & L. Assn.	Jan. dues 462 N. G. St.	100.00
12	Master B. & L. Assn.	" " 41 R. Ave.	100.00
12	Int. 18M	Trustee Note	93.00
12	Payment on note	" "	2,000.00
14	H. A. Higginson	Painting	20.00
20	Connolly & Connolly	rep. floors	6.39
26	do	snow removal	4.50
26	Investment B. & L.	Jan. dues 34 R. Ave.	60.00
26	"	do 42 R. Ave.	60.00
26	"	snow removal	4.50
Feb. 2	Connolly & Connolly	water repairs 206 Sp. Ave.	5.25
2	E. J. Kern	Brokerage 4 houses	322.50
6	C. A. Price	Atty. Fees	1,500.00
6	Benj. Singer		18,000.00
11	Trustee Note		16.00
11	Int. 5M	Trustee note	
			<u>311,291.02</u>

FINAL STATEMENT TRUSTEES TROY REALTY COMPANY.

		Receipts.	
3-29-24	Proceeds	20 M note	19,996.00
"	"	10 M note	9,998.00
4-11-24	"	5 M note	4,999.00
4-25-24	"	5 M note	4,999.00
5-17-24	"	2500 note	2,500.00
6-6-24	"	3000 note	2,999.40
6-13-24	"	2000 note	1,999.60
6-28-24	Equities	10 houses see Schedule A	111,400.00
7-5-24	Phone Rebate		14.08
7-11-24	Proceeds B. & L.	see Schedule B	32,205.00
7-16-24	Proceeds B. & L.	see Schedule C	11,966.62
7-21-24	" Peerless B. & L.	#36 R. Ave.	5,000.00
7-29-24	"		126.10
8-12-24	Proceeds B. & L.	see Schedule D	10,340.50
22	Dr. Knowles	July dues	100.00
10-25-24	B. & L. proceeds	#34 R. Av.	7,029.20
25	Proceeds 25 M note		24,937.50
27	B. & L. proceeds	see Schedule E	22,313.47
30	Proceeds B. & L.	206 Springdale Ave.	11,748.40
			<u>200.00</u>
11-12-24	Bal. from Dr. Knowles		6,500.00
12-2-24	H. Demel, 206 Spgdale. Ave.	Prepaid Stock	9.16
31	Int. Victory B. & L. Assn.		107.33
20	Rebate Insurance premium		
			<u>150.00</u>
1-16-25	Int. Dr. Knowles Mtge.	Prepaid Stock	1,000.00
2-7-25	Victory B. & L. Assn.	Spgdale. Ave.	100.00
7	Bal. for H. Demel		
			<u>292,738.36</u>
		DEFICIENCY	13,552.66
		Trustee Note due 4-10-25 (
		unpaid. To be paid by (
		National Box & Lbr. Co. (5,000.00
			<u>311,291.02</u>

Exhibit D. 1.

STATEMENT TRUSTEES TROY REALTY COMPANY.

SCHEDULES.

Schedule A.

	Value	Mort.	Equity	
462 N. Grove St.	20,000.00	8,000.00	12,000.00	10,000.00
" " " "	16,500.00		16,500.00	8,000.00
34 Rutledge Ave.	18,000.00	9,000.00	9,000.00	
35 Rutledge Ave.	16,500.00	8,600.00	7,900.00	
36 " " "	17,500.00	10,000.00	7,500.00	
40 " " "	16,500.00	10,000.00	6,500.00	
41 " " "	17,500.00	10,000.00	7,500.00	
42 " " "	16,500.00		16,500.00	8,000.00
43 " " "	18,000.00		18,000.00	8,500.00
46 " " "	19,000.00	9,000.00	10,000.00	
	<u>176,000.00</u>	<u>64,600.00</u>	<u>111,400.00</u>	<u>24,500.00</u>

Schedule B.

B/L proceeds # 37 R. Avenue	6,499.75
" # 40 R. Avenue	6,406.00
" # 41 R. Avenue	6,499.75
# 462 N. Grove St.	5,899.75
# 470 Dr. Knowles	6,899.75
	<u>32,205.00</u>

Schedule C.

