INDEX

TESTIMONY.

For Defendant.

EXHIBITS.

		Off'd	P't'd
D. 14.	Note—May 14, 1919.....	49	180
D. 15.	Note—August 15, 1919	51	180
D. 17.	Ledger Account—Jules Mechanic	151	181
P. 1.	Check for $600.00	78,144	183
P. 2.	Check for $1,000.00	78,144	184
P. 3.	Check for $1,000.00	78,144	185
P. 4.	Check for $263.50	78,144	186
P. 5.	By-Laws of Broad and Market National Bank	145	186
P. 6.	Articles of Association of Broad and Market National Bank	145	194
P. 7.	Reports to the Comptroller of the Treasury	151	198

NOTICE OF APPEAL.

Filed January 29, 1925.

Essex County Circuit Court

LOUIS J. BEERS, *Plaintiff,* *vs.* BROAD AND MARKET NATIONAL BANK OF NEWARK, *Defendant.*	*Action at Law.* *Notice of Appeal to New Jersey Supreme Court.*

To Louis J. Beers, Esq., attorney of plaintiff:

TAKE NOTICE that the defendant appeals to the New Jersey Supreme Court from the whole of the judgment entered in this cause.

CHARLES H. STEWART,
Attorney for Defendant-Appellant.

LEBER & RUBACK,
Of Counsel with Defendant-Appellant.

Dated January 29, 1925.

Service of the within notice of appeal is hereby acknowledged this 29th day of January, 1925.

.....,
Attorney for Plaintiff.

Filed January 29, 1925.

JOHN H. SCOTT,
Clerk.

Notice of Appeal.

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

Meyer Ruback, being duly sworn, deposes and says, that on January 29, 1925, at 1 P. M., he served the within notice of appeal upon the within-named Louis J. Beers, by delivering a true copy thereof at the office of said Louis J. Beers to Edward Schilling, an attorney at law associated with and employed by said Louis J. Beers. The said Edward Schilling being then and there in charge of said office at 763 Broad street, Newark, N. J.

MEYER E. RUBACK.

Sworn and subscribed to this
29th day of January, 1925,
at Newark, N. J., before me.

ALBERT W. HARRIS,
Master in Chancery of New Jersey.

Summons.

SUMMONS.

STATE OF NEW JERSEY, *ss.*

To: LOUIS J. BEERS. You are summoned to answer the annexed complaint of the Broad and Market National Bank of Newark, in an action at law in the Essex County Circuit Court, and take notice that unless you file your answer to the said complaint with the Clerk of the Essex County Circuit Court at Newark, within twenty days after the service upon you of this writ and the annexed complaint the plaintiff may proceed in the suit and judgment may be taken against you.

(SEAL)

WITNESS, WORRALL F. MOUNTAIN, Judge of the Essex County Circuit Court at Newark, this 4th day of August, 1923.

JOHN SCOTT,
Clerk.

CHARLES H. STEWART,
Attorney for Plaintiff.

COMPLAINT.

Filed.

ESSEX COUNTY CIRCUIT COURT.

BROAD AND MARKET NATIONAL BANK OF NEWARK, a corporation, *Plaintiff,*	*Action at Law.*
vs.	*Complaint.*
LOUIS J. BEERS, *Defendant.*	

Plaintiff, a corporation organized and existing under the laws of the United States and doing business at 800 Broad street, Newark, New Jersey, says that:

1. On January 25, 1923, defendant, Louis J. Beers, made his promissory note of that date for fifty-eight hundred dollars ($5,800), payable to the order of himself four months from date at the Broad and Market National Bank of Newark, a true copy of which note is hereto annexed and made a part hereof and marked Schedule "A."

2. The payee afterwards endorsed said note to plaintiff for value.

3. On the day when the same fell due, May 25, 1923, it was presented for payment at the place where it was payable and payment was not made, whereupon the sum of nine hundred and forty dollars and eighty-seven cents ($940.87) being the amount of the account of de-

fendant on deposit with plaintiff, was applied to said note, thereby leaving a balance of four thousand eight hundred and fifty-nine dollars and thirteen cents ($4,859.13) unpaid.

4. Said note was protested on May 25, 1923, the protest fees being two dollars and twelve cents ($2.12) a copy of the certificate of protest being hereto annexed and made a part hereof and marked Schedule "B."

5. On July 2, 1923, there was applied on said note eight hundred and ten dollars ($810) being the amount of dividends on shares of stock of plaintiff standing in the name of defendant, thereby reducing the principal sum due on said note to four thousand and forty-nine dollars and thirteen cents ($4,049.13).

6. Said note is now the property of plaintiff and is unpaid except for the two payments of nine hundred and forty dollars and eighty-seven cents ($940.87) and eight hundred and ten dollars ($810) aforesaid.

Plaintiff demands as damages four thousand and fifty-one dollars and twenty-five cents ($4,051.25) with lawful interest on $4,861.25 from May 25, 1923, to July 2, 1923, and on $4,051.25 from July 2, 1923, to date of judgment and costs of this suit.

CHARLES H. STEWART,
Attorney for Plaintiff.

Complaint.

Schedule "A."

"B&M&B $5800.00 Newark, N. J. January 25, 1923. Four months after date I promise to pay to the order of myself .....

Fifty eight hundred and 00/100 Dollars at the Broad & Market National Bank of Newark,

Value received

(Signed) LOUIS J. BEERS.

Due May 25"

Endorsement:

"Louis J. Beers. Pd 940.87—5.25"

Revenue stamps affixed 17c

Schedule "B."

UNITED STATES OF AMERICA,
STATE OF NEW JERSEY,
COUNTY OF ESSEX,
CITY OF NEWARK. } *ss.*

On the 25th day of May, in the year of our Lord One Thousand nine hundred and twenty three, at the request of the Broad and Market National Bank of Newark, I, F. J. Kugelman, Notary Public, duly commissioned and sworn did present the original Note above annexed at the Counter of the Teller thereof in attendance The Broad And Market Nat'l Bank, Newark, N. J. and demanded payment of said Note which was refused. Whereupon, I, the said Notary, at the request aforesaid, did Protest, and by these presents do publicly and solemnly Protest, as well against the Maker and Endorsers of the

Complaint.

said Note as against all others whom it doth or may concern, for exchange, reexchange and all costs, damages and interests, already incurred and to be hereafter incurred for want of payment of the same. And thereupon I did serve notice upon the drawer and endorsers by putting the same on the last day aforesaid in the Post Office of the City of Newark, New Jersey, sealed up with the postage thereon prepaid and directed as follows: viz:

Louis J. Beers. Prudential Bldg, Newark, N. J.
Louis J. Beers. Prudential Bldg, Newark, N. J.

Thus done and protested at Newark, New Jersey.

In Testimony whereof, I have hereunto set my hand and seal the day and year above written.

F. J. KUGELMAN,
Notary Public.

(N. P. SEAL)

Protest	$4,859.13
Fees	2.00
Notices Postage	.12
	$4,861.25

The Broad & Market National Bank of Newark, N. J.

May 25, 1923.

F. J. KUGELMAN,
800 Broad St.,
Newark, N. J.

Recorded in Book 8 of Protests
page 282

Complaint.

Due and legal service of the within summons and complaint acknowledged this 4th day of August, 1923.

LOUIS J. BEERS.

Louis J. Beers:

Sir:

Take Notice that if you intend to make a defense to the within complaint you must file an affidavit of merits within ten days of service of this complaint upon you and an answer within twenty days therefrom, and in default thereof judgment will be entered against you.

CHARLES H. STEWART,
Attorney for Plaintiff.

Affidavit of Merits.

Filed August 13, 1923.

ESSEX COUNTY CIRCUIT COURT.

BROAD AND MARKET NATIONAL BANK, *Plaintiff,* *vs.* LOUIS J. BEERS, *Defendant.*	*Action at Law.* *Affidavit of Merits.*

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

Louis J. Beers, being duly sworn upon his oath according to law, deposes and says:

1. That he is the defendant in the above-entitled cause and believes that he has a just and legal defense to said action on the merits of the case.

LOUIS J. BEERS.

Sworn to and subscribed before me at Newark, N. J., this thirteenth day of August, A. D. 1923.

EDWARD A. SCHILLING,
A Master in Chancery of New Jersey.

ANSWER AND COUNTER-CLAIM.

Filed August 24, 1923.

ESSEX COUNTY CIRCUIT COURT.

BROAD AND MARKET NATIONAL BANK OF NEWARK, a corporation, *Plaintiff,* *vs.* LOUIS J. BEERS, *Defendant.*	*Action at Law.* *Answer and Counter-Claim.*

The defendant, Louis J. Beers, residing at 536 Clifton avenue, in the City of Newark, County of Essex, State of New Jersey, answering the plaintiff's complaint, says that:

1. He admits paragraph one of the complaint.

2. He admits paragraph two of the complaint.

3. He admits paragraph three of the complaint.

4. He admits paragraph four of the complaint.

5. He admits paragraph five of the complaint.

6. He admits paragraph six of the complaint except that he denies that there is anything due to the plaintiff by reason of the fact that plaintiff is indebted to defendant in a greater amount than plaintiff's claim against defendant.

Answer and Counter-claim.

By way of counter-claim against the plaintiff, defendant says that:

FIRST COUNT.

1. During the months of July and August, 1914, defendant paid to the use of the plaintiff and at its request, the sum of $5,000 to one Jules Mechanic and to his creditors which sum of $5,000 the plaintiff promised to repay to defendant with interest.

2. Interest was paid on said sum until March 10, 1915.

3. On March 17, 1919, there was due defendant for principal and interest the sum of $6,419.74.

4. On or about March 17, 1919, plaintiff repaid to defendant on account of the amount due defendant the sum of $1,000.

5. On May 14, 1919, there was due defendant for balance of principal and interest the sum of $5,501.04.

6. On or about May 14, 1919, plaintiff repaid to defendant on account of the amount due defendant the sum of $1,000.

7. The balance of $4,501.04, together with interest from May 14, 1919, has not been paid, although defendant has demanded payment thereof.

SECOND COUNT.

1. During the months of July and August, 1914, defendant, at the special instance and request of the plaintiff, paid to one Jules Mechanic and his creditors the sum of $5,000 upon the

express promise of the plaintiff to repay the same with interest.

2. Interest was paid on said sum until March 10, 1915.

3. On March 17, 1919, there was due defendant for principal and interest the sum of $6,-419.74.

4. On or about March 17, 1919, plaintiff repaid to defendant on account of the amount due defendant the sum of $1,000.

5. On May 14, 1919, there was due defendant for balance of principal and interest the sum of $5,501.04.

6. On or about May 14, 1919, plaintiff repaid to defendant on account of the amount due defendant the sum of $1,000.

7. The balance of $4,501.04, together with interest from May 14, 1919, has not been paid, although defendant has demanded payment thereof.

THIRD COUNT.

1. During the month of July, 1914, one Jules Mechanic was indebted in a large sum of money to the plaintiff.

2. At that time, the plaintiff desiring to secure and save said sums due it from the said Jules Mechanic, by preserving the assets of the said Jules Mechanic, who was in need of money, requested defendant to borrow $5,000 upon his note and to pay the said sum of money to the said Jules Mechanic and his creditors, and

promised to repay to the said defendant the said sum of money with interest.

3. The defendant, at the request of the said plaintiff and on its promise to repay the same, did borrow $5,000 and did pay same to the said Jules Mechanic and his creditors.

4. Interest was paid on said sum until March 10, 1915.

5. On March 17, 1919, there was due defendant for principal and interest the sum of $6,419.74.

6. On or about March 17, 1919, plaintiff repaid to defendant on account of the amount due defendant, the sum of $1,000.

7. On May, 1919, there was due defendant for balance of principal and interest the sum of $5,501.04.

8. On or about May 14, 1919, plaintiff repaid to defendant on account of the amount due defendant the sum of $1,000.

9. The balance of $4,501.04, together with interest from May 14, 1919, has not been paid although defendant has demanded payment thereof.

FOURTH COUNT.

1. On or about November 12, 1917, defendant and plaintiff agreed that there was due from the plaintiff to the defendant on an account stated between them for money advanced by defendant to Jules Mechanic and his creditors at the request of and use of the plaintiff, the sum of $6,001.81, together with interest from that day.

2. On March 17, 1919, there was due upon said account stated for principal and interest $6,419.74.

3. On or about March 17, 1919, plaintiff paid to defendant on said account the sum of $1,000.

4. On May 14, 1919, there was due upon said account stated, for principal and interest $5,501.04.

5. On May 14, 1919, plaintiff paid to defendant on said account the sum of $1,000.

6. The balance of $4,501.04, together with interest from May 14, 1919, has not been paid, although defendant has demanded payment thereof.

FIFTH COUNT.

1. On or about October 14, 1918, at Newark, defendant made and delivered to plaintiff two promissory notes for $6,208.92 and $82.62 respectively, payable on February 14, 1919, with interest.

2. Said notes were accommodation notes given to the plaintiff without consideration and at its request and upon the promise that the plaintiff would pay them at maturity.

3. There was due on said notes for principal and interest on March 17, 1919, the sum of $6,419.74.

4. On or about March 17, 1919, plaintiff paid $1,000 on account of said notes and requested defendant to give plaintiff a renewal accommodation note.

5. On or about March 17, 1919, at Newark, defendant made and delivered to plaintiff a promissory note for $5,419.74, dated February 14, 1919, and payable on May 14, 1919.

6. Said note was an accommodation note given to the plaintiff without consideration and at its request and upon the promise that the plaintiff would pay same at maturity.

7. There was due on said note for principal and interest on May 14, 1919, the sum of $5,501.94.

8. On or about May 14, 1919, the plaintiff paid $1,000 on account of said notes and requested defendant to give plaintiff a renewal promissory note.

9. On or about May 14, 1919, at Newark, defendant made and delivered to plaintiff, a promissory note for $4,501.94 payable on August 14, 1919, with interest.

10. Said note was an accommodation note, given to the plaintiff without consideration and at its request and upon the promise that plaintiff would pay it at maturity.

11. The plaintiff failed to pay said note at its maturity and defendant was compelled to pay and did pay it.

12. Plaintiff has not repaid the same.

SIXTH COUNT.

1. On or about May 14, 1919, at Newark, the defendant made and delivered to plaintiff, his promissory note for $4,501.94 payable on August 14, 1919, with interest.

2. Said note was an accommodation note, given to the plaintiff without consideration and at its request, and upon the promise that plaintiff would pay it at maturity.

3. Plaintiff failed to pay said note at its maturity and defendant was compelled to pay and did pay it.

4. Plaintiff has not repaid the same.

SEVENTH COUNT.

1. Defendant on or about May 25, 1923, was a depositor in the plaintiff bank, and had on deposit with it, in an account subject to withdrawal by check, the sum of $940.87.

2. On May 25, 1923, the plaintiff wrongfully applied the proceeds of said account on the alleged indebtedness of defendant to the plaintiff as set forth in paragraph three of the complaint.

3. Plaintiff has refused to pay over to defendant the said sum of $940.87.

EIGHTH COUNT.

1. On or about July 2, 1923, and for a long time prior thereto defendant was the owner of one hundred and sixty-two shares of the capital stock of the plaintiff bank, which said shares were duly registered in defendant's name on the books of the plaintiff bank.

2. On or before July 2, 1923, the Board of Directors of the plaintiff bank declared a dividend of five per cent. $5.00 per share on its stock, payable July 1, 1923.

3. Defendant thereby became entitled to a dividend of $810.

4. On July 2, 1923, the plaintiff wrongfully applied the proceeds of said dividend on the alleged indebtedness of the defendant to the plaintiff as set forth in paragraph five of the complaint.

5. Plaintiff has refused to pay over to defendant the said sum of $810.

Defendant demands as damages against the plaintiff on the first, second, third, fourth, fifth and sixth counts, $4,501.94 plus interest from May 14, 1919; defendant demands on the seventh count $940.87 and interest from May 25, 1923, defendant demands as damages on the eighth count $810 and interest from July 2, 1923, less the sum of $5,800 (being the claim of the plaintiff set forth in the complaint) and interest from May 25, 1923.

LOUIS J. BEERS,
Attorney of Defendant.

REPLY AND ANSWER TO COUNTER-CLAIM.

Filed September 12, 1923.

ESSEX COUNTY CIRCUIT COURT.

BROAD AND MARKET NATIONAL BANK OF NEWARK, a corporation, *Plaintiff,* *vs.* LOUIS J. BEERS, *Defendant.*	*Action at Law.* *Reply, Answer to Counter-Claim.*

The plaintiff replying to the defendant's answer and answering defendant's counter-claim says:

1. That it denies so much of paragraph six of the answer of defendant as alleges that the plaintiff is indebted to the defendant in a greater amount than plaintiff's claim against the defendant.

ANSWER TO COUNTER-CLAIM.

Answer to First Count.

It denies paragraphs 1, 2, 3, 4, 5, 6 and 7, excepting that as to paragraph 7 it admits that it has not paid to defendant the said sum of $4,501.04.

Answer to Second Count.

It denies paragraphs 1, 2, 3, 4, 5, 6 and 7, excepting that as to paragraph 7 it admits that it

has not paid to defendant the said sum of $4,501.04.

Answer to Third Count.

1. It admits paragraph one.

2. It denies paragraphs 2, 3, 4, 5, 6, 7, 8 and 9 excepting that as to paragraph 9 it admits that it has not paid to defendant the said sum of $4,501.04.

Answer to Fourth Count.

1. It denies paragraphs 1, 2, 3, 4, 5 and 6, excepting as to paragraph 6 it admits that it has not paid to defendant the said sum of $4,501.04.

Answer to Fifth Count.

1. It admits paragraph 1 of the fifth count, excepting that it says that the note for $82.62 was made on November 14, 1918.

2. It denies paragraphs 2, 3, 4, 5, 6, 7, 8, 9 and 10.

3. As to paragraph 11 it admits that it failed to pay said note at its maturity and says that defendant was obligated to pay the same.

4. It admits paragraph 12.

Answer to Sixth Count.

1. It denies paragraphs 1 and 2.

2. As to paragraphs 3 and 4, plaintiff says that no such note was made. It admits that if any such note was made that plaintiff did not pay the same.

Reply and Answer to Counter-claim.

Answer to Seventh Count.

1. It admits paragraph 1.

2. As to paragraph 2, it admits that it applied the proceeds of defendant's account on his indebtedness to plaintiff, but denies that this was wrongfully done.

Answer to Eighth Count.

1. It admits paragraphs 1, 2 and 3.

2. As to paragraph 2, it admits that it applied the proceeds of said defendant's account on the indebtedness of defendant to plaintiff, but denies that this was wrongfully done.

3. As to paragraph 5 it admits that it has refused to pay over to defendant the sum of $810. It denies that it owes the defendant any moneys whatsoever but realleges that defendant is indebted to plaintiff as set forth in the complaint of this action.

FIRST SEPARATE DEFENSE.

As to Fifth Count.

1. As to paragraph 1, plaintiff admits that on or about October 14, 1918, at Newark, N. J., defendant made and delivered to plaintiff a promissory note for $6,208.92, payable on February 14, 1919, with interest, but denies that on October 14, 1918, it delivered to defendant the promissory note for $82.62, but says that on November 14, 1918, defendant delivered his note for $82.62, payable on February 14, 1919, with interest.

Reply and Answer to Counter-claim.

2. As to paragraph 2 plaintiff says that it was without power or authority to enter into an agreement with defendant to take from him accommodation notes as therein alleged and to promise him at maturity plaintiff would repay to him, the defendant, the amount of said notes and that if any such agreement had been made it would have been *ultra vires* on the part of plaintiff and its officers. It denies the allegations in paragraph 2.

3. As to paragraphs 5 and 7 plaintiff says that on or about February 14, 1919, defendant made and executed his promissory note dated that day and due May 14, 1919, the amount of which note on the due date was to be $5,501.04.

4. As to paragraphs 6 and 10 plaintiff says that it was without power of authority to enter into any such agreement with defendant and that if any such agreement had been made it would have been *ultra vires* on the part of the plaintiff and its officers. It denies the allegations of paragraphs 6 and 10.

SECOND SEPARATE DEFENSE.

As to Sixth Count.

1. As to paragraph 1 of the sixth count, plaintiff says that on May 14, 1919, at Newark, defendant made and delivered to plaintiff his promissory note, payable August 14, 1919, with interest, the amount of which note on the due date was to be $4,570.94.

2. As to paragraph 2 plaintiff denies the same and says that it was without power or authority to enter into any such agreement with

defendant and that if any such agreement had been made with defendant it would have been *ultra vires* on the part of the plaintiff and its officers.

THIRD SEPARATE DEFENSE.

As to Counts 1 to 6 inclusive.

1. During the months of July and August, 1914, plaintiff is informed and believes that defendant was the attorney at law of one Jules Mechanic. That to assist the said Jules Mechanic he endorsed a promissory note in the principal sum of $5,000 bearing date July 9, 1914, and due November 9, 1914, with interest, made by Jules Mechanic and presented the same for discount to the plaintiff and the same was discounted by plaintiff. That on December 31, 1914, said note not having been paid, defendant paid to plaintiff the interest due on the same and renewed the same with a new note made by the said Jules Mechanic and dated November 9, 1914, payable March 9, 1915, with interest and endorsed by defendant and discounted by defendant with plaintiff, in the sum of $5,000. That said note was renewed in the same sum by a new note on March 10, 1915, due July 9, 1915, made by the said Jules Mechanic and endorsed and discounted by defendant. That said note was likewise renewed again on July 14, 1915, and again on November 15, 1915, in the same amount by the same parties, the interest on each of the said successive notes having been paid to plaintiff by defendant at the time of the said renewals. The last of the said successive notes was due in the amount of $5,100 on March 9, 1916.

2. On April 13, 1916, a promissory note was made by the said Jules Mechanic in connection with the adjustment of the said note which was due March 9, 1916. This new note was due July 10, 1916, in the amount of $5,204.55. Said note was endorsed by and discounted by defendant with plaintiff on April 13, 1916.

3. On September 6, 1916, defendant made his promissory note in connection with the adjustment of the amount due on July 10, 1916, on the aforesaid note of Jules Mechanic. This new note was due November 10, 1916, in the amount of $5,187.13 and was discounted by defendant with plaintiff on September 6, 1916.

4. On November 14, 1916, defendant made and delivered his promissory note in connection with the adjustment of the aforesaid note which was due on November 10, 1916. This new note was due March 12, 1917, in the amount of $5,802.68, and was discounted by defendant with plaintiff on November 14, 1916. The amount of this note was increased above the previous amount ostensibly to show arrearages of interest owing from Jules Mechanic to defendant.

5. On March 13, 1917, defendant made and delivered his promissory note in connection with the adjustment of the note due March 12, 1917. This new note was due July 12, 1917, in the amount of $5,901.01 and was discounted by defendant with plaintiff on March 13, 1917.

6. On July 12, 1917, defendant made his promissory note in connection with the adjustment of the aforesaid note due July 12, 1917. This new note was due November 12, 1917, in

the amount of $6,021.97, and was discounted by defendant with plaintiff on July 12, 1917.

7. On November 12, 1917, defendant made his promissory note in connection with the adjustment of the aforesaid note due November 12, 1917. This new note was due March 12, 1918, in the amount of $6,101.84 and was discounted by defendant with plaintiff on November 12, 1917.

8. On March 12, 1918, defendant made his promissory note in connection with the adjustment of the aforesaid note due March 12, 1918. This new note was due July 12, 1918, in the amount of $6,206.42 and was discounted by defendant with plaintiff on March 12, 1918.

9. On July 12, 1918, defendant made his promissory note in connection with the adjustment of the aforesaid note due July 12, 1918. This new note was payable October 14, 1918, in the amount of $6,288.70, and was discounted by defendant with plaintiff on July 12, 1918.

10. On October 14, 1918, defendant made his promissory note in connection with the adjustment of the aforesaid note due October 14, 1918. This new note was due February 14, 1919, in the amount of $6,336.02, and was discounted by defendant with plaintiff on October 14, 1918.

11. On February 14, 1919, defendant made his promissory note in connection with the adjustment of the aforesaid note due February 14, 1919. This new note was payable on May 14, 1919, in the amount of $5,501.04 and was discounted by defendant with plaintiff on February 14, 1919.

Reply and Answer to Counter-claim.

12. On May 14, 1919, defendant made his promissory note in connection with the adjustment of the aforesaid note due May 14, 1919. This new note was payable August 14, 1919, in the amount of $4,570.94 and was discounted by defendant with plaintiff on May 14, 1919.

13. On August 20, 1919, defendant made his promissory note in connection with the adjustment of the aforesaid note due August 14, 1919, in the amount of $4,062 and was discounted by defendant with plaintiff on August 20, 1919.

14. On or about November 17, 1919, the aforesaid note due November 17, 1919, was satisfied in full and the foregoing series of promissory notes brought to a close.

CHARLES H. STEWART,
Attorney for Defendant.

REPLY.

Filed September 20, 1923.

ESSEX COUNTY CIRCUIT COURT.

BROAD AND MARKET NATIONAL BANK OF NEWARK, a corporation, *Plaintiff,*	*Action at Law.*
vs.	*Reply.*
LOUIS J. BEERS, *Defendant.*	

The reply of the defendant to the plaintiff's answer to defendant's counter-claim.

1. The defendant joins issue with the plaintiff on its answer to the counter-claim.

2. He denies paragraph two of the first separate defense.

3. He denies paragraph four of the first separate defense.

4. He denies paragraph two of the second separate defense.

5. He admits the endorsement and making by him of the notes mentioned in paragraphs one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve and thirteen of the third separate defense. He denies that he was or is the attorney of Jules Mechanic, or that he made or endorsed any notes for him, but reiterates that said notes were made and endorsed by him at the request of the plaintiff, as accommodation, and as alleged in the complaint. He denies the other allegations in the third separate defense.

LOUIS J. BEERS,
Attorney *pro se.*

Order.

ORDER.

Filed January 29, 1925.

ESSEX COUNTY CIRCUIT COURT.

LOUIS J. BEERS, *Plaintiff,* vs. BROAD AND MARKET NATIONAL BANK OF NEWARK, *Defendant.*	*Action at Law.* *Order.*

This Court having on application of defendant's attorneys ORDERED that all proceedings on the writ of execution issued in this cause be stayed and it now appearing that the sheriff did immediately prior to the entry of such order post notices of sale under said writ of execution:

It is on this 29th day of January, 1925, ordered that the Sheriff of Essex County forthwith remove all such notices from all places wheresoever the same have been posted by him.

WORRALL F. MOUNTAIN,
Judge.

CHAS. H. STEWART.

ORDER STAYING PROCEEDINGS UNDER WRIT OF EXECUTION.

Filed January 29, 1925.

ESSEX COUNTY CIRCUIT COURT.

LOUIS J. BEERS, *Plaintiff,* *vs.* BROAD AND MARKET NATIONAL BANK OF NEWARK, *Defendant.*	*Action at Law.* *Order Staying Proceedings Under Writ of Execution.*

This matter being opened to the Court by Leber & Ruback, Esqs., of counsel with defendant; and it appearing to the Court that a writ of execution was issued in this cause on January 28, 1925, directed to the Sheriff of Essex County, commanding him to make of the goods and chattels of the defendant the sum of $6,032.55 damages and $64.96 costs, by the plaintiff recovered in this cause, and it further appearing that said defendant has given notice of its appeal to the New Jersey Supreme Court from the whole of the judgment entered in this cause and that a good and sufficient bond, first approved by this Court was furnished by defendant, as required by law:

It is, on this 29th day of January, 1925, ORDERED that all further proceedings on said writ of execution be and the same are hereby stayed and the Sheriff of Essex County is hereby ordered and directed to take no further proceedings under said writ of execution.

WORRALL F. MOUNTAIN,
Judge.

Judgment.

JUDGMENT.

ESSEX COUNTY CIRCUIT COURT.

34605 BROAD AND MARKET NATIONAL BANK OF NEWARK, a corporation, *Plaintiff,* *vs.* LOUIS J. BEERS, *Defendant.*	*Action at Law.* *Verdict by a Jury.* *Judgment for Defendant.*

Damage	$6,032.55
Costs	64.96
Total	$6,097.51

Louis J. Beers, Attorney for Defendant.

This action was tried before Judge Worrall F. Mountain, with a jury at the Essex County Circuit Court on the twenty-first day of January, A. D. nineteen hundred and twenty-five.

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

They find in favor of the defendant Louis J. Beers, and against the plaintiff Broad and Market National Bank of Newark, a corporation, for the sum of six thousand thirty-two dollars and fifty-five ($6,032.55) cents damage.

Whereupon it is adjudged that the defendant recover of the plaintiff the sum of six thousand thirty-two dollars and fifty-five cents and costs which are taxed at the sum of sixty-four

Certificate of Clerk.

dollars and ninety-six cents making in the whole the sum of six thousand ninety-seven dollars fifty-one cents.

Judgment entered and signed January 21, 1925.

WILLIAM S. GUMMERE,
Judge.

JOHN H. SCOTT,
Clerk.

ESSEX COUNTY CLERK'S OFFICE.

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

I, John H. Scott, Clerk of the Circuit Court, in and for the County of Essex in the State of New Jersey,

DO HEREBY CERTIFY That the foregoing is a true and correct copy of all the proceedings in the notice of appeal in the case of Broad and Market National Bank of Newark, plaintiff, *vs.* Louis J. Beers, defendant, and the same is taken from and compared with original copies of all proceedings and as the same now remains on the files of said office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the (SEAL) official seal of said Court and County at Newark, N. J., this 10th day of February, A. D. 1925.

JOHN H. SCOTT,
Clerk.

Opening.

ESSEX COUNTY CIRCUIT COURT.

January 20, 1925.

THE BROAD AND MARKET NATIONAL BANK OF NEWARK, a corporation,

vs.

LOUIS J. BEERS.

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

For the plaintiff appears Charles H. Stewart, Esq.

For the defendant appears Merritt Lane, Esq.

(A jury is called and sworn.)

Mr. Stewart: Mr. Lane and I have come to an agreement with reference to the note sued upon. The note is to be considered as paid. The statement in Mr. Beers counter-claim relating to the taking of $940.70 and the amount of dividends mentioned in the counter-claim as applied to the payment of this note, are admitted as properly applied, and the counter-claim is now a suit to recover moneys mentioned in the notes.

The Court: Wait a minute. It is admitted that the moneys taken for dividends, I suppose on stock, were properly applied on these notes mentioned in the complaint.

Mr. Stewart: Yes, and the counter-claim is now based on the note of $5,000 mentioned in

the first count. I think the other counts follow on the $6,208 note mentioned in the fifth count.

The Court: Just a minute. Let me get that. In the first count?

Mr. Lane: That complaint is in such an involved form, having six or seven different counts that it seems to me it would simplify the situation if I should say now that the counter-payments claimed are for $500 which on August 15, 1919, was charged against our account as part payment for a note of $4,501.94, dated May 14, 1919, payable three months after date, and for $4,000 charged against our account November 15, 1919, in payment of a note dated August 15, 1919, for $4,000 payable four months after date. That is the counter-claimant's claim.

Mr. Stewart: Those are the ultimate results of the notes mentioned in your other count?

Mr. Lane: Yes.

(Mr. Lane opens for the defendant as plaintiff on the counter-claim.)

(Mr. Stewart opens for the plaintiff as defendant on the counter-claim.)

Mr. Lane: I have here examination papers taken before trial, under the seal of the Master. I desire to offer the testimony in the examination before me of Mr. Williams, president of the Broad & Market National Bank. I don't know whether you want me to open it or hand it to the Court.

The Court: You open it. What is his first name?

Mr. Lane: Francis Williams.

