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BILL OF COMPLAINT.

Filed February 14, 1928.

In Chancery of New Jersey

To his Honor Edwin Robert Walker, Chancellor of the State of New Jersey:

Complainant, Metropolitan Lumber Company, a corporation of the State of New Jersey, with its principal place of business in Newark, Essex County, New Jersey, respectfully shows unto your Honor that:

1. On or about November 15, 1927, the defendant, the Fordham National Bank in New York, recovered a judgment against the complainant in the United States District Court for the District of New Jersey for the sum of sixteen thousand one hundred eighty-one and ninety-eight one-hundredths dollars ($16,181.98), upon which judgment the defendants, John G. Flanigan and William J. Cogan, as attorneys for the defendant, the Fordham National Bank in New York, caused execution to be issued; thereafter an appeal was taken and no bond being filed, the complainant was allowed no stay upon the execution.

2. Some time prior to the recovery of the judgment, hereinabove referred to, and on or about June 27, 1927, complainant made and delivered a note in the sum of thirty-three hundred dollars ($3,300.00) to the Stanford Lumber Co., who in turn endorsed said note, to the defendant, the Fordham National Bank in New York.

3. On July 7, 1927, complainant made and delivered a note in the sum of twelve hundred

dollars ($1,200,00) to the Stanford Lumber Co., who in turn endorsed said note to the Fordham National Bank in New York.

4. Thereafter suit was instituted by the holder of the notes against complainant, and complainant herein filed an answer in the actions at law setting up in addition a counter-claim, and those actions are still pending in the law court.

5. On September 26, 1927, there was presented to the complainant by a representative of the Broad and Market National Bank, a promissory note alleged to have been made by the complainant by Jacob Jacobson, Secretary, which note complainant refused to honor or make payment thereof, because said note was a forgery, and on or about September 26, 1927, complainant filed a bill in this court to restrain the defendants therein named from transferring, assigning or negotiating said note or any part thereof, and for other relief, which said suit is still pending in the Court of Chancery and in which suit the injunction prayed for as a preliminary relief as above was granted and is now in effect.

6. Fordham National Bank in New York, on or about the day of , 1927, through its agents, John G. Flanigan and William J. Cogan, caused an execution to be issued upon the judgment which it obtained, which is referred to in paragraph 1 hereof, to the Marshal of the District of New Jersey, with instructions to levy upon the rents, upon the property of complainant, becoming due. Although the equities in complainant's properties were more than sufficient to meet all possible demand of the said Fordham National Bank in New York upon its said judgment, said Fordham National

Bank in New York, through its agents and attorneys, insisted that the rents coming due upon complainant's properties should be levied upon. Complainant did not have the money, and said Fordham National Bank in New York, through its attorneys, knew that it did not have the money to meet the amount due upon said judgment, and knew that although complainant had appealed from said judgment, it could not stay the issuance of execution at that time. Said Fordham National Bank in New York also knew that complainant had certain real estate which was subject to the lien of said judgments to meet the amount due upon said judgment many times over. Jacob Jacobson is the president and sole owner of the Metropolitan Lumber Company, and attempted to negotiate with the said Fordham National Bank in New York, through its attorneys, so that judgment would not be executed at that time, so as to tie up the rents, the result of which would be that the business of the Metropolitan Lumber Company and of the said Jacob Jacobson would be ruined. The said Jacob Jacobson was, at the time of such negotiations, ill, as hereinafter set forth, and was known to be ill by the said John G. Flanigan and William J. Cogan, representatives of the said Fordham National Bank in New York, and the said Fordham National Bank in New York also knew that by reason of the lien which it had acquired upon the rents of the Metropolitan Lumber Company, neither the said Metropolitan Lumber Company nor the said Jacob Jacobson could move. As a condition for not enforcing its execution at that time the said Fordham National Bank in New York, through its representatives, demanded that complainant make, execute and deliver a mort-

gage upon the property belonging to the Metropolitan Lumber Company, located at the southwest corner of Commerce and Mulberry streets, Newark, New Jersey, and also # Mulberry street. Through its agents, defendant had an equity in that lien of sixteen thousand one hundred eighty-one and ninety-eight one-hundredths ($16,181.98) dollars, and insisted that said mortgage be for the principal sum of upwards of $26,000, and insisted that said mortgage secure:

a. The judgment of the said Fordham National Bank in New York, from which the appeal had been taken, which said judgment was in the sum of $16,181.98.

b. A claim of said Fordham National Bank based upon certain notes in the sum of $4,500, which said claim was being litigated, and was then pending in the United States District Court in the District of New Jersey.

c. An alleged claim in the sum of approximately $5,200 based upon a note alleged to have been made by complainant to one Harry W. Lobose, which said claim formed the basis of a suit in chancery, instituted by complainant, which is referred to in the fifth paragraph of this bill, and upon which said note complainant was in nowise liable, and with respect to which said note the said Fordham National Bank in New York had no interest, and the collection of which had been enjoined by this court. Said Fordham National Bank in New York also insisted that there should be paid to John G. Flanigan and William J. Cogan the sum of $3,000 for counsel fees.

If the said levy was made it would ruin the business of the Metropolitan Lumber Company.

During the course of said negotiations, the said Jacob Jacobson, who was representing complainant, was taken violently ill and was obliged to go to his home, where he remained under the doctor's care until on or about the 15th day of January, 1928. The said John G. Flanigan and William J. Cogan, representing the said Fordham National Bank in New York, came to the office of David Bobker, on December 30, 1927, at about the hour of 5 P. M., stating that they had come for the purpose of securing a bond to be secured by a mortgage on properties belonging to the complainant, and they insisted that unless said bond and mortgage was given, as they demanded, a deputy of the United States Marshal's office for the District of New Jersey would be instructed to levy upon the rents, issues and profits of the complainant.

John G. Flanigan and William J. Cogan were informed and advised by the said David Bobker that he was not familiar with the transaction involved by the giving of the bond and mortgage, that he had not been informed by Jacob Jacobson, president of the Metropolitan Lumber Company, complainant, that a bond and mortgage were to be executed and delivered, covering a parcel of property located at the southwest corner of Commerce and Mulberry streets, Newark, New Jersey. David Bobker thereupon got into telephone conversation with the said Jacob Jacobson, but because of the physical and mental condition of the said Jacob Jacobson, was unable to procure any date, facts or figures concerning the proposed bond and mortgage, and on or about 5:30 P. M., on December 30, 1927, and at the time when the said John G. Flanigan and William J. Cogan were in David Bobker's law office, the said Jacob Jacobson was obliged to leave the Metropolitan Lumber Company's of-

fices, was taken home and, pursuant with instructions issued by Dr. Rowitz, was ordered to bed with a temperature of 106 degrees, and as a result of the condition of said Jacob Jacobson, the said David Bobker was unable to secure any information concerning the alleged and proposed settlement.

7. Said David Bobker directed the attention of said John G. Flanigan and William J. Cogan to the situation that Jacob Jacobson was found in, and requested that the matter be carried over to Saturday, December 31, 1927, but said John G. Flanigan and William J. Cogan objected to any postponement and insisted that the transaction must be closed on December 30, 1927.

8. Pursuant with the request of the said John G. Flanigan and William J. Cogan, a mortgage was prepared in the principal sum of $26,614.17, a bond in double of said principal amount was likewise prepared, and said John G. Flanigan and William J. Cogan insisted that the mortgage not only cover the southwest corner of Commerce street and Mulberry street, Newark, N. J., but also the property located at 102-104 Mulberry street, Newark, N. J.

9. David Bobker was unable to verify the fact that the mortgage was to cover both properties owing to the fact that Jacob Jacobson was confined to his bed and unable to see anybody nor speak to anybody.

10. At the time of the preparation of the bond and mortgage an assignment of rents, due from the property at 102-104 Mulberry street, Newark, N. J., and also other property was prepared, upon the instructions of said John G.

Flanigan and William J. Cogan, and an agreement was also prepared, providing that, while the mortgage on its face was payable on demand, the moneys secured thereby were not to be paid until six months from date of said mortgage, providing that no default occurred in any of the terms of said bond and mortgage or any prior mortgage or mortgages covering the said properties.

11. At the time of the preparation of the aforesaid papers, a check for the sum of Three Thousand Dollars ($3,000) was drawn payable to the order of Fordham National Bank of New York, which said check was issued for the purpose of paying counsel fees to John G. Flanigan and William H. Cogan. The principal sum of said mortgage was to cover the items hereinbefore referred to, although at the time said mortgage was executed, the second of the said items of $5,200 *i. e.*, a note held by Harry W. Lobose, had been enjoined by this court and although complainant was in nowise liable upon said note, and although the Fordham National Bank in New York had no interest therein; and said claim of $4,500 of said Fordham National Bank in New York based upon certain notes was then in litigation in the United States District Court for the District of New Jersey.

12. The bond and mortgage so executed as aforesaid was delivered to the said John G. Flanigan and William J. Cogan and has been recorded in the office of the Register of Essex County in Book January 15, 1928, of Mortgages at page . Annexed hereto and made a part hereof is the agreement of John G. Flanigan and William J. Cogan, attorneys for Fordham Na-

tional Bank in New York, dated December 30, 1927, delivered to complainant, and marked Exhibit 1.

Annexed hereto and marked Exhibit 1, and made a part hereof is the agreement made by the Fordham National Bank in New York, by John G. Flanigan and William J. Cogan, its attorneys, that said mortgage would not be payable for six months.

Annexed hereto and marked Exhibit 2 is the assignment of rents, executed by the Metropolitan Lumber Company to the said Fordham National Bank in New York, and made a part hereof.

13. Complainant says that the only person having knowledge of the business of complainant, and the person in charge of the business of complainant was the said Jacob Jacobson; that during the time of the negotiations of withholding execution of said judgment, and at the time the papers hereinbefore referred were executed, and at the time of the payment of the $1,500 on account of the $3,000 check which had been delivered by complainant, the said Jacob Jacobson was ill and was unable to transact business; that the Fordham National Bank in New York, through its agents, knew that the said Jacob Jacobson was ill.

Complainant says that the said Fordham National Bank, through its representatives, issued the execution which it had obtained upon the judgment in the United States District Court, with instructions to the United States Marshal to levy upon the rents, issues and profits on the lands of complainant, knowing full well that the said levy would disrupt the entire business of

complainant, although they knew that complainant had real estate in its name for equities much more than that sufficient to satisfy the said judgment, or any claim of defendant, but compelled complainant to give the bond and mortgage, and the instructions aforesaid to secure the payment of large sums of money which complainant did not owe, with respect to part of which the said Fordham National Bank in New York had no interest whatsoever, and complainant says that said instruments aforesaid were obtained from complainant through duress, exercised upon its officers, and that the conduct of the defendants, as aforesaid, is inequitable and unjust.

Complainant offers to pay to the Fordham National Bank in New York, and to John G. Flanigan and William J. Cogan, any sum of money which it may be determined ultimately to be due, to them, and others, in the meantime to secure payment thereof.

14. Complainant says that unless temporary restraint be granted, the said John G. Flanigan and William J. Cogan will serve notices upon the first day of February, 1928, and will collect the monies secured by the assignment of rents given to them in the sum of $3,000 as hereinbefore set forth.

Complainant is without adequate remedy at common law and therefore prays:

1. That the defendants who are Fordham National Bank, John G. Flanigan and William J. Cogan answer this bill and each statement therein contained, but without oath.

2. That it may be adjudged and decreed that the instruments referred to in this bill, which were obtained from complainant upon the 30th day of December, 1927, and the assignment of rents given to the said Fordham National Bank in New York, through its representatives John G. Flanigan and William J. Cogan, were obtained from complainant by duress, and that each and every of them be set aside.

3. That the defendants, their agents and attorneys, may be enjoined and restrained temporarily, as aforesaid.

4. That defendant may be required to give such security to complainant as may be ordered, and that it may be adjudged and decreed what amount is actually due and owing from the complainant to the defendants, or any or either of them.

5. That complainant may have such other and further relief as may be proper.

PHILIP KLEIN,
Solicitor Complainant.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } *ss.*

JACOB JACOBSON, of full age, being duly sworn according to law, on his oath deposes and says:

I am the president of the Metropolitan Lumber Company, the complainant herein. I have read the bill of complaint and the statements therein contained, and the same is true, to the best of my knowledge, information and belief.

JACOB JACOBSON.

Sworn and subscribed to before me,
this 1st day of February, 1928.

ERNEST PHILBURN,
Notary Public of N. J.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } *ss.*

JACOB JACOBSON, being duly sworn upon his oath according to law, deposes and says:

1. On or about November 15, 1927, the defendant, the Fordham National Bank in New York recovered a judgment against the complainant, Metropolitan Lumber Company, in the United States District Court for the District of New Jersey, for the sum of Sixteen Thousand One Hundred Eighty-one Dollars and Ninety-eight cents ($16,181.98), upon which judgment the defendants, John G. Flanigan and William J. Cogan, as attorneys for the defendant, The Fordham National Bank in New York, caused execution to be issued; thereafter an appeal was taken and no bond being filed, the complainant, Metropolitan Lumber Company, was allowed no stay upon the execution.

2. Sometime prior to the recovery of the judgment, hereinabove referred to, and on or about June 27, 1927, complainant, Metropolitan Lumber Company, made and delivered a note in the sum of thirty-three hundred dollars ($3,300.00) to the Stanford Lumber Co., who in turn endorsed said note to the defendant, The Fordham National Bank in New York.

3. On July 7, 1927, complainant, Metropolitan Lumber Company, made and delivered a note

in the sum of twelve hundred dollars ($1,200.00) to the Stanford Lumber Co., who in turn endorsed said note to The Fordham National Bank in New York.

4. Thereafter suit was instituted by the holder of the notes against the complainant, Metropolitan Lumber Company, and said complainant, Metropolitan Lumber Company, filed an answer in the action at law setting up in addition a counter-claim and those actions are still pending in the law court.

5. On September 26, 1927, there was presented to the complainant, Metropolitan Lumber Company, by a representative of the Broad and Market National Bank, a promissory note alleged to have been made by the complainant, Metropolitan Lumber Company, by Jacob Jacobson, Secretary, which note complainant refused to honor or make payment thereof, because said note was a forgery, and on or about September 26, 1927, complainant, Metropolitan Lumber Company, filed a bill in this court to restrain the defendants therein named from transferring, assigning or negotiating said note or any part thereof, and for other relief, which said suit is still pending in the Court of Chancery, and in which suit the injunction prayed for as a preliminary relief as above was granted and is now in effect.

6. Fordham National Bank in New York, on or about the day of 1927, through its agents, John G. Flanigan and William J. Cogan, caused an execution to be issued upon the judgment which it obtained, which is referred to in paragraph 1 hereof, to the Marshal of the District of New Jersey, with instructions

to levy upon the rents, upon the property of complainant, Metropolitan Lumber Company, becoming due. Although the equities in complainant, Metropolitan Lumber Company's properties were more than sufficient to meet all possible demand of the said Fordham National Bank in New York upon its said judgment, said Fordham National Bank in New York, through its agents and attorneys, insisted that the rents coming due upon complainant, Metropolitan Lumber Company's properties should be levied upon. Complainant, Metropolitan Lumber Company, did not have the money, and said Fordham National Bank in New York, through its attorneys, knew that it did not have the money to meet the amount due upon said judgment, and knew that although complainant, Metropolitan Lumber Company, had appealed from said judgment it could not stay the issuance of execution at that time. Said Fordham National Bank in New York, also knew that complainant, Metropolitan Lumber Company, had certain real estate which was subject to the lien of said judgments to meet the amount due upon said judgment many times over. I, Jacob Jacobson, am the President and sole owner of the Metropolitan Lumber Company, and attempted to negotiate with the said Fordham National Bank in New York, through its attorneys, so that judgment would not be executed at that time, so as to tie up the rents, and result of which would be that the business of the Metropolitan Lumber Company, and my business would be ruined. I was at the time of such negotiations ill, as hereinafter set forth, and was known to be ill by the said John G. Flanigan and William J. Cogan, representatives of the said Fordham National Bank in New York, and

the said Fordham National Bank in New York also knew that by reason of the lien which it had acquired upon the rents of the Metropolitan Lumber Company, neither the said Metropolitan Lumber Company nor I could move. As a condition for not enforcing its execution at that time, the said Fordham National Bank in New York, through its representatives, demanded that complainant make, execute and deliver a mortgage upon the property belonging to the Metropolitan Lumber Company, located at the southwest corner of Commerce and Mulberry streets, Newark, New Jersey, and also No. Mulberry street, Newark, New Jersey. Through its agents, defendant had an equity in that lien of sixteen thousand one hundred eighty-one dollars and ninety-eight cents ($16,181.98), and insisted that said mortgage be for the principal sum of upwards of twenty-six thousand dollar ($26,000.00), and insisted that said mortgage secure:

a. The judgment of the said Fordham National Bank in New York, from which the appeal had been taken, which said judgment was in the sum of $16,181.98.

b. A claim of said Fordham National Bank based upon certain notes in the sum of $4,500 which said claim was being litigated and was then pending in the United States District Court in the District of New Jersey.

c. An alleged claim in the sum of approximately $5,200.00 based upon a note alleged to have been made by complainant, Metropolitan Lumber Company, to one Harry W. Lobose, which said claim formed the basis of a suit in Chancery instituted by complainant, Metropolitan Lumber Company, which is referred to in the fifth paragraph of this bill, and upon which said note

complainant, Metropolitan Lumber Company, was in nowise liable and with respect to which said note the said Fordham National Bank in New York had no interest, and the collection of which had been enjoined by this court. Said Fordham National Bank in New York also insisted that there should be paid to John G. Flanigan and William J. Cogan the sum of $3,000.00 for counsel fees.

If the said levy was made it would ruin the business of the Metropolitan Lumber Company.

During the course of said negotiations, I was taken violently ill and was obliged to go to my home, where I remained under the doctors' care until on or about the 15th day of January, 1928. On information and belief, I state that the said John G. Flanigan and William J. Cogan, representing the said Fordham National Bank in New York, came to the office of David Bobker, on December 30, 1927, at about 5 P. M., stating that they had come for the purpose of securing a bond to be secured by a mortgage on properties belonging to the complainant, Metropolitan Lumber Company, and they insisted that unless said bond and mortgage was given as they demanded, a deputy of the United States Marshal's office for the District of New Jersey, would be instructed to levy upon the rents, issues and profits of the complainant, Metropolitan Lumber Company.

On information and belief, I state that John G. Flanigan and William J. Cogan were informed and advised by the said David Bobker, that he was not familiar with the transaction involved by the giving of the bond and mortgage; that he had not been informed by me, the President of the Metropolitan Lumber Company, the com-

plainant, that a bond and mortgage were to be executed and delivered, covering a parcel of property located at the southwest corner of Commerce and Mulberry streets, Newark, New Jersey. David Bobker thereupon got into telephone conversation with me, but because of my physical and mental condition, was unable to procure any date, facts or figures concerning the proposed bond and mortgage, and on or about 5:30 P. M., on December 30, 1927, and at the time when the said John G. Flanigan and William J. Cogan, were in David Bobker's law office, I had been obliged to leave the Metropolitan Lumber Company's offices, and was taken home pursuant with instructions issued by Doctor Rawitz; I was ordered to bed with a temperature of 106 degrees, and as a result of my condition, the said David Bobker was unable to secure any information concerning the alleged and proposed settlement.

7. On information and belief, I state that the said David Bobker directed the attention of said John G. Flanigan and William J. Cogan to the situation that I was found in, and requested that the matter be carried over to Saturday, December 31, 1927, but said John G. Flanigan and William J. Cogan objected to any postponement and insisted that the transaction must be closed on December 30, 1927.

8. On information and belief, I state that pursuant with the request of the said John G. Flanigan and William J. Cogan, a mortgage was prepared in the principal sum of $26,614.17, a bond in double of said principal amount was likewise prepared, and said John G. Flanigan and William J. Cogan insisted that the mortgage

not only covered the southwest corner of Commerce street and Mulberry street, Newark, N. J., but also the property located at No. 102-104 Mulberry street, Newark, N. J.

9. On information and belief, I state that David Bobker was unable to verify the fact that the mortgage was to cover both properties owing to the fact that I was confined to my bed and unable to see anybody or speak to anybody.

10. On information and belief I state that at the time of the preparation of the bond and mortgage, an assignment of rents due from the property at No. 102-104 Mulberry street, Newark, N. J., was prepared upon the instructions of said John G. Flanigan and William J. Cogan, and an agreement was also prepared, providing that while the mortgage on its face was payable on demand, the moneys secured thereby were not to be paid until six months from date of said mortgage, providing that no default occurred in any of the terms of said bond and mortgage or any prior mortgage or mortgages covering the said properties.

11. At the time of the preparation of the aforesaid papers, a check for the sum of three thousand dollars was drawn payable to the order of Fordham National Bank of New York, which said check was issued for the purpose of paying counsel fees to John G. Flanigan and William J. Cogan. The principal sum of said mortgage was to cover the items hereinbefore referred to, although at the time said mortgage was executed, the second of the said items of $5,200.00; *i. e.*, a note held by Harry W. Lobose, had been enjoined by this court and although complainant, Metropolitan Lumber Company, was in nowise

liable upon said note, and although the Fordham National Bank in New York had no interest therein; and said claim of $4,500.00 of said Fordham National Bank in New York based upon certain notes was then in litigation in the United States District Court for the District of New Jersey.

12. On information and belief, I state that the bond and mortgage so executed as aforesaid, was delivered to the said John G. Flanigan and William J. Cogan and was recorded in the office of the Register of Essex County on January 15, 1928. That annexed to the bill of complaint and made part thereof, is the agreement of John G. Flanigan and William J. Cogan, attorneys for Fordham National Bank in New York, dated December 30, 1927, delivered to complainant, Metropolitan Lumber Company, and marked "Exhibit 1."

That annexed to the bill of complaint and marked "Exhibit 1," and made part thereof, is the agreement made by the Fordham National Bank in New York, by John G. Flanigan and William J. Cogan, its attorneys, that said mortgage would not be payable for six months.

That annexed to the bill of complaint and marked "Exhibit 2," is the assignment of rents executed by the Metropolitan Lumber Company to the said Fordham National Bank in New York, and made a part thereof.

13. I further state that I am the only person having knowledge of the business of complainant, Metropolitan Lumber Company, and I am the person in charge of the business of complainant; that during the time of the negotiations of withholding execution of said judgment,

and at the time the papers hereinbefore referred were executed, and at the time of the payment of the $1,500 on account of the $3,000 check which had been delivered by complainant, Metropolitan Lumber Company, I was ill and was unable to transact business, and that any and all documents signed by me were signed while I was home confined to my bed; that the Fordham National Bank in New York, through its agents, knew that I was ill.

I further state that the said Fordham National Bank, through its representatives, issued the execution which it had obtained upon the judgment in the United States District Court, with instructions to the United States Marshal to levy upon the rents, issues and profits on the lands of complainant, Metropolitan Lumber Company, knowing full well that the said levy would disrupt the entire business of complainant, Metropolitan Lumber Company, although they knew that the said Metropolitan Lumber Company had real estate in its name for equities much more than sufficient to satisfy the said judgment, or any claim of defendant, but compelled complainant, Metropolitan Lumber Company, to give the bond and mortgage, and the instructions aforesaid, to secure the payment of large sums of money which complainant, Metropolitan Lumber Company, did not owe, with respect to part of which the said Fordham National Bank in New York had no interest whatsoever, and I further state that said instruments aforesaid were obtained from complainant, Metropolitan Lumber Company, through duress, exercised upon its officers, and that the conduct of the defendants, as aforesaid, is inequitable and unjust.

I further state that the complainant, Metropolitan Lumber Company, offers to pay to the Fordham National Bank in New York, and to John G. Flanigan and William J. Cogan, any sum of money which it may be determined ultimately to be due to them and others, in the meantime to secure payment thereof.

14. I further state that unless temporary restraint be granted, the said John G. Flanigan and William J. Cogan will serve notices upon the first day of February, 1928, and will collect the moneys secured by the assignment of rents given to them in the sum of $2,000, as hereinbefore set forth.

JACOB JACOBSON.

Sworn to and subscribed before me
this 1st day of February, 1928.

FANNY KIRSCHNER,
A Notary Public of New Jersey.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } *ss.*

DAVID BOBKER, of full age, being duly sworn according to law, on his oath deposes and says:

I am an attorney and counsellor at law of the State of New Jersey. On December 30, 1927, at about the hour of 5:00 o'clock P. M., one John G. Flanigan and one William J. Cogan came to my office and they stated to me that they represented the defendant herein, Fordham National Bank in New York, and that they understood that I was to represent the complainant, Metropolitan Lumber Company, and they informed me that they had come to my office for the purpose

of securing a bond to be secured by a mortgage on property belonging to the complainant, and they insisted that unless said bond and mortgage was given, as they demanded, a deputy of the United States Marshal's office for the District of New Jersey would be instructed to levy upon the rents, issues and profits of the complainant. I informed the said John G. Flanigan and William J. Cogan that I was not familiar with the transaction involved by the giving of the bond and mortgage executed, that I had not been informed by Jacob Jacobson, the president of the Metropolitan Lumber Co., complainant, that a bond and mortgage were to be executed and delivered, covering a parcel of property located at the southwest corner of Commerce and Mulberry streets, Newark, N. J. I thereupon got into telephone connection with the said Jacob Jacobson, but because of the physical and mental condition of Mr. Jacobson, I was unable to secure any data, facts or figures concerning the proposed bond and mortgage, and on or about 5:30 P. M. of the same day, and at the time the said John G. Flanigan and William J. Cogan were in my office, Jacob Jacobson was obliged to leave the offices of the Metropolitan Lumber Company, and was taken home violently ill, and, pursuant to instruction issued by Dr. Rawitz, was ordered to bed. As a result of Mr. Jacobson's condition I was unable to secure any information concerning the alleged and proposed settlement.

I directed the attention of the said John G. Flanigan and William J. Cogan to the situation that Jacob Jacobson was found in, and requested that the matter be carried over to Saturday, December 31, 1927, but the said John G. Flanigan and William J. Cogan objected to any postpone-

ment and insisted that the transaction must be settled on December 30, 1927.

Pursuant with the request of Messrs. Flanigan and Cogan, a mortgage was prepared in the principal sum of $26,614.17, a bond and double of said principal amount was likewise prepared, and said John G. Flanigan and William J. Cogan insisted that the mortgage not only cover the property at the southwest corner of Commerce and Mulberry streets, but also property located at 102-104 Mulberry street, Newark, N. J.

I was unable to verify the fact that the mortgage was to cover both properties owing to the fact that Mr. Jacobson was confined to his bed and unable to see anybody or speak to anybody.

At the time of the preparation of the bond and mortgage an assignment of rents, due from the property at 102-104 Mulberry street, Newark, N. J., was prepared, upon the instructions of the said John G. Flanigan and William J. Cogan, and an agreement was also prepared, providing that, while the mortgage on its face was payable on demand, the moneys secured thereby were not to be made until six months from date of said mortgage, providing that no default occurred in any of the terms of said bond and mortgage or any prior mortgage or mortgages covering the said properties.

At the time of the preparation of the aforesaid papers, a check for the sum of three thousand dollars ($3,000) was drawn payable to the order of the Fordham National Bank of New York, which said check was issued for the purpose of paying counsel fees to John G. Flanigan and William J. Cogan. I was afterwards informed that the principal sum of said mortgage was to cover the items hereinbefore referred to,

although at the time said mortgage was executed, the note held by Harry W. Lobose had been enjoined by this court and although the Fordham National Bank in New York had no interest therein; and said claim of $4,500 of said Fordham National Bank in New York based upon certain notes was then in litigation in the United States District Court for the District of New Jersey. I had no knowledge at that time of the facts and figures involved in the mortgage and assignment of rents, counsel fee, &c., except as I have hereinbefore set forth. I know that the said Jacob Jacobson, at that time, was very sick.

Sworn and subscribed to before me,
this 1st day of February, 1928.

EXHIBIT 1.

TO METROPOLITAN LUMBER CO.

The undersigned, having received from Metropolitan Lumber Co., a certain bond and mortgage and assignment of rentals all dated December 30th, 1927, said papers being delivered to secure the sum of $26,614.17, and which said mortgage is payable upon demand, does hereby expressly agree that said bond and mortgage shall not become payable for six months from date hereof; except and unless in the judgment of The Fordham National Bank in New York the above debt of $26,614.17, and payment thereof shall in any way be jeopardized, in which event the said bank shall have the right and privilege of demanding immediate payment therof and of proceeding thereon, or of proceeding with the collection of

Exhibit 2.

said debt in any other manner, in nowise being limited by the terms of said bond and mortgage.

Dated December 30th, 1927.

THE FORDHAM NATIONAL BANK
IN NEW YORK,

By Jno G. Flanigan.

EXHIBIT 2.

Metropolitan Lumber Co., a corporation, —to— John G. Flanigan and William J. Cogan.	Assignment of Rents.

Know all men by these presents, that

WHEREAS Metropolitan Lumber Co. a Corporation of the State of New Jersey is indebted to John G. Flanigan and William J. Cogan, both of the City of Jersey City, County of Hudson and State of New Jersey in the sum of $2000.00

NOW THIS INDENTURE, WITNESSETH, for and in consideration of the sum of One ($1.00) Dollar, and other good and valuable consideration, receipt of which is hereby acknowledged, paid by John G. Flanigan and William J. Cogan, Metropolitan Lumber Company does hereby assign, set over and transfer to the said John G. Flanigan and the said William J. Cogan, the installment of rent due it from the Studebaker Sales Company of Newark, for the rental of the store in the premises 640-652 Bloomfield

Exhibit 2.

Avenue, Montclair, New Jersey, which premises are owned by it and leased to the said Studebaker Sales Company of Newark, by lease dated the day of , 19 , on February 1st, 1928, in the sum of $666.66, as well as the installment of rent due it by the F. and H. Motors Inc., for the rental of the store in the premises 640-652 Bloomfield Avenue, Montclair, N. J., which premises are owned by it and leased to the said F. and H. Motors Inc., by lease dated the day of , 19 , in the sum of $541.67, also the installment of rent due it from George Rubin, for the rental of the store in the premises 92-94 Mulberry St., Newark, N. J., which premises are leased by it and in turn sublet by it to the said George Rubin by lease dated the day of , 19 , in the sum of $833.00, and in the event that this installment of rent due from the said George Rubin on February 1st is for any reason not paid then the installment of rent due from him on March 1st for the same premises in the same sum is to be substituted for and paid the said John G. Flanigan and William J. Cogan instead of the sum due February 1st.

And the Metropolitan Lumber Co., does hereby nominate, constitute and appoint the said John G. Flanigan and or the said William J. Cogan, its duly authorized agent or attorney for the collection of the said respective installments of rent due from the Studebaker Sales Company of Newark, the F. and H. Motors Inc., and the said George Rubin on February 1st, 1928, and to give said leases a proper receipt for same as it would and could have done but for this assignment, and that said moneys so collected by the said John G. Flanigan and or the said William

Exhibit 2.

J. Cogan are for their own and each of their uses and benefits.

IN WITNESS WHEREOF, the said Metropolitan Lumber Company has signed, sealed and delivered this assignment of rents on January 11th, 1928.

Metropolitan Lumber Company

By JACOB JACOBSON
President

Attest:

ERNEST PHILBURN
Secretary

STATE OF NEW JERSEY, } *ss.*
COUNTY OF HUDSON. }

BE IT REMEMBERED, that on this 11th day of January, 1928, before me, personally appeared Jacob Jacobson to me known, who being by me duly sworn according to law doth depose and make proof to my satisfaction that he is the President of Metropolitan Lumber Company a corporation, the grantor in the foregoing assignment named; that he well knows the seal of said corporation; that the seal affixed to the said assignment is the corporate seal of said corporation that it was fixed in pursuance of a resolution of the Directors of the said corporation; that he affixed the seal to the said assignment and signed same and delivered same, and declared that he signed, sealed and delivered same as the voluntary act and deed of said corporation in pursuance of said resolution and that Ernest Philburn signed his name thereto at the same time as a subscribing witness.