B. & L. proceeds # 490 Grove St.	1,838.40
" # 440-442 " "	3,468.15
" # 470 " "	1,660.07
2nd Mortgage # 470 " "	5,000.00
	<u>11,966.62</u>

Schedule D.

B. & L. proceeds # 37 Rutledge Avenue	1,833.75
40 " "	1,900.00
41 " "	1,833.75
462 N. Grove	1,873.00
470 N. Grove	2,900.00
	<u>10,340.50</u>

FINAL STATEMENT TRUSTEES TROY REALTY COMPANY.

Schedule E.

CREDIT 10-27-24	
B. & L. proceeds # 35 R. Ave.	7,732.71
" " " # 42 R. Ave.	7,029.25
" " " # 43 R. Ave.	7,551.51
	<u>22,313.47</u>

Exhibit D. 2.

Mortgages Paid.

6-28-24	First National Bank	20,148.26
7- 8-24	Newark Cons. Co. & Int.	24,666.49
7-11-24	" " D. Litwin atty.	32,254.00
10-24	" "	35,606.84
7-11-24	L. Levy Atty. paid	33,126.63
7- 8-24	Marcus Ward Mort.	6,016.42
7- 8-24	Camorrotta	4,010.00
10-25-24	Do Bal.	7,495.40
		<u>163,323.74</u>

We, EDMUND A. RUNG, LOUIS ROMAN, Trustees of the Troy Realty Company do hereby solemnly swear that the foregoing statement is true, to the best of our knowledge and belief.

EDMUND A. RUNG,
Trustee.
LOUIS ROMAN,
Trustee.
.....
Trustee.

STATE OF NEW JERSEY,
COUNTY OF ESSEX.

Sworn to and subscribed before me this
13th day of June, 1925.

(SEAL) EDWARD J. CULLEN,
Notary Public.

EXHIBIT D. 2.

No..... Bellville, N. J. Oct. 25 1924

FIRST NATIONAL BANK

Pay to the
Order of ANTHONY C. CAMARATA or
JULIUS H. HALPRIN, Atty.

Seven Thousand Four Hundred and Ninety-
five 40/100.....Dollars

(signed) EDMUND A. RUNG
Trustee

\$7495 40/100

Certified Across Face
Endorsement
Anthony C. Camarata
or Julius H. Halprin, Atty.
Julius H. Halprin, Atty.

Exhibit D. 2.

LEVY, FENSTER & McCLOSKEY, Trustees
 No. 12637 Newark, N. J. July 12th, 1924
 PAY to the
 Order of Anthony C. Camarata \$3990 00/100
 Thirty Nine Hundred Ninety no/100 ...Dollars.
 To National Newark & Essex Banking Co.
 Newark, N. J. 55-1
 Levy, Fenster & McCloskey, Trustees
 (signed) LOUIS LEVY

Endorsement
 For deposit to the account of
 ANTHONY C. CAMARATA

Pay to the Order of
 Merchants & Mfrs. Nat'l Bank
 Newark, N. J.
 Weequahic Trust Co.
 Henry F. Hays, Jr. Treas.
 RECEIVED PAYMENT
 Through the Newark Clearing House
 Prior Endorsements Guaranteed
 M July 14, 1924 M
 Merchants & Mfrs. Nat'l Bank No. 3

Opinion of Supreme Court.

OPINION OF SUPREME COURT.

Filed February 8, 1927.

NEW JERSEY SUPREME COURT.

No. 30, October Term, 1926.

FIRST NATIONAL BANK OF BELLE-
 VILLE, a corporation,
Plaintiff-Appellee,
vs.
 NATIONAL BOX & LUMBER COM-
 PANY, a corporation,
Defendant-Appellant.

10

*On Appeal
 from the
 Essex
 County
 Circuit
 Court.*

Submitted October 16, 1926; decided February 8, 1927. 20

Before Gummere, Chief Justice, and Justices
 Trenchard and Minturn.

For the appellant, Schneider & Schneider
 (Jacob Schneider, of counsel).