With the permission of the Court I will read. This is the examination by us:

"Q Mr. Williams, you are the president of the Broad and Market National Bank and have been since January 1, 1916? A Yes. Q You are familiar with the note or notes referred to in my counter-claim filed to the suit of the bank against me? A Yes. Q On March 15, 1919, you caused to be credited to my account the sum of $1,000 to be credited to that note? A Yes. Q And again on May 14, 1919, did you cause to be credited to my account the sum of $1,000 to be applied in reduction of that note? A I caused to be applied to your account the sum of $1,000. Q On the days on which you caused to be credited to my account the two deposits of $1,000 each, Mr. Schilling had been to see you about the note referred to in my counter-claim? A I cannot remember that. Q Will you say that he did not call on you on that day? A No, I will not. I will simply say I do not remember. Q That is the note that was formerly known as the Mechanic note? A Yes, that is the Mechanic note. Q The note just referred to fell due on February 14, 1919? A Yes. Q And when was a note given in renewal of that note, either in whole or in part? A On the same day. Yes, it went to your credit March 17, 1919, for $5,419.74. Q Mr. Williams, the note which fell due February 14, 1919, was renewed by the giving of a note of that date in the sum of

$5,501.04, and which was credited to my account on March 17, 1919? A Yes. Q Is it not true that the $1,000 which you credited to my account on March 17, 1919, was to make up the difference between the amount of the note which fell due February 14, 1919, in the sum of $6,208.92 and interest, and $81 and interest and the note given by me bearing date February 14, 1919, and credited to my account on March 17, 1919, the day on which you caused to be credited to my account the sum of $1,000? A Yes, it is true. Q That note became due on May 14, 1919, did it not? I mean the note for $5,419.74? A Yes. Q And the amount due on that day, May 14, 1919, was $5,501.04? A Yes. Q For principal and interest? A Yes. Q On that day, that is on May 14, 1919, you caused to be credited to my account the sum of $1,000? A Yes. Q And you took from me a note for $4,501.94? A Yes. Q And this note was in renewal of the note that fell due on May 14, 1919, in the sum of $5,419.74? A That is right. Q Is there any difference between Francis Williams, Trustee account and Francis Williams No. 2? A Yes. Q What is the source of the funds that were credited to the account of Francis Williams No. 2? Witness refuses to answer on advice of counsel. Q The two checks, each in the sum of $1,000 and which were credited to my account, as you have been testifying, were drawn on your Francis Williams No. 2 account? A Yes."

Louis J. Beers, direct.

The Court: Mark it in evidence.

(The paper read was marked D. 1.)

Mr. Stewart: It was a mere matter of courtesy on my part that I let him be examined.

The Court: Do I understand this was an examination simply out of courtesy?

Mr. Stewart: I don't think it makes any difference.

LOUIS J. BEERS, defendant, sworn in his own behalf.

Direct examination by Mr. Lane.

Q Where do you live? A 536 Clifton avenue, Newark.

Q What is your profession? A Attorney at law.

Q How long have you been an attorney at law? A Since June, 1901.

Q In 1914, were you connected in any way with the Broad & Market National Bank? A I was.

Q How? A As a director.

Q How long had you been a director of that bank? A I think it was four years.

Q Were you a stockholder? A I was.

Q How much stock did you hold? A 150 shares, I believe.

Q Who was president of the bank at that time? A Christian Fleisner.

Q Did you at that time know Jules Mechanic? A I knew he was a depositor. I knew who he was.

Q Did you have any business relations of any kind with Jules Mechanic prior to 1914? A I

did not represent him. He got a loan from one of my building and loan associations at the suggestion of Mr. Fleisner of the bank. In that transaction I, of course, represented the building and loan. With the exception of that, I had absolutely no relations with him at all.

Q Did you have any business relations with him of any kind, nature, or description? A None whatever.

Q Did he owe you any money, or did you owe him any money? A Excepting on behalf of the bank.

Q I mean personally, as distinct from the bank? A None.

Q Did he owe you any money on account of any business relations of any kind, nature, or description whatever? A No, sir.

Q I show you a paper in writing purporting to be a note dated July 9, 1914, signed "Jules Mechanic" to your order, indorsed by you. Is that your signature on the back of the note? A It is.

Mr. Lane: I offer it in evidence.

(The paper referred to was received in evidence and marked D. 2.)

By Mr. Lane.

Q That is a note for $5,000, payable four months after date at the Broad & Market National Bank. Will you tell us under what circumstances that note came to be executed?

Mr. Stewart: I wish to interpose an objection on the ground that it is immaterial and irrelevant—under what circumstances it was executed.

The Court: How is it irrelevant under the counter-claim?

Mr. Stewart: It is simply a note, an obligation to pay. It does not make much difference under what circumstances it was executed.

The Court: I will admit it.

Mr. Stewart: May I have an exception?

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

Exception noted as ground of appeal.

Q In July, I think it was, 1914, at noon at the bank Mr. Fleisner said to me that "Jules Mechanic owes the bank a large sum of money and he tells me that he is in arrears with the demands of interest on mortgages covering his properties," and that he owed for a lot of materials. There was a certain indebtedness against Mechanic that had to do with that property. Mr. Fleisner said, "We want to give him more money, but we don't want to give it direct to Mr. Mechanic. We want to see that this money is paid to the building and loan associations in a way to conserve it and to protect his assets," which consisted, I believe, wholly of real estate in Newark. I at first demurred and he said, "You must do this for the bank," and I consented. I indorsed the note. The proceeds of the note were applied to my account; and then I had Mr. Schilling of my office open an account in the ledger, which he did.

The Court: We will take a recess until two o'clock.

Recess From 1 to 2 P. M.

AFTER RECESS.

LOUIS J. BEERS, resumes the stand.

Direct examination by Mr. Lane (continued).

Q What was done by you with the proceeds of this note of July 9, 1914—Exhibit D. 2? A The note was deposited to my account by the bank. I only knew that from an examination of the pass book afterwards. Then I asked Mr. Edward Schilling of my office to open an account in the name of Jules Mechanic with the Broad & Market National Bank in my ledger. That was done, and the moneys were disbursed by paying the various building and loans that had mortgages on Mechanic's property and by paying some claims that were against Mechanic for, I think, materials furnished him in the construction of some of the properties.

Q When that note became due on November 9, 1914, did you have any conversation with any officers of the bank, or was the note renewed as a matter of course?

Mr. Stewart: I raise the same objection now that I did before. This note and the renewals of it are promises to pay—promissory notes. Any conversation that may have been had with reference to it is immaterial and tending to vary the terms of a written contract. In addition to that I object to it on the ground that any promise made on the part of any officer of the bank has been held by the Supreme Court to be *ultra vires* under the statutes of the United States and the construction of the National Banking Act in a case of this kind.

Louis J. Beers, direct.

The Court: I will admit it.

Mr. Stewart: May I have an exception?

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

Exception noted as ground of appeal.

A I talked with the president of the bank and told him of the situation in the Mechanic matter and he said that the note would be renewed.

By the Court.

Q Was that Fleisner, A Yes, Fleisner.

Q I show you a note dated November 9, 1914, for $5,000, signed "Jules Mechanic," indorsed by Louis J. Beers, and ask you whether that is the renewal. A This is a note that I signed. This is the renewal note.

By the Court.

Q What is the date of that note?

Mr. Lane: November 9, 1914.

The Court: What is the amount?

Mr. Lane: $5,000.

(The paper referred to was received in evidence and marked D. 3.)

By Mr. Lane.

Q When the note became due the next time, which would be on March 9, 1915, did you have any further conversation with any officer of the bank?

Mr. Stewart: I renew my objection on the same grounds.

Louis J. Beers, direct.

Mr. Lane: I am quite content, if the Court is, that counsel may object to this testimony without objecting to each question.

The Court: All right. Objection overruled.

Mr. Stewart: The same exception.

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

Exception noted as ground of appeal.

A Yes, I had a conversation with the then president of the bank concerning it.

By Mr. Lane.

Q Tell us who that was. A Mr. Fleisner. I don't recall just when it was. It concerned the note and the Mechanic's matter; but I do recall that he said that Mechanic hadn't any money and wanted it renewed, and I consented.

Q I show you the note of— A He said this: He said he was trying to work out the Mechanic matter.

Q I show you a note of March 9, 1915, for $5,100, payable four months after date, and ask you whether that is the renewal. A This is a renewal with the accrued interest.

Q Was there any discussion at that time between you and anybody representing the bank with respect to that interest? A Yes, I was not to pay any interest on that note.

Q Why not? A Because it was purely a bank matter; and that was the clear understanding of the president of the bank.

Mr. Lane: I offer that note in evidence.

(The paper referred to was received in evidence and marked D. 4.)

Louis J. Beers, direct.

Q I show you another renewal, another note, July 9, 1915, $5,100, payable four months after date, and ask you whether that is another renewal of the same note (handing paper to witness)? A It is another renewal on the same note.

Q Did you know at the time this note was renewed for $5,100 what had happened to the interest; how they had charged the interest? A Of course. We had a great deal of trouble with the bank, and I left the matter to Mr. Schilling as to the interest. I know that we discovered that they had charged some interest to my account and then Mr. Schilling went over to see—

Q I am talking now of this note of July, 1915. At the time of the renewal of that note did you know what had been done about the interest? A I don't know now what was done about the interest except that the arrangement was that I was not to pay any interest or to pay anything on that note.

Mr. Lane: I offer that note in evidence.

(The paper referred to was received in evidence and marked D. 5.)

The Witness: And I didn't pay any interest or make any payments on it.

By Mr. Lane.

Q I show you a note of November 9, 1915, for $5,100, payable four months after date, drawn by Mr. Mechanic to your order and indorsed by you; and I ask you if that is the renewal of the same note? A It is. May I look at the handwriting of this note just a minute? (Witness examines note.) A It is.

Louis J. Beers, direct.

Mr. Lane: May I offer it?

(The paper referred to was received in evidence and marked D. 6.)

By Mr. Lane.

Q I show you a note dated March 9, 1916, made by Mr. Mechanic to your order, indorsed by you for $5,100; and ask you whether that is the renewal of the note we are discussing? A Yes, sir, this is a renewal note.

Mr. Lane: I offer it.

(The paper referred to was received in evidence and marked D. 7.)

By Mr. Lane.

Q Now, I show you a note dated July 10, 1916, made by you to the order of yourself, indorsed by you for $5,100, payable four months after date; and ask you whether you remember the circumstances under which the form of that note was changed from a note made by Mechanic to you and indorsed by you to a note made by you to yourself and indorsed by you?

Mr. Stewart: My objection, of course, covers this question the same as the preceding ones.

A I do.

By Mr. Lane.

Q Tell us what the circumstances were. A Mr. Fleisner, president of the bank—I think it was—was it he or Mr. Williams—one or the other of the two named men told me that Me-

chanic was no longer in Newark; and I then said, "Write off the note." He said, "No, we can't do it at this time"; so I then, pursuant to their request, gave them this note as an accommodation.

Mr. Lane: I offer it.

(The paper referred to was offered in evidence and marked D. 8.)

By Mr. Lane.

Q I show you a note dated March 12, 1918, made by you to the order of the Broad & Market National Bank for $6,101.84, and ask you whether you remember the circumstances under which the form of that note was again changed to make it a note payable to the bank directly. Do you know anything about that? A I don't know anything about that. When the note became due, I refused to renew it. I refused through Mr. Schilling, who was taking care of these notes by going over to the bank whenever they would become due. I told Mr. Schilling—

Mr. Stewart: I object to that.

By Mr. Lane.

Q Don't tell us what you told Mr. Schilling. He will testify as to that. If you don't know, say so. Do you know of your own knowledge, based upon any conversation which you had with the officers of the bank, what was the reason for the change? A If my memory serves me right—and I think it does—it was discovered that they had charged my account with interest, in going over the account; and I raised that

question; and then whatever was done pursuant to that finding, or after that finding, was done by Mr. Schilling.

Q There is an increase in the amount of that note for $5,100 approximately, to $6,101.84. Do you know what the difference of $1,001.84 represents? A That represents the interest.

Q That was charged to your account? A That was charged to my account. Either had been charged to my account or had accrued. As I recall it, it had been charged to my account, and some of the interest that had accrued had been added to the note; but when this note was made, just about that time it was found that some of the interest had been charged to my account. Whatever had been charged to my account was added to this note. I was then made whole.

Q It was recredited to your account? A Recredited.

Mr. Lane: I offer it in evidence.

(The paper referred to was received in evidence and marked D. 9.)

Mr. Lane: Apparently there is a note missing, a note which should be dated July. Oh, no, I beg your pardon. I offered that note too quickly; and I move to strike from the record for the purpose of clarity all of the testimony of this witness with respect to D. 9. It is out of place.

The Court: Is that the March 12, 1918, note?

Mr. Lane: Yes. It is out of place.

Louis J. Beers, direct.

By Mr. Lane.

Q The note that I thought I had in my hand is a note of November 12, 1916, made by you to the order of the Broad and Market National Bank. I show it to you and ask you whether that is a renewal of the note of July 10, 1916, for $6,000, Exhibit D. 8? A It is.

Q What does the difference between the $5,100 and the $6,000 represent? A It is a renewal note.

Mr. Stewart: You still haven't them in order. There are two notes missing.

Mr. Lane: Yes, but we haven't the notes.

By Mr. Lane.

Q It appears that on November 10, 1916, you gave a note for $5,706, payable four months after date. Will you tell me what the difference between $5,100 and the $5,706 represents? A That was the interest on that note.

Q That had been charged against your account and then recredited, in part at least, and part accrued interest? A I don't know whether at that time they had charged any of the interest against my account. I was of the opinion that when the $6,000 or $6,100 note was given, that it was about then that we had discovered that they had charged my account with some of the interest due.

Q You see, the difference between the note of July 10, 1916, for $5,100 and this note of November 10, 1916, for $5,706 is approximately $600. A That was interest. The interest was always added to the new note. I never paid any interest except when they charged my account

possibly two or three times. Upon discovering that they had done that, and the bank being told of that, they then had a new note made out including that interest and including the war stamps. I never paid the bank any interest.

Q You say the war stamps were also included? A Yes, that is my recollection.

Q It appears that on March 12, 1917, you gave a note for $5,802.68, payable four months after date. I ask you whether the difference between the note for $5,706 and the note for $5,802.68 represents interest and war stamps? A Interest and war stamps.

Q It appears also that on July 12, 1917, you gave to the bank a note for $5,901.01, payable four months after date. Will you tell us what the difference between the note of March 12, 1916, and the note of July 12, 1917, for $5,901.01, represents? A The difference represented the interest due.

Q Now, I show you a note of November 12, 1917, for $6,001.84, payable four months after date, and ask you whether that is the renewal of the previous note and whether the difference is interest and war stamps? A It is a renewal note and the difference represents interest.

Mr. Lane: I offer that.

(The paper referred to was received in evidence and marked D. 10.)

By Mr. Lane.

Q I show you the note which has been referred to, marked Exhibit D. 9, dated March 12, 1918, for $6,101.84, payable four months after date; and ask you whether the difference be-

tween that note and the last preceding one represents interest and war stamps? A It does.

Mr. Lane: I offer it.

(The paper referred to was received in evidence and marked D. 9.)

By Mr. Lane.

Q I show you a note of July 12, 1918, for $6,207.66, payable three months after date; and ask you whether the difference between that and the last preceding note represents interest and war stamps? A It does.

Mr. Lane: I offer it.

(The paper referred to is received in evidence and marked D. 11.)

By Mr. Lane.

Q I show you two notes, each dated October 14, 1918, one payable four months after date, for $6,208.92, and the other payable February 14, 1919, for $81; and ask you what those two notes represent? A The note in the sum of $6,208.92 represents the original principal of $5,000 plus interest. I don't know what the $81 note represents. The notes were made out over at the bank. I signed them, I believe, in the bank.

Q Did you get $82 at that time? Did you get any money on account of either of those notes? A I believe those notes were credited to my account.

Q And charged against you? A Charged against me.

Q Did any resultant money come to you? A No. I believe they charged my account with

the amount found to be due, and then would take the note.

Q I draw your attention to the fact that on this note, D. 11, of July 12, 1918, for $6,207.66, the interest has been figured at $81.04, and also to the fact that this note of October 14, 1918, is for $81. Can you tell me what that note for $81 represents? A It represents interest.

(The two notes last referred to were received in evidence and marked D. 12.)

Q Now, I show you a note dated February 14, 1919, for $5,419.74, payable three months after date to the order of yourself; and ask you whether that is one of the series and what explains the reduction of exactly $1,000 when you compute interest? A There was due on February 14, 1919, $6,419.74. When the notes became due on that day, February 14, 1919, I refused to renew it and then Mr. Schilling went over to the bank. This note was given, I think, in March, 1919—March 17 and 19, 1919—in renewal in part of the note that fell due February 14, 1919.

Q Who paid the difference? A The bank.

Q Did you? A I did not. I renewed it with the understanding—

Mr. Stewart: I object. I have let Mr. Beers go on time and time again stating that the understanding was this and that his position was so and so. All that sort of thing is unfair. I think he should put his testimony in in such a shape that I can object to it. I object to his putting

before the jury evidence that he otherwise could not get there without my objection.

The Court: Just what was the objectionable part of the answer?

Mr. Stewart: He said that the understanding was—

The Court: Strike out that part of the answer.

Mr. Lane: I offer this note of February 14, 1919.

(The paper referred to was received in evidence and marked D. 13.)

By Mr. Lane.

Q I show you a note of May 14, 1919, made by you to the order of the Broad and Market National Bank for $4,501.94; and ask you whether the difference between that note and the previous one, approximately a thousand dollars, was paid by you? A It was not.

Q Have you any knowledge based upon any conversation with any officer of the bank as to how it was paid? A I talked with Mr. Williams, the president of the bank, and he told me that he had cut the note a thousand dollars.

Q Then you didn't pay it? A I did not.

Mr. Lane: I offer it.

(The paper referred to was received in evidence and marked D. 14.)

By Mr. Lane.

Q I show you a note dated August 15, 1919, for $4,000, payable three months after date, made by you to the order of the Broad and

Market National Bank; and ask you whether that is in renewal of the note of $4,500 and also whether you knew at the time how the difference between that and the preceding note—a difference of $500—was paid? A I do.

Q Did you know at the time? A I did.

Q Go ahead and tell us about it. A Mr. Williams said that he could cut the note about $500 and asked me to give him a note for $4,000, which I did.

Q What was the date of that? A August 15, 1919. I gave this note of $4,000 and discovered afterwards that some time—I believe it was—some time after the giving of this note, my account was charged with $500.

Q Was there any talk between you and Mr. Williams at the time of the renewal of the $4,000 note as to any intention on his part to charge your account with that $500? A There was not. He was going to pay it. That was what he said.

Q How soon after the charging was made to your account did you discover it; do you know? A As near as I can recall, it was a matter of weeks. It was discovered by me through someone in the office, through Mr. Schilling.

Q Was it brought to your attention? A It was brought to my attention.

Q Did you subsequently see Mr. Williams? A I did.

Q What was said to him? A I went over to the bank and I said, "Why did you charge my account with this $500?" and he said, "You think your friends have control of the bank, don't you? You can go to Hades." He said, "Go to hell." That was the answer I got when I

requested information as to why my account had been charged.

Mr. Lane: I offer the note for $4,000.

(The paper referred to was received in evidence and marked Exhibit D. 15.)

By Mr. Lane.

Q When the note for $4,000 became due, do you know what was done with it with respect to payment? A It was carried under promises made by Mr. Williams.

Q What promises? A Mr. Williams promised me from time to time that he would take up, I think he said, with the boys or men the writing off of that note. I wasn't then a director.

Q When was it charged against your account; do you know? A It was charged against my account in 1919 or early in 1920.

Q Did you have any knowledge that it was being charged against your account? A I did not.

Q After you discovered that it had been charged against your account did you take any position with respect to the note for $5,800 of January 25, which is referred to in the complaint?

Mr. Stewart: 1923.

A Did I take a position?

Q As to whether you would pay it? A That note, as I recall, was in a larger sum. I don't know whether it was $8,000. Each director donated $8,000 to the bank. I gave a note. A note for $8,000.

Q It had been renewed from time to time? A Yes.

Q And after you discovered that the bank had charged against your account this note, did you take any position with respect to the balance due on the other note? A I did.

Q What was it? A I said that this note of $4,000 plus the $500 which had been charged to my account was not my indebtedness and Mr. Williams knew—this was my conversation with Mr. Williams—and that I did not propose to pay it, that when the note which I had given the bank, this contribution of $8,000 to help the bank take out some paper that I think the first president had made a mistake in taking, would come due, that is, at such a time when the amount due thereon would be equal to the amount that the bank had charged against my account, I would refuse to pay it.

Q Did you? A I did. I called Mr. Williams in May, 1923. We had a fairly lengthy conversation over the 'phone in which I told him among other things that I would not pay that note; that it was time to go to court about it; and I did not pay it.

Q Is that reason which you have now described to us the only reason why you declined to pay the note upon which there was a balance due of some fifty odd hundred dollars, which represented the balance due on your contribution? A That was the only reason. At that time there had been accrued interest on the notes for $4,000 and the charge against my account of $500.

Q So that the one offsets the other? A Offsets the other.

Louis J. Beers, direct.

Q Did you have any conversation with Mr. Williams at any time with respect to the attitude of Mr. Williams as to this note and your ownership of stock in the bank? A I did. Several conversations.

Q When? A The first conversation was some four years ago.

Mr. Stewart: I think I must interpose an objection at this point. I don't see how this is relevant or material at all in the issue. Any conversation which he had with Mr. Williams after the note was given, after the original alleged promise was given which we claim is *ultra vires,* any such conversation with the president would be *ultra vires.* On that ground I base my objection.

The Court: I understand that this conversation was held while these notes were being given to continue the indebtedness.

Mr. Stewart: I understand now that he is talking about the $5,800. It is immaterial to me which way it is; it is still, to my way of thinking, incompetent and immaterial testimony on the ground that any conversation with Mr. Williams would be *ultra vires.*

The Court: I will admit it.

A I believe the first conversation was about five years ago. Mr. Williams then said to me that if I would let him have my stock he would arrange to have that note written off.

By Mr. Lane.

Q Did he say in any subsequent conversation what would happen if you did not let him have your stock?

Louis J. Beers, direct.

Mr. Stewart: I renew my objection on the same grounds.

The Court: I will admit it.

A There was no subsequent conversation—yes, one subsequent conversation did relate to this stock. He didn't say what would happen except by intimation.

By Mr. Lane.

Q What did he say? A That he would insist upon my paying the note.

Q At some time was there a conversation with respect to your stock? A There was.

Q What was it? A Mr. Williams told me as late as six or eight months ago that, if I would let him have my stock, he would arrange to have this note written off.

Q Did you at any time consent to give them your stock? A I did not.

Q Are you still the owner of that stock? A I am, under an arrangement with a friend of mine that it would largely depend upon the construction of the agreement.

Q It doesn't belong to Mr. Williams? A No, it does not.

Q Has any demand ever been made upon you for the payment of the $2,000 or any part of it which represents the two cuts in this note which you yourself did not pay? A Never, never.

Q Has there ever been mentioned that you owed the bank $2,000 more, the amount of those two cuts? A Not a word has ever been uttered by the bank or by any one in behalf of the bank concerning the repayment by me of that $2,000.

Louis J. Beers, cross.

Cross examination by Mr. Stewart.

Q You are a director of the bank how long? A From 1910—I think that is when the bank was organized—until five years ago—five years ago this month.

Q January, 1919, or 1920? A I don't recall which—five or six years ago.

Q During the period of your being a director of the bank you knew that the bank was under the statute compelled to file statements five times a year with the Comptroller of the Treasury? A I don't recall that it had to be filed five times, but I know that statements had to be filed; yes.

Q And those statements set forth the assets and liabilities of the bank? A They do. I know in a general way that they do. They are required.

Q You have signed some of them? A I signed one of them.

Q Is that all you signed? A I think so.

Q Did you sign one during the period that these notes were running? A I don't recall that.

Q You knew that the bank was carrying this note of $5,000 with its increases on its books as an asset of the bank? A I don't know that that was so.

Q When they balance your books and so forth, would not the charge on your books show that? A That they were carrying it as an asset?

Q Yes. A Yes, I suppose they would carry it as an asset.

Q You knew that it was carried on the books as an asset, and that when the national bank

examiner came around, he would see there what would appear to be a valid obligation of yours. A Yes, except that I had several times requested both presidents to write it off and make known the facts, and Mr. Williams wanted to do that.

Q What I asked you is this: You knew that, when the bank examiner came there and looked at the books, he would find that note on the books as a valid asset of the bank? A I don't know that. I had reason to believe that the president would do as he had promised to do—explain the situation—write it off.

Q You knew over a long period of years that he was not writing it off? A I did.

Q You knew over a long period of years that he was not writing it off? A I did.

Q And you knew that during that period of years it must have appeared on the books of the bank as an asset? A If he carried it as such, and I suppose he did.

Q You didn't think that just before the examiner came he would put it on the books as an asset and after the examiner went away that he would charge it off again? A I had reason to believe that he would make known the facts concerning that note.

Q Would they have made any difference? They would still have been on the books of the bank? A I never had it written off, as I wanted it. I didn't want it written off except in the proper way.

Q How did you want it written off? A By doing it openly. By having the records show that the money was disbursed to the credit of Jules Mechanic to protect the property of Me-

chanic, to whom the bank had loaned a lot of money.

Q Did you tell him how you wanted it written off? A I told Mr. Williams how I wanted it written off. During a conversation with Mr. Williams he asked me—

Q Held when? A This was at least five years ago, maybe six years. Mr. Williams asked me to put in the note of anybody and he would write it off when that note would become due and I said, "No. I want it written off in the regular way and have it come before the board of directors of the Broad and Market National Bank." When I brought the matter up, Mr. Williams said to Mr. Gardner, the cashier, and said, "Harry, you have one of the boys outside make a note" and Mr. Gardner refused to do it.

Q Just tell us how you wanted it written off. You have told us a lot of suggestions that Mr. Williams made. How did you want it written off? A I wanted it written off as a Mechanic loss, which it in point of fact was.

Q A Mechanic loss? A A Mechanic loss.

Q In other words— A And added to the other losses as a Mechanic loss.

Q Why, if you were not to pay this note, and it was not to be your obligation—do you remember when Mechanic left Newark, approximately? A I think it was about five or six years ago.

Q Within a couple of years after this original note had been given? A Some three years.

Q When he left town no one knew where he went, did they, as far as you know? A I don't know.

Q I don't suppose you made any effort to find out? A I requested Mr. Schilling to.

Louis J. Beers, cross.

Q When he went away— A When do you mean? To fix the time? You want to know whether I made an effort to locate Mr. Mechanic?

Q I was referring to when he went away. A We tried to locate him here in Newark, yes.

Q Mechanic was a builder and contractor? A He was.

Q You had quite a bit of dealings with him? A Absolutely none.

Q Was the only dealing you had with him this particular note? A This note.

Q This $5,000 note that is the beginning of the series of notes on which your counter-claim is filed? A The one transaction I had in which—

Q Wait a minute. You can answer my question. I say, this transaction regarding this $5,000 note, on which your counter-claim is filed, is the only transaction you had had up to that time with Mr. Mechanic? A There was a transaction with the building and loan. I don't recall the exact date of that. I think that transaction took place subsequent to the making of this note, that is, the original note.

By the Court.

Q Was that in connection with property of his? A Yes.

Q You didn't represent the bank? A No, I represented the building and loan.

By Mr. Stewart.

Q The first note was, I think, in May, 1914. A The first note was in July, I believe.

Q July, 1914? That is this note, Exhibit D. 2? A Yes.

Louis J. Beers, cross.

Q At that time the only business you had had with Mechanic was this note transaction in which the bank appeared and some transaction through the building and loan? A Yes. I don't know just what you mean by transactions. There was this in connection with the note; I believe there was another note or other notes which Mr. Mechanic had given to the Broad and Market National Bank and Mr. Fleisner, the then president, asked me to take some mortgages. He said, "You take them in your name. A national bank cannot take this mortgage. You take them in your name and hold them for the bank." I took two or three mortgages and then I told Mr. Fleisner that I did not want to hold them, and I assigned them.

Q Why did you think it was necessary to take any security from Mr. Mechanic if you felt that you were not to be held on this note? A I did not feel that it was necessary for my protection. I took it pursuant to the direction of Mr. Fleisner.

Q To whom did you assign this mortgage that you say he asked you to take out at that time? A My attention is called to the fact that this is back in 1914 that the mortgage was assigned to Miss Hart and then from Miss Hart to the American Mortgage & Realty Company.

Q Did they have any connection with the bank? A Absolutely not excepting this: that Mr. Fleisner knew that these mortgages were going to be transferred by me. I believe at that time Mechanic told—that is erroneous.

Q It is erroneous that you assigned the mortgages to Miss Hart? A That is correct. I mean what happened to Mechanic.

Q When you took these mortgages out at Mr. Fleisner's direction to secure yourself—I judge from what you say that they were to secure the bank? A To secure the bank; not to secure me.

Q If you took these mortgages to secure the bank, why did you assign them to Miss Hart? A I told Mr. Fleisner that I did not want to carry the mortgages and I turned them over to Miss Hart, and then she asked me why she should carry them and I turned them over to the American Mortgage & Realty Company.

Q If these mortgages were taken to secure the bank, why did you turn them over to the bank? She had nothing to do with the bank, did she? A She did not.

Q The American Mortgage & Realty Company has nothing to do with the bank? A No.

Q The American Mortgage & Realty Company was a corporation of yours, that you represented? A A corporation in which several were interested.

Q That you represented? A Yes.

Q And in which you held stock? A Yes.

Q If these mortgages were given to secure the bank, why did you turn them over to Miss Hart and from Miss Hart to the American Mortgage & Realty Company? A I said to Mr. Fleisner, "Mr. Fleisner, I don't want to hold these mortgages," and Mr. Fleisner then said, that Mechanic did not have enough money with which to pay all of the building and loan arrears and that foreclosures were threatening and I said, "I don't want to appear as the defendant in these foreclosure proceedings." Fleisner said, "Then turn them over to somebody else. Don't let the bank appear as a defendant," and

I turned them over to Miss Hart. Then I thought it was unfair to have them in her name and then turned them over to the American Mortgage & Realty Company with Mr. Fleisner's knowledge and understanding.

Q There is nothing in any of these assignments that recite that they were to be held by Miss Hart or the American Mortgage & Realty Company as trustee for the bank? A No.

Q There was nothing in the mortgages made by you to show that they were held in trust by the bank? A No.

Q There is nothing to indicate that they were held in trust by you or by these other parties for anybody? A It was not and for a reason—

Q This security that you took at Mr. Fleisner's behest for the benefit of the bank was kept in such a way that if misfortune befell you, if you were to die, or if Miss Hart were to die then your next of kin or your creditors could have made claim on them? A Absolutely no.

Q What was there to show that that was not the situation? A In the first place, Mr. Schilling and everybody in my office knew of the arrangement.

Q That is no protection against creditors. A And the company knew it.

Q That is no protection against creditors. A We know that Miss Hart had no creditors and the American Mortgage & Realty Company had no creditors. There was absolutely no danger so far as reassigning it to the bank was concerned. If the mortgages had proven good, that would have been done even if I had passed away, because everybody in the office knew that.

Q As a lawyer did you think that was a good way to handle such a situation? A It was pur-

suant to what Mr. Fleisner wanted and pursuant to the practice of the bank then. I believe the practice at that time was against taking mortgages in the name of any individual connected with the bank.

Q That is an assumption. A It is not an assumption. I know it to be a fact.

Q And at whose direction was it that these mortgages were cancelled of record? A Mr. Mechanic became involved in the bank. Mr. Williams gave Mechanic $6,600 and asked me to disburse it and I did. Trustees were appointed. Mechanic, notwithstanding that, the real estate market being bad—

Q When was this? A And he lost the properties and I think it was at that time that trustees for Mechanic took a mortgage or shortly after that that the mortgages were cancelled.

Q When was it that this $6,600 was given by Mr. Williams to Mechanic? When was that done? Can you fix the date? A I cannot. My docket, my ledger shows it.

Q Have you your ledger here? A Yes.

Q Suppose you look at it, if that will help you (Mr. Stewart hands book to witness). A Mr. Schilling, will you come up and open to the first account? (Mr. Schilling steps up and opens the book.)

Q When was this $6,600 given to Mr. Mechanic by Mr. Williams? A It wasn't carried along, but it was about five years ago.

Q About 1919? A 1919, I think.

Q There is something there that fixes the date for you, isn't there? A Mr. Schilling would know because he took care of the whole matter.

Q Isn't there any date on either the debit or credit side that shows that? There must be some things that were kept up. A Well, there is an entry of $6,200 showing where the money came from.

Q Where did the money come from? A Check from the bank.

Q What do you mean by "bank"? A The Broad and Market National Bank.

Q What do you mean? Do you mean a check from the Broad and Market National Bank or Mr. Williams? A It is in Mr. Schilling's handwriting. Of course, he would know about it.

Q Do you mean to tell me that there is nothing on that book to show when that account was opened and when it was closed? A I did not keep this account.

Q Do you know whether it was in 1916? A This is 1915.

Q When was it that the $6,200 was given? A I guess it was 1915; nine years or more ago.

Q Mr. Williams was not president of the bank then? A Mr. Williams was president of the Broad and Market National Bank when Jules Mechanic became involved—

Q Answer my question. A Let me see. I don't know just when he did become president. I think it was in 1916.

Q Yes. 1916. A But he was the president when in the neighborhood of $6,000 was given to Jules Mechanic.

Q Do you know how that $6,000— A I beg your pardon. He was either president or vice-president, but he was the active man.

Q Do you know how that $6,000 was given to Mr. Mechanic on a note of Mechanic's? A I

don't know. Mr. Schilling went over and took care of it. He attended the meeting of the creditors and did all the work.