JACOB JACOBSON.

Affidavits of S. B. Rawitz and Charles E. Teeter.

Sworn and subscribed to before me,
this 11th day of January, 1928.

ERNEST PHILBURN,
Notary Public of New Jersey.

STATE OF NEW JERSEY, } *ss.*
COUNTY OF ESSEX. }

S. B. RAWITZ, of full age, being duly sworn, according to law, upon his oath deposes and says:

I am a practicing physician in the State of New Jersey. On December 30, 1927, I attended Jacob Jacobson professionally at his home 93 Lincoln Park, Newark, New Jersey. He was confined to his bed and seriously ill. He had a temperature of 105 and was partially delirious and in a state of collapse. He was, in my opinion, unable on that day, physically and mentally, to transact any business.

SIDNEY B. RAWITZ, M. D.

Sworn and subscribed to before me,
this 1st day of February, 1928.

ERNEST PHILBURN,
Notary Public of N. J.

STATE OF NEW JERSEY, } *ss.*
COUNTY OF ESSEX. }

CHARLES E. TEETER, of full age, being duly sworn according to law, upon his oath deposes and says:

I am a practicing physician in the State of New Jersey. On January 1, 1928, I attended Jacob Jacobson professionally. At the time I

attended him he was confined to his bed, had a high fever and was a very sick man. He was not in any condition on January 1, 1928, when I saw him to transact any business.

CHARLES E. TEETER.

Sworn and subscribed to before me
this 1st day of February, 1928.

ERNEST PHILBURN,
Notary Public of N. J.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } *ss.*

JULIUS SOBIN, of full age, being duly sworn according to law, upon his oath deposes and says:

I am a practicing physician in the State of New Jersey. I attended Jacob Jacobson professionally from December 31, 1927, to January 14, 1928. He was suffering from a very severe attach of the grippe. He had a high fever and was at times delirious, and most of the time during that period he was unable to transact any business. From my examination and observation of the said Jacob Jacobson on December 31, 1927, when I first saw him, I am of the opinion that he was in no condition to transact any business due to his high fever and delirium on December 30, 1927.

JULIUS SOBIN, M. D.

Sworn and subscribed to before me
this 1st day of February, 1928.

ERNEST PHILBURN,
Notary Public of N. J.

ORDER.

Filed February 1, 1928.

This matter being opened to the Court by Philip Klein, of counsel with complainant, and upon reading and filing the bill of complaint and the affidavits thereto annexed:

It is on this 1st day of February, 1928, ORDERED that the defendants, The Fordham National Bank in New York, John G. Flanigan and William J. Cogan, show cause before the Chancellor, at Chancery Chambers in the City of Newark, on Tuesday, the 7th day of February, 1928, why they and their agents and attorneys should not be enjoined and restrained from taking any steps to enforce the provisions of the bond and mortgage, the two assignments of rents, or any other instruments delivered by complainant to defendants or either or any of them as set out in the bill of complaint, and why they should not be enjoined and restrained from assigning, transferring and encumbering, or otherwise dealing with said instruments in any manner whatsoever, and why complainants should not have such other and further relief as may be proper.

It is further ORDERED that in the meantime and until further order of Court, the said defendants, their agents, attorneys and representatives do desist and refrain from taking any steps to enforce the provisions of the bond and mortgage, the two assignments of rents, or any other instruments delivered by complainant to defendants or either or any of them as set out in the bill of complaint, and why they should not be enjoined and restrained from assigning, transferring or encumbering, or otherwise dealing with said instruments in any matter whatsoever,

Order to Show Cause.

and why complainants should not have such other and further relief as may be proper.

It is further Ordered that as a condition for the granting of this restraint the said complainant do give bond in the penal sum of $3,000 to the said John G. Flanigan and William J. Cogan, conditioned that it will pay to the said John G. Flanigan and William J. Cogan such amount as this court may direct it to pay and that it will save harmless the said John G. Flanigan and William J. Cogan from any effect of the granting of the restraint contained in this order, which said bond both as to form and sufficiency of surety may be approved by any Special Master of this court and shall be filed within twenty-four hours after the granting of this order.

It is further Ordered that copies of this order, together with copies of the bill of complaint, be served upon the said defendants by service upon the individual defendants personally, or by leaving at their usual place of abode within one day of the date hereof, and upon the corporate defendants by service on one of its officers either within or without the State, or upon its attorney in the litigation pending in the United States District Court for the State of New Jersey between the parties, which said service shall be made within one day of the date hereof.

EDWIN R. WALKER,
C.

Respectfully advised,

Alonzo Church,
V.-C.

Order of February 7, 1928.

ORDER.

Filed February 7, 1928.

This matter being opened to the Court by John G. Flanigan, of counsel with the defendants John G. Flanigan, William J. Cogan and the Fordham National Bank in New York, and upon hearing John G. Flanigan, of counsel for defendants, and Herbert J. Hannoch, of counsel for complainant, and sufficient cause appearing therefor,

It is on this 7th day of February, 1928, Ordered that in accordance with Rule Number 204 of this court, that the affiants, David Bobker, S. B. Rabitz, Charles N. Teeter, Julius Sobin, Jacob Jacobson, appear and submit to cross examination in respect to the matter contained in their respective affidavits, as annexed to the bill of complaint filed herein, by and on behalf of complainant, before Roger E. Salmon, a Master of this court, on the 19th day of February, 1928, at 2 o'clock in the afternoon, at the office of the said Roger E. Salmon, Room 638, Prudential Building, Newark, N. J.

It Is Further Ordered that the rule to show cause heretofore made in this cause and dated February 1, 1928, be and the same is hereby continued to February 21, 1928.

It Is Futher Ordered that the complainant give bond to the defendant, The Fordham National Bank in New York, to assure any counsel fee and costs which may be awarded said defendant on the return of the rule to show cause herein, and that said bond shall be in the sum of $500, may be approved by any Special Master of this court and shall be filed within three days after the granting of this order.

IT IS FURTHER ORDERED that the answering affidavits of defendants be filed within seven days of the granting of this order, and that John G. Flanigan, William J. Cogan, Roy H. Griffin, George T. Winner, who intend filing such affidavits, or such of them as do execute such affidavits, appear and submit to cross examination in respect to the matter contained in their respective affidavits so executed before the said Roger E. Salmon, a Master of this court, on the 17th day of February, 1928, at 2 o'clock in the afternoon, at the office of the said Roger E. Salmon, Room 638, Prudential Building, Newark, N. J., on two days' notice to John G. Flanigan, if such examination is required by said complainants.

IT IS FURTHER ORDERED that a copy of this order be served within three days from the date hereof upon each of the said affiants whose affidavits are filed herein by said complainant, and that a copy of this order be served upon the attorney of the complainant herein, within one day of the date hereof.

E. R. WALKER,
C.

Respectfully advised,

ALONZO CHURCH,
V.-C.

ORDER.

Filed February 24, 1928.

An order having heretofore been entered herein requiring that persons who have submitted affidavits on behalf of the complainant and defendants appear before Roger E. Salmon, Esq., and submit to cross examination, and Drs. Charles N. Teeter and Julius Sobin, persons who have submitted affidavits on behalf of the complainant, and John G. Flanigan, William J. Cogan, Roy H. Griffin and George T. Winner, persons who have submitted affidavits on behalf of the defendant, having not as yet submitted to such cross examination, and the order to show cause heretofore entered herein and duly adjourned to February 21, 1928, having been in open court further adjourned to February 28, 1928, and application for the entry hereof now being made on behalf of the complainant,

It is on this 24th day of February, 1928, on motion of Stein, McGlynn & Hannoch, solicitors for the complainant, ORDERED that Dr. Charles N. Teeter, Dr. Julius Sobin, John G. Flanigan, William J. Cogan, Roy H. Griffin and George T. Winner appear before Roger E. Salmon, Esq., at his office on the 6th floor, Room 638, Prudential Building, Newark, N. J., on Monday, February 27, 1928, at 3 P. M., and then and there to submit to cross examination, and

IT IS FURTHER ORDERED that Dr. Charles N. Teeter and Dr. Julius Sobin appear without further order, and that copy of this order, insofar as it affects the remaining affiants, be served

Order of February 24, 1928.

upon John G. Flanigan, Esq., solicitor of the defendants, within one day from the date hereof.

E. R. WALKER,
C.

Respectfully advised,

ALONZO CHURCH,
V.-C.

Sidney Rawitz, direct.

TESTIMONY.

IN CHANCERY OF NEW JERSEY.

Between

METROPOLITAN LUMBER CO., a corporation of New Jersey,
Complainant,

and

THE FORDHAM NATIONAL BANK IN NEW YORK, JOHN G. FLANIGAN and WILLIAM J. COGAN,
Defendants.

Transcript of shorthand notes of testimony taken in the above-entitled cause before Roger E. Salmon, a Master in Chancery of New Jersey, on the 10th day of February, 1928, at 2 P. M., Room 638 Prudential Building, Newark, New Jersey, in the presence of Aaron Lasser for complainant; John G. Flanigan and William J. Cogan for defendants.

SIDNEY RAWITZ, sworn for the defendants.

Direct examination by Mr. Flanigan.

Q What is you full name, doctor? A Sidney Rawitz.

Q And where is your office? A 190 Clinton avenue.

Q Newark, of course? A Newark.

Q How long have you been practicing, doctor? A About twelve years.

Q And do you know one Jacob Jacobson? A Yes.

Q How long have you known him? A The first time I met him was when I was called to see him here about a month and a few days, possibly five weeks ago or so.

Q That was the first time you met Jacobson? A Personally, yes.

Q What do you mean by "personally"? A I have been at the house, treated one of the children, but never saw him, never met him before, to my knowledge.

Q Are you the family physician? A No.

Q Now, when did you see Jacobson? A On the—I think it was the 30th day of December.

Q Where? A At his home.

Q Which is located where? A On Lincoln Park. I don't remember the number.

Q What time of the day did you see him? A It was about four in the afternoon.

Q Can you be absolutely accurate as to the time of the day that you saw him? A I cannot, Mr. Flanigan.

Q Is there any way that you can refresh your memory so that you can tell us accurately what time on that day you saw him? A Well, I can judge about this way—

Q No. That is not my question. A Why, yes, about. Yes, I think I can.

Q All right. How can you fix it, how can you fix the time accurately? A I think it was between three and four. It must have been after three, my office hours are between one and three, so it must have been between three and four.

Q Was it after or before you had your dinner in the evening? A In the evening? I saw him

twice that day, Mr. Flanigan. I saw him at four and I saw him in the evening, about 7 o'clock, thereabouts.

Q Around 7 o'clock? A Around 6 or 7 o'clock, yes.

Q Where? A At his home.

Q And did you see him after that? A No, I did not, Mr. Flanigan.

Q Have you, down to this time seen him since that last visit on December 30th? A I have not, no.

Q Were you requested after the second visit on December 30th to see him thereafter? A I was not.

Q How much time did you spend with him on the occasion of your first visit? A About a half hour.

Q How much time did you give him on the occasion of the second visit? A About the same time.

Q During the time that you were there on the first visit, did Jacobson answer the telephone? A Yes.

Q Do you know to whom he talked? A I do not.

Q How long a conversation did he hold? A I couldn't tell you.

Q Well, doctor, was it a minute, two minutes or five minutes? A Well, if you will ask me how I came to hear it, I can probably answer.

Q I didn't ask you that. I asked you how long was the conversation? A I can't tell you.

Q Was it more than five minutes? A I can't tell you, unless you will let me make it a little bit clearer.

Q I am asking you to measure time, not asking you to make it clear. You cannot measure it, you say? A I can't do it.

Q Now, during that first visit, did he talk more than once on the telephone? A I didn't say during the first visit, Mr. Flanigan.

Q My question was, the first visit? A No, Mr. Flanigan. I don't remember him answering the telephone the first visit at all.

Q Did he talk with any one besides you on the occasion of your first visit? A Yes.

Q To whom? A To his wife.

Q Any one else? A Some man there.

Q Do you know who that man was? A I do not.

Q Can you describe him? A I think he was a stocky built fellow, possibly around forty.

Q Do you know whether or not he was associated with Jacobson in business? A I don't know.

Q What, if anything, was said by and between Jacobson, your patient, and this man? A I don't know.

Q Weren't you present when they talked? A They were not talking face to face.

Q How were they talking, if they were not talking face to face? A The man walked in the room and said something to him and Mr. Jacobson with his face to the window mumbled something, "Return." That is all I remember.

Q Do you know what Mr. Jacobson said? A No.

Q Did this man have a ruddy face? A If I remember correctly, I think he did. I think it was a full faced man. I had just a passing glimpse. He walked right out again so I couldn't describe him exactly.

Q Did he have his hat on? A No.

Q Did he have curly hair, bushy hair? A I don't remember that.

Q Would you know his name, if you heard it mentioned? A No name was mentioned there.

Q What did he do, just break into the room? A The door was open. He walked in.

Q Do you know whether it was Mr. Philburn? A Who is Mr. Philburn? I don't know him.

Q Your answer is, no, apparently you do not. Now, on the occasion of the second visit in the evening, did Mr. Jacobson telephone to anybody? A Yes.

Q To whom did he telephone? A I don't know.

Q Whom did he ask for? A I don't know.

Q Were you present? A No.

Q How do you know he telephoned? A The door was open. His wife said, "What is going on?" And he explained. I don't know how long it was.

Q Do you know the nature of the conversation? A No; I couldn't hear it, just the mumbling of voices.

Q Did you hear the name David Bobker mentioned? A I didn't hear anything mentioned.

Q Did you hear the name Flanigan mentioned or Cogan? A I didn't hear any part of the conversation.

Q But you do know that there was a conversation? A There must have been, yes.

Q How long did that conversation last? A I don't know how long it had been going on before I questioned who was talking there and walked into the room.

Q Was the conversation going on when you entered for your second visit? A Just ended.

Q Just ended? A Just ended, the receiver went up.

Q Now, did anybody talk to Jacobson besides you on the occasion of the second visit that day? A I don't think so. I don't remember that.

Q You are not sure? A I don't remember. I am not sure, no.

Q Did this same man whom you saw in the afternoon, did he appear during that second visit? A I don't recollect. I don't think he did, Mr. Flanigan.

Mr. Flanigan: Now, Mr. Salmon, I am going to ask you to excuse Mr. Jacobson until we are finished with this witness.

Mr. Lasser: I object on the ground that Mr. Jacobson, being one of the parties who made the affidavit in this case has a right to be in the court room while the testimony is being taken.

(Discussion.)

(Mr. Jacobson leaves the room.)

Q Where was Jacobson when you came in the room on the occasion of your first visit, doctor? A In bed.

Q Was he asleep or awake? A Sort of in a daze, dozing.

Mr. Lasser: Dazed or doze?

(Answer read as follows: "Sort of in a daze, dozing.")

Q Did you examine him? A Yes, I did.

Q Did you talk with him? A Yes, I did.

Q What did you say to him? A Asked him how he felt.

Q What did he say? A He wouldn't answer.

Q He didn't answer you? A No.

Q Did you talk with him at all? A Yes.

Q Did he answer you at all? A Yes.

Q What did he say to you? A I asked him whether he had any pain. "No." (Illustrating.)

Q He said, "No"? A "No."

Q He said he had no pain? A Yes.

Q Are you sure of that?

Mr. Lasser: You cannot get the expression of the witness at the time that he is making that statement, saying that. The witness said, "No." He said it in a manner that indicates—(interrupted).

Mr. Flanigan: Are you objecting to the question or answer?

Mr. Lasser: I am objecting to the—(interrupted).

Mr. Flanigan: The objection comes late. The question and answer is in.

Q Did you prescribe for this man? A Yes.

Q What did you prescribe? A Why, treatment for what I found, such as cold bath, medication to take his temperature down, make him feel more comfortable.

Q What medication did you prescribe? A Dover powders antisebrile mixture, something to take the temperature down.

Q Did you give him a prescription? A Yes.

Q On what drug store? A I didn't give it on any drug store. I left the prescription there for the man to take.

Q No particular drug store? A No.

Q Is that all you did there? A Yes.

Q What further conversation, if any, did you have with the patient, Jacobson, in the afternoon visit, other than what you have already

testified to? A Just what he felt and how generally he felt, got the history and so on—chills, chills and chills, hot, chills, hot, chills.

Q Did he tell you the history of his case? A No, no.

Q Did you ask him? A Yes, sure.

Q Why didn't he tell you? A Why, it was pretty hard to rouse the man to get a definite answer from him. I got more in the morning from the wife than I did from him. In fact, I got most all of it from the wife.

Q In the evening visit, what time did you arrive there? A About seven or seven-thirty, Mr. Flanigan. I can't tell exactly.

Q You can't fix that accurately? A No.

Q What time do you have office hours in the evening, if you do have them? A Six to eight.

Q Obviously, you did not stay late at your office that night? A I have no office hours Friday night.

Q You had no office hours that night? A No.

Q And when you got there in the evening, you found Jacobson in the next room telephoning; is that correct? A I did not, sir.

Q You did not? A No, sir.

Q Where did you find him? A In bed.

Q Did he get out of bed while you were there that evening? A No, sir; not while I was there, sir.

Q Sure of that? A Yes, sir.

Q Did you give him any more medicine that night? A I don't think I did, Mr. Flanigan, no new medicine that I can remember.

Q Did you have any conversation with him in the evening, during the evening visit? A Not particular, excepting how he felt.

Q Is that all you said to him? A That is all.

Q How long were you there? A Possibly twenty minutes, half an hour.

Q That is the only question you propounded during that time, to ask him how he felt? A Yes, sir.

Q Now, have you seen him since that evening visit of December 30th? A No, sir.

Q You know nothing about his condition as it existed immediately following and on down to the present time? A No, sir, Mr. Flanigan, I do not.

Q Comparing it with that last visit? A (Witness nods no.)

Cross examination by Mr. Lasser.

Q Doctor, when you spoke to Mr. Jacobson first and asked him whether he had any pain and he answered "No," in what manner did he answer "No"? A Sort of a daze, "No, no," sort of a daze. I couldn't make him out.

Q As though he didn't want to be bothered?

Mr. Flanigan: I object to the form of the question.

Q How did he answer? A This way: "No."

Q We can't get that down. A He growled. He just growled. He was irritable, sort of—well, it is hard for us to describe it. A man when he does that he can be in pain or he can be irritable; he can be almost any condition, or lackadaisical about himself. It is hard for me to describe it to you.

JACOB JACOBSON, sworn.

Direct examination by Mr. Cogan.

Q Mr. Jacobson, you are president of the Metropolitan Lumber Company? A Yes.

Q And you executed an affidavit in connection with the bill of complaint lately filed by the Metropolitan Lumber Company? A Yes.

Q Which affidavit is dated February 1, 1928; is that right? A Yes.

Q Now, Mr. Jacobson, in your affidavit you state that an appeal was taken from the judgment Fordham National Bank in New York, which was secured on November 15th; was that right? A Mr.— that was the date I got from Mr. Unger. I don't know whether it was taken or not. Mr. Unger told me it was taken on that date.

Q You swear in your affidavit that such appeal was taken. A Yes. I put up a bond for it.

Q You don't know whether or not such an appeal was taken? A Yes; I know I took up an appeal, but I believe Mr. Unger gave me the facts.

Q Of your personal knowledge you don't know whether or not an appeal was taken, do you? A Yes, I do. From what Mr. Unger told me, an appeal was taken. I took his word for it.

Q Were you also informed what date such appeal was taken? A I couldn't tell you offhand. It is in the papers.

Q Well, you say in your affidavit that a bond has been filed to secure that judgment. Is that true? A Yes.

Q When was that bond filed? A I couldn't tell you the exact date.

Q Well, the exact month. A It was done some time last month I believe, or—it was done before this. I think it was done before.

Q Was it done in January? A I think it was done some time in January, but I am not sure. I know the bond was filed.

Q I am speaking of the bond. A I know the bond was filed, but I don't know what day.

Q You don't know what month, either? A I couldn't tell you exactly. It was either late last month or early this month.

Q Do you know whether or not it was before or after the date Mr. Flanigan saw you at your home? A I couldn't tell you.

Q On which date you executed an assignment of rent to Mr. Flanigan and Mr. Cogan? A I think the bond was filed after that.

Q You refer in paragraph 5 in your affi—davit—(interrupted).

Mr. Lasser: I will have to make an objection. Mr. Jacobson objects, and I on his behalf object to your examining.

Mr. Cogan: On what grounds?

Mr. Lasser: On the ground that the examination was started by Mr. Flanigan and also on the ground that Mr. Cogan is not a member of the Bar of New Jersey.

Mr. Flanigan: The answer to that is, Mr. Cogan is a party to this suit, is an attorney of the State of New Jersey as well as the State of New York, and Mr. Flanigan did not start the examination of this witness.

Q Mr. Jacobson, you state in paragraph 5 of your affidavit, among other things, that you re-

fused payment of the Labob note because that note was a forgery? A Yes, it is—was, and it is.

Q You executed an affidavit—on October 30, 1927, you executed an affidavit stating that the words "Jacob Jacobson" on that note were written by you; is that correct? A Yes.

Q On December 1st what lawyer represented you in connection with the case in which the Fordham National Bank secured a judgment of $16,181.88? A I think it was Mr. Klein.

Q You just testified that Mr. Unger told you he filed an appeal in that case? A Mr. Klein took that case over later on—substitution of attorney.

Q Who filed on your behalf the notice of appeal in that case? A Mr. Unger.

Q Who filed in your behalf the bond in that case? A Mr. Unger.

Q You testified before that that bond was filed sometime in January, to your best recollection? A I didn't say that. I said either late in January or early in February.

Q Well, on December 1st who represented you in that case? A I couldn't tell you about the date. It was either Mr. Klein or Mr. Unger. It was transferred from Mr. Klein to Mr. Unger.

Q Did Mr. Unger ever tell you that he received an offer of settlement of these various claims of the Fordham National Bank? A No.

Q Did he ever tell you that I wrote him on December 6, 1927, making him an offer of settlement in these various cases? A No, sir; he did not.

Q Do you recall the occasion when the United States Marshal and Mr. Flanigan and myself called at your office shortly before the end of December? A Yes.

Q Do you recall stating, at that time, that you would not make any settlement which included the Labob note? A I did.

Q Nobody had mentioned the Labob note to you prior to that, had they? A You did. You said you wanted that paid up, too.

Q Is that the first date that you knew of the settlement which we were willing to effect? A No, it was—at that time, I told you that the Labob note was a forgery and I wouldn't—(interrupted).

Q Excuse me. Please answer the question.

Mr. Cogan: Read him the question.

(Question read as follows: "Is that the first date that you knew of the settlement which we were willing to effect?")

A Yes.

Q Who represented the Metropolitan Lumber Company on the action brought by the Fordham National Bank against the Metropolitan Lumber Company on two notes which are still in suit? A Mr. Unger.

Q And did he represent you from the time the suit was started until now? A Yes, sir.

Q And who represented the Metropolitan Lumber Company on the Labob suit which you started? A Mr. Unger.

Q And has he represented you ever since in that suit? A Yes.

Q On what date did Mr. Klein cease to represent you in the suit in which the Fordham Bank secured a judgment? A I don't know. You would have to look up the substitution.

Q Is there a substitution of attorneys filed in that matter? A I suppose there is. I don't

know. But I know the case was transferred from Mr. Klein to Mr. Unger.

Q Did you ever execute a substitution of attorneys in that matter? A No.

Q And Mr. Unger is the only man who has represented the Metropolitan Lumber Company in the matter of the appeal— A Yes.

Q —from that judgment, is he not? A That is right.

Q And if the appeal was filed on December 1, 1927, necessarily Mr. Unger represented you? A That is right.

Q Mr. Jacobson, do you recall a visit to your office on the 28th of December, 1927, by the United States Deputy Marshal, John G. Flanigan and William J. Cogan? A Yes.

Q What did the marshal state to you on that occasion? A You three were all doing the talking. I can't remember what you said.

Q Did the marshal ask you whether you wanted to pay the judgment of $16,181.88? A He did.

Q Held by the Fordham Bank? A He did.

Q What did you say? A I told him it was in Mr. Unger's hands, if I can remember correctly, in my attorney's hands, to go up and see my attorney about it.

Q Do you recall telephoning to Mr. McGlynn, an attorney of Newark, on that day? A I might have.

Q Do you recall telling Mr. Flanigan and Mr. Cogan that— A Yes; I think I did call.

Q —they wouldn't get five cents? A I don't remember just what—I had a heavy fever that day and I was just about ready to go to bed.

Mr. Cogan: I move to strike that out. Ask him the question again, will you, please?

(Question read as follows: "Do you recall telling Mr. Flanigan and Mr. Cogan that they wouldn't get five cents?")

A I might have, but I don't remember just what I did say to him.

Q Do you remember telephoning to Mr. McGlynn? A I think I did. I know I was in a very excitable state that time.

Q Did you tell Mr. McGlynn not to make a certain payment? A I can't remember just what I did tell Mr. McGlynn, because, as I told you—

Q That is all. A —I was just about ready to go to bed that time. I was in bad shape.

Mr. Cogan: Ask him the question again.

(Question read as follows: "Did you tell Mr. McGlynn not to make a certain payment?")

A I just don't remember what I told Mr. McGlynn, because I was just about ready to go to bed.

Mr. Cogan: I move to strike out anything else not in response to my question.

Q That visit was on the 28th of December, 1927, was it not? A Let me see. What day was that on?

Q Wednesday. A No, it was on a Friday I think you were there, not on a Wednesday.

Q Friday is December 30th, isn't it? A Yes; I think it was December 30th, you were there, because I got sick December 31st at night. Friday night was the night I got sick.

Q You think it was Friday, December 30th, when the marshal and John G. Flanigan and myself were in your place? A I think it was that day. I am not sure, but that is what I think.

Q And do you recall speaking with the marshal on the day prior to that, the 29th of December, 1927? A If my memory serves me right, I think the first time I seen you two was on a Friday.

Mr. Cogan: Ask him the question again, please.

(Question read as follows: "And do you recall speaking with the marshal on the day prior to that, the 29th day of December, 1927?")

A I don't recall that. I might have, but I do not recall that.

Q Do you recall speaking with the marshal on the day prior to that, on the 28th day of December, 1927? A Let me see. It might have been a Wednesday, I am not sure, I wouldn't say sure. It might have been the first—I think it was either Wednesday or Friday. I don't remember what day it was. I think you might be right on that being Wednesday.

Q All right. Then you now recall that it was Wednesday the 28th— A I think it was.

Q —on which you saw the marshal and John G. Flanigan and myself? A Yes; I think it was on that day.

Q And do you recall that on that date we, John G. Flanigan and William J. Cogan, directed the marshal to make a levy? A Yes, I do.

Q And do you recall that the marshal made such a levy in your office? A I believe he did.

Q And did you learn later in that day that the marshal had notified certain tenants— A I did.

Q —that their rents were due— A On certain tenants?

Q Rents were to be levied upon the tenants? A You never notified my tenants.

Q Then, on December 29th, the following day, what steps did you take towards settlement? A I didn't take any steps until Friday, I think it was, you came around Friday, I believe it was.

Q Assuming that it was Wednesday that we first appeared? A Yes.

Q What did you do Thursday in connection with the levy? A I didn't do anything on Thursday.

Mr. Lasser: There is nothing in the affidavit about what happened on Thursday, is there?

Mr. Cogan: Yes. The affidavit is full of what happened. It is this settlement he is complaining of; it is this settlement that is imputed all the way through this affidavit. He alleges duress.

The Witness: The settlement was not a— (interrupted).

Mr. Cogan: He alleges that duress was had on the part of Flanigan and Cogan and the marshal.

What is the last question?

(Question read as follows: "What did you do Thursday in connection with the levy?")

Q Did you telephone to John G. Flanigan the day after the marshal was in and made his levy? A I don't remember whether I did or not.

Q Did you telephone to the Fordham National Bank in New York the day after the marshal was in and made his levy? A I couldn't tell you whether I did.

Q Did you telephone to the Commercial Trust Company of New Jersey the day after the marshal made his levy? A No. I think we telephoned there on Friday. I am not sure about those dates.

Q That Friday you now refer to covers a telephone call you made to the Commercial Trust Company? A I think it was on Friday.

Q Does it also cover a telephone call made to the Fordham National Bank? A I couldn't tell you what we did on that Friday or that Thursday, because I was having chills right along then, but the hold-up you fellows pulled off was on a Friday night.

Q That is all. Mr. Jacobson, did anyone—did you telephone to John G. Flanigan on Thursday afternoon, December 29th, stating that you were prepared to settle on the terms of the Fordham National Bank? A No, I did not, because the judgment was for seventeen and we only had eight.

Q Did you telephone on that date to Mr. Flanigan at all? A No, sir. I might have telephoned to him; I might have telephoned to the bank also, trying to get—(interrupted).

Q Did you tell Mr. John G. Flanigan that Mr. Milton M. Unger would represent you on the settlement? A No, sir.

Q Didn't you and Mr. John G. Flanigan, on the 29th day of December, 1927, agree, over the

telephone, on the terms of this settlement? A No, sir.

Q Well, just what date did you agree on the terms of this settlement, Mr. Jacobson? A The only thing I knew about it was—(interrupted).

Q Just answer that question. A There was no settlement. It was a hold-up I told you. We didn't agree on a settlement.

Mr. Cogan: Ask him the question, will you?

(Question read as follows: "Well, just what date did you agree on the terms of this settlement, Mr. Jacobson?")

A There was no settlement agreed on.

Q Didn't Mr. Flanigan tell you by telephone, on Thursday afternoon, the properties which the Fordham National Bank would accept a settlement on? A No, sir.

Q Didn't you agree on that date to give a mortgage on those properties? A I did not.

Q In the sum of twenty-six thousand odd dollars? A I did not.

Q What was the first occasion you got in touch with Mr. David Bobker concerning the proposed settlement? A I got word from the office that you were down there with your marshal.

Mr. Cogan: Ask him the question, please.

(Question read as follows: "What was the first occasion you got in touch with Mr. David Bobker concerning the proposed settlement?")

A You asked me when I got first word from Bobker and I am trying to answer it.

Mr. Cogan: Ask him the question and we will see whether you are answering it correctly or not.

(Question read as follows: "What was the first occasion you go in touch with Mr. David Bobker concerning the proposed settlement?")

A When the office telephoned me.

Q What date? A That was on Friday, about three o'clock.

Q Friday what, December 30th? A About—I don't know—it was Friday afternoon. I wouldn't say what time exactly it was.

Q At three P. M.? A I wouldn't say three P. M.; it was sometime in the afternoon.

Q Where did you telephone him from? A No; it was telephoned to my—it was telephoned to my house.

Q What did you direct Mr. Bobker to do? A Well, I told him—

Q (Continuing.) On December 30, 1927. A I told him to find out what was to be done and to see that the marshal wouldn't be around there; because it was—it would put us out of business, if you two and the marshal kept marching around the block there.

Q And what hour of the day, December 30th, did you tell Mr Bobker all that? A I told him that about, I think it was sometime in the afternoon.

Q Your recollection is quite clear as to what you told Mr. Bobker on that occasion? A Yes, sir. The sum and substance I told you that you two—(interrupted).

Q That is the answer? A Don't you want the answer?

Q And did Mr. Bobker telephone you at any time later that day? A No; Mr. Bobker came when I was in bed and had some papers to sign.

Q The question is, did Mr. Bobker telephone you at any time later that day? A Yes; he said he was going to get in touch and find out what the situation was.

Q The question is, did Mr. Bobker telephone you later that day? Did he? A No; he didn't telephone me.

Q Did you telephone him later that day? A No.