For the respondent, Kessler & Kessler (Sam-
 uel I. Kessler, of counsel).

PER CURIAM:

30

This was an action on a bond and resulted in
 a directed verdict for the plaintiff.

The Troy Realty Company was engaged in a
 building operation and while financially embar-
 rassed gave a mortgage for \$11,000 to one Cam-
 arata, whereupon five creditors, including the
 plaintiff, with claims aggregating \$65,000, threat-
 ened bankruptcy and a receivership, claiming
 that the mortgage to Camarata was a subter-
 fuge to give the defendant, National Box & Lum-
 ber Company, a preference for its claim. 40

Opinion of Supreme Court.

Several conferences between the defendant and the objecting creditors culminated in an arrangement whereby three trustees were nominated to complete the operations of the Realty Company and liquidate its debts. As part of the arrangement a bond was given by the defendant to the plaintiff and the other creditors, the latter of whom assigned their interest to the plaintiff before this action was brought.

The bond contained several provisions as conditions precedent to any liability thereunder, as follows: (1) That creditors refrain from applying for a receivership, and that a creditors' committee be appointed; (2) That \$11,000 due on mortgage be paid to Camarata; (3) That creditors shall not be paid in full their claims at windup of Troy Realty Company affairs. The three above conditions were fulfilled.

The obligation or penalty of the bond was that the defendant pay a sufficient amount (not exceeding \$5,000) "to make the percentage of loss, if any, sustained by the parties of the second part (the creditors) no greater than if the said party of the first part had not received the sum of \$11,000 on the mortgage hereinabove mentioned, but had shared equally its proportionate loss together with the parties of the second part."

The defendant contends that there was error in the Court's refusal to grant its motion for a directed verdict and in granting a like motion in plaintiff's behalf.

To this we deem it to be a sufficient answer to say that this contention is unsound, and that under the undisputed facts the verdict was properly directed for the plaintiff.

We find no error in the admission of evidence. The judgment below will be affirmed with costs.

Rule on Affirmance and Remittitur.

RULE ON AFFIRMANCE AND REMITTITUR.

NEW JERSEY SUPREME COURT.

FIRST NATIONAL BANK OF BELLEVILLE, a corporation, <i>Plaintiff-Appellee,</i> vs. NATIONAL BOX & LUMBER COMPANY, a corporation, <i>Defendant-Appellant.</i>	}	<i>On Appeal from Essex County Circuit Court.</i>	10
		<i>Order on Affirmance and Remittitur.</i>	

This case having been duly argued at the October term, 1926, of this Court by Schneider & Schneider (Jacob Schneider, of counsel), of counsel for the defendant-appellant, and Kessler & Kessler (Samuel I. Kessler, of counsel), of counsel for the plaintiff-appellee, and the Court having inspected the record and judgment below, and considered the causes for error,

It is thereupon ORDERED that the judgment of the Essex County Circuit Court be in all matters affirmed and that the record and proceedings be affirmed with costs, and that the record and proceedings be remitted to the said Essex County Circuit Court to be proceeded with in accordance with this judgment and the practice of said Court.

Entered February 14, 1927.

On motion of

KESSLER & KESSLER,
 Attorneys for Plaintiff-Respondent.

*Notice and Ground of Appeal.***NOTICE AND GROUND OF APPEAL.**

NEW JERSEY SUPREME COURT.

10	FIRST NATIONAL BANK OF BELLE- VILLE, a corporation, <i>Plaintiff-Appellee,</i>	}	<i>Action at Law.</i>
	<i>vs.</i>		<i>On Appeal from Essex County Circuit Court.</i>
	NATIONAL BOX & LUMBER COM- PANY, a corporation, <i>Defendant-Appellant.</i>		<i>Notice and Ground of Appeal.</i>

20 To Kessler & Kessler, Esqs., attorneys for plain-
tiff-appellee:

PLEASE TAKE NOTICE that the defendant-appel-
lant, National Box & Lumber Company, appeals
to the Court of Errors and Appeals in the last
resort in all causes in New Jersey from the whole
of the judgment entered in this cause on the
following ground: The New Jersey Supreme
Court affirmed the judgment of the Essex County
Circuit Court, although there was error in so
doing.