Q You say that this $6,000 was given to Mr. Mechanic at a time when he was in such financial difficulty that he was having a meeting of his creditors? A Yes. It was disbursed by Mr. Harris, who represented the petitioning creditors in bankruptcy at the request of Mr. Williams, who was president or vice-president. He was the active man. Whatever we did we did pursuant to talks with him. The actual work done was by Mr. Schilling.

Q Do you know when Mr. Mechanic left Newark? A Do I know when he left Newark?

Q Yes. A Evidently he left Newark eight or nine years ago.

Q I am asking you whether you know or not. A I know that he left Newark when—if I had that series of notes—when Mechanic stopped making the notes.

Q Here is Exhibit D. 7, which is a note dated March 9, 1916. That was made by Mechanic? A Yes.

Q And that fell due when? A Four months after date, which was March 9.

Q And the next note is one dated July 10, 1916, which is a renewal of that note? A Yes.

Q But the note was made by you? A Yes.

Q When that note which had been made by Mechanic on March 9, 1916, fell due and Mechanic had departed for parts unknown so that he was not available for you to get his signature on it, why didn't you then refuse to sign any more notes on this Mechanic account? A Because the bank asked me if I would not give the

note so that the bank could carry it until it could more favorably write off the note.

Q In other words, your note was to be carried as an asset of the bank? A Put it as you please. I did that for the bank. Yes.

Q And you continued to do that for a long, long time? A Yes, subject to my request that it be written off.

Q I understand you to say that on this note, from the time the first note was given down to some time when a note was increased above $5,000, that you did not pay any interest on these notes? A I did not.

Q How was the interest paid; do you know? A The interest was added to the notes.

Q Was that so in the very beginning? A It was so in the very beginning. The practice was this: Mr. Schilling would take my note, signed by me, and then go over to the bank and arrange—

Q You mean Mr. Mechanic's note? A Yes. In the beginning I signed his note and they would send it over.

Q You indorsed his note? A Yes, and the interest was added on each time except in a few times when they charged my account.

Q The first note is dated July 9, 1914, and fell due November 9, 1914. That was for $5,000. Is that correct? A Yes. This is the first note.

Q The next note that was given in renewal, dated November 9, 1914, was for $5,000. They did not add the interest on that one, did they? A No. This interest I believe was paid by Mechanic. This interest was paid by Mechanic.

Q Do you know that? A I am pretty sure that was so. I don't say it.

Q Was it charged against your account? A No.

Q Are you sure it was not? A I am positive it was not charged against my account.

Q The next note which was in renewal of that one of November 9, fell due on March 9— A If it was, I certainly didn't know it. If it was discovered afterwards, I know that I received credit for it.

Q The next note was for $5,100 instead of $5,000. That was when they began to add interest on your note? A Yes.

Q That fell due when? A This note fell due July 9, 1915.

Q I show you Exhibit D. 5, which is the renewal of the note I last showed you, dated July 9, 1915. This is for $5,100. That is the same amount of the note ahead of it? A Yes, sir.

Q Where was that interest paid from? A I didn't pay it.

Q You don't know how it was paid? A No.

Q It was not charged against your account? A If it was, I didn't know it. I went over to the bank. I happened to be there and they asked me to sign the note and I signed it.

Q You mean you indorsed it? A Yes, I indorsed it.

Q That note I last showed you fell due on November 9, and on November 9 a new note of Mechanic's, indorsed by you, Exhibit D. 6, was given for $5,100. They didn't add interest on that note, did they? A No, they didn't.

Q Who paid that; do you know? A I don't know. I know that I didn't. I mean by that that eventually I didn't.

Q Was that charged to your account, that interest? A I don't know. I didn't know if it was.

Q That note fell due on March 9, that last one? A No, the last one was November 15.

Q It fell due in March? A Yes. March, 1916.

Q I show you a note dated March 9, 1916, Exhibit D. 7. That is for $5,100, isn't it? A It is.

Q They didn't add the interest on that note? A They didn't.

Q That was not paid out of your account? A I didn't pay it by check. If they charged my account they afterwards gave it back to me through Mr. Schilling.

Q I understand. That is what you say every time. Whether it was charged against your account, you don't know. A I don't know, because Mr. Schilling took care of the account.

Q I show you a note, Exhibit D. 8. This note was not made by Mr. Mechanic. This is the one in renewal of the one I last showed you, the first one of your notes. It is dated July 10, 1916, for $5,100? A It is.

Q Do you know where that interest was paid from? A I do not.

Q Did Mr. Mechanic pay that interest? A This interest—I think Mechanic was out of Newark at that time. That is why I gave this note.

Q You don't know where that interest was derived from, do you? A I don't know, because Mr. Schilling took care of the renewal of these notes.

Q In November, 1916, didn't you give a note for $5,100, due March 19, 1917? A Is the note here?

Q It does not appear to be here. It appears to be one that you lost. A I think I did.

Q Where was that interest paid on that note? That note was still for $5,100. A I don't know except that I eventually did not pay it. If they charged it, I know I got it back when their attention was called to it.

Q In what way did you get that interest back? A Mr. Schilling called my attention to the fact that some interest had been charged to me. Then he went over to the bank and came back, as I recall it, with a note for a larger sum, including all the interest that had been charged to my account, together with the war stamps. Of course, I am not permitted to say what he told me. However, in that way they added the interest that had been charged to my account to that note.

Q Where you got your interest back is by signing a new note for the sum of $5,100 or $5,000? A Whatever it was.

Q Plus interest that had been charged to your account previously; is that it? A Yes.

Q The way you got it back was by giving a new note in your name for the amount of the note plus interest? A Yes.

Q When you did that, you knew that that would appear on the books of the bank as a valid asset? A Do you mean at that time?

Q Yes. A Frankly, I don't know whether I gave it a thought because—

Q You don't want this jury to believe that you, a lawyer of fifteen or sixteen years' standing, would put your name on a piece of paper and in the amount of sixty-one or sixty-two hundred dollars and put it in a bank and have it charged to your account—credited to your ac-

count, rather—and then say that you don't know whether you thought about the bank examiner taking that for a valid asset? A I positively felt that it was all right to do it in that way because the bank felt that it was, and because it was aiding the bank at a time when it needed aid.

Q You don't answer my question. A I want to answer it.

Q You can answer it very easily. You don't want this jury to believe that you, a lawyer of sixteen or seventeen years' standing, and at that time a director in the bank, did not give any thought to the question of whether the bank examiner, when he saw your note in the bank for $6,000 or $6,100—whatever the amount may be—would not consider it a valid asset of the bank? A As a lawyer of sixteen or seventeen years' standing I tell you that I did not give the matter general thought because I was so worried about the condition of the bank that every time the bank needed money I put it up.

Q I don't see that you have answered me. You have given quite a discourse, but you haven't answered my question. A As to whether I thought this was going to be listed as an asset?

Q Yes. A I never gave it a thought. We were willing to do everything that we could for the bank that we considered honorable and fair.

Q I believe you said that at some time or other when Mr. Fleisner was president of the bank you wanted to have that note written off because Mechanic was no longer in Newark. Will you repeat that conversation? I think you said it was some time in 1916. A It was when Me-

chanic left. I said that the note should be written off.

Q Whom did you say that to? A That was with Mr. Fleisner. I say it was with Mr. Fleisner. Mr. Williams came in as vice-president of the bank, but he took active charge notwithstanding that Mr. Fleisner remained as president with the understanding that he was to resign later on. My conversations were with both for a time. Now going back some eight or nine years it is rather difficult to distinguish, but I told one or the other of them, whoever was there, that I wanted it written off. Mechanic had gone. He said, "Carry it along until we are in a position to write it off."

Q And at that time you knew they would carry it as an asset of the bank, didn't you? A I knew they would carry it. Sure, they were carrying the notes.

Q How could they write it off at any time when it was listed as a debt due from you to the bank? What method did you think they had of writing such a valid debt off—valid on its face? A I thought that what they should have done was this: The bank should set forth that this money was originally disbursed by me, as I have already said to you, to conserve the assets of Mechanic, who was deeply indebted to the bank, and that the bank did not want Mechanic to have the money in his hands, but wanted me to disburse it. I thought they could show all of these facts to the examiner and that it should be written off.

Q Why, when this loan was originally made to Mechanic, wasn't it entered in the book then? Why was it necessary for you to indorse the

note? A They took the check of $5,000 and applied it to my account.

Q I understand that. Why was it necessary to do it that way? Why could not they have taken Mr. Mechanic's—turned it over to him to disburse? A That meeting was like a funeral. At that time I was spending much time away from my office and I did the fool thing of indorsing it so that it would be applied to my account—it was some nine years ago—so that I might then disburse it. I didn't see the check. They took the check and credited it to my account.

Q While you were director of the bank you were present at a number of meetings at which the bank examiner was present when he had the board of directors in the room and talked with them about the condition of the bank? A I remember that he was there—

Q You can answer it yes or no. A I was present on one occasion that I recall.

Q Weren't you there on more than one occasion when a bank examiner was there? A I recall one occasion.

Q That was, I suppose, before this note had been indorsed by you? A I don't know just when that was.

Q These four notes—there were four notes drawn—the first note was not drawn with interest at all? A Yes, and interest at the top.

Q That was drawn with interest. The second was drawn with interest (handing paper to witness)? A Oh, yes.

Q The third note, as far as I can see, was not drawn with interest. It must have been discounted and the discount charged to your ac-

count. That is correct, isn't it? A The note does not show anything about interest.

Q You know when a note is discounted they charge the discount to you and you get the difference credited to your account between the face of the note and the interest? A I suppose my bank account would show it.

Q You know that as a matter of fact—that this is the way that would be done? A Yes, that would be the way.

Q The next note seems to be drawn without interest so that that was discounted at six per cent., wasn't it? A I don't know. I guess it was; at six per cent. or five per cent.

Q The next one seems to be the same way. Then the next one for $5,100 was drawn with interest so that that bears six per cent. interest? A Yes.

Q The next one, July 10, 1916, is drawn with interest. That would bear interest at six per cent.? A The last one, July 10th?

Q Yes. A November 10, 1916, the four months' note.

Q There doesn't seem to be the renewal of that note here. A Of which note?

Q At no time during the progress of this note transaction did you expect to have to pay this note? A No, never.

Q And you were sure you would not have to pay it? A I sure was, up to a certain time.

Q Will you tell me why on November 12, 1917, the interest rate on that note was changed from six per cent. to five per cent.? A I don't know. I wasn't interested in that.

Q You were not interested in that? A Absolutely not.

Q You were not going to pay it? It was not charged to your account? A Absolutely no.

Q You never even looked? A Looked at the interest?

Q Yes. A Frankly, I don't know whether I looked at it or not. If Edward Schilling came in and said, "This is a note including all of the interest that they charged," I would take his word for it and sign it.

Q In whose handwriting is that note? A I think it is in Edward Schilling's handwriting. I don't know whether the figures are in his handwriting but I think the words are.

Q Did Mr. Schilling draw these notes at your direction, these renewal notes? A He went over to the bank and adjusted that over at the bank and then came over and had me sign the note.

Q All you did was to put your name down on whatever Mr. Schilling put under your nose? A Oh, no.

Q I understood you to say that you did not take any interest in that at all? A I sure did.

Q If Mr. Schilling came from the bank with a note and said it was all right you would just sign it? A No, I would not do that. I said that when Mr. Schilling would come over and say this note represents the principal and the interest, I could tell by glancing at it—if he said he had computed it, I would not sit down and compute it over again. I had full faith and confidence in him. If he said, "These figures are correct," I would sign it.

Q None of these notes were signed at the bank? They were all signed in your office? A I would not say that. Mr. Schilling went over a number of times.

Q Did you ever have any talk with Mr. Williams about the rate of interest that these notes were to bear? A No, sir, I didn't.

Q When was the first conversation that you had with Williams about these notes? A Just as soon as Williams came into the bank I called his attention to this note. We had several conversations about this note. Do you want to know what he said to me?

Q Surely. A Mr. Williams talked to me one night. I don't know what preceded the conversation. I said to him this: "That note in the bank I have talked to you about should be written off. It is not fair to my wife and children." He said, "No, it is not." I don't recall his exact words, but he wanted me to put in a note—we had quite a conversation and he told me in this plain language: "You get somebody to put a note in, and when it comes due I will write it off." I said, "I don't want it done in that way."

Q You were to indorse this new note? A No, sir; absolutely not. He was to write it off.

Q In other words, you want the jury to believe that Mr. Williams said to you that you should just get any Tom, Dick, or Harry to come in and make out a note and "we will put it in the bank without ever taking any notice whether they had any credit or not or anything that is good and we will write off that note when that note comes due. We will find the man is no good and just write that off?" A Absolutely. Postively. That is just what Mr. Williams wanted me to do. You say that I want the jury to believe it. I absolutely do, as sure and solemn truth.

Q These two $1,000 payments that he made to you, as you say, by the bank—whose checks were they? A I don't know. They were made by Mr. Williams, I learned through Mr. Schilling.

Q They were made to your order? A The sum of $1,000 was credited to my account and they took a note for a thousand less.

Q You don't know then how these got to your account at all; is that it? You don't know where the money came from (handing paper to witness)? A These checks are in the handwriting of Mr. Williams, I am pretty sure. At least one of them is. They are not indorsed by me.

Q Whom are they indorsed by? A It says, "Credit to the account of Louis J. Beers at the Broad and Market National Bank." I didn't sign them. I didn't see these checks.

Q This one says, "Credit to the account of Louis J. Beers." You never saw either of these checks? A Never until today. They are not indorsed by me.

Q Didn't you know anything about them? A I knew that I had received a credit each time I had refused to renew the notes. They credited me with a thousand and then I made a note for a thousand dollars less.

Q Didn't you know they came from the No. 2 account of Mr. Williams? A No.

Q Did you know that he had such an account? A I wasn't there.

Q Did you know that he had such an account? A No, I don't think I did. Of course, I talked with him—

Q Answer yes or no. You don't have to talk quite so long. Yes or no will be sufficient. Did

you ever get any checks from that account of Mr. Williams? A I don't know that. I know that I did receive a check from Mr. Williams.

Q For how much? A I don't remember.

Q For what? A A mechanics' realty company. I think they took over some old notes which the directors had bought for a considerable sum, more than they were worth. Some small sum was realized on them.

Q You don't know whether that was Mr. Williams' No. 2 account or not? A I really do not.

Q Isn't it a fact that he ran this account for the benefit of the directors who had made good some losses that arose in Fleisner's presidency or the former one? A He had an account. I don't know whether it was a No. 2 account or a trustee account or what.

Q Did you ever get as much as $600 from Mr. Williams besides this thousand? A I got the money that was due me, yes.

Q Did you ever get as much as $263 or $264? A I would not recall the amount. When do you mean?

Q In 1918 or 1919. A You are going back so far—I remember receiving some money, but I don't remember the amount.

Q These checks are in 1918 or 1919. Your memory is pretty good as to what happened then. A I said I received some checks, but I don't recall the amount of those checks.

Q I show you a check for $600 to the order of Louis J. Beers, Francis Williams No. 2 account, May 28, 1919. Do you remember getting that? That is indorsed by you? A That indorsed by me and I got it.

Q Do you remember the circumstances at all? A There was some money paid by a

bonding company—I cannot answer in this way—there were three times or four times I put it with some of the other directors' money to take some of the poor notes, loans made by the first president, not Fleisner, Mr. Rafter—some money was realized. I don't know just what they were for, but one Mr. King—I don't know, three or four times I put up money—a thousand dollars I think or fourteen hundred we were called upon to pay—that was given by all the directors to take out some of the early bad paper that was acquired when the bank first opened up. There was a small sum realized on that.

Q That money that was realized on those bad notes—Mr. Williams handled that money in an account that he ran in his own name? A No, he did not.

Q How did he? A I don't know whether you looked after that or whether I tried to collect some of that for the bank. I know I tried to collect some of it.

Q Do you remember getting this check for $263.50 from Mr. Williams' No. 2 account, August 16, 1918? A I remember receiving this.

Q That is your indorsement on it? A Yes.

Q When you got your two $1,000 payments in 1919 you knew then that Mr. Williams had a No. 2 account from which he paid money out to some of the directors, who had advanced money to take up these bad checks? A No, because Mr. Schilling—I told Mr. Schilling to go over to the bank and tell them that I would not renew the notes. That was in February. The credits were made over. I had nothing to do with them. I only know that I refused to renew the notes. Mr. Schilling then came back and

had me sign a note in March for a thousand dollars less and again in May for a thousand less. And that that was made up by Mr. Williams crediting my account. I didn't know that was taken from the No. 2 account. I never have seen the checks to this day. I didn't know where it came from.

Q Are you sure you never saw them until today? A Positive.

Q When you got these two $1,000 payments, one in March, 1919, you didn't know at that time that Mr. Williams had a No. 2 account? A I didn't know what he called it. I knew he had an account.

Q You knew that there was an account and that he had paid money from it to different ones of the directors? A Yes. I say yes. I don't recall. This was in 1919. I didn't know that in 1919. I recall this check of August, 1918.

Mr. Stewart: I would like to have these four checks marked for identification.

(The papers referred to were marked P. 1 to P. 4 for identification respectively.)

Q Where did that money come from that was given to you in August, 1919? A That was charged to my account without my knowledge.

Q I understood you to say that before you made that note on which a reduction of $500 was made, you had a talk with Mr. Williams? A Yes.

Q He said he could not cut that more than $500? A He said something about he could not cut it more than $500. He would reduce it gradually.

Louis J. Beers, cross.

Q Did he say where that $500 was coming from? A No, he didn't.

Q How long was it after this reduction of $500 that you discovered it had been charged against your account? A I don't know exactly. I think it was a matter of a few weeks when in balancing the account Edward Schilling called my attention to it, and then I went right over to the bank and saw Mr. Williams.

The Court: We will adjourn until tomorrow morning at ten o'clock.

Adjourned until Wednesday, January 21, 1925, at ten o'clock A. M.

SECOND DAY.

Wednesday, January 21, 1925.

Continued pursuant to adjournment.

Present, counsel as before stated.

LOUIS J. BEERS resumes the stand.

Cross examination by Mr. Stewart (continued).

Q Referring again to the mortgages which you took from Jules Mechanic, do you recall how many mortgages you took? A Two or three; I think three.

Q They were all taken in your name? A Yes.

Q All assigned to Catherine Hart? A I don't recall whether they were all assigned or

not. I know that the intention was to assign all.

Q The only consideration for those mortgages was as security for the $5,000 loan that had been made, as you contend, to Jules Mechanic through this note that was signed by you, indorsed by you, and deposited in your account? A No, that is not.

Q Tell us what the consideration. A I believe that the bank had loaned Mechanic $4,500. Of course, Mechanic was indebted to the bank, and for a discount granted quite some time before this transaction. He had been a depositor, I think, from the inception of the bank. Mr. Fleisner wanted me to take these mortgages and therefore they were taken.

Q When you assigned these two mortgages—if there were only two—to Catherine Hart, was any consideration paid to you for that assignment? A Not a penny.

Q Did the assignment recite any consideration? A I don't recall. I didn't draw them.

Q You signed them? A Yes.

Q As a careful lawyer, you must have read them over. A Now you say as a careful lawyer—

Q I have known you a great many years and I think you have a reputation— A If they produce a paper to me, I will sort of proof-read it hurriedly. In a matter of that kind I could have left it absolutely to him.

Q To whom? A To whoever has charge of it, to Mr. Doyle or Mr. Schilling. I could not be injured by signing an assignment whether there was a consideration or not.

Q The first mortgage that you took from Jules Mechanic was dated June 13, 1914, for

$4,500 and was recorded June 22, 1914. That is what the record shows. Was that taken as security for this $5,000 note? A No. It could not have been. It was taken in June. It was taken at a time when the Mechanic matter was up.

Q The second mortgage that you took was for $5,500, dated June 30, recorded July 1st. Was that taken as security for this $5,000? A What was the amount of that note?

Q $5,500, dated June 30, recorded July 1. A Of course, I am going back ten years. I know those mortgages were taken as security for Mechanic's note, but which particular note I do not recall.

Q In other words, you now wish to convey to us that, before this scheme was evolved between you and Mr. Fleisner to pay $5,000 to Mr. Mechanic through the instrumentality of your indorsing the note and putting it through your account, you had already begun by taking mortgages? A Yes, these mortgages for the bank. You say in your question, "scheme between Fleisner and myself."

Q On July 9, the date of this $5,000 note, you took from Mechanic a mortgage for $6,000. That mortgage was not assigned to anybody, was it? A I don't recall.

Q If I tell you that the records show that it was not, that there is no assignment of record— A If anybody examined the record carefully, I will agree that it was not. It must have been overlooked.

Q Why were all these mortgages cancelled on November 23, 1916? A I really don't know. They had no value then. I became a trustee at the request of the bank when the bank advanced

Mechanic some more money, and Mr. Curtis and some other builder and I, I think, became trustees for Mechanic, and somebody made a request that they be cancelled and they were cancelled. I think he lost his property or something.

Q Was there any authorization from the board of directors of the bank to cancel the securities which you say were given for their benefit? A At that time I did not handle the matter. If my memory serves me right, and I think it does, Mr. Schilling was going over to the bank repeatedly concerning this matter. The matter was in the hands of Mr. Harris also. I think the bank dealt directly with Harris at times, but Mr. Schilling went over to the bank.

Q In 1916 Williams was president of the bank? A I think he was—president or vice-president—I think he was president.

Q I understood you yesterday to say that the only transactions that you had with Mechanic were those transactions whereby you sought to secure the bank against loss of this $5,000, as you said this morning, on the prior indebtedness of Mechanic to the bank, and some building and loan transactions had just practically coincident with the giving of these mortgages. A That is true.

Q How long had you known Mechanic? A I only knew Mechanic through the bank.

Q How long have you known him? A At what time?

Q In 1914, July 9. A I think it was a matter of months.

Q Do you remember taking an acknowledgment of a mortgage made by Jules Mechanic to Christian Fleisner on September 4, 1913, on property in Montclair? A No, I do not recall.

I know I did not represent him. Do you mean that I merely took the acknowledgment to the deed?

Q The records show that you took the acknowledgment in September. A I may have been in the bank, and they asked me to take the acknowledgment and I took it. I didn't represent him nor Fleisner.

Q I asked you yesterday about the reports that are filed with the Comptroller of the Treasury. You know that those reports are published in the newspapers? A Yes, I do.

Q Your recollection yesterday was that you had signed only one of them. A Yes, I said that.

Q If I was to tell you that the published report of September, 1911, as to the bank's resources of September 1, 1911, was signed by George H. Fritz, Charles Stewart, and Louis J. Beers, you would not dispute the fact that you actually signed in 1911? A No, sir, I would not.

Q If I told you that the published report of June 14, 1912, showed that you had signed the report with Joseph Samuels and R. Russell Brant, you would not dispute that, would you? A Certainly not.

Q If I told you that on August 9, 1913, you signed a report with George H. Fritz and Frank Williams, you would not dispute that? A No, sir.

Q If I told you that on March 11, 1914, you signed one of those statements with Otto Oppenheim and George Lambert, you would not dispute that, would you? A No.

Q If I told you that on September 12, 1914, you signed one of those statements with Morris

Cohen and Christian Fleisner, you would not dispute that? A If you say you had a copy—

Q I have a printed copy. A Are you reading from it?

Q I am reading from it. A I certainly would not dispute it.

Q If I told you that on September 12, 1916, you signed one with George H. Fritz and George Lambert, you would not dispute that, would you? A No, sir.

Q If I told you that on March 5, 1917, you signed one with Timothy Foyle and Francis Williams, you would not dispute that? A No, sir.

Q As a matter of fact, instead of having signed just one of those reports, you have signed seven? A Seven. You read off seven. What was the date of the last report?

Q 1917—March, 1917. This is not a report signed by you (exhibiting paper to witness). I just want you to identify it as a general form signed by the Comptroller of the Treasury. A I could not do that. These reports were handed to me by officers of the bank and I was asked to sign them. I would not try to identify it.

Q I understood you to say yesterday that this $5,800 on which suit was brought by the bank was the remnant of an $8,800 note that you had given with other directors who gave a like sum of $8,800 to settle a loss from paper that the Comptroller of the Treasury had directed to be written off. A I didn't say that the Comptroller had directed that any paper be written off. I didn't say that it was $8,800. I said the directors put up $8,800. My recollection is—I know I gave the note. I didn't have money so I gave the note for $8,000. I am pretty sure that the note which you speak of

for $5,800 was a remnant for the balance of the larger note of which this $8,000 and perhaps some other moneys that I advanced them—gave notes and money to take out some paper.

Q Did you ever, prior to the giving of this $8,000 note, contribute money to take out that paper? A Yes, sir.

Q Wasn't that the first lot that the directors were called upon to settle? A I am absolutely positively sure.

Q Wasn't that $8,000 note that you gave at the time that the other directors gave eight thousand discounted at another bank than the Broad and Market? A I have a recollection of the note being—no, I had a note in the bank secured by some building and loan stock—I think that note at one time—the bank asked me if I would place it over in the Federal Trust so they could have some money to lend customers. My recollection is that I gave it to the bank.

Q Wasn't it, as a matter of fact, discounted at the Federal Trust together with the notes of the other directors? Each director went on a note of the other directors? Isn't that a fact? A No, all of the directors did not give notes. Some of the directors were able to pay cash. I had to give a note. I don't know whether that note was discounted at another bank or not. I know I gave a note.

Re-direct examination by Mr. Lane.

Q At the time you took the mortgage for $4,500 and the mortgage for $5,500, which has been referred to by counsel, was any money due from Mechanic to you at all? A Not a penny.

Q At the time you took the mortgage of $6,000, referred to by counsel, was there any money due you from Mechanic? A No, sir.

Q Yesterday the question was asked you with respect to whether Mr. Fleisner was a client of yours. What is the fact with reference to that? A He was not. While I was running to the bank every day I did some trivial little things for him. He had an attorney at that time.

Q Do you know where he is now? A I made inquiries. I know from hearsay that he is in Europe.

Q After you ceased your connection with the bank and after he ceased his connection with the bank, did you act for him as attorney in any matters? A No, sir.

Q Have you told the jury your entire connection with the Mechanic matter? A I have. There was something said about the Mechanic Realty Company yesterday. That was a company which had some connection with the bank and nothing to do with Jules Mechanic.

Q Did you have anything to do with the preparation of those reports which counsel has referred to? A Not at all. They were made up by the officers, who came and asked me to sign them.

EDWARD A. SCHILLING, sworn in behalf of defendant.

Direct examination by Mr. Lane.

Q What is your business? A Attorney and counsellor-at-law, State of New Jersey.

Q How long have you been in the practice of law? A Since February, 1916.

Q And whom are you associated with? A Louis J. Beers.

Q How long have you been associated with Mr. Beers? A I have been connected with his office for almost sixteen years.

Q Were you connected with the office of Mr. Beers in 1914? A I was.

Q Do you of your own knowledge know anything about the genesis of this note, D. 2, July 9, 1914, for $5,000? By that I mean, were you familiar with the circumstances at the time? A No, I was not.

Q I don't mean any information that you acquired later. A No, I was not.

Q Do you know what was done with the proceeds of that note? A I do.

Q Did you keep a ledger account? A I did.

Q I show you a ledger. Turning to the account of Jules Mechanic, I ask you whether this is the account to which the proceedings of that note went? A Yes, the account of Jules Mechanic with the B. & M. Bank. The B. & M. here (indicating) denotes that the checks in the account were drawn on the Broad and Market Bank.

Q B. & M. refers to— A The checks of Louis J. Beers which disbursed these moneys were drawn on the Broad and Market Bank.

Q That may refer either to bond and mortgage or Broad and Market. A It refers to the Broad and Market. Mr. Beers had three accounts. You will see that either these accounts are labelled B. & M. or Fed. or National Newark.

Q Those letters mean the Broad and Market? A Yes.

Q Will you point out the proceedings of that loan? A The loan is entered under July 9, "loan $5,000."

Q Now there is also to the credit of that account some $4,400—$4,431. A That is right.

Q What was that the proceeds of? A The proceeds of a note of Jules Mechanic, a check of Jules Mechanic, transferred to Louis J. Beers and credited to this account in the month of June. The exact date is missing here.

Q Was that $4,400 the proceeds of an advance made by the bank to Jules Mechanic? A Yes.

Q Were those notes disbursed? A They were.

Q In the one account? A Yes.

Q Just tell us everything for which they were disbursed. A Primarily for payments to building and loan associations who had first mortgages upon the properties of Jules Mechanic; secondly, to attorneys for fees in foreclosures on those mortgages; thirdly, to mechanics and material men who had claims against Mechanic on those properties for labor and materials furnished these properties.

Q Do you know of your own knowledge whether at that time Jules Mechanic was indebted to the bank in any other amounts? A No, only from what he told me.

Q Nothing from what the bank said? A No.

Q When did you personally become acquainted with any of the details of this transaction? A June 12, 1914, or thereabouts.

Q You have already told me that you did not have any personal knowledge of the genesis of

this note at the time. My question was designed to bring out when you did acquire personal knowledge of this transaction, of the genesis of it. A I first learned it from Mr. Beers after the note had been given. He explained the situation to me and he instructed me—

Mr. Stewart: I object to what he instructed him.

By Mr. Lane.

Q I want now to get down to the first information you acquired through the bank, if you can recall. A At the request of Mr. Beers, I saw Mr. Fleisner as to the disbursing of these moneys.

Q And that was about when? A That was in June, 1914, and subsequently thereto. I saw Mr. Fleisner from June until probably the beginning of the following year whenever any question arose in the Mechanic matter.

Q Did you talk with Mr. Fleisner with respect to the disbursing of this money? A Absolutely.

Q At whose direction were the moneys disbursed? A At Mr. Fleisner's. At the request of Jules Mechanic with the sanction of Fleisner. Mr. Mechanic would come in and state that he had to pay this or that. Before I would pay it I would talk to Mr. Fleisner to see if Mr. Fleisner was satisfied that that particular man or item should be paid.

Q Does that tell what you did with all these items that were disbursed out of those two funds or out of that fund? A Yes.

Q What was the next transaction you had with the bank? A The next transaction follow-

ing the disbursement of these moneys was the bankruptcy of Jules Mechanic.

Q When was that? A That was in the fall or late in the year of 1914.

Q During the conduct or course of that bankruptcy did you have any communication with the bank as to this note of July 9, 1914? A I did not.

Q When was the next time that you had any conversation with any representative of the bank with respect to this note? A I should say—I can tell if you will let me see the note.

(Mr. Lane hands paper to the witness.)

A (Continued.) Some time prior to March, 1915, when the third renewal was put in.

Q Tell us what happened. What is the exhibit number of that note? A D. 4. Mr. Fleisner, at one time president of the bank—

Q What is the date of that? A March 9, 1915. Mr. Fleisner had been president of the bank and had had charge of this particular matter and I had seen him regularly about it. After the note preceding the note of March 9th had been put in, Mr. Williams had taken active charge at the bank and Mr. Fleisner was not there as frequently as he had been, although I believe he was still president. Mr. Williams as vice-president was active head of the bank. When that note became due—the note Exhibit P. 3, I believe, became due in March 9, 1915—I went over to see Mr. Williams about the renewal of it.

Q Tell us the conversation.

Mr. Stewart: I object on the ground that I did yesterday that any conversation which would tend to vary the terms of that note is inadmissible because it is a written contract, which cannot be changed by oral testimony; secondly, that regardless of what Mr. Williams may have promised, if he did promise anything with regard to the non-payment of that note, it would be an act not within his power; it would be *ultra vires* under the law, and therefore is not admissible here.

The Court: Objection overruled.

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

Exception noted as ground of appeal.

A Mr. Williams or someone at the bank when I said that the note was due said, "Send over a renewal." It was made out at the bank and then was sent over for Mr. Beers' signature. Mr. Beers referred it to me or came directly to me and I went over to the bank with the one indorsed by Mr. Beers and I spoke to Mr. Williams about it and then—I don't remember the exact language, of course—I called Mr. Williams' attention to the fact that this was a Jules Mechanic note, and I told him the situation. Mr. Williams had just come to the bank and had not been there at the inception of this transaction. I went over the transaction with him. I told him that that note was in the Mechanic matter and that Mr. Beers had signed that note or indorsed it for Mechanic for the bank, that it had gone through Mr. Beers' account, it was a bank matter, that there was no liability upon it, that Mr. Beers was only carrying this temporary.

Mr. Williams told me, I believe the first time I had seen him, that he knew there was a Mechanic transaction in the bank and that there was some such arrangement, but he had not officially heard of it at the time. He said, "Have Mr. Beers renew the note and we will take that up before the next renewal."

Q When was the next time that you had an interview with him? A The note then became due again in July and the same situation arose.

Mr. Stewart: Just a minute. Just so that I won't have to interrupt, may it be understood, as it was yesterday, that I raise the same objection to all these conversations in reference to the note?