Q Then, you were not in communication with each other between three o'clock in the afternoon of that day and the following day, were you? A No. We were not in communication. You are trying to skip that night when you had the hold-up. And don't try to skip it.

Q The answer is "Yes," if you were in communication with him, the answer is "Yes." A The answer is—(interrupted).

Mr. Cogan: Read him the question.

(Question read as follows: "Then you were not in communication with each other between three o'clock in the afternoon of that date and the following day, were you?")

Q By telephone? A No; I was not in touch with him by telephone until about after I got out of bed.

Q That evening? A No, sir. I wasn't out of bed for about sixteen days.

Q What time on December 30, 1927, did you leave your office? A I think it was about four or four-thirty, something around that time.

Q And did you go to bed as soon as you left your office? A Yes, sir.

Q And what was the first time you were standing up after you went to bed? A It was about—well, it was about the 10th or 12th that I got out of bed—was able to creep around the house.

Q Weren't you out of bed for any reason at any time in the interim between December 30, 1927, and January 14, 1928? A No.

Mr. Cogan? Ask him that question again to be sure he understands it, will you, please?

(Question read as follows: "Weren't you out of bed for any reason at any time in the interim between December 30, 1927, and January 14, 1928?")

A No. Well, I might have got out of bed just to go to the bathroom or sit down. You don't mean that, do you? I didn't go to business.

Q Was the only occasion for your being out of bed the necessity for going to the bathroom? A What do you say?

Q Was the only occasion for your being out of bed at any time during that period the necessity for going to the bathroom? A Yes.

Q You were not out of bed at any time during that period for the purpose of exercise? A No.

Q Nor for the purpose of walking around the room? A No.

Q Nor for the purpose of talking to any individual? A No—yes, I was talking to people that came in.

Q Were you out of bed at any time? A No.

Q Is your telephone right at your bedside? A Yes.

Q And you don't have to get out of bed to answer the telephone? A No.

Q Is there any telephone in the room next to your personal bedroom, Mr. Jacobson? A No.

Q The only telephone upstairs is the one— A No, it is downstairs, and then there is a connection upstairs.

Q The only connection upstairs is the one alongside of your bed? A Yes.

Q Did you transact any business of any nature with any person or persons between December 30, 1927, and January 14, 1928? A Oh, I might have talked to some people, just called up on the phone. People came in, I had to—people come in, I would talk to them.

Mr. Flanigan: Did you sign any checks?

The Witness: Yes.

Mr. Cogan: Wait a minute.

Q People come in on business? A Yes.

Q Did you talk to any of those persons on business? A Yes.

Q And was any business actually transacted by you between the dates December 30th— A No.

Q 1927, and January 14th— A No, sir.

Q —1928? A No, sir.

Q No business? A No, sir.

Q (Continuing.) Of any nature was transacted by you? A No, sir.

Q These telephone calls you speak of about business matters, who were they with? A With my office.

Q Then you did transact business? A No. They would call me up on certain things and I would give them an answer.

Q You would give them the decision on those things? A Give them—yes.

Q How often during the period did your office telephone business matters? A Well, didn't get any telephone calls until about the 12th.

Q No telephone calls? A No, sir.

Q Between— A Between the 1st and the 12th.

Q Do you remember seeing Mr. Flanigan between— A Yes, Flanigan.

Q —January 1st and January 12th? A Yes. He was in there one day and we had a couple of drinks together.

Q Were you in bed while Mr. Flanigan was at your house? A No; I was sitting right near the bed there.

Q Was that the only occasion between December 30th and January 14th when you were sitting near the bed? A Yes, sir.

Q Is it the only occasion that you were out of bed except— A Oh, I might have just sat down right near the bed there for—just not to be laying all day long on your back.

Q You were fully dressed the day you talked with Mr. Flanigan? A No; I was not. I was not fully dressed.

Q You saw another gentleman the same date you saw Mr. Flanigan, a little earlier in the day, did you not, Mr. Jacobson? A No, sir.

Q Did you sign any checks between December 30, 1927, and January 14, 1928? A I did.

Q How many? A Oh, whatever they would bring in.

Q Whatever your office would bring in? A Yes, sir.

Q Then you transacted the general business of your office? A No; I did not.

Q From your bedside? A I did not.

Q Did the business that you did transact consist merely of advising over the telephone on business matters and signing checks for business purposes? A There was no advice over the telephone until about the 12th or 14th, but there was checks brought in to be signed during that time.

Q Where there any checks brought in to you to be signed between December 30, 1927, and January 10th? A Yes; there was some checks brought in then.

Q For business purposes? A Yes, sir.

Q What is the approximate number of those checks? A I couldn't tell you.

Q A couple of hundred? A No, no, no.

Q Couple of dozen? A I couldn't tell you without counting them.

Q You can estimate the number, can't you? A Sir?

Q You can estimate the number, can't you? A No; I cannot estimate the number.

Q Well, was there more than three? A I couldn't tell you how many.

Q Well, on how many occasions did anybody from your office bring checks in to be signed? A Well, whenever they brought them up I would sign them.

Q How often would that be? A It would be about once a day.

Q And would they have a batch of checks each day? A No; sometimes they might have one; some days they wouldn't have any.

Q Did they ever have a dozen? A No.

Q Did they ever have half a dozen? A I couldn't tell you without counting them.

Q Mr. Jacobson, you have testified a few minutes ago that you saw nobody on the same day that you saw Mr. Flanigan? A Yes.

Q At your house? A Yes.

Q Prior to the time you saw Mr. Flanigan? A That is what I believe.

Q Do you know anybody connected with the Nash Automobile Company in Newark? A Nash? No.

Q You do not? A No, sir. By seeing—there might have been people coming to visit with me. I can't tell the number of people I seen. I told you he was the only man I seen on business. There might have been somebody else walked in. I can't tell you how many men I seen a certain day.

Q Did you sign a check for a man who saw you immediately before Mr. Flanigan on January 11, 1928? A No.

Q Do you remember Ernest Philburn and John Flanigan and a third man coming to your home in the third man's automobile on January 11, 1928? A No. I remember your partner here.

Q That is, you remember Mr. Flanigan? A Yes; and Mr. Philburn.

Q And Mr. Philburn? A Yes.

Q But not a third man? A No; I don't remember.

Q Do you remember Mr. Flanigan waiting until you had finished your business with another gentleman? A I don't remember that.

Q Before you could see him? A No.

Q What is the approximate number of visitors you would have each day between December 30, 1927— A I can't tell you that.

Q —and January 14, 1928? A I can't tell you that.

Q Would you have at least one each day? A I can't tell you that. How can I remember how many people visited me in January 1st? Today is February 10th.

Q You remember you had visitors during the period of your illness, don't you? A Yes; I had some people visit me.

Q Well, was that as many as a half dozen? A I didn't keep any diary of who visited me.

Q Then the answer to that question is you don't know? A No; I don't know how many people visited me.

Mr. Cogan: Would you mind asking him the question again?

(Question read as follows: "Well, was that as many as a half dozen?")

A The first five days nobody was allowed there; nobody was allowed in excepting the doctors.

Q Did you see Mr. Philburn at all in the first five days? A No; I didn't see anybody.

Q Well, after the first five days did the doctors allow you to have frequent visitors? A No; they just allowed visitors to come in.

Q Did the doctors forbid you to have visitors after the first five days? A They did. They said I shouldn't have anybody. But people would come in, and you can't turn them away.

Q Which doctor advised you that you could not have anybody after the first five days of your illness? A Dr. Sobin, I think it was.

Q And did you have such visitors in spite of Dr. Sobin's orders? A Yes. I had some people come in.

Q In spite of Dr. Sobin's orders? A Yes.

Q And when did Dr. Sobin tell you that you could have visitors? A Well, he told me I should not have any visitors at all. I went out of bed too early the way—he wanted me to stay in bed a couple of more weeks.

Q Did you leave your home at any time for any purpose between January 30th—or, December 30, 1927, and January 14, 1928? A No, sir.

Q You were not outside the door of your house? A No, sir.

Q Did Dr. Sobin prescribe medicine for you? A Yes, sir.

Q Did any other doctor prescribe medicine for you? A Yes. I had three doctors altogether.

Q Did the first doctor prescribe medicine for you? A Yes.

Q And did the second doctor prescribe medicine for you? A Yes.

Q And did the third doctor prescribe medicine for you? A Well, there was two doctors there at one time. I don't know who wrote the prescriptions, I couldn't tell you.

Q Did you only get one set of prescriptions? A No; I had—I think it was two or three. It was more than three. I think it was about five different kinds of prescriptions I had. Then I had ice bags and had hot water bottles.

Q Well, between January 5th and January 14, 1928, approximately how many visitors did you have, Mr. Jacobson? A You have asked me that question and I told you I didn't keep any diary. How can I tell you?

Q You would know whether it was ten or fifty? A Will you tell me what you ate for breakfast on January 1st. If you tell me I will tell you—

Mr. Cogan: Ask him the question, would he know whether it was any more than ten or fifty visitors between January 5th and January 14th.

The Witness: Well, the first five days I didn't know what I was doing.

Mr. Cogan: Ask him the question, please.

(Question read as follows: "You would know whether it was ten or fifty?")

A I was delirious the first five days. How could I tell you anything about it? You asked if I can remember how many visitors, and I tell you the reason why I can't.

Q Mr. Jacobson, between January 5, 1927, and January 14th, which is a period of approximately ten days, can you tell me the number of visitors you had was nearer ten or nearer fifty? A I couldn't tell you that.

Q Could you tell me whether or not the number of visitors you had during that same period was over ten? A I couldn't tell you that.

Q Was it over three? A I can't tell you whether it was three or twenty-four hundred.

Q There was nothing the matter with your mind between January 5th and January 14th, was there? A Well, I had quite some fever yet.

Q There was nothing the matter with your mind, was there? A No, but I was choking, I had something the matter with my chest, just like choking and my heart was affected.

Q You had no difficulty in chatting with the visitors you did have during that period, did you? A Yes, I did.

Q What difficulty did you have? A Well, I couldn't talk.

Q Could you talk the day Mr. Flanigan saw you? A Yes, I could talk that day. That was about the—

Q You had no difficulty talking to him that day, did you? A Yes, I did. Every time I talked to a person it would affect my heart.

Q You were able to understand when Mr. Flanigan said to you that date, were you not? A Yes. He wanted some money. That is all. The same mission you two were there.

Q You were able to understand that he wanted it, were you not? A Yes.

Q As a result of the conference you had that date with Mr. John G. Flanigan did you agree to give him the money? A No. There was no conferences. Mr. Philburn came in with him and said that Mr. Bobker said we should give him $1,500 and we gave it to him. There was no conference about it.

Q Well, did you give Mr. Flanigan $1,500? A I just signed a check that Philburn had made out.

Q For $1,500? A I don't remember just what it was, but it was a check signed, I think it was $1,500, but I wouldn't be sure.

Q Did you give it to him on the same day he saw you? A No; he came in with Mr.—(interrupted).

Q Did you give it to him on the same day he saw you? A Mr. Philburn handed it to him.

Q In your presence? A Yes, I believe it was in my presence.

Q And on that date? A Yes; I think it was that day.

Q Do you remember giving a check of $3,000? A No; I do not.

Q On December 30, 1927? A But I know you did have a check like that, now.

Q You remember on the occasion that Mr. Flanigan saw you in January at your house and that you offered him—or stated to him that you might use your wife's bracelet to secure the payment of the $3,000? A No, sir; I did not.

Q Did you exhibit your wife's bracelet on that occasion? A No; I did not.

Q Has your wife got a bracelet? A Yes, she has got a lot of jewelry.

Q Didn't you on or about that date pawn a bracelet belonging to your wife? A I did not.

Mr. Lesser: I object to that.

Q Do you remember stating to Mr. Flanagan on the day he called that a certain bracelet you exhibited to him on that date was worth $6,000? A I wouldn't—I did not.

Q And you say that you did not exhibit any bracelet to him on that day? A No, sir.

Q Mr. Jacobson, do you remember on December 30, 1927, about between six and seven o'clock, Mr. David Bobker telephoned to you at your house? A No, I don't remember that.

Q Do you remember that he asked you where a certain deed was so that he could copy the subscription of that deed? A No, I don't remember that.

Q Do you remember telling him on the telephone that that deed was in the office of Cohen & Klein? A No.

Q Do you remember him telephoning you again that Cohen & Klein held a receipt for that deed? A No.

Q Signed by you? A No.

Jacob Jacobson, direct.

Q Do you remember directing Mr. Philburn, or anybody employed by the Metropolitan Lumber Company, to deliver that deed to Mr. Bobker at the office of Mr. Bobker? A No.

Q Have you learned since that date that that deed was delivered to the office of David Bobker? A Yes, I did.

Q Who was it delivered by? A I don't know who it was delivered by.

Q Who authorized it to be delivered? A Who authorized it? Mr. Philburn said that I did, but I don't remember it.

Q Who authorized the delivery of the deed to Mr. Bobker, covering the first piece of property which was in the mortgage? A I don't remember. Mr. Philburn said that I told him to give Mr. Bobker whatever he wanted.

Q Mr. Milton M. Unger represented you in all of these actions, did he not? A No.

Q Who did represent you in these actions? A Well, Mr. Klein.

Q Which one did he represent you in, or ones? A Well, he represented us in some of the stolen notes, some of those stolen notes.

Q Which stolen notes do you refer to? A Just a minute. Let me answer my question, will you, please. Some of the stolen notes of the Fordham Bank and Glassberg was mixed up in, and then some of the other stolen notes Mr. Unger represented me.

Q Will you enumerate the various stolen notes?

Mr. Lasser: I object to that.

Q That you have reference to?

Jacob Jacobson, direct.

Mr. Lasser: I don't see that that is material.

Mr. Cogan: You did not object to his answer.

The Witness: Yes, there is some things—well, there is dozens of them that were stolen. One especially the bank got. We just found out from a fellow in Philadelphia and they collected it for this man Glassberg; it was a $2,500 note.

Q Well, let us take the specific notes which were in question here, Mr. Jacobson. A You mean those you are mixed up in or trying to collect?

Q The notes which the Fordham National Bank in New York secured judgment against you in the sum of $16,181.88, were they stolen?

Mr. Lasser: I object to any testimony in connection with these notes. The judgment has already been entered upon them. It is not material in this hearing.

The Witness: We are going to go all over our records now to find out the fifty-five hundred—(interrupted).

Q Is the answer to that you don't know those particular notes? A Those particular notes we are checking back now.

Q You didn't know? A But the fifty-five hundred that you got a mortgage for, that was stolen, and you know it was stolen.

Q Those particular notes, what is the answer to that particular question, were they stolen or not? A We don't know. We are having accountants checking them back now.

Q And you don't know whether they were stolen or not? A No.

Q The note of $3,300 and the note of $1,200? A We are checking them back to—(interrupted).

Q Were they stolen?

Mr. Lasser: I object to this testimony in in reference to the notes, because it is not material in this hearing.

Mr. Cogan: Note his objection in the proper place.

Mr. Lasser: You are not on the complaint; you are only on affidavits.

Mr. Cogan: He doesn't say in his affidavit here that any of those notes were stolen, but now on examination he does. Now, I am asking him—

The Witness: Yes you have got in your first papers.

Mr. Cogan: If he now alleges these notes were taken.

The Witness: Those are papers you have that the notes were stolen. Why don't you be truthful? We don't know yet. As soon as the accountant gets through we will be able to tell.

Q How long have the accountants been working on your books to ascertain whether or not such notes were stolen? A For the last ten days.

Q What accountants are they?

Mr. Lasser: I object to that. That is not material.

Q Do you refuse to answer? A No. Do you want me to answer?

Mr. Lasser: I think that is objectionable. It doesn't make any difference in this hearing.

Mr. Cogan: As a matter of fact, it doesn't make much, and we will withdraw that.

Q Did you make any attempt during October and November, 1927, to ascertain whether or not—

Mr. Lasser: I object to that. That is before the—

Q —the notes were stolen?

Mr. Lasser: I object to that. That is before the time of the filing of this bill and is not mentioned in the affidavit.

Mr. Cogan: This bill refers to specific notes.

Mr. Lasser: I think the fact these notes were stolen is immaterial in this hearing. You have got a judgment on them.

Mr. Cogan: Well, make a note to ask the Vice-Chancellor if he is to answer that question.

The Witness: You don't want me to answer that, Mr.—

The Master: You don't have to answer it now.

The Witness: I don't want it to appear I am trying to hide anything.

Q Mr. Jacobsen, the day following the visit of John G. Flanigan and Mr. Winner, the Deputy U. S. Marshal, and myself, to your office, do you remember telephoning or having a telephone con-

versation with Mr. Winner, the marshal? A I don't remember. I might have.

Q Did you talk to Mr. Flanigan at the same time? A I don't remember. I can't remember now.

Q Did you on that occasion tell Mr. Winner, the marshal, that the case was settled, or was to be settled?

Mr. Lasser: I object to that. I think that is not material. Whatever he told somebody else, it is a self-serving declaration.

Mr. Cogan: It is an admission against interest. Make a note of it. We will ask the Vice-Chancellor on that.

Q Do you recall talking with Mr. Winner, the marshal, at all after the occasion when Mr. Winner, Mr. Flanigan and myself were in your office? A Yes; I might have talked to him. I don't remember how many times.

Q Do you remember what you talked about? A We must have been talking about this case.

Q Do you remember what you said to him? A No.

Q Do you remember what he said to you? A No. He came around to serve some tenants, and I told him not to do that because I was trying to get the bank to take the right amount that was due them.

Q You recall very clearly that is what you told him? A I don't remember the exact language I used, but I told him I am trying—I might have told him I am trying to make a settlement with the bank. That is no doubt what I must have told him.

Q Now, on December 30, 1927, you executed a bond and mortgage in the Metropolitan Lumber Company to the Fordham National Bank? A Yes.

Q You also executed an affidavit on that date? A On that night. Don't say the day.

Q On that date? A Don't try to keep away from that night.

Mr. Cogan: I move to strike out that answer.

Q You executed an affidavit at the same time you executed the bond and mortgage? A I don't remember what I signed that night. Whatever Mr. Bobker brought in I signed.

Q Do you remember that you signed certain papers that night? A No. I know now that I signed them, but I did not know at that time.

Q Do you remember that you acknowledged before Mr.— A No, I do not.

Q —David Bobker that you signed them? A No.

Q Your mind is a blank on that? A No; it is not blank, but I was very sick and Mr. Bobker came in and told me—I told Mr. Bobker before I went to bed that the marshal was around there and he should make—get rid of you and him.

Q Don't you remember that you signed any of those papers? A Oh, yes; I signed those papers all right, but I don't remember signing them.

Q And you remember that you signed them? A No.

Q Do you remember that you signed them? A No, sir.

Q Do you remember that you signed any one of them? A No; I do not.

Q Do you remember Mr. Bobker coming to see you that evening? A I remember him in there that evening, yes.

Q Do you remember any conversation you had with him? A No; I didn't talk to him. He just handed me the papers and I signed them.

Q Do you remember whether or not anyone came in the house with him? A No; he just came to my room himself.

Q Didn't any other person accompany him to your room? A No.

Q On that occasion? A No.

Q You know, at least, that Mr. Flanigan did not, do you not? A I believe that he told me that Flanigan was waiting outside with the marshal, or words to that effect.

Q Who else was in the room besides you and Mr. Bobker at the time— A No one else.

Q —the papers were signed? A There was nobody there at all.

Q Who left Mr. Bobker into the room? A Who left him in?

Q Yes. A I think it was Herbert or somebody there. Herbert, I think, left him in, or somebody else there.

Q Who is Herbert? A He is one of the men that was putting ice water—one of my men that was putting ice water on my head.

Q What is his last name A I don't know his last name. They call him Herbert. He is working for me still. You can have him here.

Q Does he admit visitors to your house? A No; but they come and told me Mr. Bobker was there and he was very serious and very important and they left him in.

Q He came and told you that? A No; they told—he told that to—in the house that he must see me.

Q Who came and told you that Mr. Bobker was there? A Herbert come in.

Q Did Herbert admit Mr. Bobker in the house? A That is what I told you. I don't remember who it was, but Herbert had charge that night—that time of keeping the ice water, or the ice bags on my head.

Q Wasn't there anybody whose job it was to admit visitors? A Nobody was admitted there.

Q How did it happen that Mr. Bobker was admitted? A Well, he was my attorney for years and he asked to come in and they left him in. Mr. Bobker has been representing me now for about ten years.

Q When was the last time prior to December 30, 1927, that Mr. Bobker represented you? A Oh, he has been representing me right along.

Q When was the last time prior to December 30, 1927, that Mr. Bobker represented you? A The week before, isn't it, Mr. Bobker?

Q In what matter? A Oh, different matters, district court cases, he has been in the upper courts.

Q What particular case did Mr. Bobker represent you in the week before? A I will get you a half dozen cases.

Q Name one? A The Reliable Box, I think it is some box company. That is one of them. What is the name of those other two?

Mr. Bobker: Those all came up afterwards.

The Witness: They came up afterwards. They have been in your office before January. You have got some cases there.

Q You used to have a private wire between your office and Mr. Bobker's office?

Mr. Lasser: I object to that. It doesn't make any difference.

The Witness: We didn't have any wire, did we? We did—oh, yes. There is no harm in that.

Mr. Lasser: It doesn't make any difference.

Q Was that correct, Mr. Jacobson? A Yes, sure.

Q And how long since that is out? A Oh, about—I don't remember when the private wire was in there.

Mr. Bobker: I think it was down on Broad street a long time ago.

Q There was a long interval, was there not— A No; Mr. Bobker—

Q —in which Mr. Bobker did not represent you? A No, there was not. He always had cases on for me.

Q How did you happen to select Mr. Bobker to represent you on this settlement of December 30, 1927? A The same reason that the bank selected you, because you represent them.

Q Mr. Unger had represented you in various matters, had he not? A Yes, but you—Mr. Unger, I believe we called him up and he was not around and you two were—wanted it done

right away and if we didn't do it right away you were going to put the company into bankruptcy and collect the rent and everything else.

Q Was the reason why— A Why don't you let me finish the question? You threatened to go around to all the tenants, which you did; you threatened to sell the property; you threatened to put us practically out of business.

Mr. Cogan: I suppose you are going to allow us to question all these allegations, aren't you?

The Witness: Why, sure I am.

Mr. Lasser: You mean that he just made?

Mr. Cogan: Yes. I object to anything but a responsive answer to the question.

The Witness: Yes; that was my reason. We couldn't get Mr. Unger at the time.

Mr. Cogan: And I move to strike it out.

Ask the question again.

(Question read as follows: "Mr. Unger had represented you in various matters, had he not?")

Mr. Lasser: Then he said, "Yes," but at this time he couldn't get him.

Mr. Cogan: I move to strike out all but the "Yes."

Q Mr. Unger was familiar with these particular matters which constituted the settlement, was he not? A Yes.

Q And Mr. Bobker was not familiar with them? A No; but he—on account of your urgency we had to get somebody quick.

Q Was your reason for not having Mr. Unger that he was not available? A He was not avail-

able at the moment and you insisted that you would not wait for him to return to the office.

Mr. Flanigan: How do you know that?

The Witness: How do I know? Because you stood there with your big marshal.

Q On what date do you allege that we stated we would not wait for Mr. Unger to return? A On the 30th when we got on the phone.

Q When who got on the phone? A I think you had your marshal there first, and then you two were ringing the phone every minute in the day.

Q And who was answering the phone? A Mr. Philburn answered it most of the times.

Q Did you answer it at all? A Yes; I answered it in the morning.

Q And is that the time you allege we wouldn't wait for Mr. Unger? A No; that is not the time. It was about 3:30 or 4:00 o'clock.

Q Do you depend on the statement of Mr. Philburn that we said we would not wait for Mr. Unger? A No. Mr. Philburn come and told me how that you fellows were just making a lot of trouble.

Q You did not hear either Mr. Flanigan or myself say that we would not wait for Mr. Unger, did you? A Yes, you did. Yes, I think Mr. Flanigan—I think I was talking in the morning, if I can remember now, and he said unless that case were settled, why, there would be a petition in bankruptcy filed.

Q By the Fordham National Bank? A Yes. He said he would do that after he collected the rent first; he was going to go around and collect all the rents.

Q Don't you know that the only procedure Mr. Flanigan said he would take was to levy upon the rents for the amount of the judgment? A No; he did not. He said he was going to take the rent first, then put the company in bankruptcy and ask for a receiver.

Q You say that you recall Mr. Flanigan making that statement to you over the telephone— A Yes, sir.

Q —on the morning of December 30th? A Yes, sir.

Q What time on the morning of December 30th? A I can't tell you exactly what time.

Q Was it later than eleven o'clock? A No; he says—it was about—I think it was—well, it was sometime in the morning. He said, "I got the United States Marshal here now and you have got to do business or else we will close the place up." I says, "Wait until Mr. Unger returns." He said, "No; we are not going to wait." Then he says, "I will call up Cogan."

Q Close up what—(interrupted). A And he came back and said, "Cogan insists this thing be settled."

Q Close up what place? A Closing up our place.

Q Meaning what, 74 Commerce street? A Yes, sir.

Q You knew that prior to that time the marshal had notified the tenant that he was there levying upon their rents, did you not? A Yes, sir.

Q And the reason why you were ready to make a settlement was to save those rents? A It was not.

Q For other business purposes, was it not? A It was not. It was your—(interrupted).

Q Why were you attempting to save those rents? A We were not attempting to save the rents. It was not the rents we were trying to save. It was—the thing that you were running around with your marshal and notifying everybody that we were in bad shape.

Q Didn't you try to save those rents? A No—sure, I tried to save everything.

Q Wasn't your motive in making settlement to prevent the Fordham National Bank from levying on the rents? A No; my motive was to get rid of you and the marshal.

Q Who was levying upon the rents? A Levying upon everything. You levied upon the office furniture; you levied on the rents; you levied on everything. They were going on down and levy on the trucks. You levied on everything you could find, and you made as much trouble as you possibly could.

Q And the settlement you made was to avoid that levy, was it not? A No; it was not. I was trying to save the business.

Q The lumber business? A The lumber business, yes.

Q Have you got any lumber? A Yes; we have got some.

Q Where do you keep it? A Oh, down on Wilson avenue.

Q Was there any lumber on Wilson avenue— A And I got some in Elizabeth.

Q Was there any lumber on Wilson avenue— A There was some.

Q On the 28th day of December— A There was some.

Q 1927? A Some.

Q What was the value of that lumber? A I couldn't tell you the value of that.

Q Over $10? A Some in Elizabeth.

Q Was the value of the lumber on Wilson avenue that day over $10? A It certainly was.

Q Was it over $100? A I can't answer your question. I didn't take no inventory.

Q What was the nature of the lumber you said was there on December 28, 1927? A There was considerable lumber there, and considerable on Market street.

Q What kind, long boards? A All kinds of lumber.

Q Was there any new lumber there on that day? A Sure, there was; there was some lumber on Market street, too.

Q Do you remember the occasion, Mr. Jacobson, when Mr. Flanigan called at your house on January 11, 1928? A Yes, sir.

Q You stated before that you were out of bed on that occasion? A Yes.

Q Were you fully dressed? A No.

Q How nearly fully dressed, were you? A Well, I can't tell you how near. I think I had a robe on.

Q Were you walking around the room on that occasion? A No, I was just sitting alongside of the bed.

Q Do you remember on that occasion signing an assignment of rent payable— A No.

Q —to John G. Flanigan and William J. Cogan? A I don't remember signing anything on that day. I remember there was a check there and Mr. Philburn brought in some stuff that he—and said that Mr. Bobker wanted it signed, and I signed it.

Q What did the stuff consist of? A I can't tell you.

Q But you know you signed a check? A Yes; because Mr. Flanigan just told me a little while ago he had gotten a check for $1,500, and mentioned it. That is the reason I think it was that time. I am not sure.

Q Is that your only reason for knowing that was the $1,500 check you signed? A Yes. I don't know whether it was $1,500 or $3,000. I know—I think he still has a check for $3,000.

Q Did you look at the check at the occasion you signed it? A I don't remember whether I looked at it. Sure, I must have looked at it. I couldn't have signed it if I didn't look at it.

Q Were you able to read on that day? A Yes.

Q Did you sign another paper besides the check? A I don't remember that.

Q The $3,000 check you referred to has never been paid, has it? A No; payment is stopped on it now.

Q On what date did you stop payment? A I think it was on the 16th.

Q Of January? A When I got out of bed. The day I think I got out of bed.

Q The 16th of January? A I think it was, the 16th or the 18th; sometime along then.

Q You refer in your affidavit that there was a talk of negotiations of withholding execution of the judgment of the Fordham National Bank. What would you say was the period of such negotiations? A Only about a day—a day and a half it was.

Q Was there any other or further negotiations besides the day and a half you admit? A No. Well, there was negotiations going on between another bank and them, but I mean as far as I am concerned between you two and me there was only about a day and a half.

Q The negotiations between your attorney, Mr. Milton M. Unger— A No; not between him.

Q —and ourselves? A No; there was another bank negotiating with you.

Q On December 29, 1927, which was a Thursday, do you remember telephoning either to Mr. Griffin of the Fordham National Bank or to Mr. Carmichael of the Commercial Trust Company, to ask them to persuade John G. Flanigan and William J. Cogan to accept a $3,000 check as part of the settlement instead of $3,000— A No.

Q —cash which they insisted on? A No. I didn't tell them that at all. I told Mr. Griffin to take $3,000 on account of what we owed him and the balance you should give me credit for the $8,000 that they had gotten from Glassberg.

Mr. Cogan: Ask the question again.

(Question read as follows: "On December 29, 1927, which was a Thursday, do you remember telephoning either to Mr. Griffin, of the Fordham National Bank, or to Mr. Carmichael, of the Commercial Trust Company, to ask them to persuade John G. Flanigan and William J. Cogan to accept a $3,000 check as part of the settlement instead of $3,000 cash which they insisted on?")

A No.

Mr. Cogan: Refer in the question and ask it again, $3,000 check as their fee upon the settlement arrived at.

The Witness: No settlement was arrived at.

Q Is your answer the same to that? A There was no settlement arrived at.

Mr. Cogan: Read the question again.

(Question re-read as follows: "On December 29, 1927, which was a Thursday, do you remember telephoning either to Mr. Griffin, of the Fordham National Bank, or to Mr. Carmichael, of the Commercial Trust Company, to ask them to persuade John G. Flanigan and William J. Cogan to accept a $3,000 check as part of the settlement instead of $3,000 cash which they insisted on as their fee upon the settlement arrived at?")

A No settlement was arrived at.

Q The answer is did you telephone to those people and ask them that. A No, there was no settlement arrived at, I told you.

Q That is not responsive. Did you make the telephone calls I referred to, Mr. Jacobson? A Yes; I called up Mr. Carmichael and told him to try and get this case settled up, but I did not ask him if there was any check at all.

Q Did you ask what I just asked if you asked? A I asked him to try and settle the case up, but I didn't ask him anything about a check.

Q Does that same thing refer to Mr. Griffin? A Yes.

Q Mr. Jacobson, isn't the real reason why you employed Mr. Bobker on December 30th because he handled the real estate matters for the Metropolitan Lumber Company? A No, sir; it is not. Mr. Philip Klein handled all matters.

Q Didn't you tell Mr. Flanigan on December 30th that that was the reason you had Mr. Bobker? A No, sir. Mr. Bobker never handled a

real estate deal with me yet. Mr. Klein handled all my real estate.

Q And when you say "me," you mean the Metropolitan Lumber Company? A Yes, I do.

Q As well as yourself personally? A Yes.

Q Now, you have seen the assignment of rent which is Exhibit 2 of the bill of complaint, made by the Metropolitan Lumber Company, January 11th, to John G. Flanigan? A Yes, sir; I have seen it now.

Q And James J. Cogan in the sum of $2,000? A Yes.