30 SCHNEIDER & SCHNEIDER,
Attorneys for Defendant-Appellant.
JACOB SCHNEIDER,
Of Counsel.

40

OF THE WITHIN Brief
 IS HEREBY ACKNOWLEDGED THIS _____ DAY
 OF April, 1927.
Schneider & Schneider

New Jersey Court of Errors and Appeals

FIRST NATIONAL BANK OF BELLE- VILLE, a corporation, Plaintiff-Appellee,	}	<i>vs.</i>	NATIONAL BOX & LUMBER COM- PANY, a corporation, Defendant-Appellant.

BRIEF OF PLAINTIFF-APPELLEE.

This case is brought to this court on appeal
from a decision by the New Jersey Supreme
Court (No. 30 October Term, 1926) affirming a
verdict for the plaintiff entered in the Essex
County Circuit Court in the sum of \$5,400.

The facts proven in this case are fully stated
in the brief of the defendant-appellant, but specific
attention is called to the following facts:

It is admitted that Anthony C. Camarata was,
in fact, a person used by the National Box & Lum-
ber Company to whom the mortgage was given
by the Troy Realty Company and to whom the
trustees paid the \$11,000. as set out in the bond,
and that the \$11,000. came into the hands of the
National Box & Lumber Company; that Elmer
E. Ross, one of the three trustees to complete the
unfinished buildings of the Troy Realty Company,
was also the Treasurer of the defendant corpo-
ration; the National Box & Lumber Company at
the time it received its mortgage was in no better
position to receive a preference or priority over

any of the other creditors mentioned in the case; that the giving of the mortgage to Anthony C. Camarata was a preference to the National Box & Lumber Company.

I.

The Trial Court did not err in directing a verdict in favor of the plaintiff and against the defendant.

The only question in this case is whether or not the plaintiff was entitled to recover the sum of \$5,000 from the defendant under the terms of a certain bond (S. C. p. 20, Ex. P. 1.) given to certain creditors by the defendant. The obligees of this bond having assigned their interest in the bond to the plaintiff (S. C. p. 21, Ex. P. 2.), the plaintiff brings this suit in its own name as the sole plaintiff, by virtue of P. L. 1903, p. 540.

That part of the condition of the bond involved in this case is as follows:

Now, THEREFORE, the party of the first part agrees that:

(1) If the parties of the second part jointly and severally refrain from applying for a receivership for the said TROY REALTY COMPANY, and the creditors' committee aforementioned will be formed to administer the affairs of the said TROY REALTY COMPANY (insofar as it relates to the East Orange tract) until such time when the respective claims of the parties hereunto shall have been liquidated,

(2) If the said ANTHONY C. CAMARATA shall have received the sum of Eleven Thousand (\$11,000) Dollars now due on said mortgage together with interest thereon until date of cancellation of said mortgage, and

(3) If the parties of the second part jointly or severally shall not be paid their just claims in full at the time the affairs of the said TROY REALTY COMPANY will be wound up;

Then, and in those events, mentioned in the preceding paragraphs, one, two and three, the party of the first part shall and will truly pay or cause to be paid unto the parties of the second part, individually, jointly or severally, or their attorneys, executors, administrators, successors or assigns a sufficient amount (the amount not exceeding in total the sum of Five Thousand (\$5,000) Dollars, to make the percentage of loss, if any, sustained by the parties of the second part no greater than if the said party of the first part had not received the sum of Eleven Thousand (\$11,000) Dollars on the mortgage hereinabove mentioned, but had shared equally its proportionate loss together with the parties of the second part, then this obligation to be void, otherwise to remain in full force and virtue. S. C., Page 10, Line 10.