The Court: I think you had better object, as far as I am concerned.

Mr. Stewart: I object to the question on the same ground that I raised to the last question. I object to a conversation between Mr. Williams and Mr. Schilling on the ground that the conversation would be parol testimony as to change—

The Court: What are they trying to vary? They are trying to show no consideration.

Mr. Stewart: They are trying to show that the note—

The Court: No consideration is always a personal defense.

Mr. Stewart: I am simply stating my objection on the record.

The Court: I am trying to understand why you make that objection. What are they trying to vary?

Mr. Stewart: Because I think it is good. They are trying to show that this particular note—that Mr. Beers had no liability on it.

The Court: What are they trying to vary?

Mr. Stewart: They are trying to vary the terms of the note, which by its terms in law is a promise to pay. My second objection is that it would be *ultra vires* in any event.

The Court: What are they trying to vary?

Mr. Stewart: I think I have endeavored to answer.

The Court: What part of any note are they trying to vary? I want to know because perhaps you are right.

Mr. Stewart: He says in a previous conversation—I suppose my objection must be given before the answer is given because I cannot move to strike it out. The question is, what was said about these renewals of this note? Now, if any of the conversation about the renewal of the note relates to the non-liability of Mr. Beers, it is objectionable. I understand that your Honor rules against me and that I may have an exception?

Exception noted as ground of appeal.

Mr. Lane: Will you read the last question?

(The stenographer read the last question as follows: "When was the next time that you had an interview with him?")

A Thereafter either on the renewal of July 9, 1915, or November 9, 1915—I won't say which of the two, because I don't recall, it being so far back—each time having called Mr. Williams' attention to the fact that the note being renewed was a Jules Mechanic note, and that there was no personal liability of Mr. Beers, Mr. Williams told me in July, 1915, or November, 1915, that he had been informed of the situation and that he understood that that note was being indorsed by Mr. Beers and carried by the bank as a Mechanic liability and that no liability attached to Mr. Beers.

Q I note that the note of July 10, 1916, is for $6,100 and that the note for November 10, 1916, is for $5,700. Did you have knowledge of it? Did you have knowledge of the difference between those two notes? If you did, tell me how it came about. A Yes, I do. These notes—the first one, when it became due, $5,000, it was charged against Mr. Beers for $5,102.50 against his account and a new note was put in for $5,000.

Q I am starting back with the July note. It was for $5,000 with interest. A When it became due it was charged against Mr. Beers' account, $5,102.50, and a new note for $5,000 was put in. When the note came to be renewed in November it was renewed for $5,000 with the interest thereto of $102.50. I had charge of the bank books at that time, and I did not know why the balance on the books should charge that interest against Mr. Beers. The note of November 9th went in for $5,000 with interest. A hundred dollars was the interest charged on that. When it became due, we made the new note for $5,100, which included that hundred dollars interest, so that hundred dollars was not paid but the note

was increased by one hundred dollars, therefore, the note was made for $5,100 and each time Mr. Beers paid these old interest charges. I awoke to the fact some time in 1916 that for two years or thereabouts Mr. Beers had been paying $102, $101, and $100, whatever the payments were, and the revenue stamps on these notes, and I took the matter up with him. After having talked with him, I went over to see Mr. Williams and I told Mr. Williams that we had been making an error here in the matter, that Mr. Beers had been paying the interest each time, and since there was no liability on the notes he should not be paying the interest and he ought to get it back. Mr. Williams thereupon suggested I figure out what interest had been charged against Mr. Beers' account, and I should add the revenue stamps which had been placed upon these notes and that he make a new note for a large enough amount to cover those interest charges and revenue stamps, and he would then discount that new note for fifty-seven and some odd hundred dollars, and that way Mr. Beers would get back this interest which he had been paying over a period of about two years; and that was done.

Q When you say he paid them, you mean they were charged against his account? A They were charged against his account, but they were taken out of his funds and therefore he paid them.

By the Court.

Q What was the date of that new note that was given right then A That note is lost, but I have it.

Mr. Lane: The date is November 10, 1916, for $5,706.

By Mr. Lane.

Q I note that thereafter until the notes of October 14, 1918, the renewals increased by approximately $100 at each renewal. A That is right.

Q And that increase represented what? A That increase represented interest on the note each time. In other words—

Q We understand it. Plus what? A Plus revenue stamps.

Q I note that in October 14, 1918, a new note was given for $6,208.92 and one note for $81. Why were those two split up? A I made out the note for $6,208.92 in my handwriting and took it over to the bank and told Mr. Williams the same situation. I discovered that the $81 interest on the previous note had not been included in that renewal and I made out—Mr. Beers made a mistake in addition or had forgotten to add the interest—I made out a new note for $81 and took it over to Mr. Williams and told him the situation and he put it in together with the $6,208.92 note, which, together with the amount of the previous note with $81.04 interest—

Q I note that the note of February 14, 1918, is for $5,419.74, which is approximately $1,000 less than the old note plus interest. What is the explanation? A That is correct. This series of notes had run along from 1914 until February 14, 1919. The October 14, 1918, note became due on February 14, 1919. At the request of Mr. Beers I went to the bank and told Mr. Williams that Mr. Beers said that the note

had run for over four years, and that it was increasing in amount and that he would not renew it again. It was not his obligation, as Mr. Williams understood, and it had grown from $5,000 to $6,400; and he would refuse to renew it. Mr. Williams said, "Edward, I know that it has grown bigger. It ought to be taken care of, but you know the situation. We have got a little money now. We can't afford to charge this note off at the present time. Give me a new note for a thousand dollars—I am getting ahead of the story—and he turned to Mr. Gardner and he said, 'Harry, how much money is there in that account?' Mr. Gardner told him some amount that I do not recall and Mr. Williams said, 'Edward, I can give you a thousand dollars on that note. Give me a new note for four months for a thousand dollars less.'" I went to Mr. Beers and prepared a new note for $5,419.74, but only for three months and took it over to Mr. Williams and gave it to him and told him that Mr. Beers did not want to make it for four months, that he felt that three months would be sufficient. Thereupon I gave Mr. Williams a note for $5,419.74 and Mr. Gardner received from Mr. Williams a check for a thousand dollars which I learned subsequently was drawn on Francis Williams, No. 2, which was deposited to Mr. Beers' account—which I found had been deposited when the bank book was balanced on the next day.

Q Did you ever see that check? A I saw it at the hearing before Mr. Pedrick.

Q You saw it at the time? A I saw a check; that is all.

Q I note that the note of May 14, 1919, is for $4,501.94 or $1,000 less than the last previous note, with interest? A That is right.

Q Explain how that occurred? A This previous note which I have just referred to with interest to May, 1914, when it became due—which amounted to $5,501.04—when it became due I went over to see Mr. Williams and I said that I had come back on the same thing again, the Jules Mechanic note. "Can you charge it off now?" He says, "Edward, I can do this; I can give you another thousand dollars. I can't afford to take $5,500 out now. Ask Mr. Beers to renew it again and I will pay it off a thousand dollars." I went back and saw Mr. Beers, who instructed me to give a note for only two months this time. I took it back with the time left out and I told Mr. Williams that Mr. Beers felt that he would renew it once more providing it was only for two months. Mr. Williams told me that there were several things that were coming up and that it was impossible to let it go for only two months. He called up Mr. Beers on the telephone and asked him whether he would consent to making it a three months' note and he wrote it in his own handwriting, "three months"—the rest of the note was in my handwriting—and he again made out a check for a thousand dollars, which I found was entered on the pass-book as having been credited on our account when the bank book was balanced immediately thereafter.

Q I note that the note of August 15, 1919, is for $4,000. That is for $500 less than the last preceding renewal? A It is $570.94 exact less. The old note was $4,501.94 and interest $69, so that the amount due on August 14 was $570.94. When that note came due, Mr. Beers asked me to go over to the bank again. I went

over at his request and I told Mr. Williams the same situation. He says, "We are even worse than the last time. I don't see how I can cut it even a thousand dollars this time." He said, "I will give you the $570.94 and we will make it an even $4,000 and see how it looks at the end of three months." He says, "You can tell Mr. Beers that we are doing the best we can. We are cutting this note gradually. We have reduced it from $6,500 to $4,000. Get me a new note and we will take care of it and gradually we will get rid of it." I went back to the office and had the note made out, which was taken over to the bank. When the bank book was balanced, we discovered that no credit had been given us, or no check deposited, for the $570.94, as agreed by Mr. Williams.

Q When did you first discover that that $500 instead of being paid by the bank was charged against Mr. Beers' account? A When the bank book was balanced after August 14, 1919. I can give you the exact date if you want it from the bank book—but not until then.

Q Did you see Mr. Williams after that? A No. I saw Mr. Williams, but not about this account.

Q When was the note of August 15, 1919, for $4,000 charged against Mr. Beers' account? A November 17, 1919.

Q Did you have any knowledge of the taking of these mortgages which have been referred to? A Yes; I did.

Q Tell us about them. A I handled the whole transaction and drew those mortgages. I was instructed and did draw a mortgage of $4,500 first to cover the note from which we re-

ceived the proceeds of $4,431 in the month of June, 1914.

Q By whom were you instructed to do that? A I was instructed by Mr. Beers to draw it. I spoke to Mr. Fleisner about the drawing up of the bond and mortgage.

Q Let us have what conversation you had with Mr. Fleisner about it? A I drew the mortgages and made them at the request of Mr. Beers or the instructions of Mr. Beers to Louis J. Beers. I saw Mr. Fleisner and informed him that that mortgage had been drawn and that it was all right now to forward or to see that we got the $4,431, the Mechanic note proceeds; and that came into Mr. Beers' account. I then made out some checks in the matter and saw Mr. Fleisner repeatedly from June 12 until some time prior to the first of July, and the $4,500 had been disbursed and I went over and told him that the $4,500 was gone and that we had to have more money. He asked me how much more was necessary and I said, "From the claims that are coming in and what payments are due, I think we need somewhere in the neighborhood of $5,000." He said I had to make out a mortgage for $5,500 to make it an even $10,000; so I did. I drew another mortgage and I informed him that I had drawn that mortgage and also Mr. Beers and I thereupon—therefore this note was credited to Mr. Beers' account for $5,000. Subsequently I told him I needed some more money. He gave me another thousand dollars and he instructed me to draw another mortgage for $6,000. We talked about how much probably would be necessary. I told Mr. Fleisner at the time that I did not think Mechanic could

be pulled out of his difficulty with less than $20,000. He said, "Draw another $6,000 mortgage," and I did.

Q Did the bank after the drawing of that $6,000 mortgage advance another $6,000? A Yes.

Q Which also went into the same account? A The very same account.

Q And was disbursed in the same way? A Absolutely. Intermingled and disbursed together.

Q Did you have anything to do with the assignment of those mortgages to Miss Hart and to the American Mortgage & Realty Company? A I very probably drew those assignments on instructions from Mr. Beers.

Q Did you have any conversation with the bank in reference to them? A I don't recall any.

Q Was there any consideration paid for either of those assignments? A None that I know of.

Q Did you have anything to do with the cancelling of these mortgages? A Yes.

Q What was it? A Jules Mechanic went into bankruptcy. He finally engaged William Harris, an attorney in this city. Of course, the bank was involved. It had a lot of money up. I took an active interest in the proceedings. Finally Mr. Harris succeeded in getting the petition withdrawn. Things ran along for a very short time. The renting season was very poor. Mechanic had some pieces of property and he could not rent them. He was falling behind in his building and loan payments. The bank refused to put up any more money. I talked with

Mr. Williams about it and told him we were being served repeatedly with subpoenas in foreclosure suits, and he said, "Well, I will tell you. You will never get out of it. There is only one way to get out of the mess. Let them go ahead with their foreclosures. We will buy some of the good properties in at the sale and in that way we will try to save something out of the Mechanic matter." So we allowed the foreclosures to proceed and made no further attempt to stop it. These mortgages which had been given to the bank were third and fourth mortgages; in other words, there were building and loans on most of them. The second mortgages were held by Mr. Newman, and Anton F. Miller and a great many other individuals. These mortgages were third mortgages. They were cut off by the foreclosures. Some of the attorneys who had represented the prior mortgages who had bought in some of the properties raised the question as to whether the mortgages were any good and asked me why they could not be gotten off the record. They were open. They had to explain each time that the title of the mortgagee had been cut off. They were no longer a lien on the property. I took the matter up with Williams at the bank. He realized and admitted that the mortgages were worthless. He said we might just as well take them off the record and they were cancelled.

Q Who took care of that? A I did.

Q As I understand it, the cancellations were at the direction of Mr. Williams? A At his direction or consent; either one. I don't know as I remember. I asked him whether they could not be cancelled and he consented that they

should be. Several of the properties which they covered had been bought in by or for the bank.

Q Previous to these various loans, did Mr. Beers get any part of that money? A Yes; Mr. Beers received $7.50 for recording mortgages.

Q I am talking now personally. I am not talking about expenses. A No, absolutely not one dollar.

Cross examination by Mr. Stewart.

Q In these foreclosures against the properties covered by these particular mortgages that have been referred to was not either Mr. Beers or the American Mortgage & Realty Company, or Miss Hart made party defendants to those suits? A They were.

Q There wasn't any question about their being cut off? A There was not.

Q Do you mean to say that some of the attorneys raised the question when the records showed that Mr. Beers or Miss Hart or the American Mortgage & Realty Company had been made defendants as to whether these mortgages had been cut off? A Yes. And one of the reasons—one of the places where it was raised was this: The Delavan house had been taken over and bought for the bank in the name of Edward Beers, trustee. Corey & Zimmerman, who were partners at that time, wanted to know who Beers was trustee for. When he was informed that he was trustee for the Broad and Market National Bank and knew something about these mortgages, he questioned whether there was a revivor of these mortgages against those properties.

Q When you got this reduction of $500, or $570.90, which you say Mr. Williams promised to make on this $4,500 that came due on August 14, 1914, you discovered that no $570 had been credited to his account? A I found it out when the note came due, when the bank book was balanced.

Q Did you find any credit in Mr. Beers' bank book around that time for any payments made by Mr. Williams to Mr. Beers' account? A I think the bank book is here if you want to see it.

Q That note of February 14, 1919, fell due on May 14, 1919. With interest, it was for $5,501? A Yes.

Q When you renewed that was when the thousand dollars was paid? A Yes, sir.

Q On May 14th a new note was made for $4,570. That would be with interest? A Yes, sir.

Q Now, between that and August 14th, when the note fell due, did Mr. Beers get any check from Williams for anything at all; do you know? A I don't know.

Q I show you this check dated March 28, 1919, D. 1 for identification, Louis J. Beers, $600, Francis Williams No. 2 account, indorsed by Mr. Beers. That went through his account? A That went through as a deposit. May I have the bank book? I want to see how it went through. It may have gone through with some other funds. (A book handed to the witness.) There were several deposits on May 28th.

Q You must have somewhere a record of your deposits. A Yes; our ledger—in Mr. Beers' ledger.

Q When you found a deposit in your book on that day in some amount larger than $600,

didn't you separate it into its various items so that somewhere you had a record to show that $600 had gone into Mr. Beers' account? A Yes.

Q You don't know what this $600 was for? A I don't know now what it was for, only from what I have been told or from what I have heard here now.

Q If I understand you rightly, you said that this first mortgage for $4,500 was made by Jules Mechanic to Louis J. Beers to secure an advance made by the bank to Mechanic? A That is right.

Q And the second one for $5,500 was made to secure an advance made by the bank to Mechanic? A This $5,000 one.

Q Why did you take a mortgage for $5,500? A Because Mr. Fleisner told me to make it an even $10,000.

Q Is that $5,500 mortgage the one that was given at the time that Mr. Beers indorsed this note dated July 9, 1914? A The mortgage was made previously.

Q Is that the one that was made to secure that note? A Yes.

Q Why was this one of $6,000 taken on July 9, 1914, if you know? A They were going to advance more money. In fact, the bank did give us another thousand dollars on July 9th.

Q The bank gave you $6,000 on July 9th? A Yes.

Q Why, if they gave you $6,000 on July 9th, was the note which Mr. Beers indorsed only made for $5,000? A That was one advance. The other was another thousand. How they came to be made I don't know.

Q This thousand dollar note was not charged to Mr. Beers? A No.

Q That note went through the clerk's desk? A I don't know where it came from.

Q You don't know? A Except that Fleisner said that he would give us some more money.

Q You didn't ask whether it was charged in the bank to Mechanic or to Beers? A No.

Q It wasn't charged to Beers? A No.

Q Was the prior note for $4,500 charged to Beers' account? A No.

Q The only one that went to his account was this $5,000 note? A Yes.

Q Can you tell me why there was a change in the rate of interest on these notes? A They changed them from six to five per cent.

Q Six to five. Do you know why that was? A Certainly. They were growing larger too quickly. In 1916 they had, when we added interest, been brought up to $5,700. It was then suggested that instead of increasing the interest a hundred dollars each four months they should cut it down to five per cent. and that would only increase it about $85.

Q Who suggested that? A I don't know. It was talked over between Mr. Beers and Mr. Williams and myself. I know it was done. I know that was the reason.

Q What difference did it make to you how large that note got on the books of the bank if Mr. Beers was not to pay it? A This was when it was being carried against Beers' liability. He didn't want it to keep on increasing. He was always talking about keeping it down, not making it larger. Beers wanted it carried without interest. Williams said he could not do that. He had to charge interest. The best he could do was to decrease it by one per cent. and that

would keep it by sixty or seventy dollars a year from getting larger.

DEFENDANT RESTS.

Mr. Stewart: I now move for a non-suit on the ground that this was a note made by Mr. Mechanic and ultimately made by Mr. Beers, and made with the knowledge of Mr. Beers that the note was to be carried in the bank as an asset of the bank. In the first place, the only evidence we have here is that of a conversation alleged to have been had between Mr. Fleisner and Mr. Beers at the inception of this note with relation to the fact that Fleisner did not want this discount to go through Mechanic's account in the bank, but desired that it should go through Mr. Beers' account in order that Mr. Beers might see to the disbursement of it and that if he would do that, Mr. Beers would not be held liable on the note.

Now, the general rule is that the president or cashier or any similar executive officer of a bank has no authority simply by virtue of his office to bind the bank by an agreement with the maker or indorser of commercial paper payable to the bank that his liability on the paper will not be enforced. The same rule applies whether the agreement is made before the paper is signed or afterwards. In Morse on Banking, volume 1, section 144, says, "The same species of limitation on the power of the president forbids him to surrender or release claims of the bank against any person from whatsoever source arising; or to stay

the collection of an execution against the estate of a judgment debtor; or to extend time to a debtor. For either of these acts is the exercise of a discretionary authority over the affairs and property of the bank, which is the peculiar and exclusive province of all the directors." There has not been a word of evidence here that this matter was ever brought to the attention of the directors of the bank. All this arrangement is is an arrangement made between Mr. Beers and Mr. Fleisner, the president of the bank. Subsequently an arrangement is alleged to have been made on the renewal of this note between Mr. Beers and Mr. Williams wherein either Mr. Beers or Mr. Schilling says that Mr. Williams agreed that he had learned of the circumstances under which this note was given and that he would not enforce Mr. Beers' liability but would write it off.

The matter of *ultra vires,* as set forth in the Federal Courts, is this: I have a number of cases here. "The view which this Court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows: a contract of a corporation which is *ultra vires* in the proper sense, that is to say, outside of the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could

not make it. The contract cannot be ratified by either party because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it." In the case of the *Best Brewing Company* v. *Klassen,* the Court said: "The general rule is that a corporation can do only those acts which are within the scope of its charter, and, if the signing of the bond in question as surety was an act not originally within the express or necessarily implied powers of the corporation, it is void, and no subsequent act could make it valid by way of estoppel." In another case the Court said: "The reasons why a corporation is not liable upon a contract *ultra vires,* that is to say, beyond the powers conferred upon it by the legislature, and varying from the objects of its creation as declared in the law of its organization, are: first, the interest of the public, that the corporation shall not transcend the powers granted; second, the interest of the stockholders, that the capital shall not be subjected to the risk of enterprises not contemplated by the charter, and therefore not authorized by the stockholders in subscribing for the stock; third, the obligation of everyone entering into a contract with a corporation to take notice of the legal limits of its powers." Further on: "The provisions under which that system of limiting liability was inaugurated were provisions not merely—perhaps I might say not mainly—for the benefit of the shareholders for the time being in the company,

but were enactments intended also to provide for the interests of two other very important bodies; in the first place, those who might become shareholders in succession to the persons who were shareholders for the time being; and, secondly, the outside public, and more particularly those who might be creditors of companies of this kind."

Right here I should like to say that if Mr. Williams or Mr. Fleisner or any other bank president can make an arrangement like this and go to an indorser or maker of a note and say that he will not be liable when the time comes, and if these notes are carried as an asset of the bank, put into public statements of the bank and the comptroller of the treasury and the bank examiners look at them and find them to be assets, a bank might at any time on its face appear to be perfectly solvent under such an arrangement as this and yet be found to be totally insolvent; and you and I and every other man who puts his money in a bank thinking that it is solvent might put it into an insolvent institution.

The Court said in another case: "The doctrine of the Supreme Court is sound on principle for if an *ultra vires* act is illegal, no corporation or individual by his own action or estoppel can make that act legal. It was this thought which led this Court in *Montgomery* v. *Montgomery* and *W. P. L. Road Company* (1857), 31 Ala. 76, to say: 'If this doctrine (*i. e.,* estoppel) be established, then corporations, no matter how

limited their powers, may make themselves omnipotent. They have only to induce persons to contract with them beyond the scope of their powers, and their very usurpations have the effect of conferring powers on them which the legislature have withheld. A proposition so erroneous can scarcely need argument to overturn it.' ''

The doctrine of the Federal Court in the case of the *Chemical National Bank* v. *Havermale,* 120 Cal., was "That appellant is, and at all times mentioned in the complaint was, a national bank duly incorporated under the laws of the United States, as distinctly alleged in the complaint, and therefore the question as to the power of the appellant to subscribe for, purchase, or own shares in said savings bank is one that must be determined by the laws from the statutes of the United States and as to the construction of those statutes in that regard we must look to the Supreme Court of the United States, just as that Court looks to the decisions of this Court for construction given to our own statutes where no federal question is involved."

Take the case of the *First National Bank* against the *American National Bank,* 173 Mo., which was a case of a national bank guaranteeing an accommodation note of one of its customers, and where the defendant was not held liable on the guarantee, the Court said: "The powers of a national bank under the National Banking Act are essentially matters for federal construction and interpretation and whatever rules may obtain

in the several States as to the power of corporations under State statutes, all State Courts must yield to the decisions of the Supreme Court of the United States, construing the powers of the national banks under the National Banking Act." The Court then proceeds to show that the Supreme Court of the United States has decided that a national bank has no more power to bind itself than a draft drawn on its customer will be paid and when sued on such contract, it can plead *ultra vires,* and the fact that the other party to the contract has performed his part of it does not estop the bank from so pleading. The Court concludes this opinion in these words: "It will be no profit in this case to consider the rules of law adopted by the several States bearing upon the power of banks organized by authority other than the Federal Government, to enter into such contracts or to impose the defense of *ultra vires* after the other party to the contract has fully performed it; for the decisions of the Federal Courts treat of such contracts as void and unenforcible as to national banks, and this Court is in duty bound to defer to those Federal decisions."

There are a whole lot of cases which hold the same rule. I would just like to read an excerpt from another case in which the situation was similar to that which we have here. It is found in 108 Pacific 914, in which a note was given by some brother of an official of a bank, as I remember, under an agreement as alleged here that the maker of

the note or the indorser of it would not have to pay it. After the recital of a long history of the case and a discussion of various points of law, the Court finally said: "Thurston was engaged in a palpable attempt to defraud the bank of which he was cashier, and the defendant by his acts made it possible for him to consummate the fraud. If, however, this was not really the case but that in truth the transaction was a mere trick to make it appear to the government and to the creditors and stockholders of the bank that it had a valuable note when in fact it did not have one, the result must be the same, for when parties employ legal instruments of an obligatory character for fraudulent and deceitful purposes, it is sound reason as well as pure justice to leave him bound who has bound himself."

That is the situation we have here. This was a case where Mr. Beers gave a note to the bank. It is not material what Beers intended to do. We have to look at the transaction in its legal aspect. If he put his name on that note and allowed it to go in as an asset of the bank, that was a fraud, as I said before, on the shareholders and depositors; and the Court said that in such a case as that it was not only sound reason but pure justice to leave him bound who has bound himself.

It is no defense to this action that he did not get any consideration for the note or that he did not get any benefit out of it. "It will never do for the Courts to hold

that the officers of a bank by the connivance of a third party can give to it the semblance of solidity and security when its insolvency is disclosed and that the third party can escape the consequences of his fraudulent act. It would require more credulity than I possess to believe that the defendant and his brother, who was the bookkeeper of the bank, came to him with the proposition of its vice-president in its every suggestion and essence deceptive and fraudulent—did not know its true character and purpose."

I say that under those cases the plaintiff's case should fall and that we should have a non-suit.

(Argument.)

This motion, which has been made on behalf of the plaintiff bank, admits for its purposes the truth of all statements made by the witnesses for the most favorable inferences that can be drawn from those statements for Mr. Beers, but denies their sufficiency in law.

Briefly Mr. Beers' story is that he had no relations with Jules Mechanic, a borrower from the Broad and Market National Bank, until about 1914, when he says the president of the bank suggested to him that the bank should make a note, as I understand it, to Mechanic and that Beers should indorse the note. Later on, as I understand it, this note, as it was carried along, was signed by Mr. Beers. According to Mr. Beers, he was at one time a director in the bank. He has testified that he received no money from

Mechanic. He says that the explanation made to induce him to indorse the note was that the bank loaned Mechanic a large sum of money, that it seemed that more money would be required to get him out of his difficulties—perhaps the inference is that the money was required to save whatever money had been already loaned to him—and that the bank did not think it was desirable to give any more loans directly to Mechanic. Mr. Beers says that thereafter the arrangement was made as I have indicated and the money was disbursed by him to various building and loan associations and to various material men and mechanics who worked on the real estate, I suppose, of Jules Mechanic. Mr. Beers has testified to and produced a ledger, which he has kept, wherein he says he opened a separate account showing this Mechanic matter as a separate transaction.

It has been called to the Court's attention that in cases where the situation has been reversed, where an action has been brought against a person who has in good faith accommodated a bank by giving it his paper, the maker of the paper has been discharged from his liability upon proof that there was good faith and that the paper was given for the accommodation of the bank.

This is, of course, not an action between the stockholders of the bank or the creditors of the bank and Mr. Beers. The relation between the bank and Mr. Beers is not, so far as our approach to it or the point of

view of our Negotiable Instruments Act are concerned, that of maker and indorser, but is less remote and is direct between the parties to the transaction. There are no intervening parties. That is why the Court permitted evidence indicating no consideration, which is a personal defense.

I think it is a question for the jury to determine under all the facts and circumstances whether Mr. Beers signed these notes and gave this paper in good faith for the accommodation of the bank, if I may put it that way, or whether it was an accommodation paper for the benefit of Mechanic. I will deny your motion and leave it to the jury.

Mr. Stewart: May I have an exception?

Exception noted as ground of appeal.

HARRY C. GARDNER, sworn in behalf of plaintiff.

Direct examination by Mr. Stewart.

Q You are cashier of the Broad and Market National Bank? A Yes, sir.

Q And have been for how long? A Since March, 1915.

Q At the time you were made cashier of the Broad and Market National Bank what position did Mr. Williams occupy? A Vice-president.

Q How long had he occupied that position? A Since December, 1914.

Q In other words, he went to the bank a few months before you did? A A few months before I did.

Q You are familiar with these notes that were given by Mr. Jules Mechanic, indorsed by Mr. Beers, and later given by Mr. Beers alone, which are involved in this action? A Yes.

Q Mr. Beers told us yesterday in his testimony that at one time when he was talking about a renewal of one of these notes or the matter of its being paid off, Mr. Williams directed you to procure a note signed by someone outside—some one of the clerks of the bank or some other person—put it in the bank and take out Mr. Beers' note and that he refused to do so. Did any such conversation ever take place in your presence? A It did not.

Q Did Mr. Williams ever ask you to do that? A No, sir.

Cross examination by Mr. Lane.

Q Has your memory since June, 1924, with respect to this transaction been refreshed? A No, sir..

Q You were as certain in June 16, 1924, with respect to whether this conversation took place as you are now? A I was at that time.

Q Will you tell me why it was that you testified on the 16th of June, 1924, as follows: "Question: Do you remember that on a certain occasion when I brought up this matter of the Jules Mechanic note, Mr. Williams then said that he would fix the matter up, and turned to you and said, 'Harry, have one of the boys outside make a note,'" to which your answer was, "No, I thought that was the question I just replied to.

Q Did Mr. Williams, however, at any other meeting request you to have one of the boys make a note? A I do not recall any such request. Q Will you say that Mr. Williams did not make such a request of you and that you did not reply by saying you would not call any one of the boys? A No, I will not make such a statement, but to the best of my knowledge, I do not recall any such question ever having been asked me." Now, I ask you why it is that on the 16th day of June, 1924, you refused to say that no such statement had been made to you, only going so far as to say that you did not recall it, whereas now, a year later, 16 months later, you are willing to swear that no such statement was ever made to you? A Because it was not.

Q Why didn't you say so when you were asked that question on the 16th of June instead of saying that you would not say that it had not been made, but all you would say was that you couldn't recall it? Can you explain that? A No more than to say that the questions were asked in such a peculiar way by Mr. Beers to me at that time.

Q You understand the English language? A I do.

Q You understand what the question was: "Question: Will you say that Mr. Williams did not make such a request of you and you did not reply by saying you would not call one of the boys?" You understand that? A I didn't call any of the boys.

Q That you would not call any of the boys to sign a note? A Yes.

Q You understood your answer: "No, I will not make such a statement." That is clear, isn't it? A Very.

Q Now, today you do make such a statement, to wit, that he did not ask you to call any one of the boys. I ask you why you change? A (The witness hesitates.)

Q Is it because you talked about this thing with Mr. Williams? A No, sir.

Q With Mr. Stewart? A No, sir.

Q Or with someone else? A No, sir.

Q Your memory six months later is better? A (No answer.)

Q Why didn't you, on June 16, 1924, when you were asked that question, answer unequivocally, "No. No such request was ever made of me," instead of saying, "I will not say it was not. All I will say is I do not recall"? A Because a period of years had elapsed. A man cannot jack himself up on that in two minutes.

Q Yet six months more has elapsed now. If you have jacked yourself since, tell me how you have done it. A I have not. I say now no.

Q Why do you say now no when you would not say no then? A (No answer.)

Q Two minutes have elapsed. Can you answer? A (No answer.)

Mr. Lane: That is all.

FRANCIS WILLIAMS, sworn in behalf of plaintiff.

Direct examination by Mr. Stewart.

Q Have you the discount sheets and so forth from the ledger of the bank that relate to these notes in question? A I have.

Q When was that first note put on? A July 9, 1914.

Q And that fell due in November? A November 9, 1914.

Q In November 9, 1914, were you connected with the Broad and Market National Bank? A I was not.

Q When did you go there? A The first day of December, 1914.

Q When did the second note fall due, the note of November 9? A March 9, 1915.

Q When that note fell due on March 9, 1915, did you have any conversation concerning the renewal of the same or its payment with either Mr. Beers or Mr. Schilling? A I think not.

Q There was a note given on March 9th? A Yes.

Q And that fell due when? A July 9, 1915.

Q Did you have any conversation then with either Beers or Schilling regarding that note? A I think not.

Q When was the first time you ever had any conversation about these notes or their renewal with either Mr. Beers or Mr. Schilling? Tell us which one it was you had it with. A I think it was sometime after my presidency. In 1916, I would say.

Q Did you handle this renewal from time to time from the time that you began as vice-president to the time that you became president? A I think not.

Q You think they were handled by me? A I would say Mr. Fleisner handled it. That is only my recollection. I don't know.

Q What is the first conversation you had with either Mr. Beers or Mr. Schilling in regard to these notes? A Some time after I went into the

bank Mr. Beers spoke to me and explained what he thought was his lack of liability on the notes.

Q Can you fix when that was? A No, sir; I cannot.

Q This note was finally charged up against his account in 1919? A Yes.

Q Can you say approximately what period of time elapsed between your coming to the bank in December, 1914, and the charging off of this note? A I would say it was in the year when I was elected president.

By the Court.

Q When was this note charged off? A In 1919.

Mr. Lane: November 18, 1919.

By Mr. Stewart.

Q What was that conversation? A Mr. Beers explained the proposition, that he had borrowed this money, not for his own use, but for the use of Jules Mechanic, and that there was no individual liability on that note.