Q That covered rents on Studebaker place in Montclair? A I know now what it covered.

Q Well, now, do you remember signing that paper? A No; I do not.

Q On January 11th? A I do not. I know now that I signed, but I don't remember signing it then.

Q Well, on January 11th, when Mr. Flanigan called at your residence, you— A The paper was not signed at my residence.

Q Where was it signed? A It was signed— I don't know—I am sure it was not signed at my residence.

Q Where was it signed? A I don't remember where it was signed, but I am sure—I am almost confident it was not signed at my residence. I would have to ask Mr. Philburn where it was signed.

Q You mean to tell us now you cannot tell where you signed this paper? A I certainly do mean to tell you that now.

Q Well, you have testified before that you were not out of your house up to January 14th. A Well, Mr. Philburn brought the papers, no doubt, to my house, and I signed them.

Q Then you did sign it at your house? A I either signed it at my house—but I didn't sign it in Mr. Flanigan's presence. That I just recall, refreshing my memory now on that now.

Q While Mr. Flanigan was there you acted as host and gave him several drinks? A Yes, sure.

Q And you had a friendly chat? A Yes. I treat everybody nice when they come to my home.

Q And yet you don't remember signing this paper on that date? A No.

Q At your house? A It was not signed at my house.

Q Well, where was it signed? Were you out of your house on January 11th? A No. It might have been signed at my house, but not in Mr. Flanigan's presence.

Q Do you say that the check for $1,500 was signed in Mr. Flanigan's presence? A Everything was signed in my home; I think the check was, I am not sure; I am just refreshing my memory now. I don't think it was. I won't be sure.

Q You think the check was signed in Mr. Flanigan's presence? A I am not sure. I am just refreshing my memory. I don't think it was. You see, you kept rehashing the question and everything.

Q What did you do that day in Mr. Flanigan's presence? A Well, we had a couple of drinks together and I don't remember what else we did.

Q Well, do you remember you did not sign this agreement? A I don't remember—I am now sure the agreement was not signed when he was there.

Q What makes you sure of that? A Well, I just come to think about that. I know now—I

am refreshing my memory and my memory is now that first the bank wanted $3,000.

Q Just stick to the signing of this paper. A Well, I want to tell you why, I am refreshing my memory so I can tell you.

Q No. I am not asking you what caused you to refresh your memory. A This—this requires—

Q I am asking you how do you know you did not sign this in Mr. Flanigan's presence. A Well, I want to tell you, but I cannot give you that answer in a yes or no. I am going to give you the answer more broadly.

Mr. Cogan: Scratch that question out, then.

Q You knew when you signed it, what you signed, did you not? A No.

Q Didn't you read it? A No, I did not. It was sent over by Mr. Bobker, as I recall it now.

DAVID BOBKER, sworn.

Direct examination by Mr. Flanigan.

Q Mr. Bobker, you are an attorney and counsellor at law of this State? A An attorney at law, yes.

Q Have you seen the bill of complaint filed in the Court of Chancery on behalf of the Metropolitan Lumber Company and against Flanigan, Cogan and the Fordham National Bank? A Why, I saw a copy of it, but I did not read all the allegations in the bill of complaint.

David Bobker, direct.

Q Did you see attached to the bill of complaint schedule—Exhibit 2, which purports to be an assignment of rent by the complainant to Flanigan and Cogan? A Have you a copy of it there?

Q I show you Exhibit 2. A Yes, I saw that copy.

Q When is the first time that you knew such a paper existed? A Why, either on the day or one day prior to the preparation of the bill of complaint.

Q So that you did not know that such a paper existed on January 11th this year? A No; I did not.

Q Did you ever see the original assignment of rent, Exhibit 2? A I saw the original assignment either on the day or the day previous to the preparation of the bill of complaint.

Q Where did you see that original? A Philburn, my recollection, Philburn showed it to me.

Q Are you positive, Mr. Bobker, that you ever saw the original of that assignment of rent? I don't want to— A Let me see the copy again.

Q I don't want to be hasty. A I saw an original assignment of rent other than the assignment of rent that was prepared in my office, and I think it must have meant the original of which this is the copy.

Q And who showed you that original? A I think it was Philburn.

Q Now, on January 11th—are you sure you did not see a photostatic copy of the original? A What I saw I thought was the original. It might have been a copy. I don't know whether there were one or two copies prepared, but Philburn showed me an assignment and I thought it was the original. It may have been a copy.

David Bobker, direct.

Q On January 11th did you send Exhibit 2, the original thereof, to the home of Jacobson by Philburn or any other person for Jacobson's signature? A No, I did not, excepting that—

Q This Exhibit 2 we are talking about. A No, I didn't, excepting that I cannot recall the date that I was out of the office, and when I returned the girl told me that Philburn had been there with some papers that he wanted me to look over. I don't know whether that was included or whether that was not included, but I did not send any paper over to Jacobson, that is, that particular paper.

Q I am speaking of Exhibit 2, the original. And did you ever tell Jacobson to sign Exhibit 2? A No, I did not.

Q As a matter of fact, you did not see Exhibit 2, or a photostatic copy thereof, or any copy thereof, until about the time this complaint was being prepared? A That is correct.

Q Now, can you recall when this complaint was being prepared? A The day preceding the filing of the bill and the securing of the order to show cause, as far as I can recollect.

Q Well, the bill is verified February 1st. How long previous to February 1st would you say you first saw the copy? A Either around February 1st or the day before.

Q I see. Now, Mr. Bobker, when did Jacobson first call you into the case of the Fordham National Bank in New York against the Metropolitan Lumber Company? A On December 30th.

Q What time of the day? A I think it was the early part of the afternoon.

Q Was it before one o'clock in the afternoon? A I think it was between twelve and one.

Q And did Mr. Jacobson call you in personally, or someone for him? A I received the phone call to come to the office and I don't recall whether I talked to Philburn or Jacobson, but I received a call to come to the office and I got there around one o'clock.

Q As a result of that call, what did you do, if anything? A Jacobson told me, or attempted to tell me about the details of the Fordham National Bank litigation, and asked me to prepare a bond and mortgage covering property on the corner of Commerce and Mulberry streets, Newark, and told me that I would receive a call from you as to further details. I tried to get all the details from Jacobson, but was unable to do so.

Q Did he tell you the amount of the mortgage that you were to prepare?

Mr. Lasser: I object to that. Anything he had with Jacobson because of the privilege of communication between attorney and client?

A He told me that the mortgage was to be, I think he said, around sixteen or seventeen thousand dollars, the amount of the judgment that the Fordham Bank had recovered.

Q Are you sure he did not tell you it was to be $26,000? A No. He did not tell me that.

Q You are positive of that, Mr. Bobker? A Yes.

Q Now, did you phone my office on December 30th? A I did.

Q Did you call it several times? A Yes, I think you and I had, well, probably half a dozen talks over the telephone.

Q And the first call that you made I was out, wasn't I? A I believe so, and then I think you called me back.

Q All right. You attempted to locate me first, didn't you? A I believe so.

Q And you left word for me to phone you when I got back, didn't you? A I think so, yes.

Q Well, don't you know so? A No. I am not positive whether I called you first or whether you called me, but we finally got into conversation with each other over the telephone.

Q You recall that when I got in I did phone you? A Yes; I recall that you did call me and then we talked to each other.

Q Do you recall that I told you that I understood that Mr. Unger was to take part in this settlement and that Mr. Jacobson had told me the night before that he would? A Yes.

Q And that I was surprised that you had been called in? A Yes; you told me that.

Q And what did I say to you? A I recall that I told you that Jacobson asked me to prepare a bond and mortgage and that I had prepared a bond and mortgage on the property at Commerce and Mulberry streets, and you told me that the mortgage was to include another parcel on Mulberry street.

Q Yes. A Wherein he had a lease or interest.

Q What else did I tell you that Mr. Jacobson and I had agreed upon, if anything? A You told me that the mortgage was to cover the entire amount that the Fordham claimed to be due and owing from the Jacobson Manufacturing Company.

Q I mentioned a specific figure, didn't I? A I think I asked you what that amount was and you told me $26,000 and some odd dollars.

Q What else did I tell you that had to be done in accordance with the terms of the settlement? A You told me that we would have to produce and give you $2,000 in cash covering you first.

Q And when did I tell you about the assignment of rents? A You told me that in addition to the bond and mortgage you required an assignment of the rent from the Commerce street property where Jacobson had a lease.

Q Did I say anything about the seal of the corporation and the secretary? A Yes. You told me you wanted the papers sent out by the secretary and the seal affixed.

Q Did I say anything about a resolution passed by the Metropolitan Lumber Company and its directors? A Yes.

Q To confirm this settlement? A Yes. You told me you wanted such a resolution.

Mr. Lasser: How is all this binding on the Metropolitan Lumber Company or on Jacobson, your conversation with Bobker?

Mr. Flanigan: Bobker represents Jacobson or the Metropolitan Lumber Company.

Mr. Lasser: As an attorney.

Mr. Flanigan: As an attorney, to effect this settlement, is our contention.

Q Now, do you recall the fact, the telephone conversation took place between 1:30 and 2:00 o'clock on December 30th, Mr. Bobker? A I think it was in the early part of the afternoon. I do not—I cannot give you the exact time.

Q Do you recall that you called me about an hour later, saying you were having difficulty in getting the description or getting the deed for

the description for the mortgages and that you would be delayed? A Yes; that is correct.

Q That is correct, is it? And then do you recall that you further called me a third time around 4:00 or 4:30 in the afternoon, when you said that you were still delayed and that then I stated that out of courtesy for you and because of the fact that the papers and Jacobson and the secretary and the seal and all the material were in Newark, that I would accommodate you and come to your office? A I think that is correct.

Q Well, I don't want any "think"; is it or is it not, Mr. Bobker, so? A Yes, that is so.

Q And do you recall that I came to your office? A Yes.

Q Was there anyone with me? A Mr. Cogan and the deputy marshal.

Q Well, when I first came there, was Mr. Cogan with me? A No; Cogan came on later in the afternoon.

Q Came later. That is right. Now, do you recall that when I arrived at your office that you were busy and that you sent word out for me to wait? A Yes; I think I was busy just at that moment.

Q And do you further recall that you sent out a bond and mortgage and certain other papers that you had prepared and asked me to inspect same while you were busy inside, in order to save time? A Yes; that is so.

Q You are sure about that Mr. Bobker? A Yes.

Q And do you recall that Mr. Winner, the constable, was sitting alongside of me, when you came out and personally handed me these papers? A Well, I don't know whether I personally handed them to you, or the girl in the office, but

the marshal was with you; I saw him out there with you.

Q And sometime later, about twenty minutes to half an hour later, I went in to your office, leaving the marshal outside? A Yes; that is so.

Q Isn't that the fact? A Yes.

Q And while I was in the office you recall that we spoke about the papers that had been prepared? A Yes; we had a talk about that—you told me that—

Q And I pointed out to you that the second description, the Mulberry street proper, was not included in the bond and mortgage? A Yes; that is true.

Q In the mortgage, and that about that time Mr. Cogan came in? A Yes; that is correct.

Q And do you recall how we got the description for the Mulberry street property? A Yes. I first called Philip Klein, and then it is my recollection that Philburn brought over the deed and the lease on the order, on the Commerce street property.

Q What did Mr. Klein or Mr. Klein's office tell you on the telephone, when you phoned them for this description? A And Philip Klein told me that he thinks he has the papers and would look them up, and I don't recall whether he sent the deed over or whether Philburn brought the deed, but I had the deed and the lease.

Q Didn't you get a telephone call a few moments later from Mr. Klein regarding that deed? A Yes; I think he called me.

Q And what was the effect of that telephone call—withdraw the word "effect." What was the nature of that telephone call? A I don't recall whether he told me he had the description or whether he did not have it.

Q Didn't he tell you that there was a receipt in his office, that the deed had been delivered to Jacobson? A That is right, yes.

Q You now remember that? A That is right.

Q Then what did you do after Klein told you that? A Called Jacobson's office, and then I think Philburn brought the papers over.

Q Are you sure you did not call Jacobson? A Why, I may have talked with Jacobson.

Q Well, did you or did you not? A I don't recall.

Q Now, you know, Mr. Bobker, that you called Mr. Jacobson in the presence of Mr. Cogan and me, didn't you, and told Jacobson that Klein said there was a receipt in his office conveying the deed, and that he, Jacobson, had it? A I called the office and it may be I talked to Jacobson. It was either Jacobson or Philburn. I don't recall who I talked with.

Q Was Jacobson at the office that time? A My recollection is that he left the office and was taken home about, I think it was around five or six o'clock.

Q Well, what time was it that you telephoned to Cohn? A I think it was around—I think you got there around five o'clock—I think it was around that time.

Q Well, it was fully an hour after I arrived before you telephoned to Klein, wasn't it? A Yes, sir.

Q And did you telephone to the office or to Jacobson's home at six o'clock in reference to the deed? A To the office.

Q And did you or did you not talk to Mr. Jacobson about the deed, telling him what Klein

had said? A As I said before, it was either Jacobson or Philburn. I don't recall.

Q Well, as a result of that telephone conversation, was the deed produced? A Philburn brought the deed and the lease to the office.

Q And do you recall talking to Jacobson with respect to that deed and about the description of that property going into the mortgage? A I talked with Jacobson at the office. I don't recall what time it was. And he, of course, insisted that the second parcel was not to be included.

Q Did you talk to Jacobson in our presence, meaning Cogan and myself, in which you said to Jacobson that, "Flanigan and Cogan say there is a second parcel to go into this bond and mortgage? What about it?" Do you remember asking Jacobson that question? A I think I did.

Q And as a result of that question, what did you do? A Jacobson insisted that the second parcel was not to go in, but he told me, in view of the fact that the rents were to be sequestered, to prepare the papers and give you anything that you asked for.

Q You did not tell Mr. Cogan and me that Jacobson said what you have just testified to, did you? A I don't know know whether I did or whether I didn't.

Q As a matter of fact, all you said was, "Jacobson says it is all right to put the description in"; isn't that true? A No; I didn't say that.

Q What did you say? A I didn't say anything. I told you that the papers were coming over and I would include the description. I asked you for the amount. You gave me the amount and I inserted the amount without knowing what the amount covered.

Q As a matter of fact, Mr. Bobker, the amount was already in the bond and mortgage when I arrived at the office, was it not? A Yes; the amount included the figures you gave me over the telephone.

Q It was twenty-six thousand and some odd dollars? A Yes; whatever the amount is.

Q In the neighborhood of twenty-six thousand? A The paper I showed you when you first came there just included the one parcel.

Q That is right. We agree on that. Now, several other papers were prepared in your presence and in the presence of Mr. Cogan and me, were they not? A Yes; we prepared an assignment of the rent and affidavit for Jacobson and affidavit for Philburn and the bond and the mortgage.

Q Now, Mr. Bobker, didn't you state after we had been with you about a half hour that you had a deal in New York and that you would like to call this matter off until the morning? A Yes.

Q And isn't that the only thing you said in regard to calling off this appointment until the morning? A No. It is my recollection I told you and Cogan that Jacobson had been taken home and was a pretty sick man and that I personally had an engagement to keep in New York, and I asked you to hold over until Saturday morning so the entire transaction could be closed Saturday morning.

Q Now, Mr. Bobker, as a matter of fact, wasn't the only reason you advanced as to why this meeting should go over was the fact that you had an appointment in New York? I want to be fair about this, but I want a fair answer. A I am giving you my best recollection. My best recollection is that I gave you that reason,

and also told you, whether it was at that time or a little later, that Jacobson had been taken home and was sick.

Q Do you recall that Mr. Philburn brought in a blank check and the seal at the same time he brought in the deed for the Mulberry street property? A Yes; he did.

Q Mr. Philburn sat in the room while we concluded our settlement? A Yes; he was there.

Q And do you recall whose check was proffered in payment of the $3,000 counsel fee to Cogan and me? A Check of the Jacobson Manufacturing Company.

Q Do you recall whether or not there was any discussion regarding this check because of that fact? A Yes. I think it was Mr. Cogan raised the question as to whether or not the check would be valid and binding on the Jacobson Manufacturing Company, and you concluded that it would be O. K.

Q Didn't you tell me, Mr. Bobker, that you had taken care of Mr. Jacobson, the Metropolitan Company's real estate matters, or some of them? A No. I told you and Cogan that for a number of years I had taken care of a great many of his matters and had a direct wire in my office, but that for some time prior to this Fordham Bank matter that I had done nothing for him.

Q Didn't you state that you had done a lot of real estate work for him? A No. I never handled a real estate transaction for him, so, if I made such a statement, it was made in error, but I do not recall making such a statement.

Q I show you an exhibit attached to the bill of complaint and ask you who prepared that—referring to it for the sake of the record as the statement immediately following your affidavit in

the bill of complaint attached to the bill of complaint and signed by me for the Fordham National Bank? A Your question is who prepared this?

Q Yes. A I think I prepared it, and then Cogan made some changes.

Q What part of the paper was changed by Cogan? A I think the portion which provided that unless in the judgment of the Fordham Bank the check would be jeopardized and so on.

Q The last paragraph? The latter part of the paragraph? A Well, the portion of it, the middle of it, and then the latter part of it.

Q I see. Now, you had your girl complete that to correspond to Mr. Cogan's suggestion? A Yes.

Q And you read same and saw same and presented same to me for my signature, didn't you? A Yes.

Q And where was that presented? A Why, up to my office, as far as I know.

Q Don't you recall that you gave me that to sign in Philburn's automobile outside of Jacobson's house? A Well, yes, it was prepared in the office and after you got the bond and mortgage—(interrupted).

Q Where did I sign it? A In front of Jacobson's house in the automobile.

Q And after you had been up there to Jacobson to get the other paper signed? A That is right.

Q So that that part of your affidavit which says that an agreement was also prepared providing that while the mortgage on its face was payable on demand, the moneys secured thereby were not to be made until six months from the said mortgage, provided that no default oc-

curred in any of the terms of said bond and mortgage or any prior mortgage or mortgages covering the said property.'' Isn't that a correct statement? A Well, I did not prepare that affidavit. That statement is intended to cover the provisions in that agreement which provides that the bank's right shall not be prejudiced in calling in the entire amount before the six months.

Q Who prepared the affidavit? A As far as I know, it was Phil Klein's office.

Q Where did you sign it? A In my office, Philburn brought it to my office.

Q Were you ever in any other lawyer's office other than Klein's, during the preparation of this affidavit? A I was.

Q In whose office? A I would rather not mention the name, because I have been instructed not to.

Q You refuse to? A It was not in the office of Stein, McGlynn & Hannoch and I have been asked not to mention the name of the attorney, and I am not going to do it.

Q Is there any legal reason why you should not tell us?

Mr. Lasser: That it might be privileged, again. All this testimony—

Mr. Flanigan: I know, but you are questioning something that happened between Bobker, Cogan and me. We have got to—(interrupted).

The Witness: Those papers were not prepared by me nor prepared in my office, and, as far as I know, they came from Phil Klein's office; Philburn brought me the affidavit and I made some changes and corrections and I signed the affidavit, but I understand the papers were actually prepared by some other attorney, whose name I will not mention.

Q I see. Now, this affidavit that you signed was this in the form of its original preparation? A The affidavit that I signed?

Q Yes. A Was the original affidavit and I made some changes on the original. I don't know whether the changes were made in the copies or not.

Q Well, the affidavit is filed and attached to the bill of complaint which I show you. Is that the affidavit that existed at the time it was first prepared? A When the original affidavit that is attached to the original complaint on file, you will find I made certain changes and those changes do not appear in these copies.

Q The changes will appear, as I understand it, on the original affidavit? A That is right.

Q Now, Mr. Bobker, the bond and mortgage for $26,000 had already been prepared by the time I reached your office on December 30th, had it not? A Yes; covering just one parcel.

Q So that the statement in your affidavit that pursuant to the request of Flanigan and Cogan a mortgage was prepared in the principal sum of $26,000 some odd dollars and a bond in double of said principal sum was likewise prepared before I arrived at your office, and that is what you mean to say in your affidavit, isn't it? A What I meant to say there, you gave me the figures over the telephone and Jacobson told me to prepare a mortgage covering the corner property to the amount of the Fordham judgment. He didn't even have the figures. That is why I asked you for the figures and you told me the

mortgage was to cover all items and to include the additional parcel.

Q And Jacobson authorized this figure, did he not? A No, he did not. Jacobson didn't know anything about the figure. I just got the figure from you and I even told you and Cogan I don't even know what this figure covers. I don't even know anything about the claim.

Q Jacobson authorized you to prepare a bond and mortgage, didn't he, in carrying out my talk carrying out the terms of my talk with Jacobson? A The first time I was in Jacobson's office he told me to prepare a bond and mortgage covering the corner parcel, and it is my recollection that he said it was to cover the amount of the Fordham judgment so that the rents would not be tied up, but the actual figure that appeared in the mortgage you gave me over the telephone or—

Q Why did you prepare a bond and mortgage for $26,000 if, as you say, you only were instructed to prepare one for $16,000? A Jacobson told me it was either—I don't know whether it was in his office or whether he was home at the time—to prepare the mortgage for whatever figure was submitted to me.

Q By whom? A By you.

Q He said that he and I had talked about this matter? A Why, he told me that you had been dickering back and forth for a week or ten days.

Q And we had discussed the matter? A Yes; he told me that.

Q And that I would tell you the terms of the settlement? A Well, he didn't say that.

Q Well, words to that effect? A He didn't tell me you would tell me the terms of the settlement. He told me he had arranged for the giving of this bond and mortgage. I asked him for how long the mortgage was to be for. He said he didn't know. And I asked him what the property was to cover. He said, just the corner property, but then, after I talked with you over the telephone and I called him back and told him that the other parcel was to be included. What he said to me was, "Give him almost anything as long as they won't tie up the rents."

Q That is what he told you. Now, Mr. Bobker, did Mr. Cogan and I in any way threaten Jacobson or you or anybody else about signing these papers or executing same? A No. You simply told me that unless the papers were signed and executed and the deal closed that evening, Friday night, that you would have to go ahead and levy upon the rents and that you had the marshal with you for that purpose.

Q And that is all I said to you? A That is all.

Q Did we act like gentlemen and treat you as such? A Well, judging—you told me—

Mr. Lasser: I think that is an unfair question.

Mr. Flanigan: I will withdraw it.

The Witness: You told me you would get another—(interrupted).

Q Now, you took the affidavit of Mr. Jacobson—the acknowledgment, rather, on the mortgage? A Yes, I did.

Q Concerned in this suit? A Yes, sir.

Q And you took his affidavit? A Yes, sir.

Q And Mr. Jacobson swore to same before you before you took his acknowledgment? A Yes, sir.

Q And after he swore, you had no hesitancy in taking his acknowledgment and his affidavit? A No, sir.

THIRD DAY.

Continuation of examination in the presence of the Master and counsel as before.

Mr. Cogan: I appeared today, February 17, 1928, for the purpose of examining Dr. Julius Sobin and Dr. Charles E. Teeter concerning the matters and things contained in their respective affidavits, filed with the bill of complaint of the Metropolitan Lumber Company, pursuant to adjournment from February 10, 1928, to February 17, 1928, at 2 P. M., made between John G. Flanigan as solicitor for defendant and Herbert Hannoch as solicitor for complainant. I waited from 2 P. M. until 3 P. M., and now request that the default of said doctors be noted on the record of the examination of affiants herein.

FOURTH DAY.

Transcript of shorthand notes of testimony taken in the above-entitled cause in the presence of the Master and counsel as before at Room 638 Prudential Building, Newark, New Jersey, on February 27, 1928.

JOHN G. FLANIGAN, sworn.

Examined by Mr. Hannoch.

Q You are a member of the Bar and one of the defendants in this case? A I am.

Q And you have made an affidavit in the proceedings? A I have.

Q From the affidavit it appeared that you participated in at the execution of the mortgage, an assignment of rents back in December of this past year? A Yes.

Q Now, what was the three thousand dollar counsel fee supposed to represent? A The three thousand dollar counsel fee was supposed to represent the moneys that our clients ordinarily would have had to pay us for services rendered in conjunction with the judgment obtained in the United States District Court, and all proceedings thereto, suit in the same court on two notes approximating five thousand dollars and a suit in the Chancery Court in which the note commonly known as the Lebov note—I don't know what the title of the case is.

Q The Lebov note, was that three thousand at all divided in the services in any particular case? A No. When Mr. Unger, back in early December, wanted to know the terms of settlement, not only of the case which was in the Federal Court and on which a judgment of six-

teen thousand dollars or thereabouts had been obtained, one of the conditions upon which the bank was willing to settle, not only this sixteen thousand dollar judgment, but the suit in the Federal Court for approximately five thousand dollars and the Lebov situation, was that they did not want to—the bank did not want to be burdened with any counsel fee paid to us, and that what was paid to us would have to be paid by Jacobson and the Metropolitan Lumber Company. That information was contained in a letter of December the 6th to Mr. Unger.

Q Was that to repay both your and Mr. Cogan's services jointly? A That is right.

Q Was this—the part of that that was paid amounted to some fifteen hundred dollars, and when was that paid, as far as you recall? A That will require some little elaboration. By the settlement a check was given in the sum of three thousand dollars, payable on January 1st, which check was left with the Commercial Trust Company in Jersey City for collection. Mr. Carmichael, of that bank, had the check for that purpose. It was understood that the moneys were to come from the collection of rents which Jacobson and his company would collect as of January the 1st, and, as soon as a sum equal to this check would be deposited, that check was to be honored. The check was not honored on January the 1st and was never honored. I kept in touch with the bank and I was told by Mr. Carmichael that other checks which had preceded ours were being honored and that there was not three thousand dollars in the bank to protect us—or, to pay this check, rather. I notified Jacobson and notified his office as well of the situation and called them almost daily, but

nothing was done about the honoring of that check. Finally I served an ultimatum upon Jacobson personally, that is to say, by telephone that—and that was about January 9th or 10th, that this matter would have to be straightened out and that check honored and that I was not going to wait any longer. That night—or the same night as this talk, about 9 o'clock Mr. Philburn, the secretary of the Metropolitan Lumber Company, came to my home and begged indulgence, stating that he knew that the check should have been paid long ago, but that conditions were bad with the company and that they had to use the cash for other purposes. I told him that that was not fair to us and he said that if we would take fifteen hundred dollars in cash and would wait until the 1st of February for the balance that Mr. Jacobson was prepared to pay us, to make the fee thirty-five hundred dollars in its total instead of three thousand dollars. I said that I can't do anything about that, that you are not entitled to any consideration, but that I would take it up with Cogan, and I did take it up with Cogan, as I remember it, the following day. Mr. Philburn either came to my office that same day or phoned me and asked me to go to Mr. Jacobson's home in Newark, which, I believe, is in Lincoln Park. That same day Mr. Philburn later came to the office and he said that Mr. Jacobson was willing to pay fifteen hundred dollars that day and that he would give us an assignment of rents for two thousand dollars, wouldn't I accompany him to his home to conclude the matter? This I did. First, we went to Newark around noon time, first going after the arrival in Newark to the office of the Metropolitan Lumber Company where Philburn picked

up the seal of the corporation and there we met a person who was also on his way to Jacobson's home and whom, I understood was connected with the Nash Automobile Company—I could readily identify him—and in the car Philburn and I went to Jacobson's home arriving there, I should judge, around 1 o'clock.

Q That is when you got fifteen hundred? A No; wait a minute. That is not it. That is the trouble. If I do not make a statement you will be asking me a whole lot of questions that will make me repeat.

Q All right. A If you will let me go ahead. The gentleman whose car we went in first went upstairs to see Jacobson and he talked with Jacobson about twenty minutes. Philburn had procured two or three checks at the office of the company before we went to Jacobson's home, and when we went upstairs Mr. Jacobson—I won't tell you how he was seated, because that is not the question—but Mr. Jacobson said he did not have the $1,500, but that I would have it that day. He then exhibited to me a bracelet which he said he paid $6,000 for which he said was his wife's, a gift from him, and that he would give me this bracelet to hold until the $3,500 counsel fee would be paid, and I said "No," that I was not interested in taking his wife's jewelry, but that we wanted our money and that was all I was concerned about. "Well," he said, "I will give you cash in the sum of $1,500, and I will sign an assignment of rents," which had been previously prepared in my office on the same day while Philburn was waiting for me. Thereupon Jacobson signed this assignment of rents for $2,000, which he swore to before Philburn, and he told me that Philburn would have to go

to the Colonial Trust Company for some kind of a paper with which to prove title to this bracelet—that the said bracelet would be pawned and that Jacobson would stop in my office, after going to some pawnbroker in New York, with $1,500. Philburn did not stop that afternoon, and, as I remember it, he did not stop all the next day, but that the $1,500 was deposited in the Commercial Trust Company and a check left there by someone whom I don't know, and the bank called me to that effect, whereupon I told the bank to certify the check, and, it being late in the afternoon, the check was not secured until the next day. The fifteen hundred-dollar check was therefore paid sometime after January the 11th. I don't know the exact date, but the date on the check will prove that point.

Q All right. Now, is it your understanding that the mortgage—some $26,000, is that the amount of it—was a mortgage given to secure to the Fordham bank the payment of the indebtedness that may be owing to it from the Metropolitan on this judgment already covered and the three suits that are pending, or that it was given in full payment of all of the controversies between the parties on those instructions? A The mortgage was part of the full settlement, that is to say, the Metropolitan Lumber Company wanted time on the payment of the sixteen thousand-dollar judgment and they also wanted the terms of the settlement of all matters in controversy, as a letter of December the 6th will show, and a conversation with Mr. Unger, and so that mortgage was given along with an assignment of rents as part and parcel of that settlement. In addition to that it was agreed that we would release the sixteen thousand dollar judgment.

Q Levy under what judgment? A Yes. Would give a satisfaction of judgment upon the delivery of a confession of judgment for $26,000 or whatever the amount of the three matters in controversy would total; and that all of these were part and parcel of the settlement. The mortgage in itself was a demand mortgage in which the debt was admitted, and which mortgage was one of the mediums of settlement. If the mortgage was anywhere jeopardized, in the opinion of the bank, it did not have to wait six months, but might pursue its remedy if it saw fit under that mortgage.

Q When you said before that the note was part security and part as settlement, is there any way in which you can divide which it was in security for and which it was in settlement of? A What do you mean by "note"?

Q The mortgage. A You said "note."

Q Did I? Excuse me. The mortgage was— A No, the mortgage was to cover all the matters in controversy between the parties and was part of the settlement—of the entire settlement. The whole thing was viewed as an entirety.

Q In other words, there was supposed to be a settlement of controversies? A Between the parties.

Q According to your understanding? A Yes.

Q When was this warrant for satisfaction of judgment to be given? A It was to be given, as I remember it, upon the delivery of satisfaction —upon a delivery.

Q And confession? A And confession on judgment. You have a paper—at least, if you have not, Mr. Bobker has a paper in which that is recited. That will speak for itself.

Q When was that confession of judgment to be obtained? A At our leisure. There was no special time as I remember it. The writing will bear that out.

Q Was that confession part of the settlement? A No, I wouldn't say it was part of the settlement, but Mr. Bobker thought for business reasons it might be well to have that judgment released, and we saw no reason why it should not be done, why it should not be given provided we were in the position where we could immediately enter judgment for the full settlement.

Q Well, at the time when these arrangements, were made, which you say were for settlement, did you make any request that the appeal be withdrawn that they had taken? A Well, we considered that all of the matters in controversy were then concluded excepting that we were to have the right to proceed under our mortgage and the assignment of rents or upon the confession of judgment, if and when it was made.

Q Well, were there any arrangements made whereby a discontinuance of the Chancery suit, which the Metropolitan had brought on the fourth note that was in controversy—was there any discussion of a discontinuance of that suit? A Well, there was not specifically any suit excepting that the whole thing—the whole matter was to be concluded and was considered settled. We did not think that—none of us thought there would be any further litigation on account of any of the matters there pending, that they were settled once and for all by the terms of this settlement.