It was clearly the hope and the intention of the parties as expressed by the bond that the trustees, in completing the buildings of the Troy Realty Company, would make some profit, and perhaps sufficient profit, so that the National Box & Lumber Company would not be called upon to pay the aforementioned Five Thousand (\$5,000) Dollars, and in order that the National Box & Lumber Company, defendant-appellant, should be protected, its treasurer became one of the trustees in order to work out the trusteeship as profitably as possible. It is now contended that because the trustees by their own operation, lost money rather than making the anticipated profit, the defendant-appellant is relieved under the condition of the bond, and this loss sustained by the trustees of which the defendant-appellant's treasurer was a party, is to profit the appellant to the extent of \$5,000.00.

The appellant seeks to convince the court that because of the fact that the creditors, acting through the trustees, suffered a greater loss, it should, therefore, be permitted to profit to the extent of \$5,000. The appellant does, however, concede that in the event that the trustees had made but one single dollar in the operation of the business, instead of showing a loss, then it would be liable under the terms of its bond. The very statement of this proposition is preposterous. This was not the intention of the parties when the bond was entered into, nor can the terms thereof be so interpreted.

The undisputed proofs show that (1) the party of the second part did refrain from applying for a receivership; (2) that Anthony C. Camarata did receive the sum of Eleven Thousand (\$11,000) Dollars on his mortgage, and (3) the parties of the second part were not paid their just claims in full, in fact they did not receive any payment on account of their claims.

Having fulfilled all of the terms of the bond on its part to be performed the plaintiff claims that the condition of the bond is invoked and, therefore, the defendant is liable thereon.

The defendant admits that the condition of the bond is in effect but claims that, under its obligation in the bond contained, it is not liable to the plaintiff in any sum. Thus arises a rather peculiar situation, *i. e.* a defendant admitting the legal effect and force of the bond, but claiming that under its terms, it is not liable in any sum.

The defendant's contention is as follows:—Admitting the proofs of the plaintiff to be true, and admitting that the defendant is liable to pay to the plaintiff a sufficient amount (not in excess of \$5,000) to make the percentage of loss, if any, sustained by the obligees no greater than if the defendant had not received the sum of \$11,000

on its mortgage, but had shared equally its proportional loss together with the obligees, nevertheless under the proofs the defendant is not liable to pay any sum to the plaintiff. This contention is based upon the fact that, inasmuch as the trustees showed a loss of \$18,000 in the management of the business, the plaintiff and its assignors would have received nothing on payment of their claims even though the \$11,000 had been in the estate, for that sum would have been exhausted in making up the trustees' deficiency. Simply stated it is: "The plaintiff received nothing on the claim, if we put our \$11,000 in the fund, the plaintiff would receive nothing, and therefore we are not liable on the bond, for the 'percentage of loss' was no greater than if we had not received \$11,000, *i. e.*, nothing=nothing."

This is a very ingenious result, but, it is based upon a false premise, namely, that the percentage of loss is 100% of its claim in both cases, whereas such is not the fact.

The creditors' committee authorized by the bond, and participated in by the defendant, was in all essentials a joint adventure. As joint adventurers, all the parties would be entitled to share in the profits, and, in case of a loss, must share in the loss. *Jackson v. Hooper*, 76 Eq. 185. The defendant having participated in the management through its Treasurer, Mr. Ross, who was one of the trustees in the hope of acquiring some benefit (realizing sufficient profit to pay plaintiff and its assignors in full and avoid its bond), it must share pro rata in the loss sustained in such management of the business. Any other ruling in this case would allow the defendant to place itself in such a position that, by assuring, through its trustee, a loss by the trustees, it could avoid the bond and thereby receive an advantage over the other creditors which is directly contrary to the purposes and provisions of the bond.

Let us compute, arithmetically, the loss of the plaintiff and its assignors. The claim of the plaintiff was \$38,000 (S. C., p. 21, l. 20); the claim of the assignor Berkenmeier-Kuhn Co. was \$4,700 (S. C., p. 23, l. 32); the claim of the assignor Riverside Box & Lumber Co. was \$14,900 (S. C., p. 24, l. 10); and the claim of the assignor Thatcher Furnace Co. was \$7,500 (S. C., p. 24, l. 12) making in all a total of \$65,100. The claim of the defendant which was paid was \$11,000. The exact loss sustained by the plaintiff and its assignors was \$65,100 plus 54/65 of \$18,000 (*i. e.* its share of the trustees deficiency) or \$80,000. If the defendant had contributed the \$11,000 to the fund the loss of the plaintiff and its assignors would have been \$65,000 plus 54/65 of \$7,000 or \$72,800. It is readily seen that the loss sustained by the plaintiff and its assignors because of the receipt of \$11,000 by the defendant is, in round figures, \$7,200.