Q What did you say to him? A I told him that when I came there I found the note there. The note had been listed as an obligation of Mr. Beers and I didn't see that I was interested in it in any way.

Q Subsequently, did you have any conversations with him about it? A Quite often after that.

Q What was the nature of those conversations? A All the same; along the same general lines. He tried to impress upon me that he was not liable for this note and tried to get me to do something about it.

Q Were these conversations pleasant or otherwise? A Generally, not pleasant.

Q Just tell us what you said to Mr. Beers as to how you felt about his liability on that note. A I told Mr. Beers that that note carried his indorsement, which I told him he had signed. He admitted the signature. As far as I was concerned as president of the bank, that was Mr. Beers' liability.

Q After you had this conversation with him, he continued to renew the note? A He did.

Q Mr. Beers has testified, and I think Mr. Schilling also, that when they discovered that interest was being charged to Mr. Beers' account on this note they came over to see you and had a conversation in regard to having the interest paid back to Mr. Beers. Tell us about that. A I don't know about the discovery. I do know that Mr. Beers came over to see me about it.

Q When was that? A That was when the note given on September 6, 1916, and due November 10, 1916—which, by the way, was the first note that Mr. Beers signed; the maker having then left town, Mr. Beers signed that note—when that note matured on November 10, 1916, he spoke to me and asked me if I had any objection to him adding interest which he had paid. He stated to me that he wished to keep his record clear as to just what this note had cost. I told him I saw no objection. We so made the note out.

Q I think you said this was the first note that he signed? A According to my record, that is the first note he made.

Q Subsequently to that did you have any further conversations with Mr. Schilling or with Mr. Beers regarding this? A In what way?

Q In any way regarding Mr. Beers' non-liability. A They impressed that on me every time they saw me.

Q Why was the interest changed from six to five per cent.? A It was changed at the request of Mr. Beers, because he had already suffered enough for the giving of his own note, and paying six per cent. interest was not fair. I said, "All right, make it five per cent.," so we made it five per cent.

Q Then, this suggestion that the interest and the revenue stamps be added to the note was made by Beers and not by you? A It was.

Q It was not made at a conversation between you and Schilling but at a conversation between you and Beers? A It was.

Q In 1919—February, I think it was—a note fell due, did it? A It did.

Q Did Mr. Schilling see you about that? A I talked with Mr. Beers about that. We spoke so many times and in so many places that I would not like to fix the place or the month.

Q Mr. Schilling said that he talked to you about that and told you that Mr. Beers would not renew this note, that it was getting bigger, and that you said you knew it was getting bigger, but you could not charge it off. Did you have that talk with him? A I think not.

Q About that time there was a thousand dollars paid on account of this note by reason of a check by you? A There was.

Q Tell us about that check. A Mr. Beers came to me and said, "You remember when we elected you the last time we talked about our losses, and you said that you had some outside income from which you would be willing to help the directors who helped the bank." He said,

"Can I have some money on this note?" I said, "Yes, I think so." I gave him a thousand dollars out of my No. 2 account, as it was called.

Q What is that No. 2 account? A That is money that I made and put into my No. 2 account for the purpose that I told you.

Q From what source did the money arise? A The sources of that account were from real estate deals, insurance, things of that nature, and appraisals.

Q Did you pay any money from that account to any other directors? A I did.

Q How much money did you pay to the other directors? A I cannot tell that because I haven't all my checks. Unfortunately, when Mr. Beers had that preliminary examination he subpoenaed these checks. I got them out, but the rest I am unable to find. I have my ledger sheet right here.

Q What does your ledger sheet show? A My ledger sheet shows that I put into that account approximately $13,000.

Q What does it show as to how much you paid out of that account? A The account was closed. I paid out the same amount.

Q By the entries in that ledger sheet can you tell whether you paid any of this money to other directors in the bank about the same time that you paid Mr. Beers $263? A By inference I can.

Q How is that? A Some time later Smith failed. At that time Smith owed seventeen or eighteen thousand dollars. The directors agreed to borrow that money from the Federal Trust Company, I believe—some outside bank—and they all indorsed the note. About the time I paid Mr. Beers on August 16, 1918, this $263.50, there

are two other charges against that account of $263.50. There are two charges of $527, apparently two checks presented for payment on the same day. Twice $263.50 is $527. It appeared that I paid seven directors $263.50.

Q Tell us whether there are other accounts in there around the time that you paid that $600 check to Mr. Beers. A There are two entries about that time of $1,200 apiece. Mr. Beers' check went through on June 17th. On May 16th there was a $600 check. Four days later, on the 20th, there was $600 and May 31st there was $1,200, or two six hundred dollar checks, I presume. On June 2 there was a similar charge of $600.

Q Which would make how many altogether? A Six of them. On June 18th there was a six hundred dollar payment, which would tend to show that seven directors got $600 apiece.

Q This No. 2 fund, as I understand it, was a fund in which you paid moneys that you got from the appraisals of real estate, writing of life or fire insurance and that sort of thing? A Yes.

Q Out of that fund under the arrangement which had been made when your salary was increased—

Mr. Lane: I must object to counsel leading the witness to quite the extent that counsel is now leading him.

The Court: Suppose we have lunch and then start afresh. We will take a recess until two o'clock.

Thereupon the Court took a recess from one to two o'clock P. M.

AFTER RECESS.

Continued pursuant to adjournment.

Present, counsel as before stated.

FRANCIS WILLIAMS, resumes the stand.

Direct examination (continued) by Mr. Stewart.

Q Referring to that No. 2 account: How long did you run that account? A From February 18, 1918.

Q From when until when? A February 13, 1918.

Q To— A December 19, 1919.

Q And in that account how much money did you take in? A I haven't footed it.

Q Tell us roughly. A About $15,000.

Q And how much did you pay out to the directors? A I could not tell you that either. The account is closed. I paid out those seven payments of $263.50, and seven of $600, and $2,000 additional to Mr. Beers, and then there are other charges here that I cannot tell you what they are.

Q Mr. Beers testified about a conversation which he said he had with you in which he spoke about this note and in which you said something to the effect "You think your friends have got control of this bank. You can go to hell," or some such conversation as that. Did you hear that testimony? A I probably said that with reference to the stock transaction; not in reference to this at all. That was the time we were having a fight between the directors for control of the stock. We both got

pretty hot and I may have said almost anything to him.

Q That, you say, was not in reference to this note? A In reference to control of the bank through stock ownership.

Q At the time this note was under discussion and before it was charged off against Mr. Beers' account, did you offer to charge off the note if he would sell you his stock? A I did not.

Q In 1919 did you try to buy Mr. Beers' stock at all? A No. I want to qualify that with the statement that both sides had agents trying to buy Broad and Market stock. Directly, I did not.

Q You say both sides. Beers was on one side of that wrangle trying to get control and you were on the other side? A I was.

Q When was this note, which is under consideration, charged off? A November 17th, 1919.

Q How long after that did Mr. Beers continue to do business with the Broad and Market National Bank as a depositor? A He did business—I can fix that positively by stating that he did business until the day he sailed for Europe, about which conversation he has testified. He told me he was sailing for Europe.

Q With reference to the due date of the $5,800 note, which is not the note involved at present in this litigation—that was dated— A I think that fixes the date.

Q That was dated— A I think the due date of that was May 25, 1923. I think you will find that that was the day that Mr. Beers sailed for Europe.

Q He did business with the bank from the day that the note involved in this litigation

was charged off in 1919 up to the due date of this other note—May 25, 1923? A He did.

Q Was this $5,800 which fell due May 25, 1923, and which has just been referred to, the remnants of the $8,000 note that Mr. Beers put up to make good a loss? A My records would tend to show otherwise because I can trace that note from the last time it matured—May 25, 1923—up to May 21, 1917, at which time it was $19,875.25. It had been reduced regularly and periodically until May 25, 1923, at which time it was in the amount of $5,800.

Q When you charged off the note in litigation here in 1919—November, I think you said—did Mr. Beers call you up and talk to you about that? A He did.

Q What was that conversation? A On the day this note was due I heard nothing from Beers or from Mr. Beers' office. His account was good. We charged the note to his account. Several days after, he called me and he said "I hear you have charged my note for $4,000 to my account." I said, "Yes." He said, "I would like to renew it." I informed him that I did not care to take a renewal at that time. He wanted to know if I would take a renewal if he made a payment. I said, "No; we have had enough fights about this note. The note is charged off. I think we had better let it go that way." That is the way it went.

Cross examination by Mr. Lane.

Q Mr. Beers insists that after you got into the bank he took the position that he was not liable on this note? A He did.

Q Although he did business with the bank up until May 25, 1923, he always persisted in saying that there was no personal liability on his part so far as this particular note was concerned? A He did.

Q I understood you to say that he came to you originally—I think I remember your words correctly—and said he was an accommodation maker of that note for Mr. Mechanic and that he was not personally liable, that there was no personal liability on his part? A That is true.

Q You knew as a banker, and you assumed, did you not, that Mr. Beers as a lawyer knew, that if that was the situation he was undoubtedly liable on that note? A That was my opinion.

Q There was no doubt about that in your opinion as a banker? A Not a bit.

Q Did you tell him that he had borrowed this money for the benefit of Mechanic and that there was no doubt about his liability? A Yes.

Q What did he reply to that? A He said that was the arrangement between himself and Fleisner and that he had no liability.

Q Then he, in a sense, told you that he was an accommodation maker of that note for the benefit of the bank? A Yes.

Q There is quite a difference in the use of words whether he told you he was an accommodation maker for the benefit of the bank or an accommodation maker for the benefit of Mechanic? A I am not a lawyer. I am simply a bank man.

Q How many years' experience have you had in the bank? A Thirty years.

Q In your thirty years of experience in the bank you have become familiar with the rule that a person for whom an accommodation is

made cannot hold an accommodation maker? A I don't believe in all my thirty years' experience I have ever had the case raised. I wish to explain that I have only been an officer for ten years, which has been the limit of my experience in handling notes.

Q At any rate we have it that when he first came to you he said in substance that whatever he had done in this transaction was done for the accommodation of the bank? A Yes.

Q And that position he has consistently maintained until his relations as depositor in the bank were severed in May, 1923? A Yes.

Q I understand you to say that these conversations between you and Beers were acrimonious? A Most of them.

Q And that that feeling or that situation developed from the very beginning? A I did not hear that last remark.

Q Couldn't you hear it? A No.

Q And that feeling had its inception at the beginning of the conversations between you and Mr. Beers as to this note? A What feeling is that?

Q Acrimonious discussions? A When he talked about this note. Certainly.

Q That was the feeling from the very beginning, from the beginning of his talking about the note? A Certainly.

Q And yet you at his request permitted the increase of that note so as to include every dollar of interest which had been charged to his account and every stamp which had been placed on the back of these notes? A I increased it at his request.

Q You increased it at his request notwithstanding the fact that the discussions between

you and him with respect to that note were acrimonious? A I did.

Q You departed from the ordinary bank practice? A I don't admit that.

Q You don't? A No.

Q Is it ordinary banking practice for a person who has a note in a bank for over a series of years to increase the note every four months at the time of the renewal to include the interest and the stamps put upon the back of the note? Is that bank practice? A As a good banker I see no objection if a man is financially good and maintains a proper balance. I did not in this case.

Q Have you done that in any other case? A I have.

Q You have? A I think so.

Q So that the bank not only does not get its principal or any payments on account of its principal but it renews the note for a sum to include interest due—does not get its interest? A We may if circumstances warrant.

Q And you thought the circumstances warranted it in this case notwithstanding the fact that the relation between you and Beers was one of acrimony? A Mr. Beers explained to me that he was not liable on this note. He wished to keep the transaction straight and I in all fairness, trying to be fair with him, allowed him to do it as a good banker.

Q So that it was a good banking proposition where there was a note for this amount, some $5,000, questioned by the person who made the note, to carry that note along for years with that question remaining open? A I approved of that by doing it.

Q Notwithstanding this relationship of acrimony between you and Mr. Beers, upon two occasions without any legal reason for it or any legal liability upon your part you caused funds to be applied for the reduction of that note by a thousand dollars? A Did I so testify?

Q Will you explain to me how it is that with this bitterness of feeling you did that thing? A Although I am a banker, I try to keep fair-minded.

Q What has fairness of mind to do with this transaction? A It had in my mind. I told directors that I would apply certain funds towards the losses of directors. Mr. Beers claimed this was a loss. I perhaps was a little over-fair to him.

Q It was wholly out of a feeling of fairness that you made these two payments? A Absolutely.

Q Have you any of the checks that you drew to the order of the other directors? A I have not.

Q You have the check that you drew to the order of Mr. Beers? A Mr. Beers subpoenaed them. They were searched for and I found them. I have them here.

Q Have you any other checks that you drew on that account? A I have not.

Q Will you let me see that ledger? A Certainly (witness handed a book to Mr. Lane).

Mr. Lane: I ask that this be marked for identification.

(The book referred to was marked D. 15 for identification.)

Francis Williams, cross.

By Mr. Lane.

Q This is a loose-leaf ledger kept by whom? A By the bookkeeper that ran that ledger.

Q The items in it, of course, without the assistance of the checks or vouchers, are blind except for what you can remember? A That is right.

Q When did you last see these vouchers which have been lost? A Sometime around the original subpoena and order of discovery or some such thing.

Q You were subpoenaed to produce what checks? A These checks that I have with me.

Q And you found them. You were subpoenaed to produce another account, were you not? A No. Let me explain that. I was subpoenaed to produce these checks and I was subpoenaed to produce my trustee account. I explained to Mr. Beers that my trustee account had no bearing on this matter, but that my No. 2 account did; that I would be glad to produce all checks in which he was interested, which I did. My trustee account is another matter. Mr. Beers got them mixed up.

Q You understood, of course, after your conversation with Mr. Beers that what Mr. Beers wanted were the papers with respect to the trustee account No. 2? A I did not. He told me himself as near as I remember that the checks were all that he wanted.

Q Where were the other checks? A With these in my drawer somewhere in the bank.

Q What did you do with them? A I suppose I put them back. I have since been unable to find them.

Q Those cancelled checks on which you relied for the proof of the disposition of these moneys in this trustee account No. 2 you have lost in your bank; is that right? A You have misstated the name of the account.

Q Trustee account No. 2? A It is Francis Williams No. 2.

Q Well, Francis Williams No. 2. You have lost those in your bank? A I didn't say it.

Q Have you lost them? A I don't know where I put them or else I would know where to find them.

Q Have you searched? A I have.

Q You cannot find them? A I cannot.

Q All of these checks, every single check on this account, except the checks drawn to Mr. Beers is among those which may not be lost, but which you cannot now find? A I assume so. I had no interest in looking for more than what Beers was interested in at that time.

Q You knew when you came here that you were going to testify with respect to the disposition of these moneys which made up this account? A I did.

Q In anticipation of that you looked for the original evidence, which was the checks? A I did.

Q Didn't you find them? A No.

Q You found the checks which were drawn to Mr. Beers? A They were found some time ago, as I explained.

Q What moneys went into this account? A Moneys which I personally made outside of my duty as bank president.

Q As, for instance? A As, for instance, insurance money, appraisal fees, moneys for as-

sistance in selling real estate, and things like that.

Q Were any moneys realized by the bank for discounts larger than six per cent. put in that account? A (Witness hesitates.)

Q Can't you answer it? A You bet I can answer it.

Q Answer it, then? A No.

Q I suppose you mean to imply by that that there were no such moneys? A I do.

Q In no single case? A I do.

Q And you say that upon your oath? A I do.

Q Neither by the bank nor by any person connected with the bank in any manner, shape or form?

Mr. Stewart: I object to that because the inquiry we are now following up is merely where the money in this account came from. Even if the bank did take, which Mr. Williams said it did not, usurious rates of interest on this or any other account, that would have nothing to do with this. As I understand the inquiry, it relates specifically to Mr. Williams' account No. 2.

Mr. Lane: I assume the last question to apply to this particular account.

The Court: Then I will admit it.

A There was not.

By Mr. Lane.

Q You refused to answer in your examination before trial what the sources of the money were that went into Francis Williams' account

No. 2. Why? A You have not had all the testimony transcribed that was given at that trial.

Q So that the stenographic record of that examination, which I read to the jury, "Question: What is the source of the funds that were credited to the account of Francis Williams No. 2? Witness refuses to answer on advice of counsel," is incorrect or incomplete? A It is.

Q Didn't you say in the presence of the stenographer at that point that you would rather go to jail than answer that question? A I did not.

Q Are you sure of that? A I am.

Q Would you recognize the Master that took the testimony? A Surely.

Q Did you have any conversation with Mr. Schilling with reference to these notes? A I had plenty of them.

Q When was the first one that you had with Mr. Schilling? A I cannot say that. I had so many that I cannot place any single conversation. They covered a long period of time. They were continuous.

Q I gathered from your testimony on direct examination that your conversation with Mr. Schilling, about which he testified, did not take place. A I did not say that.

Q Did you talk with Mr. Schilling about that? A Naturally. Every time he brought a note down he had something to say.

Q Did Mr. Beers on some of the occasions when he took a note down to you say to you that he was not liable upon this note? A I would say he did in some of them.

Q Are you sure it was with Mr. Beers and not with Mr. Schilling that you had the conversation with respect to the increase of that

note by reason of the interest? A Reasonably sure, yes.

Q Did the conversation that you had with reference to the $1,000 reduction follow a conversation that you had with Mr. Schilling with respect to that note? A I could not say that. Mr. Beers would call me up in general and make arrangements for the renewal of the note.

Q Will you say now that you did not have a conversation with Mr. Schilling with respect to the reduction of that note by a thousand dollars? Will you say now that you did not tell him that you would cut it a thousand dollars? A I won't say that.

Q What did you say? A I haven't said what I said except—

Q I am now asking you— A Except that I conveyed to Mr. Beers that I would put a thousand dollars to his account.

Q Did you say that to Mr. Schilling? A I said so many things to both of them that I could not tell you at this date.

Q So, the conversations which you testified to upon your direct examination as taking place between you and Beers might have taken place between you and Schilling; is that correct? A It is a possibility, of course.

Q At this time Mr. Schilling himself was acting for the bank, was carrying property in his own name as trustee for the bank; wasn't he?

Mr. Stewart: I don't know as that is material.

The Court: How is that material?

Mr. Lane: Only to show the practice of the bank. That is all.

The Court: I sustain the objection.

Mr. Lane: Allow me an exception.

Francis Williams, cross.

By Mr. Lane.

Q At some time Mr. Schilling had a note which had been discounted for the benefit of the bank, did he not, for some eleven thousand dollars?

Mr Stewart: I don't think that is material. I object to that.

The Court: I sustain the objection.

Mr. Lane: Allow me an exception.

Exception noted as ground of appeal.

By Mr. Lane.

Q When was it that you first attempted, if you ever did, to acquire the stock of Mr. Beers? A I have already testified to that. I did not attempt to acquire stock except as agents employed by our side may have attempted to.

Q Did you have any conversation with Mr. Beers with respect to stock at any time? A I cannot say that.

Q I think you testified on your direct examination that you might have used this language, "Go to hell" with reference to some conversation? A I did use that. I said that was during the fight between the two sides for the control of the stock.

Q When was that? A Sometime during the spring or summer of 1919. That is when the fight was going on.

Q What was it about? What was the subject matter of your conversation with Beers which led you to use that language? A The subject was as to who had control of the stock.

Q Was his stock discussed at that time? A I cannot say that. We were discussing the

stock of the Broad and Market National Bank as to who had control of it. He said he had and I said we had.

Q And that ended by your telling him to go to hell? A I told him lots of things more than that.

Q More virulent than that? A Probably. They were justified.

Q And this was all during the time that you permitted an increase of this note to cover interest and permitted a reduction of this note by a thousand dollars upon two different occasions when you did not have to, when you asserted that it was a binding obligation upon the part of Beers? That is true? A Except that the first reduction was made before I had any information that Mr. Beers and his friends were trying to get control of this stock. That was in May. I didn't have any information then. The fight had been so long.

Q You never talked to Mr. Beers, as I understand it, about the purchase of his stock by you? A I don't believe I did directly.

Q Don't you remember that you had a conversation with Mr. Beers with respect to the purchase of stock not longer ago than the examination before the Master on June 16, 1924? A No, I did not.

Q You have testified that the directors got seven checks for $263.50 and seven for $600. As I understand it, Mr. Beers got a check. His check was one of these seven? A I said, by inference.

Q Is there anything in this ledger account that would indicate that these directors got $2,000 in addition to the $263 and the $600? A No.

Francis Williams, re-direct.

Q Mr. Beers got that alone of the directors? A It would appear so.

Re-direct examination by Mr. Stewart.

Q When you received a subpoena to appear and testify before trial and bring these checks of the trustee account and you got out these checks of the No. 2 account referring to the Beers matter, where did you put those checks? A In Mr. Beers' credit file, where they have been since.

Q Where did you put the other checks? A I think I put those in the back of my drawer.

Q Is that the reason why you have these checks and cannot find the others? A Surely.

Q Was there any dispute with any other director regarding that No. 2 account? A There was not.

Q At the time this note was running—from 1914, when you came to the bank in the fall down to 1919—Mr. Beers was a director of the bank during all that period? A He was.

Q You had weekly meetings of the board? A We did.

Q During all that period of time down to the spring or summer of 1919, other than your acrimonious conversations about this particular note, your relations with Mr. Beers were friendly? A Fairly so.

Q Can you fix the time when you first learned that Mr. Beers and some friends of his were trying to get control of the bank? A One of my depositors came to me, I would say, in the early spring of 1919, and said, "Do you know that the directors are trying to get control of this bank?" I said that I not only did not know it

but did not believe it. He came to me sometime later and said, "Suppose I should give you proof that some of the directors are trying to get control. What would you say to that?" I said, "If you give me proof and the proof is strong enough, I would have to believe you." His name was Samuel F. Leber. He said, "They have been to me trying to buy my stock." After that I was satisfied that they were trying to get control.

Q Do you know for a certainly yourself that you did pay moneys out of that No. 2 account to the directors of that bank? A I know by inference that there were seven men on what we called, "Jim Smith note." I know that there are seven charges of $263.50 and seven charges of $600 against this account.

Q Who were the seven men? Do you remember? A Mr. Fritz, Mr. Wadsworth, Mr. Stewart, Mr. Beers, Mr. O'Connell and Mr. Foyle and Mr. Fleisner.

Re-cross examination by Mr. Lane.

Q You say that this note of $5,800—if that is the correct amount—not involved in this suit now, began as a note for $19,000. At what date? A In 1917.

Q You know, as a matter of fact, do you not, that the note of $19,000 represents the $8,000 or the $8,800 contributed by Mr. Beers and other moneys contributed by Mr. Beers to the bank? A I do not.

Q Have you made any effort to find out? A Yes, I cannot find any such entries that would lead me to that assumption.

Q Have you found any entries leading to the assumption that on that date or any other date there was an advance to the account of Mr. Beers for $19,000? A I simply carried that to that day.

Q Do you find at that time or at any other time any credit to the account of Mr. Beers for that $19,000? A Well, I can look.

Q Have you looked? A The account is here. I am perfectly willing to look now.

Q All right, look. A (Witness looks at book.) I find on May 21, 1917, that there was credited to Louis J. Beers $19,476.03.

Q Look at the offset. A There is a charge of $19,486.56.

Q Do you know where that charge went to? A This ledger was kept, of course, with one charge made in the account. I cannot tell what that charge is.

Q Don't you know that that charge was a payment by Mr. Beers out of that account for the benefit of the bank consisting of his contribution to the bank? A I do not. I don't know anything about that.

Q Have you made any investigation to find out? A No.

Q Would the books of your bank show? A I cannot say. They might.

Q Have you made any attempt to carry that note back of that? A Yes, that was the last record I could find of the note on our books.

Q There is nothing upon the books of your bank? Have you a discount ledger here? A No.

Q Did you carry a discount ledger at that time? A We carried loose sheets such as these.

Q Have you those at the bank—a daily discount book which shows every note which came into the bank for discount? A Yes, but I found no records behind 1917.

Q I would like to see the record of 1917, to show what that note was about. Have you the tickler? A I haven't the tickler. I think I have the record of that particular note. This was from what we call our liability ledger. Yes, I have that.

Q What does it show? A I have what we call the liability ledger. This is a loose-leaf ledger that contains the notes of the individual whose account is stated on them.

Q That is nothing but the name of the maker or indorser and the account to which discounted? A And the amount of the note, the day it is put in, and the day it is due.

Q The purposes of the note are not set forth there? A They have no book in any bank in which I have been which shows the purposes of any note.

Q The directors of this bank including Mr. Beers all contributed to the bank certain sums of money, did they not? A Are you talking about the $8,000 contribution?

Q Yes. A The bank examiner at one time—

Q I asked you whether they did or did not? A I am telling you about it. May I answer it in my own way?

Q I would like to have you answer yes or no. A I would like to answer it my own way.

Q Go ahead. A The examiner at one time ordered a charge-off of something about $100,000. Eleven directors of the bank agreed to give me as trustee $88,000 and put it in my hands as trustee, which they did. The money, that

$88,000, went through my account as trustee to the Broad and Market National Bank for the $88,000 contributed.

Q Did any part of that $19,000 that was referred to in that note go into that trustee account? A I think not.

Q Do you know? A Yes.

Q What? A I think I do. I don't believe it did.

Q When did Mr. Beers' contribution go into your account? A At the time he gave it to me.

Q When was that? A I don't know the time directly. Sometime after I got in the bank.

Q Can you tell me about when it was? A I cannot.

Q Can you tell me whether he gave cash or whether he discounted a note? A I cannot do that. He paid his share along with eleven other directors.

By Mr. Stewart.

Q To your knowledge did Mr. Beers at any time ever contribute $19,000 to the bank? A He did not.

Mr. Stewart: I would like to offer these four checks drawn to the order of Louis J. Beers, which have been referred to heretofore, in evidence.

(The papers referred to were marked P. 1 to P. 4, respectively.)

Mr. Stewart: I will also offer in evidence the by-laws and the articles of association.

(The papers referred to were marked P. 5 and P. 6, respectively.)

Mr. Stewart: That is the plaintiff's case.

PLAINTIFF RESTS.

ALBERT C. PEDRICK, sworn in behalf of defendant, in rebuttal.

Direct examination by Mr. Lane.

Q You are a lawyer? A Yes.

Q And a Master in Chancery? A Yes.

Q At the time of the examination before trial in the case of the Broad and Market National Bank against Louis J. Beers did you know Mr. Williams? A Yes.

Q When the question was asked him, which appears in this record: "Question: What is the source of the funds that were credited to the account of Francis Williams No. 2? Witness refuses to answer on advice of counsel," did Mr. Williams in your hearing say that he would rather go to jail than answer that question? A He did, but that remark was made at the close of the hearing.

Q He was referring to this question? A Yes.

Cross examination by Mr. Stewart.

Q To whom did he say that? A He addressed it toward me. It was at the close of the testimony that he made that remark.

Q It was addressed to you, you say? A He looked at me when he said it.

Albert C. Pedrick, re-direct.

Q What brought forth the remark A Well, the argument which had been had regarding the contents of account No. 2, I think it was called.

Q As a matter of fact, Mr. Pedrick, was not everything harmonious during that hearing? A Well, not as to the answers to the questions involving that special account.

Q How many questions were there involving that special account? A The questions—I haven't looked at the testimony since it was taken, but my recollection now is that a question was asked as to what constituted that account, how it was made up, and I believe that on counsel's advice the witness refused to answer. In fact, I know that.

Q I was there, wasn't I? A Yes.

Q Who else was there? A As I recall, I think Mr. Beers, Mr. Williams, the stenographer, and I think Mr. Schilling. I am not positive about that, but I think Schilling was there.

Q You and Mr. Beers are very friendly? A Very.

Q And have been for years? A Yes.

Q You have been associated for a great many years? A Not so many years, but very friendly.

Re-direct examination by Mr. Lane.

Q You are a Master in Chancery and have been for some years? A Over twenty-five years.

Q You realize what an oath is? A I certainly do.

LOUIS J. BEERS, defendant, recalled in his own behalf, in rebuttal.

Direct examination by Mr. Lane.

Q Were you present at the examination on June 16, which I have referred to? A I was.

Q Did you at Mr. Williams' request or at the request of anybody else withdraw the question that you had asked and not press for an answer? A No, sir.

Q As to what constituted or what went into Williams' account No. 2? A No, I did not.

Q Did you hear Mr. Williams say in the presence of the Master at the close of the testimony that he would rather go to jail than answer that question? A I did.

Q Did you have any conversation with Mr. Williams? A Yes, sir.

Q With respect to the reduction of the interest on this note from six to five per cent.? A I did not. To the best of my recollection—and I think my memory serves me right—I did not talk with him about that interest.

Q Did you yourself have any conversation with Mr. Williams with respect to the cutting of that note—the first $1,000 cut? A Not at that time.

Q I am talking about the time when it was cut. A No.

Q Did you yourself have any conversation with Mr. Williams with respect to the cutting of that note the second thousand dollars? A I did.

Q There has been some testimony on the part of Mr. Williams that the note of $5,800 which is not involved in this case goes back to a note in

1917 for $19,000, and it appears that on the same day when that credit was given to your account for that note there was drawn out against it $19,000. Did you borrow $19,000 from the bank at that time or at any other time? A I don't believe I did. That note I am pretty certain made up that contribution that I made.

Q Although that note goes back to a $19,000 note in May, I think it was, 1917, these advances to the directors had been made, or some of them had been made, previous to that time? A Advances to the directors?

Q By the directors? A Yes.

Q In different amounts at different times? A Yes.

Q Did your advance of $8,800 take the shape of a note? A Eight thousand dollars.

Q Eight thousand dollars? A It did.

Q And that $8,000 note was prior to that time? A I believe it was.

Cross examination by Mr. Stewart.

Q You don't know when that $8,000 was advanced to the bank, do you? A Just a moment. In the year 1915 or 1916. Mr. Williams had not been there very long when it was advanced.

Q You don't mean to say that you contribut ed to the bank for its benefit $19,000, do you? A No. I didn't say that.

Q All you contributed to the bank was $8,000 on the charge-off that the department directed to be made of close to a hundred thousand dollars and the directors put up eighty-eight thousand of it—as your share of the Jim Smith deficiency, which was a total deficiency of $18,000,

I think. A No. That is not so at all. I gave the bank—the first president made some bad loans and then when I came into the bank and got fairly active, the Mechanics Realty Company was formed and they took over these bad notes. Finally I received a letter from the bank stating that my liability on a note which the Mechanics Company gave to the bank and which was endorsed by the directors who aided in the taking out of the paper—my liability was something like fourteen hundred some odd dollars. I gave them $1,400 or I gave them a note for part of it. That, I think, entered into this large note.

Q Did the Mechanics Realty Company take over the assets of the bank that were charged off in this hundred thousand dollar charge-off? A I don't know. I cannot answer that, if you mean whether it is true that those assets were taken over instead of the note that I referred to as having been discounted by the first president, Mr. Rafter.

Q You were active from the very start in the bank? A No, not from the very start.

Q You didn't contribute any more than any of the other directors? A Oh, yes, I did.

Q You did? A Indeed I did. More than you. You were a director.

EDWARD A. SCHILLING, recalled in behalf of defendant, in rebuttal.

Direct examination by Mr. Lane.

Q Were you present at this hearing before the Master in June, 1924? A I was.

Q Did you hear Mr. Williams say he would rather go to jail than answer the question as to the source of that Francis Williams No. 2 account? A I did.

Q Did Mr. Beers at any time withdraw the question? A No, sir.

LOUIS J. BEERS, the defendant, recalled in his own behalf, in rebuttal.

Direct examination by Mr. Lane.

Q At any time after the $4,000 was charged against your account did you call Mr. Williams and ask him if he would renew that note if you would pay something on account? A I did not.

Cross examination by Mr. Stewart.

Q During the time that Mr. Williams was president of the bank you did not contribute any money for bad loans that had been made after he was president, did you? A I don't recall. I contributed after he came in.

Q They were all remnants of the last regime? A I know he made two loans, but whether I contributed—I know the $8,000 was given while he was in.

Q That was on old stuff which had occurred before he came there? A I think that was largely for the old stuff.

Mr. Lane: I offer in evidence, if the Court please, this account which has been referred to by the witness in the ledger, which shows the disposition of the moneys.

(The page of the book referred to was marked D. 17.)

Mr. Lane: That is our case.

DEFENDANT RESTS IN REBUTTAL.

Mr. Stewart: I would like to offer in evidence—I think I forgot it myself—if there is no objection to this, the published reports to the Comptroller of the Treasury, with slips in here where they belong.

(The pertinent pages of the book referred to were marked P. 7.)

The Court: Were these visits of the bank examiner made quarterly?

Mr. Stewart: The government makes five calls a year. The statute says they should make five calls. Sometimes they only make four, sometimes five. They called at a time when we did not know that they were coming.