Q Was there any discussion about a withdrawal of answers and counter-claims that had been filed in the suit— A There was not any

discussion as to what would have to be done, if anything, to formally conclude this matter. It was understood between the parties that this was a settlement, and that either of the parties would do anything that would be necessary to settle the matter. There was not anything definitely decided upon in that regard. It was considered that the matter was settled and anything necessary to effect that settlement would be done.

Q In one of the suits on the note was there not a counter-claim filed by the Metropolitan against the plaintiff in the note action? A As I remember it, in the second suit on the five thousand dollar note or the note totalling five thousand dollars, there was a counter-claim filed, although I wouldn't be sure.

Q I don't know just what it was? A I think there was a counter-claim in one of the suits.

Q Did you consider it necessary or advisable to have a release, general release from the Metropolitan to your client in order to carry out that settlement? A We consider the matter settled and that either of the parties would, as a matter of course, do whatever was necessary to effect that settlement in the way of signing papers or whatnot.

Q Do you know what the interest of your client is in the note that we have referred to as the Lebov note? A Mr. Cogan did all the talking with Jacobson and with Unger and with the several attorneys with respect to that note.

Q He is the man to ask then? A And I am not entirely familiar with the matter.

JULIUS SOBIN, sworn.

Examined by Mr. Flanigan.

Q How long have you been practicing, doctor? A Since 1915.

Q In private practice since that time? A Yes, sir. That is, I have been in the army for two and a half years.

Q And do you know one Jacob Jacobson? A I do.

Q How long have you known him? A I have taken care of him when he was sick. That is the only time I have known him—never known him before, never seen him before.

Q I see. When did you first attend Mr. Jacobson? A On New Year's Eve, on the night of the 31st of December, 1927.

Q What hour, if you remember. A Yes. I put it at about 8:30 that night, 8:30, 9 o'clock is the nearest I could come to it. About 8:30, I should think, P. M.

Q And did you visit him after that occasion? A Yes, I did.

Q When was the next time you visited him? A I saw him daily for about a week, and I should say about every other day for about another week; I took care of him for about two weeks, a little over two weeks after that.

Q Two weeks from the time that you first attended him? A Yes.

Q Did you see him on January the 11th? A Yes.

Q Do you recall at what hour during that day? A Now, I am not sure about that. I usually called on him in the morning. At first I used to call on him about twice a day, see? I should—

Q I am asking you about a specific day, January 11th? A No; I couldn't say that.

Q Have you any records with you with which you can verify what time you saw him? A No; my records give no time. It might not even give the day. I just took care of him from that day to about the 15th.

Q Did you make any records of this case? A I have some records at home.

Q Records with respect to the number of visits and the days that you visited him? A Approximately, yes. I have that home in a little book like this (witness exhibits book).

Q What will your records show with respect to January 11th? A It might show that I made a call on that day, see, like this.

Q And it is possible that it might show that you did not make one that day, is that not so? A The chances are it would. For instance, I would run daily calls and I would stop making a record, knowing I am making daily calls up to a certain point, and then every other day I would make a record, I was making calls every other day, see? I didn't—

Q Do you remember whether or not Mr. Jacobson was dressed and sitting about his room on January the 11th? A No; I don't remember that, I don't remember that. The chances—my instructions were and my recollection is that he was in bed, and was told not to leave the bed.

Q When did he get out of bed, so far as your instructions went? A I should say he was first out of bed for a little while around the fourteenth—thirteenth or fourteenth of January. He was never dressed. That much I remember. He was never dressed up to that time.

Q That is to say, you have never seen him dressed? A No; I never saw him dressed. When I saw him he was always in bed.

Q Did he do any telephoning in your presence while you were attending him? A I caught him with a telephone in his hands. It was contrary to my—(interrupted).

Q Wait. That was not the question? A Excuse me.

Q Do you know to whom he was talking? A No, I don't know that.

Q Did you hear what he said? A No; I didn't hear.

Q Do you know whether he was talking business or not? A I don't really know. I couldn't say. He was using the telephone.

Q And where was the telephone? A It was a telephone right beside him in his room.

Q You did not see him on January the 30th? A No.

Q And you did not see him, as I remember it, the first time until the visit—until the evening of December 31st? A The thirty-first.

Q How long does it take, doctor, to develop a high fever? A It may take a half an hour, an hour.

Q And delirium does not always accompany a high fever, does it? A Not necessarily.

Q And a man may have high fever in the morning and that fever may be dissipated and disappear by the afternoon, may it not? A Yes.

Q And it may come again that night? A It may.

Q And then the next day it may come again? A That is possible.

Q And go away? A Yes.

Julius Sobin, direct.

Q Now, regarding delirium, that does not necessarily have to be constant, does it? A No.

Q A man may be normal one minute and the next minute he may be delirious? A Exactly.

Q Would you say a man in a high fever would be able to have a mind capable of doing business? A I would say not. He would not.

Q You wouldn't say that? A No, I don't think, he might—it all depends on the business; it requiring accurate thinking, I don't think he would be able to do any more than a man who had been drinking excessively could do at it.

Q Supposing a man had concluded a business deal excepting for the signature, would you say that he was capable of knowing at the time he signed that paper he had enough mentality to know what he was doing, just the signing of his name? A He may know enough to sign his name and he may not know what he is signing for. You see what I mean.

Q Oh, assuming he knew before what he was going to sign. A He may still remember enough to sign his name to the document, that is possible; that is possible.

Q And not know what document he is signing? A I don't know. He may not know that. He may just remember the conclusion he was determined to sign his name. Now, whether he knew the entire transaction I don't know. You are presupposing too much there. I don't know that is so.

Mr. Flanigan: I guess that is all, doctor.

NOTICE OF MOTION TO DISMISS COMPLAINT.

To Metropolitan Lumber Company, a Corporation of New Jersey and/or its attorneys, Stein, McGlynn & Hannoch.

Please Take Notice that the defendants, the Fordham National Bank in New York, John G. Flanigan and William J. Cogan will move the dismissal of the bill of complaint filed herein, before the Chancellor at the Chancery Chambers in the City of Newark, on Tuesday, the 28th day of February, 1928, because:

1. There is want of equity in the bill.

2. A decree should be made on the merits in favor of each and all of the said defendants.

The defendant, The Fordham National Bank in New York, will also move at the said time and place the dismissal of the said bill of complaint filed herein against it on the ground that no injunction such as prayed for in the bill of complaint can issue against this defendant, and is contrary to the laws of the United States, in such case made and provided.

The defendants will rely upon the bill of complaint, the affidavits thereto attached, the transcript of the cross examination of the affiants, which examination was taken before Roger E. Salmon, Esq., a Master in Chancery of New Jersey on February 10, 1928, and upon the answering affidavits filed on behalf of the defendants, copies of which have heretofore been served upon the solicitors of complainant.

Notice of Motion to Dismiss Complaint.

All of the said defendant will ask for counsel fee and costs to be taxed.

Respectfully,

JNO. G. FLANIGAN.
Solicitor, *pro se,* and for William J. Cogan, and The Fordham National Bank in New York.

OPINION OF VICE-CHANCELLOR.

Filed May 10, 1928.

CHURCH, *V.-C.*

This is a motion to restrain the defendant Fordham National Bank of New York from exercising its rights in a mortgage made to it, and covering an assignment of rents.

The motion is opposed, first, because the United States statutes prohibit a state court from issuing an injunction before final decree.

United States code annotated *"Banks and Banking" §§ 91 R., 5242,* provides as follows:

"* * * and no attachment, injunction or execution shall be issued against such association or its property before final judgment in any suit, action or proceeding, in any state, county or municipal court."

This statute has been construed as follows:

"Van Reed v. *Peoples National Bank, 198 U. S. 554,* on appeal from the court of appeals of New York, the court said:

" 'The right of congress to determine to what extent a state court shall be permitted to entertain actions against national banks and how far these institutions shall be subject to state control is undeniable. National banks are *quasi*-public institutions and for the purpose for which they are instituted are national in their character, and, within constitutional limits, are subject to the control of congress and are not to be interfered with by the state legislative or judicial action, except so far as the lawmaking power of the government may permit.' And 'it was further said that if the power of issuing attachments has been taken away from the state courts so also is the power of issuing injunctions. That is true.' *Pa-*

cific National Bank v. *Mixter* (*Mass. 1888*), *124 U. S. 721.*

"'The issue of a preliminary injunction is forbidden to state courts by the provisions in the text.' *Freeman Manufacturing Co.* v. *The National Bank of Republic, 160 Mass. 398.*

"'This statute is a complete bar to the issuance of an injunction by a state court against a national banking association * * *. For the foregoing reason alone the injunction was properly dissolved as against the bank.' *Meyer* v. *Couer d' Alene First National Bank* (*1904*), *10 Idaho 175.*

"'The prohibition as to injunction applies not only in the case of the general assets of a national bank, but also to an order restraining the transfer or enforcement of particular securities as wrongfully pledged to the bank with notice.' *Freeman Manufacturing Co.* v. *National Bank of Republic* (*1894*), *160 Mass. 398.*

"'This section providing that no injunction, attachment, &c., shall issue against a national bank before final judgment in any suit in the state court inhibits the state court from enjoining national banks before final judgment against it.' *American National Bank of Macon* v. *Dure, 148 Ga. 498.*

"'Injunction cannot issue against national banking association or its property before final judgment in proceeding in state, county or municipal court.' *Hill* v. *First National Bank* (*1927*), *163 Ga. 458; 136 S. E. Rep. 437.*"

The second objection is that the bill of complaint is not properly verified. The verification states: "I have read the bill of complaint and the statements therein contained and the same is

true to the best of my knowledge, information and belief."

In *Kocher & Triers New Jersey Chancery Practice, pp. 1141, 1590,* it is stated:

"Allegations of fact on information and belief without giving the source of the information and the grounds of the belief and without the affidavit of any person having active knowledge of the facts are ordinarily insufficient whether contained in the bill or affidavits." See, also, *Giordano* v. *Asbury Park, 139 Atl. Rep. 881.*

Moreover, all the material allegations of the bill are denied in the answering affidavits; therefore a preliminary injunction should not be granted. *Ye Olde Staten Island Dyers* v. *Barrett, 98 N. J. Eq. 702.*

There is also a motion before the court to dismiss the bill. The crux of the bill is that one Jacobson executed certain papers under duress. Jacobson and his solicitor were examined before a master and I have read the testimony. I cannot see that there was any duress, and I believe Jacobson executed the papers voluntarily and with full knowledge of their contents.

I will advise a decree dismissing the bill.

FINAL DECREE.

Filed May 22, 1928.

This matter coming on to be heard in the presence of John G. Flanigan and William J. Cogan, solicitors of the defendants and *pro se* and of Herbert J. Hannoch, of counsel with Stein, McGlynn and Hannoch, solicitors of complainant, and the Court having heard and considered the arguments of the said solicitors and the Court having read and considered the bill of complaint, verified the 1st day of February, 1928, and the affidavits submitted and filed in this cause, and the testimony and proofs taken herein on behalf of the complainants and the defendants, and the motion of the complainant for an injunction pending final hearing, and the motion of the defendants to dismiss the bill of complaint based thereon, and upon the examination of the affiants thereof; and

A restraint having been imposed upon the defendant, The Fordham National Bank in New York, by order of this court dated the 1st day of February, 1928, covering a certain mortgage made by complainant to said defendant dated December 30, 1927, and recorded in the Register's office of the County of Essex in Book M 63 of Mortgages for said County, at pages 202-204, to secure the sum of $26,614.17, payable on demand after the date thereof, and

A restraint having been imposed upon the defendants John G. Flanigan and William J. Cogan by order of this court dated the 1st day of February, 1928, covering an assignment of rents in the sum of $2,000.00 made by the complainant to said defendants under date of January 11, 1928, and pursuant to a condition of the granting of

said order the bond of The Fidelity and Deposit Company of Maryland, was deposited in this court, conditioned that it would pay to John G. Flanigan and William J. Cogan, such amount as this court may direct it to pay, and saving said defendants harmless from any effect of the granting of said restraint, and it now appearing that by reason of said restraint the said John G. Flanigan and William J. Cogan were deprived of the opportunity to collect the sum of $2,000.00 due them by the terms of said assignment on February 1, 1928, and

It appearing to the satisfaction of the Court that the complainant is not entitled to a continuance of said restraints, and that this court is prohibited by the statutes of the United States of America to issue such restraint, and that the bill of complaint herein is not properly verified and that the bill of complaint, the testimony and proof taken herein disclose that there was no duress exercised by or on behalf of the defendants or any of them, as alleged in the bill of complaint, and that the complainant executed each and all of said papers voluntarily and with full knowledge of their contents,

It is, thereupon, on this 22nd day of May, in the year of Our Lord, one thousaid nine hundred and twenty-eight, by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, ADJUDGED AND DECREED, that the restraint imposed on the defendants The Fordham National Bank in New York, John G. Flanigan and William J. Cogan by a certain order of this court, made in this cause on the 1st day of February, one thousand nine hundred and twenty-eight, be and the same is hereby dissolved, and it is

Final Decree.

FURTHER ORDERED, ADJUDGED AND DECREED that complainant Metropolitan Lumber Company and The Fidelity and Deposit Company of Maryland pay to the defendants John G. Flanigan and William J. Cogan, the sum of Two Thousand ($2,000.00) Dollars with interest from the 1st day of February, 1928, together with their costs to be taxed and the further sum of $800 as a counsel fee which is hereby allowed to the said defendants John G. Flanigan and William J. Cogan, and it is

FURTHER ORDERED, ADJUDGED AND DECREED that the bill of complaint of the complainant herein be and the same is hereby dismissed, and it is

FURTHER ORDERED that complainant pay defendant The Fordham National Bank in New York the costs of this suit to be taxed by the clerk and to include the cost of the testimony taken herein.

E. R. WALKER,
C.

Respectfully advised,

ALONZO CHURCH,
V.-C.

NOTICE OF APPEAL.

Filed August 6, 1928.

To John G. Flanigan, Esq., solicitor of the defendants.

SIR:

Notice is hereby given that Metropolitan Lumber Company, the complainant, hereby appeals to the Court of Errors and Appeals, in the last resort in all causes, from the final decree and order made by the Chancellor on the advice of Vice-Chancellor Alonzo Church, and from said decree and order and every part thereof, dated May 22, 1928.

MILTON M. UNGER,
Solicitor of Complainant.

MILTON M. UNGER,
Of Counsel for Complainant.

I conceive that there is good cause for appeal in the above stated case.

MILTON M. UNGER,
Of Counsel for Complainant.

PETITION OF APPEAL.

New Jersey Court of Errors and Appeals

Between	
METROPOLITAN LUMBER CO., a corporation of New Jersey, *Complainant,*	*On Appeal from the Court of Chancery.*
and	
THE FORDHAM NATIONAL BANK IN NEW YORK, *et als., Defendants.*	*Petition of Appeal.*

To the Honorable Judges of the Court of Errors and Appeals in the last resort in all causes:

1. The petition of Metropolitan Lumber Company, the appellant in the above-stated cause, respectfully shows that your petitioner finds itself aggrieved by a decree and order made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date May 22, 1928, in a certain cause wherein the said Metropolitan Lumber Company is complainant and the Fordham National Bank in New York, *et als.*, are defendants, in the following respects, to wit:

1. The decree erroneously holds that the complainant is not entitled to a continuance of the restraint theretofore imposed by said court, and holds that the Court of Chancery is prohibited by the Statutes of the United States from issuing such restraint.

Petition of Appeal.

2. The decree erroneously holds that the Bill of Complaint is not properly verified.

3. The decree erroneously holds that the testimony and proofs taken disclose that there was no duress exercised by or on behalf of the defendants or any of them, and that the complainant executed papers voluntarily and with full knowledge of their contents.

4. The decree erroneously dissolves all restraint imposed on the defendants by an order made on February 1st, 1928.

5. The decree erroneously orders the complainant to pay to the defendants John G. Flanigan and William J. Cogan, the sum of $2,000., interest, costs and counsel fee.

6. The decree erroneously dismisses the bill of complaint.

7. The decree erroneously orders the complainant to pay to Fordham National Bank in New York the costs of suit and all testimony and upon the ground that the same are erroneous and deprive petitioner of its rights in the premises.

Petitioner therefore prays that the said order of the 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.

MILTON M. UNGER,
Solicitor for Complainant.

MILTON M. UNGER,
Of Counsel with Complainant.

ANSWER TO PETITION OF APPEAL.

The answer of The Fordham National Bank in New York, John G. Flanigan and William J. Cogan, the above-named appellees, to the petition of appeal of Metropolitan Lumber Company, the above-named appellant.

The appellees, not admitting the truth of all or any of the matters in said petition of appeal contained, for answer thereto nevertheless admit that a decree was on May 22, 1928, 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, these appellees beg leave to refer thereto when the same shall be produced.

These appellees are advised and believe, that the said decree is agreeable to equity, and they severally pray that the same may be affirmed with costs to be taxed in favor of the appellees.

JOHN G. FLANIGAN,
Solicitor for Appellees and *pro se*.

WILLIAM J. COGAN,
Of Counsel with Appellees and *pro se*.

ORDER.

Filed July 5, 1928.

The complainant having filed a notice of appeal in the above-entitled cause and having presented a petition of appeal to the New Jersey Court of Errors and Appeals, and it appearing to the Court that an execution upon said decree will destroy or impair the subject of the appeal,

It is on this 30th day of June, 1928, ORDERED, that no process shall issue on said decree until August 1, 1928, and that if process shall already have issued further proceedings on the execution or levy made by the Sheriff of the County of Essex be and the same are hereby stayed.

E. R. WALKER,
C.

Respectfully advised,

ALONZO CHURCH,
V.-C.

ORDER.

Filed August 10, 1928.

IN CHANCERY OF NEW JERSEY.

Between

METROPOLITAN LUMBER COMPANY,

Complainant,

and

THE FORDHAM NATIONAL BANK IN NEW YORK, JOHN G. FLANIGAN and WILLIAM J. COGAN,

Defendants.

On Bill, &c.

Order.

The defendants having given notice of an application to dismiss and vacate an order made in this cause on June 30, 1928, restraining the defendants from proceeding with process and execution on the decree herein until August 1, 1928, and the complainant now applying for a continuance of the said order of restraint made herein on June 30, 1928, and both of said applications coming on to be heard before the Court in the presence of Milton M. Unger, solicitor for complainant, and William J. Cogan, representing John G. Flanigan, solicitor for the defendants, and the Court having heard the same,

It is on this 6th day of August, 1928, on motion of the solicitor for the complainant, ORDERED, that the restraint contained in said order of June 30, 1928, shall be continued until the further order of the Court upon the giving by the complainant to the defendants of a bond in the sum of Five Thousand ($5,000.00) Dollars, (to be approved as to form and sufficiency of surety by , one of the Special Masters of this Court), conditioned for the payment by the complainant to the defendant The Fordham National Bank in New York, as and when this Court shall hereafter direct, of such income, issues or rent as the complainant, its officers, agents, employees shall, commencing with August 1, 1928, actually receive from the premises embraced in the mortgage made by complainant to the defendant The Fordham National Bank in New York, dated December 30, 1927, to secure $26,614.17, and interest, less however, such sums of money as complainant may out of said rentals necessarily pay after August 1, 1928, for taxes or interest on mortgages covering the premises said rents are actually received from and accruing after August 1, 1928; and further conditioned for the payment by the complainant to the defendant The Fordham National Bank in New York, as and when this Court shall hereafter direct, of such income, issues or rent as the complainant, its officers, agents, employees, or Jacob Jacobson, his agents or employees, shall commencing with August 1, 1928, receive from the premises embraced in the assignment of rents made by complainant to the defendant The Fordham National Bank in New York, dated December 30, 1927, and recorded in the office of the Register of Essex County in Book L 78 of Deeds, pages 43-44, covering premises known and designated as 92, 94 and 96 Mulberry street, in the City of Newark, County of Essex and State of New Jersey.

Order.

This order shall only be effective provided the complainant give said bond within 10 days from the date hereof.

E. R. WALKER,
C.

Respectfully advised,

JOHN H. BACKES,
V.-C.

ORDER.

Filed August 16, 1928.

This matter being opened to the Court by Milton M. Unger, solicitor for the complainant, upon application for an extension of the time within which a certain bond in the sum of $5,000.00 pending the appeal of the Final Decree in this cause in the New Jersey Court of Errors and Appeals should be filed, which time was set by an Order made in this cause on August 6th, 1928, as August 16th, 1928, and sufficient reason appearing for the said extension;

It is on this 13th day of August, 1928, ORDERED that the time within which the complainant is required to file the Bond in the sum of $5,000.00 referred to in the Order heretobefore made in this cause on August 6th, 1928, and the restraint therein contained be and the same is hereby extended, and complainant is hereby given leave to file the said Bond approved in the manner set forth in the Order dated August 6, 1928, up to and no later than August 30th, 1928.

E. R. WALKER,
C.

Respectfully advised,

JOHN H. BACKES,
V.-C.

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New Jersey State Library

NOTICE OF MOTION.

In Chancery of New Jersey

Between METROPOLITAN LUMBER COMPANY, a corporation of New Jersey, *Complainant,* *and* THE FORDHAM NATIONAL BANK IN NEW YORK, *et al.*, *Defendants.*	*On Bill, &c.* *Notice of Motion to Dismiss Complaint.*

To Metropolitan Lumber Co., a corporation of New Jersey and or their solicitors, Stein, McGlynn and Hannoch, or Philip Klein.

PLEASE TAKE NOTICE that the defendants will move before the Chancellor at the Chancery Chambers in the City of Newark, on Tuesday, the 28th day of February to dismiss the bill of complaint herein on the grounds that

1. The complaint is not properly verified and in accordance with the law and the rules of this court.

2. The defendants herein will further move to dismiss the bill of complaint herein because out of the mouth of the complainant itself it is made to appear beyond peradventure that there is no basis in fact for the bill and that the complainant cannot produce proofs thereunder wherein an amended bill will entitle it to the remedy it seeks.

Notice of Motion.

And at the above time and place the defendants will also apply for an order staying and enjoining the complainant, its attorneys, agents and servants from prosecuting its writ of error and or appeal from the judgment obtained by the defendant The Fordham National Bank in New York against the complainant on November 15, 1927 in the United States District Court for the District of New Jersey, until the further order of this court; and from further prosecuting or taking any action on a second suit instituted in the said United States District Court by the defendant The Fordham National Bank in New York against the complainant herein, which suit involves two notes, one dated June 27, 1927 in the sum of $3,300.00 made by the complainant to the Stamford Lumber Company and endorsed to the defendant The Fordham National Bank in New York and a second note of July 7, 1927 in the sum of $1,200.00 made by complainant to Stamford Lumber Company and endorsed to the defendant The Fordham National Bank of New York, until the further order of this court; and from further prosecuting or taking any action in regard to a suit pending in the Court of Chancery wherein the complainant herein is complainant therein, and Joseph Glassberg, Harry Labov, *et al* are defendants, until the further order of this court.

The defendants will insist that none of the above three actions and all of them shall be further prosecuted until the final disposition of this cause and the final decree of this court.

Respectfully,

JOHN G. FLANIGAN,
Solicitor, *pro se,* and for William J. Cogan, and The Fordham National Bank in New York.

ORDER.

This matter being opened to the Court by Philip Klein, solicitor for complainant, and it appearing to the Court that the bond required by the order of this court in this cause on February 1, 1928, in the penal sum of three thousand dollars, has been duly filed, said bond having been first duly approved as to form and sufficiency of surety by a Special Master of this court, and having been filed within 24 hours after the granting of said order, and good cause being shown therefore, it is therefore, on this third day of February, 1928,

ORDERED, that the Studebaker Sales Co. of Newark, for the rental of the store in the premises No. 640-652 Bloomfield avenue, Montclair, New Jersey, and the F. & H. Motors, Inc., for the rental of the store in premises No. 640-652 Bloomfield avenue, Montclair, New Jersey, and George Rubin, for the rental of the store in the premises No. 92-94 Mulberry street, Newark, New Jersey, do and each of them are hereby ORDERED to pay to the complainant, the Metropolitan Lumber Company, the respective rentals due from them or any of them to the complainant, Metropolitan Lumber Company.

E. R. WALKER,
C.

Respectfully advised,

ALONZO CHURCH,
V.-C.

AFFIDAVIT.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON. } *ss.*

JOHN G. FLANIGAN, being duly sworn says:

I am the attorney and counsellor-at-law of the State of New Jersey and one of the defendants in the above cause. I was associated with William J. Cogan, attorney and counsellor at law of the States of New York and New Jersey, who is also a defendant, as attorney for The Fordham National Bank in New York, a third defendant herein, in its suit in the United States District Court for the District of New Jersey, wherein it as plaintiff sued the Metropolitan Lumber Co., the above complainant and recovered a judgment in the sum of $16,181.98.

The judgment in the said United States District Court in favor of the said The Fordham National Bank in New York was recovered against the above complainant on November 15, 1927.

That I and the said Cogan were advised by Milton M. Unger, who at that time represented the complainant herein, the defendant in that suit, that an appeal might be taken and on the other hand the case might be settled. My associate Mr. Cogan, at the request of the said Unger, by letter dated in the early part of December, 1927, wrote Unger on behalf of the said bank, advising of the terms upon which the bank insisted, if settlement was to be affected. The said Unger promised and I believe wrote to the effect that the question of settlement would be taken up with his client and that we would hear from him within a reasonable length of time.

In the meantime, I, as attorney of record, did not order execution from the Clerk of the said United States Court but withheld doing so pending word from Unger. The terms of the settlement which were advanced by the bank are the same as set out in the affidavit of the said Cogan, which I have read and in all of which recitals therein, wherein I am mentioned as having knowledge of the facts therein alleged, I do hereby affirm.

After waiting two weeks or more and not getting any satisfaction from the Metropolitan Lumber Company or its attorneys I asked the Clerk to issue execution and some time later requested the United States Marshal's Office to assign a man to the case and have him get in touch with me at Newark.

Accordingly George T. Winner, a Deputy U. S. Marshal attached to the said Marshal's Office at Trenton met the defendant William J. Cogan and I at the Robert Treat Hotel about noonday on Wednesday, December 28, 1927. We decided that we would first go to the lumber yard of the Metropolitan Lumber Company at Wilson avenue, Newark, which we did, but upon arriving there the place was deserted, there was no one in attendance, there was no lumber upon which to make levy and no one from whom to make further inquiry, so that we decided that it would be useless to waste any more time at that point.

We then decided to levy upon any moneys in bank of the Metropolitan Lumber Company if we could find any, and visited several banks in some of which we were informed that the Metropolitan Lumber Company no longer had an account and that in the opinion of the person to whom we talked they did not believe that the

Metropolitan Lumber Company had an account in Newark. In one bank we were advised that the Commercial Trust Company of New Jersey, in Jersey City might possibly have an account and I accordingly telephoned Robert J. Carmichael, Vice-President of said bank and learned from him there was a small balance, as I remembered it, a few hundred dollars then to the credit of the Metropolitan Lumber Company at that bank.

Being satisfied that there was no need of looking for moneys in bank we proceeded to the office the Metropolitan Lumber Company at 74 Commerce street, Newark, and there met Jacob Jacobson, President of said Metropolitan Lumber Co., the said Deputy Marshal exhibited his credentials, told Jacobson that he was in Newark for the purpose of levying on said execution and asked Jacobson if he cared to settle the matter. The said Jacobson swore and said that we would not get five cents and that he was going to call his attorneys and tell them not to pay certain moneys then past due on a mortgge or judgment and said he would file a petition.

He then telephoned to what he said was Mr. McGlynn. Mr. Cogan stated that the marshal must be paid the amount of the judgment but if he wanted time for payment we would make no other settlement than the one submitted to Mr. Unger, including the Labov note and a counsel fee of $3,000.00.

Upon the refusal of the said Jacobson to follow either course the said Cogan then ordered the said Deputy Marshal to proceed with the task which he did and then and there levied upon the furniture and office fixtures of the said Metropolitan Lumber Company at the said address.

Thereafter and on the same afternoon Wednesday, December 28, 1927, the said Deputy Marshal, Cogan and myself went to the various tenants of the Metropolitan Lumber Co. in the neighborhood for the purpose of finding out the time when and the amount of rent next then due for the purpose of preparing written notices to these respective tenants to pay the rent when due to the said Deputy Marshal on account of said judgment. That evening December 28th, Cogan and I left the said Deputy Marshal with the understanding that he was to prepare said notices and to serve same on the following day.

On the next day Thursday, December 29th, and about noon on that day I received a telephone call from the said Jacob Jacobson to the effect that the case would be settled and that he would arrange to have the attorney, and as I remember it, Milton Unger, get in touch with me. Shortly thereafter I received a telephone call from the Deputy Marshal and told him to come to my office that there was a likelihood of settlement and not to serve the notices that he had prepared until further word from me. Late that afternoon Thursday, December 29th, not having heard from Jacobson I phoned him and he told me that he could not reach his attorney and that he would have him at my office the next morning to draw the necessary papers. I then and there on said late Friday afternoon went over the terms with Jacobson so that there would be no confusion on the following morning and told him that we would expect a mortgage in the sum of $26,000 on the property located on the southwest corner of Commerce and Mulberry street, Newark, as well as No. 102 Mulberry street, Newark, that we would want an assignment of rents for the row

of stores beginning with the butcher shop on the southeast corner of Mulberry and Commerce streets and continuing along Mulberry street, south as far as he had tenants. I also told him that he would need himself, his secretary and the seal of his corporation and that a resolution would have to be passed by his company authorizing the settlement. In addition to this I told him that the counsel fee of $3,000.00 would have to be furnished in the form of cash. Jacobson then and there answered that the aforesaid was agreeable to him and that he would have Milton M. Unger get in touch with me in the morning. I told him that I would be at the County Counsel's Office in the Court House, Newark, the first thing in the morning that Unger could get in touch with me at that point. Before talking with Jacobson on the said Thursday late afternoon the said Cogan and I, in the presence of Mr. Winner went over and discussed the available properties of the Metropolitan Lumber Co., with view to selecting two for the purpose of said mortgage.

The next day Friday, December 30th, I went to the County Counsel's Office and there attended a meeting of creditors of the Newark Baseball Team and while said meeting was in progress Ernest Philburn, the Secretary of the Metropolitan Lumber Company entered the room and spoke to Edward R. McGlynn, who had been one of the attorneys for the Metropolitan Lumber Company in the said United States District Court case, and the said McGlynn in my hearing directed the said Philburn to me. I left the room with Philburn and in the hall of said Court House Philburn told me that he had come from Jacobson and the Metropolitan Lumber Co. and that if I would name a time and place Jacobson would

have his attorney present. I then asked Philburn if he had been in touch with Unger and he said no, whereupon I stepped into a telephone booth and talked with the said Milton M. Unger, who informed me that he knew nothing about the settlement of the case for that morning the said Jacobson had not been in touch with him.

I told Mr. Unger that he had better communicate with Jacobson and that I would be in my office after 1 o'clock prepared to execute the papers in the settlement already agreed upon. I then told Mr. Philburn that Unger said he was ignorant that he, Unger, was to represent Jacobson and the Metropolitan Lumber Company and that he had better communicate this fact to Jacobson. Philburn then promised that he would have some one in my office to close out the matter at 1 o'clock.

When I arrived at my office around 1 o'clock on the said day Friday, December 30th, it was announced to me that a telephone message had been received from one David Bobker, an attorney and to phone him regarding the Metropolitan Lumber case. I forthwith did and explained to Bobker that I understood the matter was to be closed out with Unger and he said that Jacobson had asked him to get in touch with me and to represent him at the closing. I then and there narrated to Bobker the terms of the settlement so that there could be no mistake and which narration contained the same terms as agreed upon with Jacobson the day previously. Bobker said he would prepare the bond and mortgages and the other necessary papers and would come to my office in Jersey City as soon as he was ready. Mr. Winner the said Deputy Marshal was at that time in my office and remained with me the rest of the afternoon and evening.