Therefore it is incumbent upon the defendant to fulfill the provisions of its bond and pay to the plaintiff the full sum of \$5,000 in accordance with the terms of its bond.

II.

It is therefore respectfully submitted that the judgment of the Supreme Court should be affirmed.

KESSLER & KESSLER,
Attorneys for Plaintiff-Appellee.

SAMUEL I. KESSLER,
Of Counsel.

77 MAY. I. 1927

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

FIRST NATIONAL BANK OF BELLEVILLE, a corporation, <i>Plaintiff-Appellee,</i>	}	<i>Action at Law.</i>
<i>vs.</i>		<i>On Appeal from New Jersey Supreme Court.</i>
NATIONAL BOX & LUMBER COMPANY, a corporation, <i>Defendant-Appellant.</i>		

BRIEF OF THE DEFENDANT IN FAVOR OF THE APPEAL.

Statement of the Case.

The plaintiff sued on a bond executed by the defendant to the plaintiff and four others, who all assigned their right, title and interest to the plaintiff. The said bond was attached to the complaint and is set forth verbatim on pages 8, 9, 10 and 11; likewise the assignments on pages 11, 12 and 13. At the close of the case both the plaintiff and the defendant respectively made motions for the direction of a verdict. The Court directed a verdict in favor of the plaintiff for the full amount of the bond with interest and denied the motion of the defendant. Exception was taken by the defendant to both rulings and this is the only point which will be argued in this Court.

A corporation known as the Troy Realty Company had been carrying on building operations and had become financially embarrassed and involved. All the parties mentioned in the bond were creditors. The said corporation executed and delivered a mortgage for the sum of Eleven Thousand Dollars to a person named Anthony

C. Camarata. The rest of the creditors claimed that the said Camarata was simply a formal party used by the defendant National Box & Lumber Company to obtain this sum as a preference on account of its claim against the Troy Realty Company. In effect, they claimed that the National Box & Lumber Company was obtaining a preference over the other creditors and threatened bankruptcy and a receivership. The various creditors then came together and executed various documents and papers, including the aforesaid bond. Three trustees, Rung, Roman and Ross, were appointed to carry on the building operations of the Troy Realty Company, which were on a large scale, complete the operations and apply the net proceeds to the payment of the claims of the creditors, etc.

In the course of this transaction, the aforesaid bond was executed and delivered by the National Box & Lumber Company to the parties mentioned. The conditions of the bond were as follows: (See p. 10 of the State of Case.)

“(1) If the parties of the second part jointly and severally refrain from applying for a receivership for the said Troy Realty Company, and the creditors’ committee aforementioned will be formed to administer the affairs of the said Troy Realty Company (insofar as it relates to the East Orange tract) until such time when the respective claims of the parties hereunto shall have been liquidated,

(2) If the said Anthony C. Camarata shall have received the sum of Eleven Thousand (\$11,000.00) Dollars now due on said mortgage together with interest thereon until date of cancellation of said mortgage, and

(3) If the parties of the second part jointly or severally shall not be paid their just claims in full at the time the affairs of

the said Troy Realty Company will be wound up.”

These three conditions were all fulfilled. Everybody concerned refrained from applying for a receivership, the creditors’ committee was formed and functioned, Camarata received the Eleven Thousand Dollars due on his mortgage with interest, and, moreover, at the conclusion of the labor of the trustees, none of the parties to the bond received any money whatsoever on account of their claims. In fact, it was a total loss.