Mr. Stewart: I now wish to renew my motion for a non-suit on the same grounds which I urged in my motion for a direction of the verdict. I do not think it is necessary to go over that argument again.

The Court: I will deny it on the same grounds.

Mr. Stewart: I may have an exception?

Mr. Stewart sums up for the plaintiff.

Mr. Lane sums up for the defendant.

CHARGE.

The Court charges the jury as follows:

MOUNTAIN, *J.:*

Gentlemen of the Jury. The posture of this case is now that the counter-claimant, Louis Beers, has brought suit against the Broad and Market National Bank, alleging that he is entitled to recover from the bank the sum of $4,501.94.

The history of the transactions between the two parties dates back to 1914. We are told that at that time Mr. Beers was a director of the bank and that the president was Christian Fleisner. Mr. Beers owned 150 shares of stock. He knew of a man named Jules Mechanic, a depositor in the bank and a borrower from the bank. Jules Mechanic, indeed, seems to be the person who has caused or started this unfortunate situation. Mr. Beers said that he had no business and no legal or other relations with this man Mechanic. He said that in the year 1914 Mechanic was indebted to the Broad and Market National Bank for a large sum of money and that the president of the bank told Mr. Beers that it was deemed undesirable for the bank to immediately recall Mechanic's loans; that it was more desirable, in fact, to let him have a little more money to pull him out of his difficulties. I am quoting the testimony as accurately as I can from memory with the aid of my notes. If you disagree with me, you must take your own recollection of the testimony and not my memory, because you are the judges of facts. Fleisner suggested, Mr. Beers says, to him that Mr. Beers indorse Mechanic's note, that

the proceeds be placed in Mr. Beers account, and that Mr. Beers have the entire jurisdiction over the increased loan represented by the note, particularly as to its disbursement to building and loan associations and to various laborers and materialmen. Mr. Beers alleges that when he indorsed the first note, he immediately opened a separate account in his ledger to show the disbursements. He alleges as a part of his case that he received nothing for indorsing the note; that he did it solely for the accommodation of the bank.

The note which was given at that time was renewed frequently. The story of its renewal is about as we have listened to it, except that the president, Mr. Fleisner, who was at the head of this institution in 1914, was succeeded by Mr. Williams. Mr. Beers says that either he or Mr. Schilling, his associate, called Mr. Williams' attention to the situation when Williams was elected president, and that Mr. Williams said that no liability attached to Mr. Beers and that the note was being carried by the bank as Mechanic's liability. I think that the conversation just referred to was alleged to have been between Mr. Williams and Mr. Schilling.

It then appears that certain interest charges were made on these notes. The contention of Mr. Beers is that he refused to pay any of this interest because what he was doing was for the benefit of the bank.

Next, some mortgages were given. These mortgages were eventually assigned by Mr. Beers to a mortgage company. Mr. Beers says that he took these mortgages to protect the bank, that he turned them over to the mortgage company

because neither he nor the bank wanted to appear as defendant in foreclosure proceedings that were expected, and that at the time the mortgages were taken Mr. Fleisner knew all about them. Mr. Beers said that so far as he was concerned the taking of the mortgages was a ministerial matter for which he got no money at all. After Mechanic had gone into bankruptcy—which I think was in the latter part of 1914—the mortgages were cancelled, at which time I think there were three or four prior liens on the properties of Mechanic. Mr. Beers says that the cancellation was done with the knowledge of the then president of the bank.

Finally, when Mr. Beers' note had been reduced to about $4,500, there was a refusal on the part of the bank to renew it.

Now, let us turn to the bank's side of the case, because, as you may have observed, I have so far mostly discussed Mr. Beers' position in this matter and there are two sides to every case. We have been told that Mr. Fleisner is in Europe. Assuming that to be true, we are deprived of his testimony; but Mr. Francis Williams, president of the Broad and Market National Bank, took the witness stand and, as I understood him, said that the first conversation he had in reference to this matter was after his election as president in 1916, and that at that time Mr. Beers explained the then existing note and claimed that he was not liable for it. During that conversation with Mr. Beers or at some subsequent time Mr. Williams said that the explanation of the note did not concern him. The note was continued or renewed. Mr. Williams said that when the interest charge was added at the time of renewal, as was occasionally done,

it was added at Mr. Beers' request. He also said that Mr. Beers asked him to reduce the rate of interest from six to five per cent., and that he did so.

The testimony shows that Mr. Beers received some money from Mr. Williams. Mr. Williams' explanation of the way that happened is this: Mr. Williams had an account, called a number 2 account, in which he had placed certain funds derived, as I understand it, from his personal efforts in insurance matters, in appraisals, and so forth. This fund was being used by him to help the directors who had advanced some money—I suppose a previous assessment either made upon them or agreed to by them—for shortages or deficits of some kind. Mr. Williams said, as I understood him, that Mr. Beers was paid his proportionate share of the fund along with the other seven directors, and that the paying of this money to Mr. Beers was done by Mr. Williams wholly out of a feeling of fairness to Mr. Beers.

Without discussing the testimony further, I will say that I believe it is important for you, when you retire to the jury room, to ascertain the exact position of Mr. Beers in the affair which has been submitted to you. If Mr. Beers was a borrower from the bank, and if that borrowing was evidenced by a note or notes given by him, he received consideration for the notes; and, though they were renewed from time to time, the bank naturally would expect him at the proper time to pay them off. On the other hand, if Mr. Beers received nothing from the bank, but made some arrangement with it by which he became the maker or the indorser of

certain notes, and of their renewals solely for the accommodation of the bank and without any profit to himself, and because of some arrangement the bank charged his account, such procedure would indicate the bank's liability to him because he had received nothing at all for what he had done; and Mr. Beers' side of the story is as I have last narrated the situation. The bank does not agree with that.

The burden of proof is upon Louis Beers to show that when he made or indorsed these notes and delivered them or caused them to be delivered to the bank he did so in good faith solely for the accommodation of the bank, though the transaction was for the benefit of Jules Mechanic. In other words, if you find that Mr. Beers made the note or notes or renewals at the request of the Broad and Market National Bank, relying upon the bank's contemporary parol promise that he would not be held liable upon them, but that the bank would look for payment to Jules Mechanic or to such security as the bank held for Jules Mechanic and you find that this arrangement was made for the benefit of the bank solely for its accommodation, you may find that the bank is not a holder of this note for value; and in that case Mr. Beers would be entitled to recover judgment at your hands. If you find to the contrary, your verdict should be in favor of the bank.

I should like to ask counsel, because counsel and I have discussed the various phases of the case, whether the amount claimed by Mr. Beers is not as I have stated, $4,501.94.

Mr. Lane: Yes, sir; with interest from May 14, 1919, I think.

The Court: Can you agree on that date, gentlemen?

Mr. Lane: The easiest way to figure it is to take the interest on $4,501.94 from May 14, 1919. That interest amounts to $1,537.56.

The Court: The interest, gentlemen of the jury, should be computed from the time that the bank charged this note against Mr. Beers. As I recollect the testimony, it was a note of May, 1919, for about $4,500. Is that right?

Mr. Lane: A note of May 14, 1919, for $4,501.94.

The Court: $4,501.94.

When that note became due—I think it was on the 14th of August—it was discovered, according to one of the witnesses testifying for Mr. Beers, that no credit for the $570.94 had been given to Mr. Beers.

It is the opinion of the Court that if you find for Mr. Beers, you should allow interest from the date of that note, May 14, 1919, until the present time.

Mr. Lane: So that the record may be straight, I would like counsel to stipulate on the record that the technical way to figure this would be to take the charge made against Mr. Beers' account on August 14, 1919, $570.94—and figure interest on that at six per cent. to date, and then to take the amount of $4,000, charged to our account on November 17, 1919, and figure interest on that at the rate of six per cent.; but the same result is achieved by taking $4,501.94 and figuring interest on that from May 14, 1919. Isn't that so?

Mr. Stewart: I think that Court, counsel, and myself have forgotten that on May 28, 1919, there was $600 credited to Mr. Beers' account.

The Court: Was that 1919?

Mr. Stewart: May 28, 1919. There is the check (exhibiting a paper).

The Court: The bank would be entitled to consider that as a credit, I suppose.

Mr. Lane: That has not been referred to. I thought it had been abandoned. The testimony, as I recollect it, upon the part of both Mr. Beers and Mr. Williams with respect to the $600 item was that it was an entirely different situation, that it was one of seven payments of $263.50 each, which were distributed to all the directors alike. Our contention was that that payment had nothing to do with this transaction. Of course, it may be a question for the jury.

Mr. Stewart: I think that is a jury question.

The Court: I will leave that to the jury. It is a question of fact whether this $600 payment, made after the allegation of the charge-off of this $4,501 note, is a proper credit against the amount claimed by Mr. Beers. The check is dated May 28, 1919. Mr. Beers alleges that the time when the bank book was balanced and when it was discovered that no credit of $570.94 had been given, was subsequent to August 15, 1919; I do not recollect the exact time and place. Is the bank book in evidence?

Mr. Lane: No, sir.

The Court: In any event, it is for you gentlemen of the jury, to decide whether this $600 item is a credit against Mr. Beers' claim or not.

Take the case.

(The jury retires.)

Exception to Charge.

Mr. Stewart: I would like to call your Honor's attention to the fact that in charging the jury your Honor said that after Mr. Williams had become president of the bank Beers spoke to him about the note in question, and that Mr. Williams said that it did not concern him, Mr. Williams. I think the testimony shows that Mr. Williams further said—and I think this should have been called to the attention of the jury—that when he came to the bank he found the note there as a live asset, and that it would have to be considered as such, or that some such conversation took place.

I should also like to have an exception to that part of your Honor's charge wherein your Honor said that it was illegal to charge up this note if it was given on the part of Mr. Beers for the accommodation of the bank, and was a note from which he got no benefit. I think that was the substance of what you said. I would like to take exception to that.

(The jury submitted the following question to the Court: "If the jury should render a verdict in favor of the plaintiff, do we figure the interest to date on the amount involved or just render a verdict with interest? Foreman.")

(The Court replied as follows: "You are to figure the interest. Worrall F. Mountain, Judge.")

Exhibit D. 1.

Exhibit D. 1.

ESSEX COUNTY CIRCUIT COURT.

Between	
BROAD AND MARKET NATIONAL BANK OF NEWARK, a corporation, *Plaintiff,*	*Action at Law.*
vs.	*Examination before Trial.*
LOUIS J. BEERS, *Defendant.*	*Depositions.*

Depositions of Harry C. Gardner and Francis Williams, Cashier and President, respectively of the Broad and Market National Bank of Newark, taken before me, Albert C. Pedrick, a Master in Chancery of New Jersey, at my office in the Prudential Building, 763 Broad Street, Newark, New Jersey, on Monday, June 16, 1924, at ten o'clock A. M., pursuant to subpoenas served June 14, 1924, and hereunto annexed.

Present: Charles H. Stewart, Esq., appearing for the Broad and Market National Bank, and Louis J. Beers, Esq., attorney *pro se.*

Albert C. Pedrick,
Master in Chancery.

Rose E. Fried, stenographer, duly sworn.

Exhibit D. 1 (Deposition of Harry C. Gardner).

HARRY C. GARDNER, Cashier of the plaintiff, Broad and Market National Bank, a corporation, being duly sworn, testified as follows:

Q Mr. Gardner, you are the Cashier of the Broad and Market National Bank of Newark, New Jersey?

A Yes.

Q How long have you been such?

A I went to the Broad and Market National Bank on the fifteenth of March, 1915.

Q Are you familiar with the suit of the Broad and Market National Bank against me?

A I am.

Q Are you familiar with the subject matter of the suit?

A I am.

Q Are you familiar with the matter known as the Jules Mechanic note?

A I am.

Q You recall, do you not, my having brought before the board of directors the question of the Jules Mechanic note?

A Of the Jules Mechanic note? I do not. Jules Mechanic did have an account when I went there.

Q And he was indebted to the bank in a large sum of money at that time? Was he not?

A I do not recall whether he was or not at that time. That was in 1915. I cannot tell without looking through the records of the bank.

Q Do you not recall my having called the attention of the board of directors of the bank, on numerous occasions, to the fact that I wished the bank to relieve me of the Jules Mechanic note, in that it was not my note, but a loan that

was made at the instance of and for the benefit of the bank?

A I do not recall any note of Mr. Mechanic there.

Q But do you remember my bringing the matter up, as I have just asked you in the previous question?

A I know there were discussions about a Jules Mechanic note.

Q Do you recall, at a meeting of the board of directors, after I had again called the attention of the board to the fact that it was unfair to have me longer carry the Mechanic note, that Mr. Williams, the then president of the bank, turned to you and asked you to have one of the boys of the bank make out a note so that I could have my note cancelled and when the note given by one of the boys would become due that it would be written off and you refused to do that?

A I do not recall any such transaction.

Q Is that because this question has been asked of you suddenly that you have not had the opportunity to revive your memory?

A No, not because the question has been asked suddenly, but I do not have any recollection of Mr. Williams' wanting one of the boys to substitute a note for Mr. Beers'.

Q Do you remember that on a certain occasion when I brought up this matter of the Jules Mechanic note, Mr. Williams then said that he would fix the matter up and turned to you and said, "Harry, have one of the boys outside make a note"?

A No. I thought that was the question I just replied to.

Exhibit D. 1 (Deposition of Harry C. Gardner).

Q Did Mr. Williams, however, at any other meeting request you to have one of the boys make a note?

A I do not recall any such request.

Q Will you say that Mr. Williams did not make such a request of you and that you did not reply by saying you would not call any one of the boys?

A No, I will not make such a statement, but to the best of knowledge. I do not recall any such question ever having been asked me.

Q Mr. Gardner, did you bring with you the deposit slips for deposits made to the credit of my account with the bank from March 1, 1919, to April 1, 1919?

A Yes.

Q Will you let me have them, please? Mr. Gardner, if at any time Mr. Williams had asked you to credit my account with a certain deposit, you to make out the check, would you have credited me with the amount of such deposit without making out a deposit ticket?

A No.

Q On February 14, 1919, or thereabouts, did you, at the instance and request of Mr. Williams, credit to my account the sum of $1000?

A I cannot tell without looking at the ticket.

Q In a general way, do you remember crediting to my account $1000. some time in March, 1919, and again in May, 1919, at the request of Mr. Williams, this having been made in the presence of Mr. Edward Schilling?

A I do not.

Q You merely say you do not recall it?

A No, I do not recall it. I do not remember crediting anything to your account at the request of Mr. Williams.

Exhibit D. 1 (Deposition of Harry C. Gardner).

Q Do you recall whether in May, 1919, Mr. Williams asked you how much money you had in a certain account and then asking you to make out a check for $1000., this request being made in the presence of Mr. Edward Schilling?

A I do not. The only account that I handle, beside my own personal account, is the cashier's account.

Q Did you at any time write out checks on the account of Francis Williams, Trustee?

A I did not.

Q You say you actually did not or you do not recall?

A I do not recall writing any check on his account. That was an account which he handled himself personally.

Q The account you have just referred to is the Francis Williams, Trustee account?

A Yes.

Q You are familiar with such an account more or less?

A No, I am not.

Q What is the source of the funds that were placed to the credit of that account?

A I do not know.

Q At any time since you became cashier of the bank, were you familiar in any degree with the Francis Williams, Trustee account?

A Well, I knew there was such an account in the bank.

Q Did you hear such an account discussed in the bank at any time? Why do you hesitate, Mr. Gardner?

A Well, because it was mentioned at different times. Mr. Williams discussed with members of the board withdrawals from that time.

Exhibit D. 1 (Deposition of Harry C. Gardner).

Q Withdrawals in respect to what?

A Giving checks to the different members of the board.

Q Then you are or were somewhat familiar with this account?

A Only insofar that I knew it was there.

Q And that checks drawn to that account were given to certain men?

A Yes.

Q Mr. Gardner, do you say that you have no knowledge whatever as to any deposit or deposits made to the credit of the Francis Williams, Trustee account?

A I do not know what funds went in that account.

Q What do you understand was the source of the funds that were placed to the credit of the account.

Witness refuses to answer on advice of counsel.

Q Were the funds or part of them credited to the Francis Williams, Trustee account acquired through a transaction or transactions that were had between certain persons, firms or corporation and the bank?

A I do not know the funds that were deposited or the source that they came from.

Q Is this account still in existence?

A I cannot answer that. I do not know.

Q Did you ever discuss the Francis Williams, Trustee account with Mr. Williams or with any officer or director of the bank?

A I did not.

Q Have you heard the account discussed at a meeting of the board of directors?

A Yes.

Q What did you hear discussed, Mr. Gardner?

A Well, I know that there was a Francis Williams, Trustee account and at different times there were questions asked as to how much there was in the account. That account to me was the same as his personal account or any other account in the bank.

Q Will you say that deposits were not made to the credit of the Francis Williams, Trustee account of funds and moneys that were derived through loans made by the bank to individuals, firms or corporations?

A I do not know what deposits were made there. I had nothing at all to do with the account.

Q Will you say that no deposits were made to the credit of this account which represented money made by the bank in the granting of loans?

A I will not.

Q Were deposits of such moneys made to the credit of this account?

A I do not know.

Q Do you know of any money that was paid for loans granted by the bank during the existence of the Francis Williams, Trustee account?

A I do not.

Q Do you know whether $1,000 was put to the credit of my account, which moneys came from the Francis Williams, Trustee account?

A I do not.

Exhibit D. 1 (Deposition of Francis Williams).

FRANCIS WILLIAMS, President of the plaintiff, Broad and Market National Bank, a corporation, being duly sworn, testified as follows:

Q Mr. Williams, you are the president of the Broad and Market National Bank and have been since January 1, 1916?

A Yes.

Q You are familiar with the note or notes referred to in my counterclaim filed to the suit of the bank against me?

A Yes.

Q On March 15, 1919, you caused to be credited to my account the sum of $1,000 to be credited to that note?

A Yes.

Q And again on May 14, 1919, did you cause to be credited to my account the sum of $1,000 to be applied in reduction of that note?

A I caused to be applied to your account the sum of $1,000.

Q On the days on which you caused to be credited to my account the two deposits of $1,000 each, Mr. Schilling had been to see you about the note referred to in my counterclaim?

A I cannot remember that.

Q Will you say that he did not call on you on that day?

A No, I will not. I will simply say I do not remember.

Q That is the note that was formerly known as the Mechanics note?

Q Yes, that is the Mechanics note.

Q The note just referred to fell due on February 14, 1919?

A Yes.

Exhibit D. 1 (Deposition of Francis Williams).

Q And when was a note given in renewal of that note, either in whole or in part?

A On the same day. Yes, it went to your credit March 17, 1919, for $5,419.74.

Q Mr. Williams, the note which fell due February 14, 1919, was renewed by the giving of a note of that date in the sum of $5,501.04 and which was credited to my account on March 17, 1919?

A Yes.

Q Is it not true that the $1,000 which you credited to my account on March 17, 1919, was to make up the difference between the amount of the note which fell due February 14, 1919, in the sum of $6,208.92 and interest, and $81 and interest and the note given by me bearing date February 14, 1919, and credited to my account on March 17, 1919, the day on which you caused to be credited to my account the sum of $1,000?

A Yes, it is true.

Q That note became due on May 14, 1919, did it not? I mean the note for $5,419.74.

A Yes.

Q And the amount due on that day, May 14, 1919, was $5,501.04?

A Yes.

Q For principal and interest?

A Yes.

Q On that day, that is on May 14, 1919, you caused to be credited to my account the sum of $1,000?

A Yes.

Q And you took from me a note for $4,501.94?

A Yes.

Q And this note was in renewal of the note that fell due on May 14, 1919, in the sum of $5,419.74?

Exhibit D. 1 (Deposition of Francis Williams).

A That is right.

Q Is there any difference between Francis Williams, Trustee account, and Francis Williams No. 2?

A Yes.

Q What is the source of the funds that were credited to the account of Francis Williams No. 2?

Witness refuses to answer on advice of counsel.

Q The two checks, each in the sum of $1,000 and which were credited to my account, as you have been testifying, were drawn on your Francis Williams No. 2 account?

A Yes.

NEW JERSEY, *ss.*

The State of New Jersey to Francis Williams and Harry C. Gardner (L. S.) (president and cashier respectively of the Broad and Market National Bank of Newark), GREETING:

We command you, that laying aside all and singular business and excuses, you personally and severally be and appear before Albert C. Pedrick, a Master in Chancery of New Jersey, to be held at his office, Room 520, Prudential Bldg., 763 Broad street, Newark, in and for the County of Essex on Monday, the sixteenth day of June, instant, at ten o'clock in the forenoon of that day, to testify all and singular what you know in a certain cause, now pending and undetermined in our said Court, between Broad and Market National Bank of Newark, plaintiff,

Exhibit D. 1.

and Louis J. Beers, defendant, in a plea of contract on the part of the defendant, and also so that you diligently search for, that you have and bring with you and produce at the same time and place aforesaid:

(1) The check book and cancelled checks of the account of H. C. Gardner, in the Broad and Market National Bank, covering the periods from February 1, 1918, to April 1, 1919, and from May 1, 1919, to June 1, 1919.

(2) The ledger sheets of the Broad and Market National Bank showing the account or accounts of H. C. Gardner or Harry C. Gardner with said bank covering the period from February 1, 1918, to June 1, 1919.

(3) The deposit tickets showing the deposits made to the credit of the account of Louis J. Beers with the Broad and Market National Bank from March 1, 1919, to April 1, 1919, and for the period from May 1, 1919, to June 1, 1919.

(4) The check book, cancelled checks, and the ledger sheets of the Broad and Market National Bank, covering the account of Francis Williams trustee with said bank, covering the period from February 1, 1918, to June 1, 1919, and this you are severally in no wise to omit, under the penalty of One Hundred Dollars.

WITNESS, Nelson Y. Dungan, Esquire, Judge of our said Court, at Newark, the 13th day of June, in the year Nineteen Hundred and Twenty-four.

JOHN H. SCOTT,
Clerk.

MERRITT LANE,
Attorney.

Exhibit D. 1.

ESSEX COUNTY CIRCUIT COURT.

Between	
BROAD AND MARKET NATIONAL BANK, OF NEWARK, a corporation, *Plaintiff,*	*Action at Law.*
vs.	*Examination before Trial. Certificate of Master.*
LOUIS J. BEERS, *Defendant.*	

I, Albert C. Pedrick, a Master in Chancery of New Jersey, do hereby certify and send to the Essex County Circuit Court the within depositions of Harry C. Gardner and Francis Williams, Treasurer and President respectively of the plaintiff, Broad and Market National Bank, of Newark, taken by me in pursuance of the said subpoena served as aforesaid, and I certify that the said depositions were taken by Rose E. Fried, a stenographer selected by me and by me duly sworn to carefully, faithfully and impartially take stenographically the testimony given and to make a true and correct transcript thereof and that such depositions were taken in my immediate presence and hearing by said stenographer, sworn as above stated, and I believe that it correctly states the testimony given by the said witnesses.

Witness my hand this sixteenth day of June, 1924.

ALBERT C. PEDRICK,
Master in Chancery of New Jersey.

Exhibits.

Exhibit D. 2.

Newark, N. J. July 9, 1914

102.50
$5000 and interest
5102.50

Four months after date I promise to pay to the order of Louis J. Beers Five Thousand and 00/100 Dollars.

Value received at the Broad & Market National Bank.

No. Due Nov. 9 Jules Mechanic

Endorsed: Louis J. Beers.

Exhibit D. 3.

Newark, N. J. Nov. 9th, 1914

100
$5000 00/100
5100.

Four months after date I promise to pay to the order of Louis J. Beers Five Thousand 00/100 Dollars at the Broad & Market National Bank of Newark

Value received with int.

No.... Due Mar. 9. Jules Mechanic

Endorsed: Louis J. Beers

THE BROAD AND MARKET NATIONAL BANK.

Charge Louis J. Beers

Newark, N. J. Mar. 10, 1915

Mechanic note

$5100.

Exhibits.

Exhibit D. 4.

Newark, N. J., Mar. 9, 1915

$5100 00/100

Four months after date I promise to pay to the order of Louis J. Beers Five thousand one and no/100 Dollars at the Broad & Market National Bank of Newark.

Value received.

No.... Due July 9/15

Jules Mechanic

THE BROAD AND MARKET NATIONAL BANK

Charge L. J. Beers

Newark, N. J. July 16, 1915

J. Mechanic note

$5100.

Endorsed: Louis J. Beers

Exhibit D. 5.

THE BROAD AND MARKET NATIONAL BANK.

Newark, N. J. 11/15

Charge

L. J. Beers

$5100 Mechanic note

Newark, N. J. July 9, 1915

$5100 00/100

Four months after date I promise to pay to the order of Louis J. Beers Five thousand one hundred and no/100 Dollars at the Broad & Market National Bank of Newark.

Value received

Jules Mechanic

No.... Due Nov. 9

Endorsed: Louis J. Beers

Exhibits.

Exhibit D. 6.

THE BROAD AND MARKET NATIONAL BANK.

Newark, N. J. Apr. 13 '16

Charge
L. J. Beers.
J. Mechanic Note
$5100.

Newark, N. J. Nov. 9, 1915

$5100 00/100

Four months after date I promise to pay to the order of Louis J. Beers Fifty-one hundred & no/100 Dollars at The Broad & Market National Bank of Newark,

Value received

Jules Mechanic

No. Due Mar 9

Endorsed: Louis J. Beers

Exhibits.

Exhibit D. 7.

THE BROAD AND MARKET NATIONAL BANK.
Newark, N. J. Sept. 6, 1916

Charge
L. J. Beers
Note of Mechanic
$5204.55

Newark, N. J. March 9, 1916.

104.55
$5100.00/100

$5204.55

Four months after date I promise to pay to the order of L. J. Beers Fifty-one hundred 00/100 Dollars at the Broad & Market National Bank of Newark,

Value received with Int.

Jules Mechanic

No....Due....July 10

Endorsed: Louis J. Beers

Exhibit D. 8.

Newark, N. J. July 10, 1916

87.13
$5100

$5187.13

Four months after date I promise to pay to the order of Myself Fifty-one hundred and 00/100 Dollars at The Broad & Market National Bank of Newark,

Value received

Louis J. Beers

No....Due Nov. 10

Endorsed: Louis J. Beers

Exhibits.

Exhibit D. 9.

Newark, N. J., November 12, 1917

100.03
$6001.81/100

6101.84

Four months after date I promise to pay to the order of Broad and Market National Bank Six Thousand One and 81/100 Dollars at the Broad & Market National Bank of Newark.

Value received with interest at 5%

Louis J. Beers

No.....Due March 12
Endorsed: Louis J. Beers

Exhibit D. 10.

Newark, N. J. March 12th, 1918

104.58
$6101.84/100

6206.42

Four months after date I promise to pay to the order of Broad and Market National Bank Sixty-one hundred one and 84/100 Dollars at Broad and Market National Bank.

Value received with interest at five per cent

Louis J. Beers

No....Due July 12

Exhibits.

Exhibit D. 11.

Newark, N. J. July 12th 1918.

81.04
$6207.66/100

6288.70

Three months after date I promise to pay to the order of Broad and Market National Bank Sixty-two hundred seven and 66/100 Dollars at the Broad & Market National Bank of Newark.
Value received with interest at five per cent

Louis J. Beers

No....Due Oct. 14

Back of note:

6207.66
81.04

6288.70
1.22

6289.92
6208.92

81.00

Exhibits.

Exhibit D. 12.

Newark, N. J. October 14, 1918

127.10
$6208.92/100

6336.02

Four months after date I promise to pay to the order of Broad and Market National Bank Sixty two hundred eight and 92/100 Dollars at The Broad & Market National Bank of Newark,
Value received with interest at 5%

Louis J. Beers

No....Due....

Newark, N. J. Oct. 14, 1918

1.62
$81.00/100

82.62

On February 14, 1919 after date I promise to pay to the order of Broad and Market National Bank Eighty one and 00/100 Dollars at the Broad & Market National Bank of Newark,
Value received with interest at five per cent.

Louis J. Beers

No. Due Feb. 14
THE BROAD AND MARKET NATIONAL BANK.
Newark, N. J. March 17, 1919

Charge
L. J. Beers
Revenue stamp
$1 10/

Exhibits.

Exhibit D. 13.

Newark, N. J. February 14, 1919

81.30
$5419.74/100

5501.04

Three months after date I promise to pay to the order of myself Fifty four hundred and Nineteen and 74/100 Dollars and interest at the Broad & Market National Bank of Newark.

Value received

Louis J. Beers

No. Due May 14

Endorsed: Louis J. Beers

The Broad and Market National Bank.

Newark, N. J. May 23, 1919

Charge
L. J. Beers
Revenue stamp
$1.51/

Exhibits.

Exhibit D. 14.

Newark, N. J. May 14, 1919

69.
$4501.94/

4570.94

Three months after date I promise to pay to the order of Broad and Market National Bank Forty five hundred one and 94/100 Dollars at The Broad & Market National Bank of Newark.
Value received with interest.

Louis J. Beers

No. Due Aug. 14

Exhibit D. 15.

Newark, N. J. Aug. 15, 1919

62.00
$4000 00/100

4062.00

Three months after date I promise to pay to the order of Broad & Market National Bank Four thousand and 00/100 Dollars with interest at The Broad & Market National Bank of Newark.
Value received
No. Due Nov. 17

Louis J. Beers

Exhibit D. 17.

JULES MECHANIC—B. & M. BANK.

1914				1914		
June 12	Jules Mechanic	(13Wd B&L)	344.40	Aug. 17	Check returned by Jules Mechanic dated July 9, 1914, endorsed over to Eugene A. Mother	202.00
12	" "	(13Wd B&L)	344.56			
15	" "	(K of Pth)	481.40			
15	" "	(13Wd B&L)	154.00			
16	" "	(Comwealth)	531.16			
17	" "	(Bankers)	253.60			
18	" "	(Porter)	113.10			
19	" "	(McCabe)	150.00			
19	" "	(Doughty & Gould)	175.00	Aug. 17	Check returned by Jules Mechanic dated July 9, 1914, endorsed over to Jos. B. Breidt, Atty. for Ike Schechtman	150.00
19	" "	(Demarest)	52.78			
19	" "	(Clancy)	201.52			
19	" "	(Bamberger)	125.41			
19	" "	(Water)	220.57			
20	" "	(Glasby)	500.00			
29	" "	(Keer)	1,746.32			
22	" "	(Beers rec. mtgs)	18.85			
23	" "	(Kinsey)	179.81	June	Check of J. M.	4,431.00
23	" "	(Granniss)	2.50			
23	" "	(Kinsey)	3.60	July 9	Loan	5,000.00
26	" "	(Pay roll)	150.00			
26	" "	(painter)	100.00	9	"	1,000.00
26	Cash to Torppey	(tax statement)	5.00	Aug. 18	Ck returned by Jules Mechanic dated June 23 endorsed to Newton P. Kinsey, Atty. (not used).	3.60
July 3	Jules Mechanic	(Willette & Lawless)	500.00			
3	" "	(Glasby)	200.00			
7	" "	(Heller)	63.80			
7	" "	(Schuchtman)	132.00			
7	" "	(Sanitary Appliance Corp)	36.87			
7	Recording mortgage		6.50	1915		
9	Jules Mechanic	(Glasby)	400.00	Feb. 23	Cr fr Acct pg 222	1,685.90
9	" "	(Litwin)	343.50	Apr. 7	Cr fr Acct pg 194	102.49

July	9	Jules Mechanic	(Wulach)	250.00
	9	" "	(Breidt)	150.00
	9	" "	(Greenfield)	100.00
	9	" "	"	25.00
	9	" "	(N. J. Chandelier)	164.50
	9	" "	(Standard Iron)	75.00
	9	" "	(Met. Carpet Co.)	65.00
	9	" "	(A. J. Larson)	50.00
	9	" "	(Mortier)	202.00
	9	" "	(Smith)	200.00
	9	" "	(Kantor)	143.00
	9	" "	(Cook & Genung)	200.00
	9	" "	(Fairchild Baldw)	142.00
	9	" "	(Tenenberg)	200.00
	9	" "	(Rashkes)	35.00
	9	" "	(Peats)	166.00
	9	" "	(Bess)	80.00
	10	" "	(Willette & Lawless)	69.20
	10	" "	(Noyes)	70.00
	13	" "	(VanKeuren)	150.00
	18	" "	(Keer)	60.00
	13	Recording mortgage		7.50
		July 28 Jules Mechanic	(Sam'l Cohn)	75.00
	28	" "	(Nat. Horowitz)	75.00
	28	" "	(John Soder)	79.50
	28	" "	(Jos. Newman)	52.50
Aug.	4	R. Arthur Heller		58.00
	12	Cancelling mortgage		.20
	17	Jules Mechanic	(Bess)	300.00
	17	" "	(Bowers)	105.00
	31	Prudential Ins. Co.	(int)	112.50
Oct.	6	N. J. Chandelier Co.		404.48
Oct.	21	Jules Mechanic		406.00
	23	" "	(Galio)	200.00
	23	" "	(Tenenberg)	125.00
	23	" "	(Gluckman)	100.00
Oct.	19	Commonwealth B & L		237.94
	19	Knights of Pythias		116.00
				12,587.57

Balance due 13.58

12,587.57

Exhibit P. 1.