About 3 o'clock Bobker phoned that he was having some difficulty finding the deeds from which to get the description and he asked me to bear with him as he would be a little late.

Again about 4:30 Bobker called to the effect that he would be delayed still further, when I, out of courtesy to him realizing that all of the papers, the officers and things necessary to close out the matter were in Newark agreed to come to his office, he stating that in the meantime he would go ahead with the preparation of the several papers.

I left for Newark with George T. Winner, the said Deputy Marshal and arrived at Bobker's office about 5 p. m. My arrival was announced to Mr. Bobker, we were told that he was busy and would see us as soon as he was free. After ten minutes Mr. Bobker came to the outer office where Winner and I were seated and handed me a bond and mortgage and other papers which he had prepared stating that I may inspect same while he was busy, in order to save time. I was perusing and had examined most of these papers when about twenty minutes later Mr. Bobker said that he would see me in his room. I left Mr. Winner in the outer office and immediately conferred with Bobker regarding the papers. Among other things I pointed out that the mortgage contained the description of only one of the properties and that the second parcel was missing.

At this point Mr. Cogan was announced and joined Bobker and me in Bobker's office. It was then between 6 and 6:30, and immediately upon the arrival of Cogan Bobker telephoned to Jacobson, told him about the second parcel not being included in the mortgage, asked him if it was to be included and further asked him where the

the deed could be obtained. Bobker was told that the deed was at the office of Cohen and Klein, whereupon he finished his conversation with Jacobson and immediately called the office of Cohen and Klein who advised him that that office had a receipt for the deed and that the same had been delivered to Jacobson on a particular date, which I do not remember. Bobker then called Jacobson advised him of what Cohen and Klein had said and told Bobker that he would send the said Philburn with the deed and other papers and the seal of the corporation to his, Bobker's office immediately.

Shortly after Mr. Cogan's arrival Bobker, because of the delay in getting the description and the papers ready stated that he had an appointment in New York and wouldn't Cogan and I wait until the morrow to execute same. I told him that we could not wait, that if he did not want to represent Jacobson and the Metropolitan Lumber Company that he should telephone to Jacobson to that effect, as the next day Saturday was the last day in which we could serve written notices to pay the said Deputy Marshal the rents on January 1st. This was made necessary because the first of January was on Sunday and the same date being New Years Day it was legally observed the following day, January 2nd, which left only Saturday morning to go ahead with our execution in the event that the settlement was not perfected.

Bobker did not see fit to tell Jacobson that he would withdraw, but continued on with the final preparation of the papers.

In the meantime Philburn arrived with a deed, the seal of the company and a blank check and sat in Bobker's room in the presence of the said

three of us, until the papers were finally completed.

The hour was then between eight and nine P. M., when it was agreed that Philburn, Bobker and I should go to the home of Jacobson for the purpose of having the papers executed and Cogan and Winner agreed to wait for me at the Robert Treat Hotel. I rode with Bobker in his automobile and Philburn followed in his car to the home of Jacobson. I was requested not to go inside and sat in Philburn's car while Philburn and Bobker entered Jacobson's home. A few minutes later they returned stating that Jacobson was asleep that that his wife would not awaken him, whereupon Bobker and I agreed that he Bobker would get the papers signed on his way to his office in the morning and I suggested that I telephone to Cogan at the Robert Treat to that effect. I accordingly went to the Tea Room which was in the basement of the apartment house next door to Jacobson's home and Bobker went with me while I attempted to reach Cogan on the phone. Cogan was paged but I was unable to talk with him.

As we were leaving the Tea Room Philburn came up to meet us and stated that Jacobson was awake and that he could be seen. I then sat in Philburn's car and waited for Bobker and Philburn to return. In about five minutes they returned stating that Jacobson had signed the necessary papers on behalf of the Metropolitan Lumber Company and as Philburn had already signed same they were delivered to me whereupon I signed two papers for Bobker, one of which is attached to the bill of complaint, immediately after the affidavit of David Bobker.

I then left Bobker and Philburn kindly drove me to the Robert Treat Hotel where I met Cogan and Winner. We had dinner after which we discharged Winner telling him to return to Trenton that he was no longer needed.

The counsel fee of $3,000.00 which was to be paid to Cogan and me was represented by a check of the Jacobson Engineering Co., when we were told that the Metropolitan Lumber Company had not sufficient funds to make such a check, and after we had been assured that this check would be paid upon presentation to the Commercial Trust Company in Jersey City.

On Thursday, December 29th, the only phase of the settlement that gave any trouble or raised any objection on the part of Jacobson was the payment of the said fee of $3,000.00 in cash. Mr. Jacobson phoned Mr. Griffin of the Fordham Bank and Mr. Carmichael of the Commercial Trust Co., and asked them to intercede and to accept a check instead of the cash payable on January 1st. Cogan and I refused for a considerable length of time and after further talks with Jacobson and the said Griffin of the Fordham National Bank in New York, and upon the promise that the Fordham Bank would guarantee our fee we agreed to take a check payable on January 1st.

The said check was left with Mr. Carmichael at the Commercial Trust Company in Jersey City and was not honored on the first banking day, January 3rd and was never honored thereafter.

About January 6th, Jacobson promised that we would get the money the next day and continued to promise that we would get same from day to day until finally on January 10th, I served an ultimatum upon the Metropolitan Lum-

ber Company, that I would have to be paid next day. That night about 9 o'clock Philburn came to my home in Jersey City and admitted that we had not been treated fairly and that Jacobson was sorry but that if we would take a check for $1,500.00 and wait for the balance until February 1st, that they would increase our fee to $3,500.00. I then and there told Philburn that Jacobson and the Metropolitan Lumber Co. were not entitled to any indulgence but that I would take the matter up with Cogan in the morning.

On January 11th, I communcated with Cogan and telephoned to Jacobson and Philburn that we would take a check for $1,500.00 on account and an assignment of rents on the Montclair properties and the butcher shop on the corner of Mulberry street and Commerce street, Newark, which would be due on February 1st.

Jacobson told me that he would send Philburn to my office with the $1,500.00 and finally Philburn arrived but without any money, stating that if I would go with him to Newark to Jacobson's home I would get a check for $1,500.00 and that Jacobson would sign along with him on behalf of the Metropolitan Lumber Co. such assignment of rents.

I left with Philburn, went to Newark, stopping first at the office of the Metropolitan Lumber Company on Commerce street, picking up the seal of the corporation and in the automobile of a friend of Jacobson, who was going to Jacobson's house on business, that friend, Philburn and I proceeded to and arrived at Jacobson's home. I waited in the parlor while this friend, whose name for the moment eludes my memory, concluded his business with Jacobson, part of which

consisted of the signing of a check by Jacobson. I thereupon, on the said January 11th, went to Jacobson's room where he was seated fully dressed, conversed generally with him and then got down to business.

He signed the assignment of rents which is attached to the bill of complaint in my presence and acknowledged same before Philburn, a Notary Public, who had previously signed as Secretary. Mr. Jacobson then offered me some Apricot Brandy, which I did not hesitate to enjoy and pronounce first rate.

While talking with Jacobson, he produced what to my eye appeared to be a very valuable ladies' bracelet, composed of platinum diamonds and other valuable stones, and for which he said he paid $6,000.00. He offered to let me take this bracelet and to hold same until he would have paid us the sum of $3,500.00 representing the counsel fee agreed upon but I stated no, that I did not want to do anything like that, that I would take $1,500.00 and the assignment of rents in preference to the bracelet. He then instructed Philburn in my presence to go to the Colonial Trust Company and some place of business where a loan would be procured on said bracelet, and told Philburn to stop at my office with $1,500.00 in cash. Philburn did not arrive that afternoon and the next day I communicated with him, but the money, the said $1,500.00 was not paid.

The folowing day about 4 P. M. in the afternoon after talking with both Jacobson and Philburn and being assured that the said $1,500.00 would be paid, I was called on the phone by Mr. Dunning of the Commercial Trust Company about 4 P. M., to the effect that a check for

$1,500.00 had been left for me and Cogan and that the money was in the bank to certify same.

I thereafter served a true and photostat copy of the assignment of rents on the Studebaker Sales Co. of Newark and the F. and H. Motors Inc., of Montclair, but delayed in serving a copy of said assignment on George Rubin because I had been requested by the Metropolitan Lumber Co., not to do so as it might stir up the other tenants in the neighborhood, the other two tenants being located in Montclair.

I then dismissed the matter entirely from my mind. About two days before the first of February I received a telephone call from Philburn that a bond had been filed and a request from Philburn that I notify the tenants whose rents Cogan and I were to collect on February 1st, to pay him, Philburn, on behalf of the Metropolitan Lumber Company. I was shocked and surprised to hear in this fashion from Philburn and told him that the case was already settled.

On February 1st, I made demand for the rents from the said three tenants but they and each of them informed me that the Metropolitan Lumber Company and Jacobson had notified them not to pay me.

On February 2nd, when I was about to prepare papers for suit against these tenants I was served with an order to show cause made in the above cause and dated February 1st, as to why among other things Cogan and I should not be restrained from proceeding on said assignment of rents.

The repudiation of the said settlement by Jacobson and the Metropolitan Lumber Company and the attempt to cast aspersion upon Cogan and me in connection with said settlement is wicked, malicious and without foundation in

fact, and is in line with the customary and usual attempts of Jacobson and the Metropolitan Lumber Company to procrastinate and pay their just debts. Jacobson and his said company have employed all manner and means of affecting delay, one of which is to inject new and fresh counsel into the matter when the then present attorney has outlived his usefulness. There have been eight attorneys opposed to Cogan and me in this matter, including, Cohen and Klein, Merritt Lane, Edward R. McGlynn, Milton M. Unger, David Bobker, Herbert Hannoch and Aaron Lasser, and if we are to judge the future by the past we may expect this performance to continue.

There can be no question about the validity of the settlement because the terms as they appeared in their final shape were practically the same terms as contained in Mr. Cogan's letter of December 6, 1927, to Milton M. Unger. They were known in their final shape and agreed upon excepting for the $3,000.00 cash counsel fee on December 29th. The agreement was signed on December 30th and the affidavits and acknowledgments taken before Jacobson's and the Metropolitan Lumber Company's own attorney, the said David Bobker and without the presence of either Cogan or myself.

Because of the failure to pay the counsel fee I was in almost daily communication with Jacobson and Philburn and finally on January 11th, secured the said assignment of rents and thereafter received $1,500.00 of this on account of said settlement and during all this time, from December 6th to about January 28th, there has been no word from either Jacobson, Philburn or The Metropolitan Lumber Co. in repudiation of said settlement.

Viewing the transaction as a continuing one from December 2nd, to January 28th, the attempt to foist the illness of Jacobson and the alleged duress of Cogan and myself as an execution for voiding same is absurd and without equity.

JNO. G. FLANIGAN.

Sworn and subscribed to before me,
this 14th day of February, 1928.

CHARLES F. X. O'BRIEN,
Attorney at Law of N. J.

AFFIDAVIT.

STATE OF NEW JERSEY,
COUNTY OF HUDSON. } *ss.*

I am a deputy marshal, attached to the office of the United States Marshal for the United States District Court, in the District of New Jersey.

That I was assigned to the case of the Fordham National Bank in New York *v.* Metropolitan Lumber Co., a corporation, a suit in the United States District Court for the District of New Jersey, wherein the plaintiff had recovered a judgment against the defendant in the sum of $16,181.88. That execution had previously been issued thereon and handed to me by William B. Snowden, Chief Deputy of the said United States Marshal's Office, with instructions to meet John G. Flanigan the attorney of record for the said bank and his associate, William J. Cogan, at Newark, on Wednesday, December 28th, at the Robert Treat Hotel, in Newark, N. J.

In accordance with said instructions and as the Deputy in charge of said execution for said Marshal's Office I proceeded to Newark, N. J., and met the said Flanigan and the said Cogan at the Robert Treat Hotel shortly after noon on Wednesday, December 28, 1927.

That I proceeded with the said attorneys to the lumber yard of the Metropolitan Lumber Co. on Wilson avenue, Newark, N. J., the location of which I knew because in the past I had made levy at said lumber yard against the said defendant in another matter; but I did not levy because the said lumber yard contained no lumber, was deserted with no one in possession, and there was nothing tangible or of sufficient value to warrant a levy in the opinion of said attorneys and at their instructions I left without making levy and proceeded with them to several banks in Newark where we were informed that there were no accounts and that in the opinion of a certain banker connected with a certain bank we were advised that the Metropolitan Lumber Company and or Jacob Jacobson, its president was not apt to have any moneys banked in the City of Newark and it was suggested that we get in touch with the Commercial Trust Company in Jersey City where funds might be found.

Accordingly Mr. Flanigan in my presence telephoned the Commercial Trust Company and found that a small balance in the neighborhood of $100.00 was deposited there to the account of the Metropolitan Lumber Company and or Jacobson or one of his other companies.

I discussed with the attorneys the advisability of making levy on any real estate of the defendant in said suit but it was agreed since all of the real estate was heavily encumbered by blanket

and individual mortgages that we should look further for assets before levying upon said real estate.

The said attorneys and I then proceeded to the office of the Metropolitan Lumber Company on Commerce street, Newark, on the said Wednesday, December 28, 1927, and there met the said Jacob Jacobson, President of the Metropolitan Lumber Co., whom I informed that I was a Deputy United States Marshal and that I had an execution and was deputized to execute same on behalf of the said bank on account of said suit. I asked the said Jacobson if his company would pay the said judgment and when he said that it would not I waited for orders from the said attorneys, the said attorneys in the meantime talking to the said Jacobson. I heard the said Flanigan and Cogan speak quietly and pleasantly to the said Jacobson advising Jacobson that they were there to levy under the execution which I had and exhibited and heard Mr. Cogan ask what he, Jacobson cared to do in the present situation. Jacobson said he would not pay the judgment and that these attorneys would not get one penny on account of same and that they and I could go ahead and do our "damndest," whereupon I was instructed by said attorneys to proceed with said execution and I thereupon went about the office making an inventory of the chattels and fixtures for the purpose of making levy and I did make levy upon said chattels and fixtures.

Whereupon the said attorneys and I proceeded to the several tenants of the said defendant and concerning whom said attorneys had information, and we went from place to place for the purpose of ascertaining the names and the

amount of rent due the said defendant on January 1st with view to preparing written notices to pay the respective rents so due on January 1, 1928, to me on account of said judgment. We spent the entire afternoon in this manner and I was instructed to prepare written notices and to meet said attorneys on the following day Thursday, December 29, 1927.

The following morning I met the said John G. Flanigan at his office and while I was there he received a telephone call from the said Jacob Jacobson not to proceed any further with the execution as the case would be settled. I, myself, talked on the telephone at the said time with the said Jacob Jacobson and told him that I was either anxious to get back to Trenton or to have the case settled as he said it would be. Mr. Flanigan then advised me to wait about his office as Jacob Jacobson had promised that he would have his attorney and the attorney of the defendant get in touch with Mr. Flanigan for the purpose of settling the case. The said Flanigan and I waited around Flanigan's office for several hours and in the late afternoon Jacobson phoned to say that he would have Milton Unger, an attorney at law, if Mr. Flanigan would kindly wait until the morning, draw up the necessary papers of settlement on the following morning, January 30th.

Mr. Flanigan in my presence told Jacobson on the phone as he said, so, that there would be no misunderstanding the next day, of the terms of the settlement to which Mr. Flanigan told me that Jacobson agreed.

The terms which I heard Mr. Flanigan state called for a mortgage in the sum of $26,000 or thereabouts, an assignment of certain rents, a

cash payment of $3,000.00 representing counsel fee which the said defendant was to pay in addition to the said $26,000. That the president and the secretary of the Metropolitan Lumber Company would have to be present and the seal available and that the company would have to pass a resolution authorizing the officers to make the above settlement. I also heard Mr. Flanigan state that the mortgage was to be a demand mortgage but that the plaintiff would agree to wait six months for the payment of same provided its security obtained by way of settlement should not in anywise jeopardize in the opinion of the plaintiff.

Before Mr. Flanigan had the last above mentioned telephone conversation with the said Jacobson, William J. Cogan had appeared at Flanigan's office and they in my presence had considered what real estate they would select for the purpose of the said mortgages and at the time Flanigan had said conversation with the said Jacobson I heard him state and name two pieces of real estate on which they would require a mortgage the following morning.

I also heard Mr. Flanigan say during said telephone conversation that he would be at the County Counsel's Office at the Court House in Newark and for Jacobson to have the said Unger get in touch with him there the next morning December 30th, and he would tell the said Unger what time he would meet him at his, Flanigan's office in Jersey City that day for the purpose of executing the settlement already agreed upon.

I was instructed by the said Flanigan and Cogan to wait at the office of the said Flanigan the following morning, December 30th until he would appear there and I waited there until Mr.

Flanigan arrived shortly after 1 o'clock when he told me that his office had received a message to get in touch with David Bobker, a lawyer, who would take care of the settlement in the place of Unger. I heard the said Flanigan almost as soon as he returned to the office telephone to Bobker as he had stated them to Jacobson the day previous, and Mr. Flanigan when he hung up the phone stated to me that Bobker would prepare the necessary papers including the mortgage and would come to the office of Mr. Flanigan in Jersey City as soon as possible. I waited around Flanigan's office and about 3:30 I heard the telephone operator in Mr. Flanigan's office state that there was a telephone call from Bobker, and Mr. Flanigan talked to one whom I understood was Bobker and Flanigan told me that there was some delay in getting the descriptions on the part of Bobker but that as soon as everything was ready that Bobker would come to the office. Some time later and about 4:30 o'clock Bobker, as I was informed telephoned again stating he was being delayed in getting the papers ready and I then heard Mr. Flanigan state that as a courtesy to Bobker that he would go to Newark to his office since Jacobson and the Secretary of the Metropolitan Lumber Company and all the papers could more readily be used at that place, and I immediately started with Mr. Flanigan for Mr. Bobker's office at Newark, where we arrived at 5 P. M. Mr. Flanigan and I sat in the outside office for about ten minutes when Mr. Bobker appeared stating he was busy. He handed to Mr. Flanigan what he stated were the bonds and mortgages and papers on account of said settlement and which he handed Mr. Flanigan to inspect while

he was busy inside with another matter and until he would be ready to see him. Mr. Flanigan sat reading the papers in my presence in the outside office for fully twenty minutes when Mr. Bobker said he was ready to see him and Mr. Flanigan went inside leaving me in the outside office. Mr. Flanigan had been with Mr. Bobker about fifteen minutes when Mr. Cogan came along and went into the office with them. I stayed in the outside office for two hours while Mr. Flanigan and Mr. Cogan and Mr. Bobker were inside. Thereafter these three gentlemen appeared and Mr. Cogan and I went to the Robert Treat Hotel to wait for Mr. Flanigan, Mr. Flanigan having left with Mr. Bobker and Mr. Philburn, whom I understand is Secretary of the Metropolitan Lumber Company, to get the papers signed by Mr. Jacobson.

Mr. Flanigan returned to the Hotel Robert Treat in Newark, and met Mr. Cogan and me shortly before nine o'clock and stated to Mr. Cogan and to me that everything had been signed and settlement completed, whereupon three of us had dinner and I was told to go back to Trenton, that I was no longer needed.

Mr. Jacobson, when I saw him on Wednesday, December 28th, had no appearance of being sick and when I talked with him the next day December 29th, I heard nothing to indicate that he was sick.

I am greatly surprised to learn that Jacobson and his company have attempted to repudiate the said settlement.

GEORGE T. WINNER.

Sworn and subscribed to before me,
this 14th day of February, 1928.

WILLIAM HANEY,
Notary Public of N. J.

AFFIDAVIT.

STATE OF NEW JERSEY,
COUNTY OF HUDSON. } *ss.*

WILLIAM J. COGAN, of full age, being duly sworn according to law, on his oath deposes and says:

I am an attorney and counselor at law of the States of New Jersey and New York, and hereby confirm the truth of the statement contained in affidavit of John G. Flanigan referring to deponent, to be filed herewith.

During the course of the proceedings and settlement complained of in the bill of complaint and its accompanying affidavits, I acted as attorney for The Fordham National Bank in New York, in conjunction with John G. Flanigan an attorney and counselor of this state.

I have read the bill of complaint and the affidavits in support thereof.

The settlement complained of and which the complainant seeks to have set aside was made at the request of the complainant, and the terms thereof were submitted by the defendants to the complainant as early as December 6th, over three weeks before the papers constituting the settlement were executed.

On or about December 1, 1927, there were three cases under way in which The Fordham National Bank in New York was interested. It had a

judgment against the complainant in the United States District Court of New Jersey, on certain promissory notes in the sum of $16,181.88, which it had secured November 15, 1927. It had an action on two promissory notes aggregating $4,500 and interest, covering which complainant had interposed a sham defense and covering which it was in position to and intended to secure summary judgment, which motion was not made because of the negotiations by complainant for settlement. The complainant had defaulted in payment of a note made by it to one J. Glassberg, endorsed by J. Glassberg and Stanford Lumber Co. to one Harry Labov. The endorsements aforesaid were precisely the same as upon some thirty promissory notes discounted by The Fordham National Bank in New York, many of which were paid at maturity.

Jacob Jacobson alleged owner of all of the stock of complainant has consistently claimed in the course of the proceedings heretofore had that he likewise is the real owner of the stock of Stanford Lumber Co., or at least its assets.

The Fordham National Bank in New York had an interest in the said Labov note of $5,200 because it had discounted notes for Labov at the request of Stanford Lumber Co., was informed that most of the proceeds thereof reached the said Jacobson through another of his corporations Level Lumber Company and because the said Labov promised to liquidate his notes through the proceeds of the said note which Jacobson has declared a forgery in spite of the fact that in an affidavit, reluctantly given this court, dated October 30, 1927, he admits his personal signature thereon.

The Fordham National Bank in New York did not urge the settlement as made.

Through the whole course of the litigation the sole motive of complainant was to secure delay and postpone the inevitable day of reckoning as far as possible.

This is indicated by the fact that it has had the following attorneys appear on its behalf: Cohen & Klein, Milton M. Unger, Mr. McGlynn, Mr. Hannoch, Mr. Bessla, Merritt Lane, Philip Klein and David Bobker. This present application is likewise for the sole purpose of delay.

On or about December 1 1927, Milton M. Unger actually represented the complainant in all three proceedings referred to and as testified by Jacob Jacobson, owner of complainant, has ever since and up to this proceedings represented said complainant in said matters.

On or about December 1, 1927, the said Milton M. Unger for and on behalf of the complainant herein stated to deponent that the complainant was short of cash and if it could secure time to pay would be willing to settle the litigation. He asked deponent to make a proposition of settlement in writing.

On December 6, 1927, deponent wrote the said Milton M. Unger making a proposition whereby the complainant would be given time to pay and including all of the litigation. Copy of this letter is annexed hereto, made part hereof and marked Exhibit "A."

This court will observe that the amount stated is $26,700 plus a counsel fee to deponent of $3,000 and will likewise observe that the settlement was for $26,600 plus a counsel fee of $3,000.

As a result of the suggested settlement the defendants herein refrained from taking any action toward the collection of its judgment until on or about December 26th, when it concluded that the settlement would not be made, that complainant was merely stalling for time and that the only way it would be paid would be upon execution. It likewise refrained from recovering judgment on the other notes.

The United States Deputy Marshal made a levy upon the office furniture of Metropolitan Lumber Company December 28, 1927, and notified various tenants that he would levy the following day upon the rent due from them to Metropolitan Lumber Company January 1, 1928. The said Jacobson at that time stated to deponent in the presence of the marshal and John G. Flanigan that if the levy was made he would not get a cent and he would file a petition in bankruptcy and deponent therefore directed the marshal to make the levy.

When the said Jacobson learned of the proposed levy upon the rents and saw that his dilatory tactics were of no avail he suddenly became active and your deponent is informed had various telephone conversations with Roy H. Griffin comptroller of The Fordham National Bank in New York as a result of which the marshal was directed to withhold his levy. Deponent is also informed and believes that Mr. Hill of Colonial Trust Company and Mr. Carmichael of Commercial Trust Company were requested to intersede for the said Jacobson and did so.

The telephone calls continued and deponent was informed on December 29, 1927, that Jacobson had agreed to give such security as deponent and John G. Flanigan deemed safe for a demand mortgage with accelerated payment if the bank

deemed the security jeopardized, covering the various matters in litigation aggregating $26,600 and would give a check for $3,000 counsel fee.

Deponent and John G. Flanigan demurred at accepting a check and demanded cash, which caused the postponement of the settlement agreed upon until the following day. On December 30th deponent and John G. Flanigan agreed to accept said check only on condition that The Fordham National Bank guaranteed payment.

Deponent was present at various of the telephone conversations held between John G. Flanigan and Jacob Jacobson and Mr. Griffin of The Fordham National Bank and John G. Flanigan. He was present with the marshal when John G. Flanigan had a telephone conversation with David Bobker and named the various papers to be executed.

Deponent arrived at the office of David Bobker about 5:30 P. M., December 30, 1927. At that time the said John G. Flanigan had just informed the said Bobker that the description of the second parcel in the mortgage was omitted. Thereupon the said David Bobker telephoned to Jacob Jacobson and was informed that the deed was in the office of Cohen & Klein. He then telephoned the office of Cohen & Klein and was informed that office held the receipt of Jacob Jacobson for said deed. He then telephoned Jacob Jacobson again and was directed to secure the deed through Philburn from Jacobson's office.

At this time, on account of the delay in securing the second deed, the said David Bobker stated to deponent and John G. Flanigan that he had an engagement for the evening and requested postponement of the closing until the following morning. This request was denied with the state-

ment that the following day was the last upon which the marshal could levy on January rents. At no time was the request for postponement made on the ground that Jacobson was too sick and deponent and John G. Flanigan relied solely upon the representations of the complainant in the execution of the various papers including a bond and mortgage, a certificate that the Board of Directors, had authorized same, an affidavit by Jacobson and an affidavit by the secretary of the complainant. The said David Bobker saw the said Jacobson and took his acknowledgment on all of the said papers so executed by him on December 30, 1927, and neither deponent nor John G. Flanigan were present when the said papers were executed.

The defendants accepted said settlement in good faith and in reliance thereupon no levy was made on the rents due complainant January 1, 1928, or the rents due February 1, 1928, covering aforesaid judgment. No mention was made for summary judgment on the other notes.

The complainant had agreed to pay the check of $3,000 accepted on the settlement for counsel fees out of the first rents received in January and said check was left with Mr. Carmichael of Commercial Trust Company of New Jersey for certification.

During the early days of January, 1928, deponent was informed that although deposits were made, other checks were first and complainant failed to pay said $3,000 check. On or about January 10th, an offer was made by complainant to pay to John G. Flanigan and William J. Cogan $1,500 cash and $2,000 on February 1st. They agreed to accept said offer provided complainant

execute a valid assignment of rents due February 1st.

Deponent is informed by the said John G. Flanigan that he visited the said Jacob Jacobson at his home on January 11, 1928, had a pleasant chat and that in his presence the said Jacob Jacobson executed the assignment of rents for $2,000, copy of which is attached to bill of complaint as Exhibit "2" and that said assignment was executed before Ernest Philburn, a notary public of New Jersey, and deponent is further informed that a check for $1,500 was executed and certified by Commercial Trust Company of New Jersey. That on the occasion of said visit the said Jacobson chatted pleasantly and entertained the said John G. Flanigan with several drinks. That nothing whatever was said on that occasion by the said Jacob Jacobson whereby he was seeking to avoid the settlement made December 30, 1927.

Deponent says that the settlement arranged December 29th and made December 30, 1927, was reaffirmed by the said Jacob Jacobson on January 11, 1928. When John G. Flanigan and William J. Cogan were proceeding with the collection of the $2,000 due them by the terms of said assignment they were informed that complainant would seek an injunction February 1st and the various tenants refused to pay the sums respectively due from them.

The application made to this court constitutes an attempt to cry out of a settlement effected to end the litigation between the parties, by the terms of which the complainant was given additional time to pay its just debts and which settlement was made on the same terms proposed by defendants December 6th, at the request of com-

plainant. The complainant had used every effort to hinder and delay the defendants from an early adjudication of its legal rights including a battery of lawyers, most of whom were used for no other purpose but delay.

Complainant has made its bed and lie in it rather than out of it.

Wherefore deponent prays this court for an order dismissing the bill of complaint herein as not stating sufficient facts to warrant the intervention of a court of equity; on the further ground that the said bill of complaint is lacking in equity; on the further ground that said bill of complaint constitutes an attempt to set aside an accord and settlement between the parties; and the further ground that said settlement was reaffirmed on January 11, 1928; and for a further order directing the companies respectively liable on the bonds filed herein by the complainant to pay to John G. Flanigan and William J. Cogan the $2,000 due them by the terms of said assignment of rent; and a further order directing the said companies to pay a counsel fee of $500 to each defendant herein and for such other and further relief as to this court may deem just.

And deponent will ever pray, etc.

WILLIAM J. COGAN.

(See Exhibit A Annexed.)

Subscribed and sworn to before me
this 14th day of February, 1928.

JOHN J. FLAHERTY, JR.,
Attorney at Law, N. J.

DEFENDANT'S EXHIBIT "A."

December 6, 1927.

Mr. Milton M. Unger,
763 Broad street,
Newark, New Jersey.

Dear Sir:

The Fordham National Bank in New York is willing to accept from the Metropolitan Lumber Company six (6) equal monthly instalments of the total amount of promissory notes either made or endorsed by the Stanford Lumber Company and/or Metropolitan Lumber Company, provided it receives what it considers to be good and sufficient security and provided you pay my fee of $3,000.00, which is to be paid at this time in addition to the first of the six payments.

The total obligations with interest to this date and including the Labov note, amount to $26,-700.00.

The money transferred by the Stamford Lumber Company to the Fordham National Bank in New York with not be considreed as a credit toward the six payments to be made but will be paid over to the Stamford Lumber Company after the Fordham National Bank has received payment in full of the obligations.

You stated to me last week that you needed three days to arrange with the Metropolitan Lumber Company to take care of the settlement and accordingly, I shall look for your answer on the 10th.

Very truly yours,

WILLIAM J. COGAN.

WJC:CS

MORTGAGE.

THIS MORTGAGE, made the 30th day of December, nineteen hundred and Twenty-seven, BETWEEN Metropolitan Lumber Co., a corporation of the State of New Jersey, the Mortgagor, AND The Fordham National Bank in New York, a corporation organized and existing under and by virtue of the Federal Laws, party of the second part;

WHEREAS, the said Metropolitan Lumber Co., is justly indebted to the said party of the second part, in the sum of ($26,614.17) twenty-six thousand six hundred fourteen dollars and seventeen cents lawful money of the United States of America, secured to be paid by a certain bond or obligation bearing even date with these presents, in the penal sum of—fifty-three thousand two hundred twenty-eight dollars thirty-four cents ($53,228.34) lawful money as aforesaid conditioned for the payment of the said first mentioned sum of twenty-six thousand six hundred fourteen dollars and seventeen cents lawful money as aforesaid, to the said party of the second part, its successors or assigns, on demand, with interest thereon, to be computed from the date hereof at and after the rate of six per cent. per annum.