The penalty portion of the bond (p. 10, ll. 30-40, and p. 11, ll. 1-10) provides that in that event, the National Box & Lumber Company would pay to the parties of the bond, or their assigns—in this case, the plaintiffs—

“A sufficient amount (the amount not exceeding in total the sum of Five Thousand (\$5,000) Dollars), to make the percentage of loss, if any, sustained by the parties of the second part no greater than if the said party of the first part had not received the sum of Eleven Thousand (\$11,000.00) Dollars on the mortgage hereinabove mentioned, but had shared equally its proportionate loss together with the parties of the second part, then this obligation to be void, otherwise to remain in full force and virtue.”

This last quotation from the bond is the crux of the contention in this case. The defendant contends and insists that the percentage of loss sustained by the parties to the bond would have been no greater if the defendant had not received the Eleven Thousand Dollars. As will be seen later, the final account of the trustees (pp. 37-43) shows—and the testimony of the plaintiff also coincides—that the deficiency at the winding up of the trusteeship was Eighteen

Thousand Five Hundred Fifty-two Dollars and Sixty-six Cents (See bot. of page 41). If, therefore, the Eleven Thousand Dollars had not been taken by the National Box & Lumber Company, the deficiency would still have been Seven Thousand Five Hundred Fifty-two Dollars and Sixty-six Cents. The creditors received nothing at the winding up of the trusteeship. Their loss in either case, therefore, was the same, namely, 100 per cent. Their loss would have been the same if the defendant had not taken its Eleven Thousand Dollars, viz., 100 per cent. The percentage of loss (to follow the phraseology of the bond) was therefore no greater in either case. Therefore, the defendant contends that they, or their assignee, the plaintiff, were not entitled to anything under the bond.

Six Grounds of Appeal are set forth (pp. 2 and 3). Grounds 1 and 4 were waived in the Supreme Court. Ground 5, relating to the Court's refusal to direct a verdict for the defendant, will be combined with Ground 6, relating to the Court's direction of a verdict for the plaintiff and will be argued together. Grounds 2 and 3, relating to questions of evidence, which were argued in the Supreme Court, are now waived.

ARGUMENT.

The Trial Court should have directed a verdict in favor of the defendant instead of directing a verdict for the plaintiff.

The detailing of the facts of the case almost comprises the argument on this point. The testimony offered by the plaintiff was as follows: Edwin A. Rung, cashier of the plaintiff bank (pp. 20-23), produced the bond, which was admitted in evidence; likewise the assignments.

He testified that the Troy Realty Company owed the bank Thirty-eight Thousand Dollars and that they received nothing at the time of the winding up of the trusteeship. On cross examination, he was asked about the written final account of the trustees, which he identified. The plaintiff did not offer this account in evidence, although defendant's counsel strongly urged the same on an argument as to the admission of evidence (p. 21, ll. 20-35). August G. Berkenmeier (p. 23) testified that the Troy Realty Company owed Berkenmeier, Kuhn Company Four Thousand Seven Hundred and Twenty-six Dollars and Thirty-three Cents, and that it received nothing on the winding up of the business of the Troy Realty Company by the trustees. Mr. Rung, recalled and testified (p. 24) that the other creditors named in the bond received nothing whatsoever on their claims at the time when the trustees wound up the affairs of the involved corporation.

Mr. Rung was recalled on behalf of the defendant (pp. 24-29) to testify that all the creditors were given a copy of the final account of the trustees (p. 25, ll. 1-20). The defendant then offered the account in evidence (p. 26, ll. 1-10). On cross examination, over objection and exception taken by defendant, Rung was allowed to testify concerning a notation in the account as to a note of the trustees for Five Thousand Dollars, which was to be taken up by the National Box & Lumber Company. The irrelevancy of this will be argued later. He also testified (p. 28) that Mr. Ross, of the National Box & Lumber Company, agreed to take up this note. Mr. Ross was one of the trustees and it nowhere appears that he had authority to make any such arrangement; moreover, defendant insists that

this is entirely outside of the issues of the present suit, which is a suit upon the covenant in a bond under seal. *The most important part of Mr. Rung's testimony appears on page 28, line 17, to page 29, line 20. He testified that at the conclusion of the trusteeship, there was a deficiency substantially of \$18,552.66; he mentioned \$13,552.66 and the other \$5,000 which he claimed was to be taken up by the defendant. This deficiency existed after the trustees completed the houses and sold them. This point is crystallized in the following question by plaintiff's counsel and the answer thereto (p. 20, ll. 8-13):*

"Q So that at the time of the conclusion of the business of the Troy Realty Company there was not only no money to be paid to the creditors, but as a matter of fact the creditors had a deficiency of \$18,000? A Correct."