Exhibit P. 1.

55-22

No..... Newark, N. J., May 28, 1919

THE BROAD & MARKET NATIONAL BANK
OF NEWARK.

Pay to
the order of L. J. Beers
Six hundred & no/100 ——————— Dollars
$600.00 Francis Williams
#2

Paid
6-4-19

Endorsed:
L. J. Beers

Stamped:
The Broad & Market Nat'l Bank
9
Jun. 17, 1919
R. T.
of Newark, N. J.

The Broad & Market Nat'l Bank
9
Jun. 3, 1919
R. T.
of Newark, N. J.

Exhibit P. 2.

Exhibit P. 2.

55-22

No..... Newark, N. J., May 14, 1919

THE BROAD & MARKET NATIONAL BANK
OF NEWARK.

Pay to
the order of L. J. Beers
One thousand & no/100 ———— Dollars
$1000.00 Francis Williams
#2

Paid
?-??-??

Endorsed:
Credited to the account of
L. J. Beers
in Broad & Market Nat'l Bank
55-22 Newark 55-22
N. J.
Endorsement guaranteed
By H. C. Gardner, Cashier.

Stamped:
The Broad & Market Nat'l Bank
9
May 14, 1919
R. T.
of Newark, N. J.

Exhibit P. 3.

Exhibit P. 3.

55-22

No..... Newark, N. J., Mar. 15, 1919

THE BROAD & MARKET NATIONAL BANK
OF NEWARK.

Pay to
the order of Louis J. Beers
One thousand & no/100 ———————— Dollars
$1000.00 Francis Williams
#2

Paid
3-17-19

Endorsed:
Cr. acct.
Louis J. Beers

Stamped:
The Broad & Market Nat'l Bank
9
Mar. 13, 1919
R. T.
of Newark, N. J.

Exhibits P. 4, P. 5.

Exhibit P. 4.

55-22

No..... Newark, N. J., Aug. 16, 1918

THE BROAD & MARKET NATIONAL BANK
OF NEWARK.

Pay to
the order of L. J. Beers
Two hundred sixty three & 50/100 —— Dollars
$263.50 Francis Williams
#2

Paid
8-28-18

Endorsed:

L. J. Beers

Stamped:
The Broad & Market Nat'l Bank
9
Aug. 27, 1918
of Newark, N. J.

Exhibit P. 5.

BY-LAWS OF
THE BROAD AND MARKET NATIONAL
BANK OF NEWARK.

Organized Under the National Banking Laws
of the United States.

ELECTIONS.

ONE. The regular annual meetings of the shareholders of this bank for the election of directors shall be held at its banking house on the second Tuesday of January of each year, between the hours of 10 a. m. and 4 p. m. of said day. It shall be the duty of the board of

directors, within one month prior to the time of the election, to appoint three shareholders to be judges of said election, who shall hold and conduct the election, and who shall, after the election has been held, notify under their hands the cashier of this bank of the result thereof and the names of the directors-elect.

TWO. The cashier, upon receiving the returns of the judges of the elections as aforesaid, shall cause the returns to be recorded upon the minute book of the bank, and shall notify the directors-elect of their election, and of the time at which they are required to meet at the bank for the purpose of organizing the new board.

If at the time fixed for the meeting of the directors-elect there is not a quorum in attendance, the members present may adjourn from time to time until a quorum is secured; and no business shall be transacted prior to taking the oath of office as prescribed by law.

THREE. If, for any cause, the annual election of directors is not held on the date fixed in the articles of association, the directors in office shall order an election to be held on some other day, of which special election, notice shall be given in accordance with the requirements of Section 5149, United States Revised Statutes, judges appointed, returns made and recorded, and the directors-elect notified, according to the provisions of sections one and two of these by-laws.

OFFICERS.

FOUR. The officers of this bank shall be a president and one or more vice-presidents (who shall be members of the board of directors), cashier, and such other officers as may be from time to time required for the prompt and or-

derly transaction of its business, to be elected or appointed by the board of directors, by whom their several duties shall be prescribed.

FIVE. The president and vice-presidents shall hold office for the current year for which the board, of which they shall be members, was elected, unless they shall resign, become disqualified, or be removed; and any vacancy occurring in these offices or in the board of directors shall be filled by the remaining members.

SIX. The cashier and the subordinate officers and clerks shall be appointed to hold their offices, respectively, during the pleasure of the board of directors.

SEVEN. The president of this bank shall be responsible for all such sums of money and property of every kind as may be intrusted to his care or placed in his hands by the board of directors or by the cashier, or otherwise come into his hands as president, and shall give bond, with security to be approved by the board, in the five penal sum of ~~forty~~ thousand dollars, conditioned for the faithful discharge of his duties as such president, and that he will faithfully and honestly apply and account for all sums of money and other property of this bank that may come into his hands as such president, and pay over and deliver the same to the order of the board of directors, or to any other person or persons authorized by the board to receive the same.

Amended to read $5,000—Jan. 10/12

The vice-president, during the absence or disability of the president, shall perform such duties of the president as he is not prohibited by law from performing.

EIGHT. The cashier of this bank shall be responsible for all the moneys, funds, and valu-

Exhibit P. 5.

ables of the bank, and shall give bond, with security to be approved by the board, in the fifteen penal sum of ~~forty~~ thousand dollars, conditioned for the faithful and honest discharge of his duties as such cashier, and that he will faithfully apply and account for all such moneys, funds, and valuables, and deliver the same to the order of the board of directors of this bank, or to the person or persons authorized to receive them.

Amended to read $25,000—Jan. 10/12 Amended to read $15,000—Jan. 27/15.

NINE. Each teller shall be responsible for all such sums of money, property, and funds of every description as may from time to time be placed in his hands by the cashier, or otherwise come into his possession as teller; and shall give bond, with security to be approved by the board, ten in the penalty of twenty-five thousand dollars, conditioned for the honest and faithful discharge of his duties as teller, and that he will faithfully apply, account for, and pay over all moneys, property, and funds of every description that may come into his hands, by virtue of his office as teller, to the order of the board of directors aforesaid, or to such person or persons as may be authorized to demand and receive the same.

Amended to read $20,000—Jan. 10/12 Amended to read $10,000—Jan. 27/15

SEAL.

TEN. The following is an impression of the seal adopted by the board of directors of this bank: (SEAL)

CONVEYANCE OF REAL ESTATE.

ELEVEN. All transfers and conveyances of real estate shall be made by the association, under seal, in accordance with the orders of the

Exhibit P. 5.

board of directors, and shall be executed by the president or cashier.

INCREASE OF STOCK.

TWELVE. Whenever an increase of stock shall be determined upon, in accordance with law, it shall be the duty of the board to notify all the shareholders, and to cause a subscription to be opened for such increase.

In the increase of capital each shareholder shall have the privilege of subscribing for such number of shares of the new stock as he may be entitled to, subscribe for in proportion to the number of shares he already owns.

If any shareholder fails to subscribe for the amount of stock to which he may be entitled, or to pay his subscription according to agreement, the board of directors shall determine what disposition shall be made of the privilege of subscribing for the new stock not taken.

BUSINESS OF THE BANK.

THIRTEEN. This bank shall be open for business from ten o'clock a. m. to three o'clock p. m. of each day of the year, excepting Sundays and days recognized by the laws of this State as holidays.

FOURTEEN. The regular meetings of the board of directors shall be held on Wednesday of each week.

When any regular weekly meeting of the board of directors falls upon a holiday, the meeting shall be held upon such other day as the board at the preceding meeting may order.

Special meetings may be called by the president, cashier, or at the request of three or more

Exhibit P. 5.

directors, and should there be no quorum at any regular or special meeting, the members present may adjourn from day to day until a quorum is in attendance. In the absence of a quorum no business except adjournment shall be transacted.

FIFTEEN. There shall be a committee, known as the discount committee, consisting of the president, cashier, and nine directors, appointed by the board every three months, to continue to act until succeeded, who shall have power to discount and purchase bills, notes and other evidences of debt, and to buy and sell bills of exchange; and who shall submit to the board of directors, at each regular meeting, a report in writing of all bills, notes and other evidences of debt discounted and purchased by them for the bank since their last report, and the board shall approve or disapprove the report of the discount committee. Such action to be recorded in the minutes of the meeting.

MINUTE BOOK.

SIXTEEN. The organization papers of the bank; returns of the judges of the elections; proceedings of all regular and special meetings of the directors and of the shareholders; by-laws and any amendments thereto, and the reports of the committees of directors shall be recorded in the minute book; and the minutes of each meeting shall be signed by the president and attested by the cashier.

TRANSFERS OF STOCK.

SEVENTEEN. The stock of this bank shall be assignable and transferable only on the books of this bank, subject to the restrictions and provisions of the national banking laws; and a

transfer book shall be provided in which all assignments and transfers of stock shall be made.

EIGHTEEN. Transfers of stock shall not be suspended preparatory to the declaration of dividends; and, unless an agreement to the contrary shall be expressed in the assignments, dividends shall be paid to the shareholders in whose name the stock shall stand on the date of the declaration of dividends.

NINETEEN. Certificates of stock, signed by the president and cashier, shall be issued to shareholders, and the certificates shall state upon the face thereof that the stock is transferable only upon the books of the bank; and when stock is transferred, the certificates thereof shall be returned to the bank, canceled, preserved, and new certificate issued.

EXPENSES.

TWENTY. All the current expenses of the bank shall be paid by the cashier, who shall every six months, or oftener if required, make to the board a detailed statement thereof.

CONTRACTS.

TWENTY-ONE. All contracts, checks, drafts, etc., and all receipts for circulating notes received from the Comptroller of the Currency shall be signed by the president or cashier, excepting as otherwise ordered by the Board.

EXAMINATIONS.

TWENTY-TWO. There shall be appointed three by the board of directors a committee of five members, whose duty it shall be to examine every

Amended to read Jan. 19, 1920

Exhibit P. 5.

six months or oftener the affairs of this bank, count its cash, and compare its assets and liabilities with the accounts of the general ledger, ascertain whether the accounts are correctly kept and the condition of the bank corresponds therewith, and whether the bank is in a sound and solvent condition, and to recommend to the board such changes in the manner of doing business, etc., as shall seem to be desirable, the result of which examination shall be reported in writing to the board at the next regular meeting thereafter.

TWENTY-THREE. The board of directors shall have power to change the form of the books and accounts when deemed expedient, and define the manner in which the affairs of the bank shall be conducted.

QUORUMS.

TWENTY-FOUR. A majority of all the directors shall constitute a quorum to do business.

AMENDMENTS.

TWENTY-FIVE. These by-laws may be changed or amended by the vote of a majority of the directors.

BY-LAWS OF
THE BROAD AND MARKET NATIONAL
BANK OF NEWARK.

See amendments in minutes Jan. 10, 1912, page 95, minute book.

See amendments in minutes Jan. 27, 1915.

See amendment in minutes Jan. 19, 1920.

Exhibit P. 6.

ARTICLES OF ASSOCIATION.

(Executed in duplicate.)

For the purpose of organizing an Association to carry on the business of banking, under the laws of the United States, the undersigned subscribers for the stock of the Association hereinafter named do enter into the following Articles of Association:

First. The title of this Association shall be "The Broad and Market National Bank of Newark."

Second. The place where its banking house or office shall be located, and its operations of discount and deposit carried on, and its general business conducted, shall be at Newark, New Jersey.

Third. The Board of Directors shall consist of not less than twelve nor more than thirty shareholders. Article No. 3 amended July 11, 1922, to read the Board of Directors shall consist of not less than five or more than nine. The first meeting of the shareholders for the election of Directors shall be held at 653 Broad street, Newark, N. J., on the seventeenth day of November, 1910, or at such other place and time as a majority of the undersigned shareholders may direct.

Fourth. The regular annual meetings of the shareholders for the election of Directors shall be held at the banking house of this Association on the second Tuesday of January of each year; but if no election shall be held on that day, it may be held on any other day according to the provisions of section 5149 of the Revised Statutes

Exhibit P. 6.

of the United States, and all elections shall be held according to such regulations as may be prescribed by the Board of Directors, not inconsistent with the provisions of the National Banking Law, and of these articles.

Fifth. The capital stock of this Association shall be $200,000 two hundred thousand dollars, divided into shares of one hundred dollars each; but the capital may, with the approval of the Comptroller of the Currency, be increased at any time by shareholders owning two-thirds of the stock, according to the provisions of an act of Congress approved May 1, 1886; and in case of the increase of the capital of the Association, each shareholder shall have the privilege of subscribing for such number of shares of the proposed increase of the capital stock as he may be entitled to according to the number of shares owned by him before the stock is increased.

Sixth. The Board of Directors, a majority of whom shall be a quorum to do business, shall elect one of its members President of this Association, who shall hold his office (unless he shall be disqualified, or be sooner removed by a two-thirds vote of all the members of the Board) for the term for which he was elected a Director. The Directors shall have power to elect Vice-Presidents who shall each also be a member of the Board of Directors, and who shall be authorized, in the absence or inability of the President from any cause, to perform all acts and duties pertaining to the office of President except such as the President only is authorized by law to perform, and to elect or appoint a Cashier, and such other officers and clerks as may be required to transact the business of the Association; to fix the salaries to be paid to

Exhibit P. 6.

them, and continue them in office, or to dismiss them as, in the opinion of a majority of the Board, the interests of the Association may demand.

The Directors shall have power to define the duties of the officers and clerks of the Association, to require bonds from them, and to fix the penalty thereof; to regulate the manner in which elections of Directors shall be held, and to appoint judges of the elections; to make all by-laws that it may be proper for them to make, not inconsistent with law, for the general regulation of the business of the Association and the management of its affairs and generally to do and perform all acts that it may be legal for a Board of Directors to do and perform under the Revised Statutes aforesaid.

Seventh. This Association shall continue for the period of twenty years from the date of the execution of its Organization Certificate, unless sooner placed in voluntary liquidation by the act of its shareholders owning at least two-thirds of its stock, or otherwise dissolved by authority of law.

Eighth. These Articles of Association may be changed or amended at any time by shareholders owning a majority of the stock of the Association, in any manner not inconsistent with law; and the Board of Directors, or any three shareholders, may call a meeting of the shareholders for this or any other purpose, not inconsistent with law, by publishing notice thereof for thirty days in a newspaper published in the town, city, or county where the Bank is located, or by mailing to each shareholder notice in writing thirty days before the time fixed for the meeting.

Exhibit P. 6.

In Witness Whereof, we have hereunto set our hands, this eleventh day of November, 1910.

(To be signed by at least five natural persons, preferably the applicants.)

1. .....
2. Theodore S. Fettinger.
3. Walter C. Jacobs.
4. Charles H. Stewart.
5. Harry M. Friend.

("Harry M." written over erasure of "H. M." Charles H. Stewart.)

6. Joseph J. Rafter.

(Duplicate.)

No.....

No. 1.

ARTICLES OF ASSOCIATION
of
"The Broad and Market National Bank
of
Newark," New Jersey
Office Comptroller
Nov. 14, 1910
of Currency.
See amendment in minutes
July 11, 1922.

Exhibit P. 7.

Exhibit P. 7.

BANK STATEMENT

REPORT of the condition of the Broad and Market National Bank, at Newark, in the State of New Jersey, at the close of business, September 1, 1911:

RESOURCES.

	Loans and discounts		$940,991 11
10	Overdrafts secured and unsecured		82 18
	U. S. bonds to secure circulation		50,000 00
	Premiums on U. S. bonds		546 88
	Bonds, securities, etc		65,136 50
	Banking house, furniture and fixtures		22,316 52
	Due from national banks (not reserve agents)		31,173 34
	Due from State and private banks and bankers, trust companies and savings banks		9,198 62
	Due from approved reserve agents		65,862 49
	Checks and other cash items		58 00
	Exchanges for clearing-house		10,747 14
	Notes of other national banks		3,200 00
	Fractional paper currency, nickels and cents		520 57
	Lawful money reserve in bank, viz.:		
	Specie	$46,992 50	
	Legal-tender notes	23,300 00	
			70,292 50
20	Redemption fund with U. S. Treasurer 5 P. C. circulation)		2,500 00
	Total		$1,272,625 85

LIABILITIES.

	Capital stock paid in	200,000 00
	Surplus fund	80,000 00
	Undivided profits, less expenses and taxes paid	13,616 82
	National bank notes outstanding	49,100 00
	Due to other national banks	1,093 74
	Due to trust companies and savings banks	311 07
	Due to approved reserve agents	7,404 32
	Individual deposits subject to check	773,808 17
	Time certificate of deposits	15,150 00
	Certified checks	6,954 52
30	Cashier's checks outstanding	177 21
	Bills payable, including certificates of deposit for money borrowed	125,000 00
	Total	$1,272,625 85

State of New Jersey, county of Essex, ss:

I, Charles W. Lent, cashier of the above-named bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

CHAS. W. LENT, Cashier.

Subscribed and sworn to before me this 7th day of September, 1911.

H. J. VAN DUYNE,
Notary Public.

Correct—Attest:

40 GEORGE H. FRITZ,
CHARLES H. STEWART,
LOUIS J. BEERS,
Directors.

Exhibit P. 7.

BANK STATEMENT

REPORT of the condition of the Broad and Market National Bank at Newark, in the State of New Jersey, at the close of business September 12, 1914.

RESOURCES.

Loans and discounts		$1,355,542 26
Overdrafts, secured and unsecured		549 63
U. S. bonds to secure circulation		200,000 00
Other bonds to secure postal savings		10,864 00
Premiums on U. S. bonds		1,343 76
Bonds, securities, etc. (other than stocks)		111,782 50
Banking-house, furniture and fixtures		22,501 79
Other real estate owned		2,618 76
Due from national banks (not reserve agents)		19,685 06
Due from State and private banks and bankers, trust companies and savings		763 49
Due from approved reserve agents in central reserve cities, $12,569.46; in other reserve cities, $31,121.37		43,690 83
Checks and other cash items		623 35
Exchanges for clearing-house		15,002 21
Notes of other national banks		10,545 00
Fractional paper currency, nickels and cents		1,562 26
Lawful money reserve in bank, viz.:		
Specie	$60,249 45	
Legal-tender notes	11,870 00	72,119 45
Redemption fund with U. S. Treasurer (5% of circulation)		10,000 00
Due from U. S. Treasurer		750 00
Total		$1,879,944 35

LIABILITIES.

Capital stock paid in	$200,000 00
Surplus fund	100,000 00
Undivided profits, less expenses and taxes paid	2,646 13
National bank notes outstanding	197,150 00
Due to other national banks	489 01
Due to trust companies and savings banks	814 09
Due to approved reserve agents in central reserve cities	5,951 60
Individual deposits subject to check	1,136,197 92
Demand certificates of deposit	28,959 63
Time certificates of deposit payable after 30 days or after notice of 30 days or longer	24,133 68
Certified checks	2,860 28
Cashier's checks outstanding	90 57
Postal savings deposits	3,651 44
Bills payable, including obligations representing money borrowed	177,000 00
Total	$1,879,944 35

State of New Jersey, county of Essex, ss:

I, Charles W. Lent, cashier of the above named bank, do solemnly swear that the above statement is true, to the best of my knowledge and belief.

CHARLES W. LENT, Cashier.

Subscribed and sworn to before me, this 18th day of September, 1914.

H. J. VAN DUYNE,
Notary Public.

Correct—Attest:

MORRIS COHN,
CHRISTIAN FLEISSNER,
LOUIS J. BEERS,
Directors.

Exhibit P. 7.

BANK STATEMENT

REPORT of condition, of the Broad and Market National Bank, at Newark, in the state of New Jersey, at the close of business on September 12, 1916:

RESOURCES.

1a.	Loans and discounts		$1,435,153 54
2.	Overdrafts, unsecured		255 76
3.	U. S. bonds:		
a.	U. S. bonds deposited to secure circulation (par value)		200,000 00
4.	Bonds, securities, etc.:		
b.	Bonds, other than U. S. bonds pledged to secure postal savings deposits	$50,000 00	
c.	Bonds and securities pledged as collateral for state, or other deposits (postal excluded) or bills payable	126,432 52	
e.	Securities other than U. S. bonds (not including stocks) owned unpledged	80,790 86	
	Total bonds, securities, etc.		257,223 38
6.	Stock of Federal Reserve Bank (50 per cent. of subscription)		8,100 09
8.	Furniture and fixtures		22,501 79
9.	Real estate owned other than banking house		11,394 17
10.	Net amount due from Federal Reserve Bank		70,058 11
11a.	Net amount due from approved reserve agents in New York, Chicago and St. Louis	$53,562 07	
b.	Net amount due from approved reserve agents in other reserve cities	24,244 77	
			77,806 84
12.	Net amount due from banks and bankers (other than included in 10 or 11)		9,355 46
13.	Exchanges for clearing house		23,981 28
15a.	Outside checks and other cash items	$1,080 36	
b.	Fractional currency, nickels and cents	816 83	
			1,897 19
19.	Coin and certificates		50,955 70
20.	Legal-tender notes		17,910 00
21.	Redemption fund with U. S. Treasurer and due from U. S. Treasurer		10,000 00
24.	Other assets		581 19
	Total		$2,197,174 41

Exhibit P. 7.

LIABILITIES.

25.	Capital stock paid in		$200,000 00
26.	Surplus fund		70,000 00
27a.	Undivided profits	$13,620 09	
b.	Less current expenses, interest and taxes paid	11,762.73	
			1,857 36
29.	Amount reserved for all interest accrued		2,062 62
30.	Circulating notes outstanding		195,600 00
	Demand deposits:		
35.	Individual deposits subject to check		1,037,469 95
36.	Certificates of deposit due in less than 30 days		39,972 49
37.	Certified checks		26,398 71
38.	Cashier's checks outstanding		146 72
40.	Postal savings deposits		35,635 81
	Total demand deposits, items 35, 36, 37, 38 and 40	$1,139,623 68	
	Time deposits (payable after 30 days, or subject to 30 days or more notice):		
43.	Certificates of deposit		5,000 00
45.	Other time deposits		482,941 15
	Total of time deposits, items 43 and 45	$487,941 15	
49.	Bills payable, including all obligations representing money borrowed, other than rediscounts		100,000 00
53.	Liabilities other than those above stated		89.60
	Total		$2,197,174 41

State of New Jersey, county of Essex, ss:

I, H. C. Gardner, cashier of the above-named bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

H. C. GARDNER, Cashier.

Subscribed and sworn to before me this 20th day of September, 1916.

H. J. VAN DUYNE,
Notary Public.

Correct—Attest:

LOUIS J. BEERS,
GEORGE H. FRITZ,
GEORGE H. LAMBERT,
Directors.

Exhibit P. 7.

BANK STATEMENT

REPORT of condition of the Broad and Market National Bank, at Newark, in the state of New Jersey, at the close of business on March 5, 1917:

RESOURCES.

1.	Loans and discounts		$1,540,072 21
2.	Overdrafts, unsecured		928 91
5.	U. S. bonds deposited to secure circulation (par value)		200,000 00
6.	Bonds, securities, etc.:		
b.	Bonds other than U. S. bonds pledged to secure postal savings deposits	$55,825 00	
c.	Bonds and securities pledged as collateral for state or other deposits (postal excluded) or bills payable	190,626 77	
e.	Securities other than U. S. bonds (not including stocks) owned unpledged	44,590 86	
	Total bonds, securities, etc.		291,042 63
8.	Stock of Federal Reserve Bank (50 per cent. of subscription)		8,100 00
10.	Furniture and fixtures		22,501 79
11.	Real estate owned other than banking house.		26,037 34
12a.	Net amount due from approved reserve agents in New York, Chicago and St. Louis	$27,201 32	
b.	Net amount due from approved reserve agents in other reserve cities	12,459 81	
			39,661 13
13.	Net amount due from banks and bankers (other than included in 12 or 20)		17,511 79
14.	Exchanges for clearing house		28,624 93
16a.	Outside checks and other cash items	$767 82	
b.	Fractional currency, nickels and cents	508 60	
			1,276 42
17.	Notes of other national banks		3,050 00
20.	Lawful reserve in vault and net amount due from Federal Reserve Bank		125,493 55
21.	Redemption fund with U. S. Treasurer and due from U. S. Treasurer		10,000 00
22.	Other assets		588 11
	Total		$2,314,888 81

Exhibit P. 7.

LIABILITIES.

23.	Capital stock paid in		$200,000 00
24.	Surplus fund		70,000 00
25a.	Undivided profits	$11,546 26	
b.	Less current expenses, interest and taxes paid	11,040 85	
			505 41
28.	Circulating notes outstanding		200,000 00
30.	Net amount due to approved reserve agents in other reserve cities		130 50
	Demand deposits:		
33.	Individual deposits subject to check		1,085,443 20
34	Certificates of deposit due in less than 30 days		17,272 40
35.	Certified checks		42,140 96
36.	Cashier's checks outstanding		94 27
38.	Postal savings deposits		44,037 40
	Total demand deposits, items 33, 34, 35, 36 and 38	$1,188,988 44	
	Time deposits (payable after 30 days, or subject to 30 days or more notice):		
41.	Certificates of deposit		8,500 00
43.	Other time deposits		546,764 37
	Total of time deposits, items 41 and 43	$555,264 37	
47.	Bills payable, other than with Federal Reserve Bank, including all obligations representing money borrowed, other than discounts		100,000 00
	Total		$2,314,888 81

State of New Jersey, county of Essex, ss:

I, H. C. Gardner, cashier of the above-named bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

H. C. GARDNER, Cashier.

Subscribed and sworn to before me this 15th day of March, 1917.

H. J. VAN DUYNE,
Notary Public.

Correct—Attest:

TIMOTHY F. FOYLE,
LOUIS J. BEERS,
FRANCIS WILLIAMS,
Directors.

GROUNDS OF APPEAL.

Filed.

NEW JERSEY SUPREME COURT.

LOUIS J. BEERS, *Plaintiff-Respondent,* *vs.* BROAD AND MARKET NATIONAL BANK OF NEWARK, *Defendant-Appellant.*	*Action at Law.* *On Appeal from Essex County Circuit Court to New Jersey Supreme Court.* *Grounds of Appeal.*

The appellant states the following grounds of appeal:

1. The Court overruled the objection of appellant's counsel to the following question and permitted the same to be answered:

> "Q That is a note for $5,000 payable four months after date at the Broad and Market National Bank. Will you tell us under what circumstances that note came to be executed?"

2. The Court overruled the objection of appellant's counsel to the following question and permitted the same to be answered:

> "Q When that note became due on November 9, 1914, did you have any conversation with any officers of the bank, or was the note renewed as a matter of course?"

3. The Court overruled the objection of appellant's counsel to the following question and permitted the same to be answered:

"Q When the note became due the next time, which would be on March 9, 1915, did you have any further conversation with any officer of the bank?"

4. The Court over the objection of appellant's counsel, permitted the witness Beers to testify to numerous conversations alleged to have been held between the witness Beers and one, Christian Fleisner, and to conversations between said witness and Francis Williams. When this line of testimony was offered, appellant's counsel objected to several questions, and thereupon it was stipulated between counsel and approved by the Court that appellant's objection shall embrace the whole line of such testimony without the necessity of objection to each question, as will appear from the following in the state of the case:

"Mr. Stewart: I renew my objection on the same grounds.

Mr. Lane: I am quite content, if the Court is, that counsel may object to this testimony without objecting to each question.

The Court: All right. Objection overruled."

5. The Court over the objection of appellant's counsel permitted the witness Beers to state a conversation alleged to have been held between himself and Francis Williams about four years before the date of trial, said time being subsequent to the execution and delivery to appellant of the promissory note involved in this suit.

The following are the question and answer involved in this ground of appeal:

"Q When? A The first conversation was some four years ago—

Objection by appellant's counsel and argument.

The Court: I will admit it.

A I believe the first conversation was about five years ago. Mr. Williams then said to me that if I would let him have my stock, he would arrange to have that note written off."

6. The Court over objection of appellant's counsel permitted the witness Beers to answer the following question:

"Q Did he say in any subsequent conversation what would happen if you did not let him have your stock?"

7. The Court over the objection of appellant's counsel permitted the witness, Edward A. Schilling, to testify to a conversation alleged to have been held with Francis Williams and permitted the said witness to answer the following question:

"Q Tell us the conversation."

8. The Court denied the motion of appellant's counsel for a non-suit at the close of respondent's case, which motion was made on the following grounds:

(a) That the agreements and arrangements alleged to have been made by the respondent Beers firstly with Christian Fleisner, the former president of the appellant bank and later with Francis Williams, the succeeding president

of appellant bank, were not within the authority or legal power of appellant's said officers and could not bind this appellant.

(b) That the agreements and arrangements alleged by the respondent Beers to have been made with the said Fleisner and Williams were wholly void and not binding on this appellant, for the reason that such agreements and arrangements were contrary to public policy.

(c) That the respondent Beers had failed to establish by competent legal evidence a cause of action against this appellant.

9. The Court denied the motion of appellant for the direction of a verdict in its favor, which motion was made upon the same grounds as was appellant's motion for a non-suit, and which motion for a directed verdict was denied by the Court upon the same grounds that it denied the said motion for a non-suit.

10. The Court erred in charging the jury the following:

> "Without discussing the testimony further, I will say that I believe it is important for you, when you retire to the jury room, to ascertain the exact position of Mr. Beers in the affair which has been submitted to you. If Mr. Beers was a borrower from the bank, and if that borrowing was evidenced by a note or notes given by him, he received consideration for the notes; and, though they were renewed from time to time, the bank naturally would expect him at the proper time to pay them off. On the other hand, if Mr. Beers received nothing from the bank, but made some arrangement

with it by which he became the maker or the indorser of certain notes and of their renewals solely for the accommodation of the bank and without any profit to himself, and because of some arrangement the bank charged his account, such procedure would indicate the bank's liability to him because he had received nothing at all for what he had done; and Mr. Beers' side of the story is as I have last narrated the situation. The bank does not agree with that.

The burden of proof is upon Louis Beers to show that when he made or indorsed these notes and delivered them or caused them to be delivered to the bank he did so in good faith solely for the accommodation of the bank, though the transaction was for the benefit of Jules Mechanic. In other words, if you find that Mr. Beers made the note or notes of renewals at the request of the Broad and Market National Bank, relying upon the bank's contemporary parol promise that he would not be held liable upon them, but that the bank, would look for payment to Jules Mechanic, or to such security as the bank held for Jules Mechanic and you find that this arrangement was made for the benefit of the bank solely for its accommodation, you may find that the bank is not a holder of this note for value; and in that case Mr. Beers would be entitled to recover judgment at your hands. If you find to the contrary, your verdict should be in favor of the bank."

11. The charge of the Court is erroneous, in that it did not sufficiently state the issues be-

tween the parties and the rules of law applicable thereto, and in that it did not correctly review the facts testified to by the witnesses in the case.

12. The verdict of the jury is against the weight of the evidence.

13. The verdict of the jury and the judgment of the Court should have been in favor of the appellant and against the respondent.

CHARLES H. STEWART,
Attorney for Appellant.

LEBER & RUBACK,
Of Counsel with Appellant.

Service of a copy of the within Grounds of Appeal is hereby acknowledged this 21st day of February, 1925.

LOUIS J. BEERS,
Attorney for Respondent.

OPINION OF SUPREME COURT.

Beers *v.* Broad & Market Nat. Bank of Newark.

(No. 29.)

(Supreme Court of New Jersey, Dec. 3, 1925.)

1. One who endorses a note without qualification cannot set up as a defense to a suit brought against him on such endorsement, a collateral oral agreement by which his liability is less than his contract of endorsement imports.

2. The president of a corporation is, in a legal sense, its agent, and, while he may bind it by contracts in matters arising in the usual course of business, he cannot bind it by a contract made without specific authority from the board of directors and which is, in a legal sense, a fraud upon the corporation.

Appeal from Circuit Court, Essex County.

Action by Louis J. Beers against the Broad & Market National Bank of Newark. Judgment for plaintiff, and defendant appeals. Reversed.

Argued May term, 1925, before GUMMERE, *C. J.*, and KALISCH and CAMPBELL, *JJ.*

Charles Stewart and Leber & Ruback, all of Newark, for appellant.

Louis J. Beers and Merritt Lane, both of Newark, for respondent.

GUMMERE, *C. J.* This action was brought by the plaintiff to recover from the defendant moneys standing to his account in its bank, and which he claimed the defendants had wrongfully refused to pay over to him upon his demand.