AND IT IS THEREBY EXPRESSLY AGREED that should any default be made in the payment of the said interest or principal or of any part thereof, on any day whereon the same is made payable, as above expressed or should any tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in this mortgage, and become due and

payable and should the said interest or principal or any part thereof remain unpaid and in arrear for the space of sixty days, then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods as the case may be, the aforesaid principal sum of twenty-six thousand six hundred fourteen dollars and seventeen cents, with all arrearage of interest thereon, shall, at the option of the said party of the second part, its successors or assigns, become and be due and payable immediately thereafter although the period above limited for the payment thereof may not then have expired, anything therein before contained to the contrary thereof in anywise notwithstanding: and the said mortgagee may at its option, pay, such tax, assessment or water rent in arrear, and the amount so paid shall be added to and become part of the principal sum secured by the said bond and this mortgage, and shall be payable on demand with interest at six per centum per annum, as by the said bond or obligation, and the condition thereof, reference being thereunto had, may more fully appear.

NOW THIS INDENTURE WITNESSETH, that the said party of the first part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation, with interest thereon, according to the true intent and meaning thereof, and also for and in consideration of the sum of one dollar, to it paid by the said party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents does grant, bargain, sell, alien, release, convey and

confirm unto the said party of the second part, and to its successors or assigns forever,

ALL that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Newark, in the County of Essex and State of New Jersey:

First Tract:

BEGINNING at the Southwest corner of Mulberry and Commerce Streets: thence running Southerly along Mulberry Street thirty-five feet; thence Westerly eighty feet; thence Northerly parallel with Mulberry Street thirty-five feet to the Southerly side of Commerce Street; thence along the same Easterly eighty feet to Mulberry Street and point or place of BEGINNING.

The distances are on the eighty foot course herein being eight feet six inches to the present line of Mulberry street as fixed by survey made by Lemassena, surveyor, November 17, 1921.

Being the same premises conveyed to Metropolitan Lumber Co., by deed from B. and B. Investment Company, Inc., dated June 1, 1926, and recorded in Book N 74 of deeds for said County, page 274.

Second Tract:

BEGINNING in the east line of Mulberry Street at a point therein distant forty-three feet and eight inches northerly from the northeasterly corner of Mulberry and Clinton Streets; and running thence (1) along the southerly line of the brick building standing on the premises herein described south seventy degrees fifteen minutes east sixty-five feet to to the southeasterly corner of the building on the premises herein described; thence (2) north nineteen degrees forty-five minutes east along the rear of said building for a distance of thirty nine one-hundredths of a foot to the most northerly line of the building standing on the premises now or formerly of Crowell & Coe on the south or any projection or encroachment thereof; thence (3) along the northerly line of said building or any projections or encroachments thereof on a course of south seventy-one degrees nineteen minutes, each forty and twenty-eight one-hundredths feet to the rear line of the premises herein described; thence (4) along said rear line north thirty-three degrees fifteen minutes east thirty-eight feet and eighty-three one-hundreths of a foot to a point in range with the northerly line of the building standing on the premises herein described; thence (5) to and along the northerly line of said building north seventy degrees fifteen minutes west one hundred five feet to the easterly line of Mulberry Street aforesaid, and thence (6) along the same south thirty-three degrees fifteen minutes west forty feet to BEGINNING.

Third Tract:

BEGINNING at a point distant sixty-five feet on a course of south seventy degrees fifteen minutes east from a point in the easterly side of Mulberry Street distant forty-three feet eight inches northerly from the northeasterly corner of Mulberry and Clinton Streets said point of beginning being the southeasterly corner of the brick building standing on the second tract above described, and running thence (1) along the rear line of said building north nineteen degrees forty-five minutes east thirty-nine one-hundredths of a foot to the most northerly line of the building standing on

the premises now or formerly of Crowell & Coe on the south or any projection or encroachment thereof; thence (2) along the northerly line of said building or any encroachment thereof on a course of south seventy one degrees nineteen minutes east forty and twenty-eight one-hundredths feet to the rear line of the premises; thence (3) along the same south thirty-three degrees fifteen minutes west one and seventeen one-hundredths feet to lands now or formerly of Crowell & Coe; thence (4) along the line of their lands north seventy degrees fifteen minutes west forty feet to BEGINNING.

The above descriptions being taken from a survey made by Lehlbach Bros., Surveyors, dated May 16, 1911.

The second and third tracts above described being the same premises conveyed to Metropolitan Lumber Co., by deed dated May 4, 1927. and recorded in Book K 76 of deeds for said County, on pages 199-201.

The principal amount of this mortgage represents a debt due and owing by party of first part unto party of the second part.

TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, and remainder and remainders, rents, issues and profits thereof. AND ALSO all the estate, right, title, interest, property, possesion, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the same, and every part and parcel thereof, with the appurtenances: TO HAVE AND TO HOLD, the above granted and described premises, with the appurtenances, unto the said party of the second part, its successors or assigns, to its own proper use, benefit and behoof forever.

PROVIDED ALWAYS and these presents are upon this express condition, that if the said party of the first part, or its successors shall well and truly pay unto the said party of the second part, its successors or assigns, the said sum of money mentioned in the condition of said bond or obligation, and the interest thereon, at the time and times, and in the manner mentioned in the said condition, according to the true intent and meaning thereof, that then these presents, and the estate hereby granted, shall cease, determine and be voided. AND the said party of the for itself and its successors does covenant and agree to pay unto to the said party of the second part, its successors or assigns, the said sum of money and interest, as mentioned above and expressed in the conditions of the said bond. AND IT IS ALSO AGREED, by and between the parties to these presents, that the said party of the first part, shall and will keep the buildings erected, and to be erected upon the lands above conveyed, insured against loss or damage by fire, by insurers, and in an amount approved by the said party of the second part its successors or assigns, and assign the policy and certificates thereof to the said party of the second part; and in default thereof, it shall be lawful for the said party of the second part to effect such insurance and the premium and premiums paid for effecting the same shall be a lien on the said mortgaged premises, added to the amount of the said bond or obligation, and secured by these presents, payable on demand, with interest at the rate of six per cent. per annum, from the time of payment of such premium or premiums.

Mortgage.

And the Said party of the first part, the owner of the lands above described, for itself, its successors and assigns, does further covenant and agree to and with the said party of the second part, its successors and assigns, that it will pay in full, all taxes levied, or to be levied upon the lands embraced in this mortgage, and will not claim any credit on, or make any deduction from the interest or principal hereby secured by reason of the payment of any taxes so levied, or to be levied, during the continuance of the lien of this mortgage, and upon the breach of this covenant or any part thereof, this mortgage may become and be due and payable immediately, at the option of the said party of the second part hereto. And the said mortgagor does covenant with the mortgage that it is seized of an indefeasible estate in fee simple in said premises, and will warrant and forever defend the title thereof unto the mortgagee its successors and assigns, against all lawful claims whatsoever.

In Witness Whereof, the said party of the first part hath caused its corporate seal to be hereto affixed and attested by its Secretary, and these presents to be signed by its President, the day and year first above written.

METROPOLITAN LUMBER CO.

By Jacob Jacobson,
President.

(seal)

Attest:

Ernest Philburn,
Secretary.

Mortgage.

State of New Jersey,
County of Essex. *ss.*

Be It Remembered, that on this 30th day of December in the year of our Lord One Thousand Nine Hundred and Twenty-seven before me the subscriber, an attorney at law of New Jersey personally appeared Ernest Philburn who, being by me duly sworn on his oath, says that he is the secretary of the Metropolitan Lumber Co., the mortgagor named in the within instrument; the Jacob Jacobson is the President of said corporation; that deponent well knows the corporate seal of said corporation; and the seal affixed to said Instrument is such corporate seal and was thereto affixed, and said Instrument signed and delivered by said President, as and for his voluntary act and deed and as and for the voluntary act and deed of said corporation, in presence of deponent, who thereupon subscribed his name thereto as witness.

ERNEST PHILBURN. (seal)

Sworn and subscribed before me,
at Newark, N. J., the date aforesaid.

David Bobker,
Attorney at Law of N. J.

AFFIDAVIT.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } *ss.*

JACOB JACOBSON, of full age, being duly sworn, on his oath deposes and says:

1. I am president of Metropolitan Lumber Co., a New Jersey Corporation.

2. Metropolitan Lumber Co. has legal title in and to the premises described in mortgage dated December 30, 1927, between Metropolitan Lumber Co. and The Fordham National Bank in New York, said premises consisting of three tracts, and referred to in deed recorded in Book N 74 of deeds, Essex County, page 274, and Book K 76 of deeds for said County, pages 192-201.

3. The existing mortgage encumbrance against the property recorded in N 74, page 274, totals $

4. The existing mortgage encumbrances against the premises recorded in K 76, pages 192-201, total $ and consist of two mortgages.

5. No judgments have been entered against Metropolitan Lumber Co. other than the one recovered by The Fordham National Bank in New York.

6. Ernest Philburn is the duly authorized agent for Metropolitan Lumber Co. and Joseph Jacobson to collect rentals from all of their real estate holdings, and the said Philburn has been requested and designated by Metropolitan Lumber Co. and Jacob Jacobson to deposit with the Commercial Trust Company of New Jersey the sum of $3,000.00, for the purposes of meeting a check dated December 30, 1927, issued by Jacobson Manufacturing Co. to The Fordham National

Bank in New York in the sum of $3,000.00, which said check has been issued for the purpose of covering legal fees the said Fordham National Bank in New York is to pay to William J. Cogan.

7. Lease recorded in Book D72 of deeds, Essex County Register's Office, pages 4-8, is the property of this deponent and has not been assigned by deponent to any person, firm or corporation, nor is it in anywise encumbered.

JACOB JACOBSON.

Subscribed and sworn to before me
this 30th day of December, 1927.

DAVID BOBKER,
Attorney at Law of N. J.

Certified Copy of Resolution.

CERTIFICATE.

I, the undersigned, do hereby certify that the following is a true copy of a resolution passed by the Directors of Metropolitan Lumber Co., a New Jersey corporation, and by the stockholders at a meeting called for the purpose set out in said resolution, on the 30th day of December, 1927:

"Resolved, That the president and secretary of Metropolitan Lumber Co. be and they are hereby authorized and directed to sign, execute and deliver unto The Fordham National Bank in New York a bond and mortgage covering the southwest corner of Mulberry and Commerce streets, Newark, N. J., also property known as 102 and 104 Mulberry street, Newark, N. J., for the purpose of securing payment to The Fordham National Bank in New York of the sum of $26,614.17.

Further Resolved, That the president and secretary be and they are hereby authorized to execute and deliver in behalf of Metropolitan Lumber Co. to The Fordham National Bank in New York an assignment of rentals due from tenants occupying premises 92, 94, 96 Mulberry street, Newark, N. J., as additional security for the payment of the aforesaid sum of money said assignment not to become effective unless there has been a breach of any of the terms and conditions of the bond and mortgage, and/or unless said bank shall demand payment of said bond and mortgage."

ERNEST PHILBURN,
Secretary.

Agreements.

AGREEMENT.

The undersigned, attorney for The Fordham National Bank in New York, does hereby expressly agree to execute and deliver satisfaction of judgment recovered by The Fordham National Bank in New York against Metropolitan Lumber Co., upon receiving from the attorney for Metropolitan Lumber Co. warrant for confession of judgment, to be prepared by John G. Flanigan, and properly signed and executed by Metropolitan Lumber Co., said warrant for confession of judgment to be in the sum of $26,614.17.

JOHN G. FLANIGAN,
Attorney for The Fordham National Bank
in New York.

Dated December 30, 1927.

AGREEMENT.

To METROPOLITAN LUMBER CO.

The undersigned, having received from Metropolitan Lumber Co. a certain bond and mortgage and assignment of rentals all dated December 30, 1927, said papers being delivered to secure the sum of $26,614.17, and which said mortgage is payable upon demand, does hereby expressly agree that said bond and mortgage shall not become payable for six months from date hereof; except and unless in the judgment of The Fordham National Bank in New York the above debt of $26,614.17, and payment thereof shall in any way be jeopardized, in which event the said bank shall have the right and privilege of demanding immediate payment thereof and of proceeding

Agreements.

thereon, or of proceeding with the collection of said debt in any other manner, in nowise being limited by the terms of said bond and mortgage.

Dated December 30, 1927.

THE FORDHAM NATIONAL BANK IN NEW YORK.

By John G. Flanigan.

Addition to affidavit of David Bobker concluded on page 23 of the State of the Case.

The name of "David Bobker" should be set forth opposite the jurat, and the following below the jurat:

"Caroline Preuss, Notary Public of New Jersey."

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

New Jersey Court of Errors and Appeals

Between

METROPOLITAN LUMBER COMPANY, a corporation of New Jersey,
Complainant-Appellant,

and

THE FORDHAM NATIONAL BANK IN NEW YORK, *et als.*,
Defendants-Appellees.

On Bill, etc.

On Appeal from the Court of Chancery.

BRIEF ON BEHALF OF COMPLAINANT-APPELLANT.

Statement of Facts.

This appeal presents for review a decree in the Court of Chancery dismissing a bill of complaint filed in this cause.

A bill was filed to fix the taint of duress upon a certain mortgage and assignment of rents executed by the complainant. It contained a prayer for a temporary restraint enjoining transfer of these last mentioned instruments, together with a prayer for general relief.

The learned Vice-Chancellor issued a temporary restraint enjoining the defendant, the Fordham National Bank in New York, and the individual defendants from taking any steps to enforce the provision of the instruments mentioned above, requiring them at the same time to show cause why that restraint should not be made permanent.

Thereafter application was made for a testimonial examination of the affiants whose affidavits accompanied the complainant's bill. By further order it was provided that those persons who submitted affidavits on behalf of the defendants, including the two individual defendants, should also be similarly examined. This examination was had and the testimony was forwarded to the Vice-Chancellor, who proceeded, without hearing in open court or further testimonial examination, to decide the case, and he advised a decree dismissing the bill, together with the restraint formerly issued.

In his opinion, the learned Vice-Chancellor rested his decision upon several grounds. In this appeal, therefore, the question to be determined is:

Did the Court of Chancery commit an error in dismissing the bill of complaint, and its restraining order?

More particularly, the questions requiring consideration are these:

1. Was the bill of complaint properly verified?

2. Was the Court of Chancery warranted in dismissing the bill upon the merits?

3. Has the Court of Chancery power and authority to issue such a restraint as was sought and granted in this cause?

Three points will be made in this brief:

1. The Bill of Complaint was sufficiently verified to warrant a refusal to dismiss it upon the ground of improper verification.

2. The Court of Chancery erred in dismissing the Bill upon the merits.

3. The Court of Chancery had power and authority to issue the restraint heretofore imposed in this cause.

POINT ONE.

The Bill of Complaint was sufficiently verified to warrant a refusal to dismiss it upon the ground of improper verification.

Annexed to the bill of complaint and in addition to the general verifying affidavit of Jacob Jacobson are the lengthy affidavits of Jacobson and his attorney, and physicians. These affidavits formed part of the bill of complaint as filed. An examination of them (S. C., pp. 11 to 23) will disclose that all of the essential allegations and many of the evidentiary facts set forth in the bill of complaint are amply verified by persons who have actual knowledge. In the affidavit of Mr. Jacobson the facts concerning the financial situation of the Metropolitan Lumber Company are further set forth with particularity, together with the claims and contentions of the defendants. In that affidavit it is stated on information and belief that the individual defendants had certain negotiations with Mr. Jacobson's attorney, David Bobker. These statements on information and belief must of course have their source in knowledge imparted to Mr. Jacobson by Mr. Bobker. The affidavit of the last named individual set forth on pages 20-23 in the State of the Case, supports the statements made by Mr. Jacobson on information and belief, and establishes in a sufficient form that portion of the bill which sets up the endeavor of the defendants to secure the mortgage and assignment of rents.

The affidavits of Doctors Rawitz, Teeter and Sobin support the statements made in the bill of

complaint respecting the physical condition of Mr. Jacobson.

The rules of the Court of Chancery warrant the form in which this matter was presented. Rule 199 provides:

> "199. Affidavits on injunction.
>
> Where injunctive relief is prayed, and the facts which are relied upon for injunction are not within the knowledge of the complainant, such facts shall be verified by the oath or affirmation of some person who has knowledge of the facts, unless under the peculiar circumstances of the case the court shall dispense with such additional verification."

This rule was strictly compiled with in the instant case. The formal, short, verifying affidavit was annexed to the bill, but immediately after it was the lengthy and particularized affidavit of Mr. Jacobson. The principal allegations of the bill have been verified and the court, upon a complete examination of all the affidavits is able to assign a statement of facts contained in those affidavits to every ultimate fact pleaded. This case is not one of an attempt to secure an injunction upon a common verifying affidavit. The short affidavit found in the bill in this case may be ignored inasmuch as affidavits in the proper form also accompanied the bill.

In *Youngblood* v. *Schamp,* 15 N. J. E. 42, Chancellor Green made the following very pertinent statement, which would seem to support the procedure adopted in this case:

> "It is rarely, if ever, that the right to an injunction can rest upon the acts of the complainant, and it is in relation to those, alone, that the affidavit professes to be founded on *knowledge.* As to the acts of all others, it is founded on belief only.

> It is not necessary that the facts should be proved by the affidavit of the complainant. Where the material facts are not within his knowledge, they should be verified by the oath or affirmation of some person who has a knowledge of the facts; or duly verified copies of private instruments or of records may be annexed to the bill, where such is the appropriate mode of proof. *Bank of Orleans* v. *Skinner*, 9 Paige 305; Rule IX, s. 11; Nix Dig. 90, s. 15.
>
> There is a class of cases, as for example bills charging fraud, and praying a discovery, where, in the very nature of things, positive proof cannot be expected. In such cases the additional verification may be dispensed with, and the injunction issue upon the affidavit of the complainant, founded on his belief alone. *Attorney General* v. *Bank of Columbia,* 1 Paige 511; *Campbell* v. *Morrison,* 7 Paige 157.
>
> The bill is usually sworn to by the complainants, or one of them. But if he be absent, or his affidavit for any reason cannot be procured, it may be sworn to by the attorney of the complainant, or by any person acquainted with the facts. 1 Smith's Chan. Pr. 595; 3 Daniell's Chan. Pr. 1800; 1 Hoffman's Chan. Pr. 79; 3 *Ibid.* 18, No. 21."

POINT TWO.

The Court of Chancery erred in dismissing the Bill upon the merits.

The lower court dealt with the sufficiency of the bill with great brevity. The opinion of the learned Vice-Chancellor discloses the following considerations respecting the motion to dismiss the bill:

> "There is also a motion before the court to dismiss the bill. The crux of the bill is that one Jacobson executed certain papers under duress. Jacobson and his solicitor were ex-

amined before a master and I have read the testimony. I cannot see that there was any duress, and I believe Jacobson executed the papers voluntarily and with full knowledge of their contents.''

The learned Vice-Chancellor apparently regarded the question of duress as though he were hearing the case as on final hearing. His reliance is placed, as he states, upon a reading of the testimony of Jacobson and his solicitor, Mr. Bobker. But the question before the court was whether the bill, admitting all the facts stated in it for the purposes of the motion, presented a cause of action. This, of course, is the effect of a motion to strike out the bill for the grounds set forth in the notice served in this cause (S. C., p. 115). The sole question before the Vice-Chancellor was whether the bill lacked equity. He could determine no other question. No order of reference had been made. It was the duty of the learned Vice-Chancellor to consider the allegations of the bill of complaint, which were properly pleaded, as admitted for the purpose of the motion.

It is elementary that the notice of motion to strike a bill for the reason here assigned by the defendants is the prototype of the demurrer of former years and has the effect stated above.

Instead, the Vice-Chancellor proceeded with an examination of the testimony in order to ascertain whether or not there was, in fact, duress. The witnesses were not examined before the court, but before a master. The complainant was never given an opportunity to present a complete case, for it was never understood that such was the purpose of the testimonial examination of the affiants. The court was entirely without authority to decide the case as it did.

If the learned Vice-Chancellor dealt with the case as being purely a motion to dismiss, and read the testimony in order to find whether or not credence should be placed in the statements made in the affidavits accompanying the bill, certainly the presented testimony discloses every evidence that the bill should have been sustained.

In addition to these considerations should be noted the disregard by the court (in considering the meritorious phase of the case), of the issue raised in addition to that of duress, namely mistake.

The testimony discloses that while the complainant thought that it was giving a mortgage and assignment of rents for the purpose of securing its indebtedness, the defendants' idea was that these instruments were given as an accord and satisfaction for a portion of the indebtedness.

An examination of the testimony of the witnesses of the complainant will disclose that it was the idea of the complainant that this mortgage and the assignment of rents was given as security merely. Jacobson secured an agreement (S. C., p. 23), by the terms of which the mortgage was not to become payable until six months from the date thereof, although upon its face, it was payable upon demand. The testimony of Mr. Flanigan in this connection is pertinent (S. C., p. 107):

''Q All right. Now, is it your understanding that the mortgage—some $26,000 is that the amount of it—was a mortgage given to secure to the Fordham Bank the payment of the indebtedness that may be owing to it from the Metropolitan on this judgment already covered and the three suits that are pending, or that it was given in full payment of all of the controversies between the parties

on those instructions? A The mortgage was part of the full settlement, that is to say, the Metropolitan Lumber Company wanted time on the payment of the sixteen thousand dollar judgment and they also wanted the terms of the settlement of all matters in controversy, as a letter of December the 6th will show, and a conversation with Mr. Unger, and so that mortgage was given along with an assignment of rents as part and parcel of that settlement. In addition to that it was agreed that we would release the sixteen thousand dollar judgment.

Q Levy under what judgment? A Yes. Would give a satisfaction of judgment upon the delivery of a confession of judgment for $26,000 or whatever the amount of the three matters in controversy would total; and that all of these were part and parcel of the settlement. The mortgage in itself was a demand mortgage in which the debt was admitted, and which mortgage was one of the mediums of settlement. If the mortgage was anywhere jeopardized, in the opinion of the bank, it did not have to wait six months, but might pursue its remedy if it saw fit under that mortgage.

* * * * * * * *

Q In other words, there was supposed to be a settlement of controversies? A Between the parties.

Q According to your understanding? A Yes.

Q When was this warrant for satisfaction of judgment to be given? A It was to be given, as I remember it, upon the delivery of satisfaction—upon a delivery.

Q And confession? A And confession on judgment. You have a paper—at least, if you have not, Mr. Bobker has a paper in which that is recited. That will speak for itself.

Q When was the confession of judgment to be obtained? A At our leisure. There was no special time as I remember it. The writing will bear that out.

Q Was that confession part of the settlement? A No, I wouldn't say it was part of the settlement, but Mr. Bobker thought for business reasons it might be well to have that judgment released, and we saw no reason why it should not be done, why it should not be given provided we were in the position where we could immediately enter judgment for the full settlement.

Q Well, at the time when these arrangements were made, which you say were for settlement, did you make any request that the appeal be withdrawn that they had taken? A Well, we considered that all of the matters in controversy were then concluded excepting that we were to have the right to proceed under our mortgage and the assignment of rents or upon the confession of judgment, if and when it was made.

Q Well, were there any arrangements made whereby a discontinuance of the Chancery suit, which the Metropolitan had brought on the fourth note that was in controversy—was there any discussion of a discontinuance of that suit? A Well, there was not specifically any suit excepting that the whole thing—the whole matter was to be concluded and was considered settled. We did not think that—none of us thought there would be any further litigation on account of any of the matters there pending, that they were settled once and for all by the terms of this settlement.

Q Was there any discussion about a withdrawal of answers and counter-claims that had been filed in the suit— A There was not any discussion as to what would have to be done, if anything, to formally conclude this matter. It was understood between the parties that this was a settlement, and that either of the parties would do anything that would be necessary to settle the matter. There was not anything definitely decided upon in that regard. It was considered that the matter was settled and anything necessary to effect that settlement would be done.

Q In one of the suits on the note was there not a counter-claim filed by the Metropolitan against the plaintiff in the note action? A As I remember it, in the second suit on the five thousand dollar note or the note totaling five thousand dollars, there was a counter-claim filed, although I wouldn't be sure.

Q I don't know just what it was? A I think there was a counter-claim in one of the suits.

Q Did you consider it necessary or advisable to have a release, general release from the Metropolitan to your client in order to carry out that settlement? A We consider the matter settled and that either of the parties would, as a matter of course, do whatever was necessary to effect that settlement in the way of signing papers or what not."

This matter the learned Vice-Chancellor entirely overlooked, and if he was warranted in going into the merits of the case, certainly this phase of it should have been considered. Especially is it desirable that this be done when it is noted that no final hearing such as is usually accorded to litigants was had in this case, at which a complete case could be developed.

POINT THREE.

The Court of Chancery had power and authority to issue the restraint heretofore imposed in this cause.

The matters contended for by the appellant in Points One and Two above are entirely independent of whether or not there is any merit in the portion of this brief about to be considered. If the dismissal of the restraint was proper, certainly the dismissal of the bill was not and the cause should, in any event, be remanded for further action in the Court of Chancery.

Again, the restraint if invalid, so far as the National Bank was concerned, was certainly proper as against the individual defendants. It should have been made permanent against them. The right of the Court of Chancery to grant a restraint against some, but less than all alleged delinquent defendants is undoubted.

Such a restraint as the one imposed in these proceedings is proper, even as against the National Bank, before final decree. The State Governments, in becoming parties to the United States Constitution, did not strip themselves of their sovereignty to such an extent that they cannot issue an *ad interim* restraint against a National Bank respecting a bond and mortgage secured for that bank by its attorneys, in its ordinary business dealings within the State.

The Act of Congress considered by the learned Vice-Chancellor is properly applicable to restraints imposed upon a Federal Bank in connection with its governmental, as distinguished from its business enterprises. It does not extend to the limits which would render it applicable to this case. State Courts have even been permitted to look into the affairs of National Banks where the question involved was one concerning the internal management of the bank.

In 3 R. C. L. 689, it is said:

"But in other contingencies, a court of equity, federal or state, with proper parties before it, and in a proper case, has jurisdiction of a national bank and the directors thereof, to compel them to observe their obligations to their stockholders, and has power to appoint a receiver."

See also, in this conection *Richmond* v. *Irons*, 121 U. S. 27; *Grout* v. *First National Bank of Grand Junction*, 48 Col. 557.

It is respectfully submitted that the Act of Congress should be read in connection with the obvious purpose and necessity for the granting to the Federal Government of supremacy in matters relating to national banks.

It is further submitted that an examination of the entire record before the court will certainly warrant the return of the cause to the Court of Chancery, so that complainant may have its rights determined in a manner which will permit a complete exposition of its cause of action.

Respectfully submitted,

MILTON M. UNGER,
Solicitor for and of Counsel with
Complainant-Appellant.

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New Jersey Court of Errors and Appeals

Between

METROPOLITAN LUMBER CO., a corporation of New Jersey,
Complainant-Appellant,

and

THE FORDHAM NATIONAL BANK IN NEW YORK, *et al.*,
Defendants-Appellees.

On Bill, &c.

On Appeal from the Court of Chancery.

BRIEF ON BEHALF OF DEFENDANTS-APPELLEES.

Statement of Facts.

This appeal presents for review a decree in the Court of Chancery dismissing a bill of complaint filed in this cause.

The bill of complaint herein alleged the exercise of duress in connection with the execution of a certain bond and mortgage made by the complainant-appellant to the defendant The Fordham National Bank in New York, and complains to the same effect concerning an assignment of rents made by the complainant-appellant to The Fordham National Bank in New York as collateral security in case of demand of payment of the mortgage and default thereon and although the bill of complaint states that said assignment of rent is annexed to the bill of complaint and marked Exhibit "2," and although the affidavit of Jacob

Jacobson in support of the bill of complaint also alleges that said assignment of rents is annexed to the bill of complaint and marked Exhibit "2," such is not the fact. An examination of said Exhibit "2" discloses an assignment of rents made by complainant-appellant to the defendants John G. Flanigan and William J. Cogan executed on January 11, 1928, which assignment is not one of the papers executed on December 30, 1927, as alleged in the bill of complaint.

The actual assignment referred to in the bill of complaint as Exhibit 2 is printed at page 24, State of Case.

The learned Vice-Chancellor issued a temporary restraint covering the instruments above referred to against the defendants and required them to show cause why that restraint should not be made permanent.

Pending the hearing of the order to show cause why that restraint should not be made permanent, the defendants applied for an examination of the affiants whose affidavits accompanied the complainant's bill and upon order of the Court of Chancery such examination was directed and was extended to include an examination of the two individual defendants, only one of whom the complainant chose to examine.

Examination of the affiants of the complainant and of the defendant John G. Flanigan was had by the respective parties and forwarded to the Vice-Chancellor.

The defendants submitted affidavits in opposition to the application for a permanent restraint and made a motion to dismiss the bill of complaint on the ground that the said bill of complaint was not properly verified and the further ground that out of the mouth of the complainant it is made to appear beyond peradventure that

there was no basis in fact for the bill and that the complainant could not produce proofs thereunder or under an amended bill that would entitle it to the remedy sought (printed at p. 1, State of Case Supplement).

The defendants also opposed the application for a permanent restraint on the ground that the statutes of the United States of America prohibit any State Court from issuing an injunction against a National Bank before a final judgment.

The learned Vice-Chancellor rendered a decision wherein he held that no injunction could issue from a State Court against a National Bank before final judgment and further held that such injunction should be denied because of the fact that the defendants in their answering affidavits denied all the material allegations of the bill.

The learned Vice-Chancellor also held that the bill of complaint was not properly verified.

The learned Vice-Chancellor also held, based upon the examination of Jacob Jacobson, President of the complainant, and of David Bobker, attorney for the complainant, that there was no duress and that the said Jacobson executed the papers voluntarily and with full knowledge of their contents, and therefore advised a decree dismissing the bill.

The solicitor of the complainant presents to this Court for consideration three points. The first is an attempt to show that the bill of complaint was sufficiently verified and the second that the Court of Chancery erred in dismissing the bill upon the merits and the third, that the Court of Chancery had power and authority to issue the restraint imposed in this cause.

These defendants now present the following points for consideration by this Court:

1. The Court of Chancery has no power or authority to issue an injunction against a National Bank before a final judgment.
2. The Bill of Complaint was not sufficiently verified and the Court of Chancery properly asserted that fact as a ground for dismissal.
3. There could be no duress under the circumstances alleged or as shown by the testimony of complainant and on behalf of complainant.
4. Assuming any merit in the contention of complainant the settlement of December 30, 1927, was reaffirmed on January 11, 1928.
5. The Court of Chancery properly dismissed the Bill of Complaint upon the merits.

POINT ONE.

The Court of Chancery has no power or authority to issue an injunction against a national bank before a final judgment.

By order of the Court of Chancery dated February 1, 1928 (State of Case, p. 29), granting a preliminary restraint to the complainant it was provided that as a condition of the restraint the complainant should file a bond to secure the defendants John G. Flanigan and William J. Cogan by reason of such restraint in the sum of Three Thousand ($3,000.00) Dollars and the complainant thereupon proceeded to and did collect and retain the rents in the sum of Two Thousand ($2,000.00) Dollars theretofore assigned to John G. Flanigan and William J. Cogan, a copy of which assignment is printed in the record of this case as

Exhibit "2" at page 24, although such exhibit is stated in the complaint and in its supporting affidavit to represent an assignment of rents by the complainant to The Fordham National Bank in New York.

Since February 4, 1928, the defendants John G. Flanigan and William J. Cogan in practical effect had no assignment of rents, but were forced to look solely to the bond filed as aforesaid and, therefore, there could be no further reason for consideration by the Court of Chancery of an application by the complainant for a permanent restraint as against the defendants John G. Flanigan and William J. Cogan.

The only contention of any of the defendants at any time during the course of this proceeding with reference to a restraint was that it was not within the power of a State Court to issue a restraint against a National Bank before final judgment.

As to the contention that it was not within the power of a State Court to issue an injunction against a National Bank, the authorities are overwhelming, the most important of which are stated by the learned Vice-Chancellor in his opinion (State of Case, p. 117) wherein Section 91 R, 5242 of the United States Code Annotated under the caption of "Banks and Banking" is stated and several leading authorities, including two cases decided by the United States Supreme Court, are referred to.