Mr. Rung was recalled on rebuttal by the plaintiff (pp. 29-30) but withdrawn (p. 32, l. 10), after argument by counsel. The attempt again was to explain the notation in the bond about the assumption of the Five Thousand Dollar note which has been mentioned above and which is entirely out of the issues of this action, which is a suit upon a bond.

It therefore appears plainly that the trusteeship resulted in a loss of Eighteen Thousand Dollars plus. If the defendant had not received the Eleven Thousand Dollars on the Camarata mortgage, the loss would have been Seven Thousand Dollars plus. In either event, the percentage of loss of the creditors would have been 100 per cent., as they received nothing on their claims at the winding up of the trusteeship and would have received nothing had the Camarata mortgage not been paid. It should be borne in

mind that the bond obligates the defendant to pay Five Thousand Dollars or less only if the percentage of loss of the parties named in the bond would be lessened thereby. The Court, in the course of the argument (p. 32, ll. 1-10) makes the following comment:

"It would not have helped the creditors out to have had their debts lessened by \$11,000?"

Counsel made the following reply:

"Not one cent because they paid out the Camarata judgment later on."

The Court was misled by the fact that it would at first blush seem helpful to the creditors in general to allow the Eleven Thousand Dollars to remain in the pot. *This suit, however, is upon a bond and the plaintiff can only recover in accordance with the terms of the bond and not upon any general theory of amelioration for somebody or other. The plaintiff and its assignors are the following: Plaintiff, Riverside Box & Lumber Company, Thatcher Furnace Company, Berkenmeier, Kuhn Company and Tobias Grunt. These five parties received nothing upon their claim at the winding up of their trusteeship and would have received nothing even if the Eleven Thousand Dollars had not been paid to Camarata. Therefore, their percentage of loss in either case was 100 per cent. total. Therefore, under the terms of the bond, they were not entitled to receive anything from the defendant. It might be argued that the notation in the account, concerning the questions on which objections were taken and exceptions noted, imposed an obligation on the National Box & Lumber Company (see p. 26, ll. 29-40, and p. 27, l. 30, to p. 28, l. 15); the argument may be that Mr. Ross, of the National Box & Lumber*

Company, agreed to have his concern pay the Five Thousand Dollars at the winding up of the trusteeship. This is entirely irrelevant under the present case as it would constitute an entirely different cause of action than the one on which this suit is based. Furthermore, the cause of action in that event would be by the trustees on the original promise made by Mr. Ross, the alleged authorized agent of the National Box & Lumber Company, and not by the five parties to the bond or their assignee. It does not appear whether the promise was made by Mr. Ross for the benefit of the obligees under the bond or for the benefit of the trusteeship. In fact, any claim on this notation would constitute an entirely different cause of action with different proofs, would involve different laws of evidence, and call for evidence on agency and scope of authority, etc., questions which do not in any way arise in this present suit on the bond. Therefore, the notation in the account, which, after all, is a self-serving statement made by the trustees, had nothing to do with this case. *The plaintiff, or its assignors, must stand or fall on the bond and the same does not entitle them to receive any money from the defendant.*

Conclusion.

It is, therefore, respectfully submitted that the judgment of the Supreme Court affirming the judgment of the Essex County Circuit Court in favor of the plaintiff should be vacated; likewise the judgment of the Essex Circuit Court; and that judgment should be entered in favor of the defendant as this Court has a right to make an order to that effect, since both parties made motions for a direction of a verdict at the conclusion of the case, which, therefore, resolves

itself into a matter of law and not of fact, both parties having joined in the motion.

SCHNEIDER & SCHNEIDER,
Attorneys of Defendant-Appellant.
JACOB SCHNEIDER,
Of Counsel.

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