The Vice-Chancellor likewise holds that all the material allegations of the bill are denied in the answering affidavits and therefore a preliminary injunction should not be granted, citing *Ye Olde Staten Island Dyers* v. *Barrett*, 98 N. J. Eq. 702.

The learned Vice-Chancellor therefore very properly held that a preliminary injunction should not be granted.

POINT TWO.

The bill of complaint was not sufficiently verified and the Court of Chancery properly asserted that fact as a ground for dismissal.

The verification made by Jacob Jacobson, as President of the Metropolitan Lumber Co., states: "I have read the bill of complaint and the statements therein contained and the same is true to the best of my knowledge, information and belief."

The complainant has in no way complied with the provisions of Rule 199 of the Rules of the Court of Chancery referring to affidavits on injunction.

The last five pages of a nine-page affidavit executed by Jacob Jacobson and purporting to sustain the allegations of the bill of complaint are made on information and belief and those pages are the very ones which contain the important allegations made by complainant.

The source of the information and the ground of the belief asserted by the said Jacobson are not given, thereby rendering the verification fatally defective.

In *Kocher & Tryers,* New Jersey Chancery Practice, pages 1141, 1590, it is stated:

> "Allegations of fact on information and belief without giving the source of the information and the grounds of the belief and without the affidavit of any person having active knowledge of the facts are ordinarily insufficient whether contained in the bill or affidavits."

The Court of Errors and Appeals of New Jersey in the case of *Giordano* v. *Asbury Park and Ocean Grove Bank, et al.,* 139 Atl. Rep. 881, holds in part as follows:

> "It has been repeatedly held that to obtain an injunction, the statements of a bill which are relied upon as ground for granting the writ must be specifically verified. Dick., Ch. Prec. (Rev. Ed.), p. 16, note (b), citing Youngblood *v.* Schomp, 15 N. J. Eq. (2 McCart.) 42; Holdrege *v.* Gwynne, 18 N. J. Eq. (3 C. E. Green) 27. On a verified bill judgment may be entered by default. See Perrine *v.* Hafeman (N. J. Ch.), 134 A. 860. Thus showing that a bill for preliminary affirmative relief must be fully verified.
>
> "Upon this ground alone, the prayer of the bill must be denied. Denial accordingly."

The other affidavits annexed to the bill of complaint do not verify any of the important allegations of the bill of complaint and do not support the bill of complaint in any manner further than to import the condition of health of Jacob Jacobson which is completely dissipated upon reading the testimony of the said Jacob Jacobson and his attorney, David Bobker, and, in any event, they fall far short of constituting an alternative or supporting verification of the various allegations of the bill of complaint.

In accordance with the law enunciated in the foregoing opinion and rule, as stated, it is respectfully submitted that the restraint prayed for by the complainant was properly denied and the bill of complaint properly dismissed.

POINT THREE.

There could be no duress under the circumstances alleged or as shown by the testimony of complainant and on behalf of complainant.

The law of the State of New Jersey is very clear on what constitutes duress warranting the Court of Chancery to intervene. Chancellor WALKER in

the case of *Koewing* v. *Town of West Orange*, stating the opinion of the Court of Errors and Appeals, 89 N. J. L. 539, said:

> "A very good definition of duress is that adopted in the opinion of the Court in re: Meyer (D. C.) 106 Fed. 831, as follows:
> " 'The duress for which a person may avoid any contract or conveyance made, or recover back any money paid under its influence, exists where one by the unlawful acts of the beneficiary or his authorized agent or by the act of some person, with his knowledge, is constrained under circumstances which deprive him of the exercise of free will to agree or to perform the act sought to be avoided.' "

At 12 Corpus Juris 347 is stated as a general rule of law:

> "It can never constitute duress merely to threaten to do what a party has the legal right to do."

and at page 348:

> " 'the mere seizure of another's property by legal process on an honest claim does not constitute duress so as to invalidate a compromise settlement.' "

No possible element of duress can be found after reading the letter of December 6, 1927, written by an attorney for the defendant to the attorney for the complainant and after reading the testimony of David Bobker, attorney for complainant, given February 10, 1928.

The letter of December 6th, just referred to, makes an offer of settlement almost identical with the settlement made on December 30, 1927, and is printed in the Supplement, State of Case, at page 33).

The testimony of David Bobker, attorney for the complainant shows at pages 87, 88 and 89 that

Jacob Jacobson called him into the case on December 30, 1927, between twelve and one o'clock, and that he got to the office of Jacob Jacobson about 1 P. M., where he was advised by Jacobson to prepare a bond and mortgage; that the said Bobker then telephoned John G. Flanigan and had a conversation with reference to the settlement, who stated the figure constituting the amount of the settlement, and the necessary papers which would be expected upon the settlement.

He further testified, at page 91, that upon the arrival of Mr. Flanigan he tendered a bond and mortgage, already prepared, to Mr. Flanigan for his inspection.

He further testified at page 94 that he telephoned to Jacobson and stated that "Flanigan and Cogan say there is a second parcel to go into this bond and mortgage" and at folio 30, page 94, testified that at the end of that conversation he didn't say anything to Mr. Flanigan and Mr. Cogan further than that the papers were coming over and that he would include the description.

He further testified at page 97, folio 10, that he prepared Exhibit "1," attached to the bill of complaint (printed at State of Case, p. 23) and that a portion of it was then changed by Cogan and that the paper was signed by John G. Flanigan in the front of Jacobson's house in an automobile.

He further testified at pages 100-101 that Jacobson told him to prepare the bond and mortgage for whatever figure was submitted to him by Mr. Flanigan, and that Jacobson also told him that the parties had been dickering back and forth for a week or ten days and that Jacobson had arranged for the giving of this bond and mortgage and that when Bobker telephoned Jacobson about the second parcel of property, he was authorized to include that.

Bobker further testified (State of Case, p. 101) that neither Mr. Cogan nor Mr. Flanigan in any way threatened Jacobson or Bobker or anybody else about signing the papers, but simply told Bobker that unless the papers were signed and executed and the deal closed that evening, they would have to go ahead and levy upon the rents and had the Marshal with them for that purpose.

Bobker then testified that he took the acknowledgment of Mr. Jacobson on the mortgage, and that he took his affidavit and that Mr. Jacobson swore to the same before Bobker before he took his acknowledgment, and that after Mr. Jacobson swore, Bobker had no hesitancy in taking the acknowledgment and the affidavit of Jacobson.

Jacobson himself testified at page 72 that Bobker came into his house alone for the purpose of having him sign the papers and that Mr. Flanigan was not with him at the time.

From the foregoing testimony the conclusion is irresistible that on December 30, 1927, the parties were merely closing out a transaction which had been under way for a week to ten days, and that the complainants got in touch with the defendants for the purpose of arranging and concluding the settlement and that the defendants had nothing to do with the execution of the papers by Jacob Jacobson.

Copies of all the papers executed on December 30, 1927, are printed in the Supplement to State of Case, on pages 34 and 46, and the Court will observe that the acknowledgment in each case was taken by David Bobker, attorney for the complainant, and will further observe that the certificate of Ernest Philburn, Secretary of the complainant corporation, showing the authorization for the execution of the papers, was acknowledged before the same Bobker, and will further observe that all the

papers taken together represent a settlement of all litigation between the parties in the sum of $26,-614.17, whereby the complainant was given an additional six months to pay and the defendants were given additional security for the purpose of making their task of collecting that sum, in case of default, easier than it otherwise would be if the defendants had been content to accept merely a mortgage.

It is nowhere contended in the course of the allegations of the complaint that any duress was exercised by the defendants or their agents upon Ernest Philburn, Secretary of the corporation, and no supporting affidavit is tendered to the Court by the said Ernest Philburn.

Since the prayer for relief in the bill of complaint printed at the foot of pages 9 and 10 of the State of the Case, is based upon an alleged duress exercised by John G. Flanigan and William J. Cogan, and such duress is completely negatived by the testimony above set forth, these defendants respectfully submit that the complainant utterly lacks the possibility of the proof of duress.

POINT FOUR.

Assuming for the purpose of this point that there is any merit in the allegations of the bill of complaint, nevertheless, the settlement of December 30, 1927, was reaffirmed on January 11, 1928.

On December 30, 1927, the complainant executed a bond, a mortgage, an assignment of rents to The Fordham National Bank in New York to be effective upon default of the mortgage and also two affidavits and two certificates. The complainant also delivered on December 30th to the defendants a check in the sum of $3,000.00 which is referred to in one of the two certificates. These

papers, together with two papers signed by John G. Flanigan, as attorney for The Fordham National Bank in New York, constituted the settlement complained of (State of Case Supplement, pp. 34-46).

The check for $3,000.00 was not paid, but payment thereof was stopped (see testimony of Jacob Jacobson, State of Case, p. 80).

On January 11, 1928, the said Jacobson signed a check payable to John G. Flanigan in the sum of $1,500.00 (see testimony of Jacobson, State of Case, p. 64) and also executed an assignment of rents by the complainant to John G. Flanigan and William J. Cogan in the sum of $2,000.00 (printed State of Case, p. 24).

This check and assignment of rents were executed and accepted in substitution for the $3,000.00 check, payment of which had been defaulted by the complainant on or about January 2, 1928.

Regarding his condition of health on January 11, 1928, the said Jacobson testified (State of Case, p. 63):

> "Q. There was nothing the matter with your mind between January 5th and January 14th, was there? A. Well, I had quite some fever yet.
>
> "Q. There was nothing the matter with your mind, was there? A. No, but I was choking, I had something the matter with my chest, just like choking and my heart was affected."

The said Jacobson made no comment criticizing in any way the settlement of December 30, 1927, at the time he signed the further check for $1,500.00 and the assignment of rents on January 11, 1928, and the defendants respectfully submit that the execution of these papers constituted a reaffirmance of the settlement of December 30, 1927.

POINT FIVE.

The Court of Chancery properly dismissed the bill of complaint upon the merits.

The defendants herein made a motion to dismiss the bill of complaint shortly after the testimony of the complainant's affiants was taken before a Master of the Court of Chancery, upon the ground that there was no equity in the bill of complaint and the further ground that the bill of complaint should be dismissed upon the merits and the further ground that out of the mouth of the complainant it is made to appear beyond peradventure that there is no basis in fact for the bill and that the complainant cannot produce proofs thereunder or under an amended bill that will entitle it to the remedy it seeks.

At the time such motion was made and considered by the Court there was before the Court the bill of complaint with its supporting affidavits and 113 pages of testimony, most of which is that of the President of the complainant company, Jacob Jacobson, and his attorney, David Bobker. The Court also had for consideration answering affidavits submitted by the defendants John G. Flanigan and William J. Cogan and by George T. Winner, a Deputy United States Marshal; the Court also had for its consideration copies of the various papers executed by or on behalf of the complainant on December 30, 1927, and complained of by the bill of complaint herein.

The complainant in its brief to this Court complains of the brevity of the opinion of the learned Vice-Chancellor dismissing the bill of complaint, which is as follows:

> "There is also a motion before the court to dismiss the bill. The crux of the bill is that one Jacobson executed certain papers under

duress. Jacobson and his solicitor were examined before a master and I have read the testimony. I cannot see that there was any duress, and I believe Jacobson executed the papers voluntarily and with full knowledge of their contents."

Jacobson and his solicitor were two of the persons whose affidavits were annexed to the bill of complaint and pursuant to the rules of the Court of Chancery, the defendants availed themselves of the right to examine Jacobson and his attorney covering the matters and things contained in their affidavits annexed to the bill of complaint. Manifestly, if the testimony given by those two men was productive of glaring inconsistencies between the statements contained in their respective affidavits and their respective testimony, they are bound by such inconsistencies and are bound by any misstatements contained in the affidavits and corrected by their testimony and the matter before the Court consists then of the bill of complaint and its affidavits and the testimony purporting to support the contents of their affidavits.

In the case of *Straus* v. *Rabe,* 97 N. J. Eq. 208, affirmed by the Court of Errors and Appeals in 98 N. J. Eq. 700, Vice-Chancellor BENTLEY stated:

> "The defendants have given notice of a motion to strike out the bill not upon the usual grounds that it is inartificially drawn and does not express a cause of action, but because out of the mouth of the complainant himself it is made to appear beyond peradventure that there is no basis in fact for the bill and that the complainant cannot produce proofs thereunder or under an amended bill that will entitle him to the remedy he seeks."

The defendants adopted the foregoing language in making a motion to dismiss the bill of complaint herein, since it was peculiarly applicable in this

case and such motion was made in addition to the usual motion to strike out the bill of complaint.

To indicate to this Court the utter lack of equity and the bad faith of the complainant and the impossibility for the complainant to be successful on final hearing, the defendants draw the attention of this Court first to the letter written by the defendant, William J. Cogan, to Milton Unger, at that time attorney for the complainant, on December 6, 1927, offering virtually the exact terms of settlement of all litigation between the parties, which was actually reached on December 30, 1927, as indicated by the various papers executed by the complainant. They further draw the attention of this Court to the fact that The Fordham National Bank in New York obtained its judgment referred to in the first paragraph of the bill of complaint herein on November 15, 1927, and were in a position to move for summary judgment in the United States District Court in the action referred to in paragraphs two and three of the bill of complaint herein on December 1, 1927, when the said Milton Unger requested the said William J. Cogan to secure an offer of settlement which would extend to the complainant six months' time within which to pay. These defendants also point out to the Court the admission of Jacob Jacobson (State of Case, p. 46, fol. 10) that the words "Jacob Jacobson" on the note referred to in paragraph numbered five of the bill of complaint herein was in his handwriting, although he alleges in said paragraph that said note was a forgery. These defendants also point out to this Court the failure of the complainant to annex a copy of a single one of the papers executed by the complainant on December 30, 1927, to its bill of complaint, although it seeks by the bill of complaint to set aside each and all of said papers as executed under alleged

duress, and these defendants confidently assert that the reason why no copy of any such paper was annexed to the bill of complaint is that all of them were executed before David Bobker, as an attorney-at-law of New Jersey, who is the attorney who represented the complainant at the settlement now complained of.

A further reason confidently asserted by the defendants for the failure of the complainant to annex copies of said papers lies in the fact that Ernest Philburn, as Secretary of complainant Metropolitan Lumber Co., executed and delivered a certificate that the stockholders and Board of Directors had authorized the execution of the bond, mortgage and assignment of rents made December 30, 1927, by Metropolitan Lumber Co., to The Fordham National Bank in New York and also executed a certificate that he was the duly authorized agent of the complainant for the collection of its rents and was authorized to deposit $3,000.00 in the Commercial Trust Company of New Jersey as soon after January 1, 1928, as that amount of rents were collected to meet the check given the defendants John G. Flanigan and William J. Cogan as counsel fee on December 30, 1927, and both of said certificates were acknowledged before David Bobker, attorney for the complainant, Metropolitan Lumber Co.

The bill of complaint alleges (State of Case, p. 3, fol. 20, and State of Case, p. 4, fol. 30) and the supporting affidavit of Jacob Jacobson (State of Case, p. 13, fol. 30, and State of Case, p. 15, fol. 10) claim and allege that if the levy by the Marshal to collect the amount of the judgment held by The Fordham National Bank in New York was made, it would ruin the business of the Metropolitan Lumber Co., and those various allegations are now referred to for the purpose of indicating

to this Court the emptiness and misstatement of the bill of complaint which is clearly indicated by the testimony of Jacob Jacobson (State of Case, pp. 78-79, fols. 20 to 40 and 1 to 10), where the said Jacob Jacobson, under oath, swore that he was trying to save the lumber business and yet could not assert that the lumber then stored by the company on Wilson Avenue was worth over $100.00.

The affidavit of George T. Winner, United States Marshal (printed State of Case Supplement, p. 18), asserts that on December 28, 1927, he went to the Wilson Avenue lumber yard of the complainant, Metropolitan Lumber Co., for the purpose of levying on behalf of The Fordham National Bank of New York, covering its judgment against the Metropolitan Lumber Co., and could not find $1.00 worth of lumber to levy upon.

As stated in the opinion of the learned Vice-Chancellor, the crux of the bill of complaint is duress, alleged to have been exercised upon the officers of the complainant in connection with the execution of a bond and mortgage and an assignment of rents made by Metropolitan Lumber Co. to The Fordham National Bank in New York on December 30, 1927, to secure a debt of $26,614.17.

This is answered by Point Three herein. In addition thereto the defendants wish to refer to testimony of David Bobker (State of Case, p. 95) where he testified that he stated as a reason for requesting an adjournment until the following day, he had an engagement that evening and says he also stated that Jacobson was sick. Manifestly, if what he meant to convey was that Jacobson was not in a sufficiently good condition of health or clarity of mind, he would at once assert that as the reason and not couple it with a statement that he had an engagement for the evening. He also

testified (State of Case, p. 97) that he had gone into Jacobson's house for the execution of the papers and Jacobson himself testified (State of Case, p. 72) that Bobker came in alone for the execution of the papers.

The real and true facts of this complete transaction are set forth in detail in the affidavits (State of Case Supplement, pp. 4-33).

It is confidently asserted that the Court need only read the testimony of Jacob Jacobson and of David Bobker to be assured that the bill of complaint is utterly without merit and was properly dismissed.

Counsel for complainant in his brief submitted to this Court attempts to inject a new issue which he designates as mistake, but since there is no allegation of mistake in the bill of complaint and no possible shadow of mistake as a matter of fact, such contention will be ignored except for this casual reference thereto.

Wherefore, these defendants pray this Court to affirm the decision of the learned Vice-Chancellor in its entirety.

Respectfully submitted,

JOHN G. FLANIGAN,
Solicitor for and of Counsel with
Defendants-Appellees.

WILLIAM J. COGAN,
Of Counsel with Defendants-Appellees.

93.

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

New Jersey Court of Errors and Appeals

Between

METROPOLITAN LUMBER COMPANY, a corporation of New Jersey,
Complainant-Appellant,

and

THE FORDHAM NATIONAL BANK IN NEW YORK, *et als.*,
Defendants-Appellees.

On Bill, etc.

On Appeal from the Court of Chancery.

BRIEF ON BEHALF OF COMPLAINANT-APPELLANT.

Statement of Facts.

This appeal presents for review a decree in the Court of Chancery dismissing a bill of complaint filed in this cause.

A bill was filed to fix the taint of duress upon a certain mortgage and assignment of rents executed by the complainant. It contained a prayer for a temporary restraint enjoining transfer of these last mentioned instruments, together with a prayer for general relief.

The learned Vice-Chancellor issued a temporary restraint enjoining the defendant, the Fordham National Bank in New York, and the individual defendants from taking any steps to enforce the provision of the instruments mentioned above, requiring them at the same time to show cause why that restraint should not be made permanent.

Thereafter application was made for a testimonial examination of the affiants whose affidavits accompanied the complainant's bill. By further order it was provided that those persons who submitted affidavits on behalf of the defendants, including the two individual defendants, should also be similarly examined. This examination was had and the testimony was forwarded to the Vice-Chancellor, who proceeded, without hearing in open court or further testimonial examination, to decide the case, and he advised a decree dismissing the bill, together with the restraint formerly issued.

In his opinion, the learned Vice-Chancellor rested his decision upon several grounds. In this appeal, therefore, the question to be determined is:

Did the Court of Chancery commit an error in dismissing the bill of complaint, and its restraining order?

More particularly, the questions requiring consideration are these:

1. Was the bill of complaint properly verified?

2. Was the Court of Chancery warranted in dismissing the bill upon the merits?

3. Has the Court of Chancery power and authority to issue such a restraint as was sought and granted in this cause?

Three points will be made in this brief:

1. The Bill of Complaint was sufficiently verified to warrant a refusal to dismiss it upon the ground of improper verification.

2. The Court of Chancery erred in dismissing the Bill upon the merits.

3. The Court of Chancery had power and authority to issue the restraint heretofore imposed in this cause.

POINT ONE.

The Bill of Complaint was sufficiently verified to warrant a refusal to dismiss it upon the ground of improper verification.

Annexed to the bill of complaint and in addition to the general verifying affidavit of Jacob Jacobson are the lengthy affidavits of Jacobson and his attorney, and physicians. These affidavits formed part of the bill of complaint as filed. An examination of them (S. C., pp. 11 to 23) will disclose that all of the essential allegations and many of the evidentiary facts set forth in the bill of complaint are amply verified by persons who have actual knowledge. In the affidavit of Mr. Jacobson the facts concerning the financial situation of the Metropolitan Lumber Company are further set forth with particularity, together with the claims and contentions of the defendants. In that affidavit it is stated on information and belief that the individual defendants had certain negotiations with Mr. Jacobson's attorney, David Bobker. These statements on information and belief must of course have their source in knowledge imparted to Mr. Jacobson by Mr. Bobker. The affidavit of the last named individual set forth on pages 20-23 in the State of the Case, supports the statements made by Mr. Jacobson on information and belief, and establishes in a sufficient form that portion of the bill which sets up the endeavor of the defendants to secure the mortgage and assignment of rents.

The affidavits of Doctors Rawitz, Teeter and Sobin support the statements made in the bill of

complaint respecting the physical condition of Mr. Jacobson.

The rules of the Court of Chancery warrant the form in which this matter was presented. Rule 199 provides:

> "199. Affidavits on injunction.
>
> Where injunctive relief is prayed, and the facts which are relied upon for injunction are not within the knowledge of the complainant, such facts shall be verified by the oath or affirmation of some person who has knowledge of the facts, unless under the peculiar circumstances of the case the court shall dispense with such additional verification."

This rule was strictly compiled with in the instant case. The formal, short, verifying affidavit was annexed to the bill, but immediately after it was the lengthy and particularized affidavit of Mr. Jacobson. The principal allegations of the bill have been verified and the court, upon a complete examination of all the affidavits is able to assign a statement of facts contained in those affidavits to every ultimate fact pleaded. This case is not one of an attempt to secure an injunction upon a common verifying affidavit. The short affidavit found in the bill in this case may be ignored inasmuch as affidavits in the proper form also accompanied the bill.

In *Youngblood* v. *Schamp,* 15 N. J. E. 42, Chancellor Green made the following very pertinent statement, which would seem to support the procedure adopted in this case:

> "It is rarely, if ever, that the right to an injunction can rest upon the acts of the complainant, and it is in relation to those, alone, that the affidavit professes to be founded on *knowledge.* As to the acts of all others, it is founded on belief only.

> It is not necessary that the facts should be proved by the affidavit of the complainant. Where the material facts are not within his knowledge, they should be verified by the oath or affirmation of some person who has a knowledge of the facts; or duly verified copies of private instruments or of records may be annexed to the bill, where such is the appropriate mode of proof. *Bank of Orleans* v. *Skinner,* 9 Paige 305; Rule IX, s. 11; Nix Dig. 90, s. 15.
>
> There is a class of cases, as for example bills charging fraud, and praying a discovery, where, in the very nature of things, positive proof cannot be expected. In such cases the additional verification may be dispensed with, and the injunction issue upon the affidavit of the complainant, founded on his belief alone. *Attorney General* v. *Bank of Columbia,* 1 Paige 511; *Campbell* v. *Morrison,* 7 Paige 157.
>
> The bill is usually sworn to by the complainants, or one of them. But if he be absent, or his affidavit for any reason cannot be procured, it may be sworn to by the attorney of the complainant, or by any person acquainted with the facts. 1 Smith's Chan. Pr. 595; 3 Daniell's Chan. Pr. 1800; 1 Hoffman's Chan. Pr. 79; 3 *Ibid.* 18, No. 21."

POINT TWO.

The Court of Chancery erred in dismissing the Bill upon the merits.

The lower court dealt with the sufficiency of the bill with great brevity. The opinion of the learned Vice-Chancellor discloses the following considerations respecting the motion to dismiss the bill:

> "There is also a motion before the court to dismiss the bill. The crux of the bill is that one Jacobson executed certain papers under duress. Jacobson and his solicitor were ex-

amined before a master and I have read the testimony. I cannot see that there was any duress, and I believe Jacobson executed the papers voluntarily and with full knowledge of their contents."

The learned Vice-Chancellor apparently regarded the question of duress as though he were hearing the case as on final hearing. His reliance is placed, as he states, upon a reading of the testimony of Jacobson and his solicitor, Mr. Bobker. But the question before the court was whether the bill, admitting all the facts stated in it for the purposes of the motion, presented a cause of action. This, of course, is the effect of a motion to strike out the bill for the grounds set forth in the notice served in this cause (S. C., p. 115). The sole question before the Vice-Chancellor was whether the bill lacked equity. He could determine no other question. No order of reference had been made. It was the duty of the learned Vice-Chancellor to consider the allegations of the bill of complaint, which were properly pleaded, as admitted for the purpose of the motion.

It is elementary that the notice of motion to strike a bill for the reason here assigned by the defendants is the prototype of the demurrer of former years and has the effect stated above.

Instead, the Vice-Chancellor proceeded with an examination of the testimony in order to ascertain whether or not there was, in fact, duress. The witnesses were not examined before the court, but before a master. The complainant was never given an opportunity to present a complete case, for it was never understood that such was the purpose of the testimonial examination of the affiants. The court was entirely without authority to decide the case as it did.

If the learned Vice-Chancellor dealt with the case as being purely a motion to dismiss, and read the testimony in order to find whether or not credence should be placed in the statements made in the affidavits accompanying the bill, certainly the presented testimony discloses every evidence that the bill should have been sustained.

In addition to these considerations should be noted the disregard by the court (in considering the meritorious phase of the case), of the issue raised in addition to that of duress, namely mistake.

The testimony discloses that while the complainant thought that it was giving a mortgage and assignment of rents for the purpose of securing its indebtedness, the defendants' idea was that these instruments were given as an accord and satisfaction for a portion of the indebtedness.

An examination of the testimony of the witnesses of the complainant will disclose that it was the idea of the complainant that this mortgage and the assignment of rents was given as security merely. Jacobson secured an agreement (S. C., p. 23), by the terms of which the mortgage was not to become payable until six months from the date thereof, although upon its face, it was payable upon demand. The testimony of Mr. Flanigan in this connection is pertinent (S. C., p. 107):

"Q All right. Now, is it your understanding that the mortgage—some $26,000 is that the amount of it—was a mortgage given to secure to the Fordham Bank the payment of the indebtedness that may be owing to it from the Metropolitan on this judgment already covered and the three suits that are pending, or that it was given in full payment of all of the controversies between the parties

on those instructions? A The mortgage was part of the full settlement, that is to say, the Metropolitan Lumber Company wanted time on the payment of the sixteen thousand dollar judgment and they also wanted the terms of the settlement of all matters in controversy, as a letter of December the 6th will show, and a conversation with Mr. Unger, and so that mortgage was given along with an assignment of rents as part and parcel of that settlement. In addition to that it was agreed that we would release the sixteen thousand dollar judgment.

Q Levy under what judgment? A Yes. Would give a satisfaction of judgment upon the delivery of a confession of judgment for $26,000 or whatever the amount of the three matters in controversy would total; and that all of these were part and parcel of the settlement. The mortgage in itself was a demand mortgage in which the debt was admitted, and which mortgage was one of the mediums of settlement. If the mortgage was anywhere jeopardized, in the opinion of the bank, it did not have to wait six months, but might pursue its remedy if it saw fit under that mortgage.

* * * * * * * *

Q In other words, there was supposed to be a settlement of controversies? A Between the parties.

Q According to your understanding? A Yes.

Q When was this warrant for satisfaction of judgment to be given? A It was to be given, as I remember it, upon the delivery of satisfaction—upon a delivery.

Q And confession? A And confession on judgment. You have a paper—at least, if you have not, Mr. Bobker has a paper in which that is recited. That will speak for itself.

Q When was the confession of judgment to be obtained? A At our leisure. There was no special time as I remember it. The writing will bear that out.

Q Was that confession part of the settlement? A No, I wouldn't say it was part of the settlement, but Mr. Bobker thought for business reasons it might be well to have that judgment released, and we saw no reason why it should not be done, why it should not be given provided we were in the position where we could immediately enter judgment for the full settlement.

Q Well, at the time when these arrangements were made, which you say were for settlement, did you make any request that the appeal be withdrawn that they had taken? A Well, we considered that all of the matters in controversy were then concluded excepting that we were to have the right to proceed under our mortgage and the assignment of rents or upon the confession of judgment, if and when it was made.

Q Well, were there any arrangements made whereby a discontinuance of the Chancery suit, which the Metropolitan had brought on the fourth note that was in controversy—was there any discussion of a discontinuance of that suit? A Well, there was not specifically any suit excepting that the whole thing—the whole matter was to be concluded and was considered settled. We did not think that—none of us thought there would be any further litigation on account of any of the matters there pending, that they were settled once and for all by the terms of this settlement.

Q Was there any discussion about a withdrawal of answers and counter-claims that had been filed in the suit— A There was not any discussion as to what would have to be done, if anything, to formally conclude this matter. It was understood between the parties that this was a settlement, and that either of the parties would do anything that would be necessary to settle the matter. There was not anything definitely decided upon in that regard. It was considered that the matter was settled and anything necessary to effect that settlement would be done.

Q In one of the suits on the note was there not a counter-claim filed by the Metropolitan against the plaintiff in the note action? A As I remember it, in the second suit on the five thousand dollar note or the note totaling five thousand dollars, there was a counter-claim filed, although I wouldn't be sure.

Q I don't know just what it was? A I think there was a counter-claim in one of the suits.

Q Did you consider it necessary or advisable to have a release, general release from the Metropolitan to your client in order to carry out that settlement? A We consider the matter settled and that either of the parties would, as a matter of course, do whatever was necessary to effect that settlement in the way of signing papers or what not."

This matter the learned Vice-Chancellor entirely overlooked, and if he was warranted in going into the merits of the case, certainly this phase of it should have been considered. Especially is it desirable that this be done when it is noted that no final hearing such as is usually accorded to litigants was had in this case, at which a complete case could be developed.

POINT THREE.

The Court of Chancery had power and authority to issue the restraint heretofore imposed in this cause.

The matters contended for by the appellant in Points One and Two above are entirely independent of whether or not there is any merit in the portion of this brief about to be considered. If the dismissal of the restraint was proper, certainly the dismissal of the bill was not and the cause should, in any event, be remanded for further action in the Court of Chancery.

Again, the restraint if invalid, so far as the National Bank was concerned, was certainly proper as against the individual defendants. It should have been made permanent against them. The right of the Court of Chancery to grant a restraint against some, but less than all alleged delinquent defendants is undoubted.

Such a restraint as the one imposed in these proceedings is proper, even as against the National Bank, before final decree. The State Governments, in becoming parties to the United States Constitution, did not strip themselves of their sovereignty to such an extent that they cannot issue an *ad interim* restraint against a National Bank respecting a bond and mortgage secured for that bank by its attorneys, in its ordinary business dealings within the State.

The Act of Congress considered by the learned Vice-Chancellor is properly applicable to restraints imposed upon a Federal Bank in connection with its governmental, as distinguished from its business enterprises. It does not extend to the limits which would render it applicable to this case. State Courts have even been permitted to look into the affairs of National Banks where the question involved was one concerning the internal management of the bank.

In 3 R. C. L. 689, it is said:

"But in other contingencies, a court of equity, federal or state, with proper parties before it, and in a proper case, has jurisdiction of a national bank and the directors thereof, to compel them to observe their obligations to their stockholders, and has power to appoint a receiver."

See also, in this conection *Richmond* v. *Irons*, 121 U. S. 27; *Grout* v. *First National Bank of Grand Junction*, 48 Col. 557.

It is respectfully submitted that the Act of Congress should be read in connection with the obvious purpose and necessity for the granting to the Federal Government of supremacy in matters relating to national banks.

It is further submitted that an examination of the entire record before the court will certainly warrant the return of the cause to the Court of Chancery, so that complainant may have its rights determined in a manner which will permit a complete exposition of its cause of action.

Respectfully submitted,

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Complainant-Appellant.