The trial resulted in a verdict in his favor for the full amount of moneys claimed by him to be due. The bank has appealed from the judgment entered upon that verdict.

Stated in the light most favorable to the plaintiff, the uncontroverted facts disclosed this situation:

Some time in July, 1914, one Mechanic, who was indebted to the defendant's bank in a large sum of money, sought to borrow from it the further sum of $5,000, for the purpose of carrying on a series of building operations in which he was then engaged. The president of the bank, desiring to accommodate Mechanic, but having doubts as to his financial soundness, laid the matter before the plaintiff, who was a director of the institution, and, as a result of their discussion, arranged with him the following plan for Mechanic's benefit: That Mechanic should draw his promissory note for $5,000 to the plaintiff's order; that the plaintiff should indorse this note and deliver it to the bank for discount; that the bank should thereupon advance to Mechanic $5,000, the amount of the note, the money to be handed over to the plaintiff and to be paid out by him in satisfaction of Mechanic's existing or future indebtedness to third parties, subject to the approval of the bank's president; and that the plaintiff should incur no liability to the bank by reason of his indorsement—that is, that he should be under no obligation to pay the note in case Mechanic should fail to do so. Pursuant to this arrangement, Mechanic drew a note payable to the order of plaintiff, who then indorsed it and turned it over to the bank. The bank thereupon advanced to him the $5,000 called for by the note, and he paid it out from time to time in

satisfaction of Mechanic's debts, with the approval of the defendant company's president. When the note came due, it was renewed from time to time; the form of the renewal notes being identical with that of the original one, except as to amounts, the interest accruing being added thereto. Some time in the year 1916, Mechanic, having become insolvent, left for parts unknown. When the last of these renewal notes fell due, the plaintiff, at the request of the bank, executed his own note to the bank in the place thereof. The note so given by him was renewed from time to time until February, 1919, when he insisted that he had carried the indebtedness of Mechanic long enough and refused to again renew the note. In this situation, the bank applied, in payment of the note, moneys which had been deposited by the plaintiff to his own account, and unpaid dividends which had accrued upon the stock in the company, and marked off the note as paid. The moneys thus appropriated are the subject-matter of the present litigation.

On the facts above recited, the defendant's counsel, at the close of the trial, moved for the direction of a verdict in its favor. The motion was denied, upon the theory advanced by counsel for plaintiff, and adopted by the Court, that the promise of the president, which was the inducing cause of plaintiff's action in indorsing the original note and its renewals, and in signing renewals in his own name after Mechanic's disappearance, relieved him from legal liability, either as indorser or maker; and that, this being so, the appropriation of the plaintiff's funds to satisfy the last renewal executed by plaintiff alone was without warrant of law.

Opinion of Supreme Court.

(1) This theory, in our opinion, is altogether unsound. The original note was negotiable, and plaintiff was an indorser upon it without qualification. Section 66 of the Negotiable Instruments Act (Comp. Stat. p. 3743) declares that every indorser who indorses without qualification warrants to all subsequent holders in due course that the instrument is genuine and in all respects what it purports to be; that he has good title to it; that the instrument is, at the time of his indorsement, valid and subsisting; and, in addition, he engages that if, on due presentment, it be dishonored, he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay it. It is entirely settled that, in a suit brought against such indorser, testimony purporting to show that his contract of indorsement was other than what the statute declares it to be is absolutely ineffectual to vary the obligation which the statute imposes upon a person who indorses a promissory note without qualification. Indeed, it is not even admissible for that purpose. Gerli *v.* National Mill Supply Co., 78 N. J. Law 1, 73 A. 252, on appeal, 80 N. J. Law 464, 78 A. 1134; Church *v.* National Newark, etc., Banking Co., 97 N. J. Law 237, 116 A. 620, 22 A. L. R. 524. Apparently the basis of the theory which led the Court to refuse the direction of a verdict is that, although this rule is applicable in full force where the suit is brought by the holder to recover against the indorser, yet it does not apply to a suit brought by the indorser against the holder on the basis of a collateral oral contract, although the latter is directly in the face of the written one. In dealing with a similar proposition, Chief Justice Beasley, in the case of Johnson *v.* Ramsey, 43

N. J. Law 279, 39 Am. Rep. 119, note, disposes of it as follows:

> "Now, what seems to me impossible to concede, is that on the facts stated there existed two legal contracts—an oral one and a written one. How can this be so, when the one is contradictory of the other? The written contract bound the first indorser, with reference to the rights of the indorsee, to pay the whole note; the oral contract bound him to pay only half. Such stipulations relate to the same subject-matter, and they cannot stand together. * * * It seems to me that it would despoil the rule, which is prohibitive of parol evidence in such matters, of much of its practical benefit, if the oral engagement, variant from the written one, can lay a separate ground of action. * * * The hypothesis on which the rule which excludes on such occasions contemporaneous oral stipulations, is the peremptory assumption that the parties at the given time, with respect to the same subject-matter, entered into but a single agreement. * * * In my opinion, upon principles thoroughly established, under the circumstances stated, the written indorsement constituted the only legal evidence that could be resorted to."

The logic of this pronouncement seems to us to be beyond controversy, and we conclude, therefore, that the Trial Court should have granted the motion to direct a verdict in favor of the defendant.

(2, 3) There is another reason why a verdict in favor of the defendant should have been directed. According to the facts already recited, the plaintiff and the president of the defendant bank entered into an illegal compact, the purpose of which was to take advantage of their official positions to deplete the assets of the bank to the

extent of $5,000 in case Mechanic should default in the repayment of the money loaned to him. The compact was illegal, so far as the defendant bank was concerned, for the reason that, in making it, the president was acting entirely outside the scope of his authority as such officer. His powers over its business and property are strictly those of an agent, delegated to him by the directors, who are the managers of the corporation, and the persons in whom the control of its business and property is vested. He may bind the corporation by contracts in matters arising in the usual course of business, but beyond this his official position gives him no more control over its property or funds than any other officer or director. Mausert *v.* Feigenspan, 68 N. J. Eq. 671, 679, 63 A. 610, 64 A. 801. So far as the plaintiff was concerned, it is apparent that he understood that the board of directors of the bank would, in all probability, refuse to discount Mechanic's note unless it was indorsed by some one whose financial responsibility was unquestionable. The purpose of the scheme engineered by him and the president was to deceive the board and lead its members to believe that the bank would be protected against loss upon the note by reason of his unqualified indorsement. The result of the scheme, if it had been carried out as the parties to it intended, would have been, as already indicated, the misappropriation of the bank's funds for the benefit of Mechanic as the result of the promise of the plaintiff, exhibited by his indorsement, but which, when made, he never intended to keep. It cannot be doubted that such misappropriation would have been a fraud in a legal sense upon the de-

fendant bank; and this being so, the plaintiff could take no benefit from his illegal compact.

For the reasons stated, the judgment under review will be reversed.

ORDER OF REVERSAL.

NEW JERSEY SUPREME COURT.

LOUIS J. BEERS, *Plaintiff-Appellee,* *vs.* THE BROAD AND MARKET NATIONAL BANK OF NEWARK, *Defendant-Appellant.*	*Action at Law.* *On Appeal.* *Order of Reversal.*

This cause having been argued at the May Term of this Court by counsel for the respective parties, and the Court having considered the same and finding error in the record, judgment and proceedings in the Essex County Circuit Court, in that the Court below should have directed a verdict in favor of the defendant, the Broad and Market National Bank of Newark;

It is thereupon, on this 14th day of December, 1925, Ordered, that the judgment of the Essex County Circuit Court removed by appeal in this cause be in all things reversed, set aside and for nothing holden;

It is further Ordered, that the record and proceedings be remitted to the said Essex County Circuit Court, there in all things to be proceeded

with in accordance with this judgment, and the practice of said Court;

And it is further Ordered, that the Clerk of this Court tax the costs of this appeal in favor of the said defendant and against the said plaintiff.

Let this rule be entered in the minutes.

WM. S. GUMMERE,
C. J.

Entered December 14, 1925.

On motion of

LEBER & RUBACK,
Attorneys for Defendant-Appellant.

A true copy.

EDWARD J. KELLEHER,
Clerk.

ORDER FOR JUDGMENT AFTER REVERSAL.

ESSEX COUNTY CIRCUIT COURT.

THE BROAD AND MARKET NATIONAL BANK OF NEWARK, *Plaintiff,* *vs.* LOUIS J. BEERS, *Defendant.*	*Action at Law.* *Order for Judgment After Reversal.*

The above-entitled action having resulted in a verdict in favor of the defendant, Louis J. Beers, and against the plaintiff, The Broad and Market National Bank of Newark, on the defendant's counter-claim, upon which verdict judgment was entered in this Court on January 21, 1925, in favor of Louis J. Beers and against the said Broad and Market National Bank of Newark for the sum of $6,032.55, besides costs of suit, and it now appearing to this Court that upon the removal of said judgment by appeal to the New Jersey Supreme Court, said Supreme Court did find error in said judgment and in the record and proceedings thereof, in that this Court should have directed a verdict in favor of said Broad and Market National Bank of Newark, and against the said Louis J. Beers, for which error the judgment of this Court was in all things reversed, set aside and for nothing holden; and it further appearing that the said record and proceedings were remitted to this Court by the said Supreme Court here in all things to be proceeded with in accordance with the said judgment of the Supreme Court;

Order for Judgment After Reversal.

It is thereupon, on this sixteenth day of December, 1925, Ordered, that judgment be entered in the above action in favor of the plaintiff, The Broad and Market National Bank of Newark, and against the defendant, Louis J. Beers, on the defendant's counter-claim, with costs duly to be taxed.

Let this rule be entered on the minutes.

WORRALL F. MOUNTAIN.

On motion of

CHARLES H. STEWART,
LEBER & RUBACK,
Attorneys for Plaintiff,
The Broad & Market National Bank of Newark.

Judgment Record.

JUDGMENT RECORD.

NEW JERSEY SUPREME COURT.

BROAD AND MARKET NATIONAL BANK OF NEWARK, *Plaintiff,*	*Action at Law.*
vs.	*After Reversal.*
LOUIS J. BEERS, *Defendant.*	*On Order of the Court.*

Judgment entered December 18, 1925.

Damage .....
Costs 71.72

Charles H. Stewart and Leber & Ruback, attorneys of plaintiff.

Judgment after reversal on order of the Court in the above-entitled action was entered on the eighteenth day of December, A. D. 1925, in favor of the plaintiff, The Broad and Market National Bank of Newark, and against the defendant, Louis J. Beers, on the defendant's counter-claim for $71.72 costs of suit.

Judgment entered and signed December 18, 1925.

NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT.

LOUIS J. BEERS, *Plaintiff-Appellant,* *vs.* BROAD AND MARKET NATIONAL BANK OF NEWARK, *Defendant-Respondent.*	*Action at Law.* *On Appeal from New Jersey Supreme Court to Court of Errors and Appeals.* *Notice of Appeal.*

To Charles H. Stewart, Esq.,
Attorney of Defendant-Respondent.

SIR:

TAKE NOTICE, That the plaintiff-appellant hereby appeals from the New Jersey Supreme Court to the Court of Errors and Appeals of the State of New Jersey, from the whole of the judgment entered in this suit.

LOUIS J. BEERS,
Attorney of Plaintiff-Appellant.

Service of within notice of appeal acknowledged this 29th day of October, 1926.

CHARLES H. STEWART,
Attorney of Defendant-Respondent.

GROUNDS OF APPEAL.

New Jersey Court of Errors and Appeals

	Action at Law.
LOUIS J. BEERS, *Plaintiff-Appellant,*	*On Appeal from New Jersey Supreme Court to Court of Errors and Appeals.*
vs.	
BROAD AND MARKET NATIONAL BANK OF NEWARK, *Defendant-Respondent.*	
	Grounds of Appeal.

The plaintiff-appellant states the following grounds of appeal:

1. The New Jersey Supreme Court erred in reversing the judgment of the Circuit Court in favor of the plaintiff-appellant.

2. The New Jersey Supreme Court erred in that it did not affirm the judgment of the Circuit Court in favor of the plaintiff-appellant.

3. The judgment of the New Jersey Supreme Court should have affirmed the judgment of the Circuit Court instead of reversing same.

LOUIS J. BEERS,
Attorney of Plaintiff-Appellant.

Service of a copy of the within grounds of appeal acknowledged this 29th day of October, 1926.

CHARLES H. STEWART,
Attorney of Defendant-Respondent.

New Jersey Court of Errors and Appeals

LOUIS J. BEERS, Plaintiff-Appellant, *vs.* BROAD AND MARKET NATIONAL BANK OF NEWARK, Defendant-Respondent.	Action at Law. On Appeal from New Jersey Supreme Court. Gummere, C. J. Kalisch and Campbell, J. J. On Appeal from Essex Circuit. Mountain, J. and a Jury.

BRIEF FOR PLAINTIFF-APPELLANT.

(Italics, etc., ours, except where otherwise noted.)

Statement of the Case.

This is an appeal from a judgment of the Supreme Court (p. 220) reversing a judgment of the Essex Circuit (p. 29) upon the verdict of a jury in favor of Louis J. Beers for $6,097.51. The opinion of the Supreme Court is found on page 210, the grounds of appeal in this Court on page 222, the grounds of appeal in the Supreme Court page 204.

The suit was brought by the Broad and Market National Bank against Beers to recover on a note, dated January 25, 1923, made by Beers to the order of himself, payable four months from date at the Broad and Market National Bank of Newark. The recovery sought was for $4,051.25 and interest (p. 4). Beers answered and counterclaimed (pp. 10, 11). The substance of the counterclaim was that in July, 1914, Beers endorsed, *for the accommodation of the Bank,* and without consideration, a note of $5,000 made by one Me-

chanic, which was renewed from time to time, in one form or another, and finally wrongfully charged against his account and thus paid by him.

At the time of the trial, the bank's cause of action had been satisfied and the suit proceeded on Beers' counterclaim, Beers becoming plaintiff and the Bank becoming defendant.

The case went to the jury on the charge of the Court (p. 152) and the jury brought in a verdict in favor of Beers for $6,097.51 (p. 29). The Bank moved for a non-suit (p. 107), which was denied, and exception noted as ground of appeal (p. 116). It is stated in the opinion of the Supreme Court that the Bank moved for a direction of a verdict (p. 212). The motion does not seem to be in the State of the Case although, from the remark of counsel for the Bank, that he was renewing his motion for a non-suit "on the same grounds which I urged for the direction of a verdict", it would seem as though such a motion had been made. The State of Case was printed by the Bank in the Supreme Court.

The Facts.

The Supreme Court (p. 211) states that the facts are, as indicated by it, "stated in the light most favorable to the plaintiff". We feel that the Supreme Court has omitted many important facts which the jury must have found in favor of Beers under the charge of the Court.

Upon the facts as indicated by the Supreme Court, that Court treated the case as if it were one in which Beers as an endorser of a note was attempting to show, as against a bona fide holder for value without notice, that an agreement had been made by the president of the bank that Beers would not be held liable upon his endorsement. That was not the contention of Beers nor was it

upon that theory that the case was sent to the jury.

The Supreme Court in its statement of the facts said that the motive which induced the president of the bank to make the agreement he did was that "he desired to accommodate Mechanic". We submit this was not the motive as disclosed by the testimony. He acted as he did because Mechanic was indebted to the bank at that time in a large sum of money and the situation was such as that the bank could not call the loan for Mechanic could not pay and, unless more money were advanced to Mechanic, Mechanic would fail and *the bank lose the money which it had already loaned to him.* As matter of business policy, the president of the bank thought that it was advisable to make the further advance to keep Mechanic on his feet, *not for the benefit of Mechanic but for the benefit of the bank.*

The theory of Beers was that he was brought into the situation by the bank for *its* accommodation. What Beers, therefore, attempted to show and what the jury found to be the fact was that the original parties to this note were the bank on the one side and Beers on the other and that there was no consideration for the note and that Beers was an accommodation endorser for the bank, *not* for Mechanic. The matter was put to the jury in the charge of the Court in clear language. The Circuit Judge (p. 156) said: "The burden of proof is upon Louis Beers to show that when he made or indorsed those notes and delivered them or caused them to be delivered to the bank he did so in good faith *for the accommodation of the bank,* though the transaction was for the benefit of Jules Mechanic."

Because the Supreme Court omitted in its Statement of Facts that which we believe to be important, we are obliged to state the facts which must

be assumed to have been found by the jury under the charge of the Court.

In June, 1914, Mechanic was greatly indebted to the Bank and was in need of additional funds to finish his building operations and meet payments of interest and installments on private and building and loan mortgages covering his property and had asked for further loans. As that time Christian Fleissner was the president of the bank, and Beers, who is an attorney, was one of its directors and a member of its Discount Committee (referred to in the testimony as the "noonday board"). The bank consented to give Mechanic more money in order to protect his assets for *its* benefit and Beers was asked by Fleissner to handle the Mechanic situation *for the bank.* Beers had had no business dealings with Mechanic prior to that time, although a building and loan association represented by him had granted Mechanic a mortgage loan on one of his properties.

The purpose of the injection of Beers into the transaction was *not* as stated by the Supreme Court, at page 215, to deceive the directors of the bank or anyone else but as testified by Beers, and there was no denial of his testimony, page 37:

> "Mr. Fleissner (the president of the bank) said, 'We want to give him more money, but *we don't want to give it direct to Mr. Mechanic. We want to see that this money is paid to the building and loan association in a way to conserve it and to protect his assets',* which consisted, I believe, wholly of real estate in Newark. I at first demurred and he said, 'You must do this for the bank', and I consented. I endorsed the note."

And this was repeated in subsequent testimony and he also said that Fleissner *had promised to explain the situation to all concerned and that he had reason to believe that his promise was carried out* (p. 56).

The transaction was handled by Beers through an agent, Edward A. Schilling, an attorney at law associated with him in his office. A ledger account was opened between "Jules Mechanic-B. & M. Bank" (meaning Broad and Market National Bank). In June there was turned over to Beers for disbursement $4,431. This was disbursed according to the *directions of Fleissner,* president of the bank (p. 89, line 29). This amount was quickly used up and it became necessary for the bank to advance other moneys to Mechanic to protect *itself.* At the request and direction of Fleissner, Beers endorsed, for the accommodation of the bank, a note of $5,000 made by Mechanic to the bank and the proceeds of this note were placed to the credit of Beers' account with the bank and Beers charged himself with the receipt thereof in the "Mechanic-B. & M. ledger account" (Exhibit D-17), and disbursed these funds *at the direction of the bank* (pp. 100-101). After this was disbursed another $1,000 was credited by the bank to Beers' account with the bank. This amount was charged by Beers against the "Jules Mechanic-B. & M. Bank" ledger account and again disbursed by him to Mechanic's creditors *at the direction of the bank.*

When the $5,000 note became due, it was charged against Beers' account and there was credited to his account the proceeds of a new note made by Mechanic which Beers again endorsed. These renewals were continued every four months until July 10, 1916, the result being that the interest and revenue stamps on the notes, by being charged against Beers' account, were paid by him.

Prior to July 10, 1916, the day on which such a renewal note came due, Mechanic left Newark, and at the request of the bank, Beers substituted a note made by himself to the bank in place of one endorsed by him, in renewal of the note matur-

ing on July 10, 1916. When this note became due on November 10, 1916, it was discovered by Beers that he had been charged with interest and revenue stamps on the renewal notes over the period from July 9, 1914, to November 10, 1916, and he insisted that he be repaid. Thereupon, Francis Williams, the then president of the bank, *admitting that Beers had been wrongfully charged these amounts,* accepted a new note for $5,802.68 and credited Beers' account with the proceeds of the same, Beers being thereby reimbursed for the moneys charged against his account (p. 94, line 26; p. 45, line 20). The difference between the amount of the new note ($5,802.68) and the note due on that date ($5,100), was the *exact amount to the penny that had been charged against Beers' account for interest and revenue stamps on the renewal notes, and was ascertained by calculation made by Schilling and Williams, the president of the bank.*

This note was renewed from time to time and on each renewal the amount of the interest and revenue stamps was added to the face of the new or renewal note (p. 96).

In February, 1919, Beers, insisting that he had carried the note long enough for the accommodation of the bank, refused to renew it again. Thereupon, the bank requested that Beers continue his accommodation by giving a new note, *the bank agreeing to pay $1,000 on account thereof at that time.* Thereupon, there was credited by the bank $1,000 to Beers' account and a new note of $5,419.74 was given by Beers in renewal of the note due on that day, amounting to $6,419.74 (p. 96, line 32, *et seq.*).

When the note came due on May 14, 1919, Beers, again insisting that he had carried the note long enough for the accommodation of the bank, again refused to renew it. The bank requested that

Beers continue his accommodation by giving a new note, *the bank agreeing to pay a further sum of $1,000 on account thereof at that time.* Thereupon, there was credited by the bank $1,000 to Beers' account and a new note of $4,501.94 was given by Beers in renewal of the note due on that day, amounting to $5,501.94 (p. 98).

Beers never saw either of the two $1,000 checks which were deposited by the bank and credited in reduction of the notes (pp. 78, 97, line 27; p. 98, line 28).

When the note came due on August 14, 1919, Beers again gave a note of $4,000 in renewal *upon the bank's promise to credit on account of the old note $501.94.* This, however, the bank failed to do. When the $4,000 note came due, the bank charged Beers' account with the full amount thereof (p. 99).

The suit and recovery by Beers were for these amounts wrongfully charged against him, and interest.

To secure the payment of Mechanic's indebtedness to the bank, Beers, at the request of Fleissner, president of the bank, took from Mechanic, mortgages upon Mechanic's property (p. 59, line 20, and p. 100, line 30). Later, Mechanic's property having been lost through foreclosure, the mortgages taken by Beers were, *at the request and consent of the bank* cancelled of record (pp. 102, 103). The bank realized something on these mortgages and the bank and Beers both acknowledged that the mortgages were made for the benefit of the bank by the fact that the *bank bought in several of the properties covered thereby to protect the amounts due on the mortgages* (p. 102).

The testimony makes it clear, and the jury under the charge of the Court must have found, that the entire transaction was one that *originated with the president of the bank* and that he sought to

preserve the assets of Mechanic who was largely indebted to the bank, so that Mechanic might retain his financial ability and pay the bank its loans to him, for if Mechanic's properties were lost to him by the filing of mechanics' liens or foreclosure, the bank's loans, previously made, would have been lost, and Fleissner, the *president of the bank,* in and about the bank's business, and exercising due vigilance *conceived and formulated* the plan of advancing more money so that material men, laborers and other creditors might be paid and interest charges and building and loan dues met, and *Mechanic's properties and assets thereby held intact and saved for the bank,* and to better make certain this result, *Fleissner asked Beers to act for the bank and to see to the disbursement of the moneys, the bank not desiring to give the money directly to Mechanic which in the view of the president of the bank* (p. 37) *would affect the control which the bank wanted to retain and which it did retain by placing the moneys to the credit of Beers and having him make the disbursements at the direction of the president of the bank, and the endorsement by Beers of Mechanic's note for the accommodation of the bank and the placing of the moneys to his account for disbursement by him was a step in a legitimate transaction of the bank and was carried out by an officer of the bank, ordinarily charged with such transactions and within the scope of his real and apparent authority.*

The testimony is likewise clear and convincing, and the jury must have found under the charge of the Court, that the *entire transaction was without benefit to or interest of Beers and solely for the accommodation of the bank.*

The result of the judgment of the Supreme Court is that Beers had been held obliged to pay a note to the person whom he accommodated by endorsing it. The Supreme Court reversed the

Circuit Court upon two grounds—one that the attempt of Beers was to alter, vary or contradict a written contract; and the other, that the arrangement was such as to constitute a fraud upon the bank and Beers could take no benefit from "his illegal compact".

ARGUMENT.

I.

The rule that the contract of endorsement cannot be altered by parol has no application in the instant case.

The Supreme Court refers to Section 66 of the Negotiable Instruments Act, Comp. Stats. p. 3743, which declares that every endorser who endorses without qualification warrants "to all subsequent holders *in due course*", among other things, that the instrument is genuine and in all respects what it purports to be.

The Supreme Court then says that it is entirely settled that, in a suit brought against such endorser, testimony purporting to show that "his contract of indorsement was other than what the statute declares it to be is absolutely ineffectual to vary the obligation which the statute imposes upon a person who indorses a promissory note without qualification. Indeed, it is not even admissible for that purpose," citing *Gerli* v. *National Mill Supply Co.*, 78 N. J. L. 1, on appeal 80 N. J. L. 464; *Church* v. *National Newark, etc., Banking Co.*, 97 N. J. L. 237.

It then states that, "apparently the basis of the theory which led the Court to refuse the direction of a verdict is that, although this rule is applicable in full force where the suit is brought by the holder to recover against the indorser, yet it

does not apply to a suit brought by the indorser against the holder on the basis of a collateral oral contract, although the latter is directly in the face of the written one." It then cites *Johnson* v. *Ramsey,* 43 N. J. L. 279.

The Supreme Court, we submit, misapprehended the theory which led the Trial Court to permit the oral testimony. The Trial Court's theory is clearly indicated in its action upon the motion for non-suit, pp. 114, 115, where it said:

> "It has been called to the Court's attention that in cases where the situation has been reversed, where an action has been brought against a person who has in good faith *accommodated a bank by giving it his paper,* the maker of the paper has been discharged from his liability upon proof that there was good faith and that the paper was given *for the accommodation of the bank";*

and again, p. 116:

> "I think it is a question for the jury to determine under all the facts and circumstances whether Mr. Beers signed these notes and gave this paper *in good faith for the accommodation of the bank,* if I may put it that way, or whether it was an accommodation paper for the benefit of Mechanic."

And the Court, in effect, charged the jury that if the endorsement was made for the accommodation of the bank, Beers was not liable upon it and therefore could recover the amount the bank charged against his account in payment of it, but if the endorsement was for the accommodation of Mechanic, then Beers *was* liable upon the note irrespective of any oral agreement and that in that event he could not recover.

Neither Section 66 of the Negotiable Instruments Act nor the cases referred to by the Supreme Court have any application whatever if

Beers endorsed the note for the accommodation of the bank and the jury found that he did.

In *Gerli* v. *National Mill Supply Co.*, 78 N. J. L. 1, the suit was brought by the holder of a note *in due course* against the maker and an endorser. The maker sought to prove that the note was given for the accommodation not of the holder but of the endorser and that it was understood between the parties that the endorser for whose accommodation the note was given was to pay the note and not the maker. The Supreme Court, and its decision was affirmed by this Court in 80 N. J. L. 464 upon the opinion below, could not help but hold that *such* an agreement could not be shown as between the holder of the note in due course and the maker. The case has no application to that at bar where the attempt is *not* to show a contract between the holder of a note in due course and the endorser that the note was not to be paid by the endorser, but *is* to show that the note was made *for the accommodation of the holder.*

In *Church* v. *National Newark, etc., Banking Co.*, 97 N. J. L. 237, the attempt was to show, as against the holder of a check *in due course,* that an endorsement was made upon the understanding that, before liability should attach, the bank should satisfy itself as to the genuineness of the check.

Here again the dispute was between an endorser and an admitted holder *in due course* and this Court held that the contract evidenced by the endorsement could not be altered, contradicted or added to by parol.

This case has no application to that at bar.

So in *Johnson* v. *Ramsey,* 43 N. J. L. 279, the controversy was between the first endorser of a note and the next endorser below him and the attempt was to show that an agreement had been

made between the two under the terms of which the ordinary contract evidenced by successive endorsements was to be changed.

It was not claimed that the first endorser endorsed for the benefit of the next endorser. The attempt was to alter the contract evidenced by a writing by parol.

Assuming that Beers endorsed the note for the accommodation of Mechanic, the cases referred to by the Supreme Court *would* apply and the Trial Court in effect so charged the jury.

Assuming, however, that Beers endorsed for *the accommodation of the bank,* and the jury must have so found, the cases have no application. It is settled beyond question that parol evidence *may* be used to show that a note was either made or endorsed for the accommodation of any party to it, and that, if it is shown by parol evidence or otherwise that the note was made or endorsed for the accommodation of *any* party to it, that party has no right against the accommodation maker or endorser.

In *Peoples National Bank* v. *Schepflin,* 73 N. J. L. 29, the Supreme Court said at p. 34:

> "It was pointed out by Chief Justice Beasley in Mount *v.* Zisgen, 7 N. J. L. 71, that evidence to show suretyship is admissible when it is offered not to vary the terms of the contract, but to show the status of the party and a fact which, taken in connection with the status, would render the contract void, and that he had intended to say in the opinion in Anthony *v.* Fritts that this distinction must be made. *As between the immediate parties to a promissory note, its real character may always be shown. If the payee sues upon it, it may be proved that the note was really given for his accommodation.* Messmore *v.* Meyer, 27 Vroom 31. *Save for the law merchant, the real character of a note might be shown even as* against a holder in due course." * * *

It further said, page 35:

> "Even with respect to parties capable of contracting, it is well settled that the rule against varying the terms of a written instrument by parol evidence does not apply at all to evidence tending to show, *as between the parties, that the contract was void for want of consideration or the like.* Metlar's Administrators *v.* Metler, 3 C. E. Gr. 270, 273; 4 *Id.* 457; Chaddock *v.* Vaness, 6 Vroom 517 (at pp. 520, 522); Johnson *v.* Ramsey, 14 *Id.* 279 (at p. 282); Middleton *v.* Griffith, 28 *Id.* 442 (at p. 448). And this is still the case under the Negotiable Instruments act of 1902. Pamp. L., 583, Secs. 16, 24, 28, 29, 68, 196."

In *Morris County Brick Co.* v. *Austin,* 79 N. J. L. 273, it was conceded that parol evidence might be introduced to show that a person was an accommodation party and the Court in that case held that the matter was one for the jury.

The case which we submit was controlling upon the Supreme Court but is not mentioned by it is the *First National Bank of Roselle* v. *Dorvall,* 89 N. J. L. 298.

In that case Dorvall made a note to himself and endorsed it to the bank, as he claimed for its accommodation, the bank advancing money thereon which he claimed to have used for the benefit of the bank. That was the situation in the case at bar. Beers did not get the money from the bank for his own use or as agent for Mechanic. *He took the money, held and disbursed it as agent for the bank and at its direction.* The issue of fact before the District Court in the Dorvall case was whether the note was made for the accommodation of the bank or for one Deitz. The District Court found as a fact that the note was given for the accommodation of Deitz and not the bank and therefore permitted recovery. On appeal, the Supreme Court affirmed the judgment. This

Court affirmed the judgment of the Supreme Court *solely* upon the ground that there was evidence to sustain the finding of the District Court that the note was for the accommodation of Deitz and not the bank.

The Supreme Court, as it has done in the instant case, rested *its* judgment upon the ground

> "that the rights and obligations of the endorser of a negotiable promissory note cannot be varied by parol testimony of his oral agreement made before or at the time of his endorsing the note."

This Court disapproved what the Supreme Court had said upon that subject and said:

> "We do not question the legal rule stated, but it is not applicable to the facts in this case where the defendant is the maker of the note, *and his defence is want of consideration.* If it be true that the bank, assuming that the cashier had authority to bind it, induced the plaintiff to give the note as an accommodation for it, and the cashier's check was used to pay the indebtedness of the bank on account of a bid for the property which in fact it was purchasing in the name of the defendant, *no consideration passed from the bank to the maker of the note, and if these facts were undisputed, the plaintiff could not recover on the note.* The Supreme Court relied upon Foley *v.* Emerald Brewing Co., 61 N. J. L. 428. In that case the endorser defended upon the ground that plaintiff, the holder of the note, had agreed with the endorser that he would accept a partial payment weekly from the maker until the note was paid, and it was there held that proof of the extension of the time for payment, contrary to the tenor of the note, was not admissible, *but this is not applicable to a case between the maker and the holder where the note is made for the accommodation of the holder.*"

In *Chaddock* v. *Vanness,* 35 N. J. L. 517, this Court said at p. 520:

> "Parol evidence may *undoubtedly* be given of the circumstances under which a note or its endorsement was made, *in order to show a want or failure of consideration,* or illegality in the transaction, or to present the defence of a fraudulent appropriation of the note to a purpose for which it was not intended; or to establish a contemporaneous agreement as to the mode of payment, which has been executed in satisfaction of the debt. Chitty on Bills, 69, 142; Duncan, Sherman & Co. *v.* Gilbert, 5 Dutcher 521; Oliver *v.* Phelps, Spencer 180; S. C., 1 Zab. 597."

And again, p. 520:

> "As between endorsee and his endorser, or a subsequent holder without superior equities, parol evidence is competent to show that *the endorsement was for the accommodation of the endorsee* (*Chitty on Bills 70*) *or was made without consideration, as that the bill or note was endorsed as agent for the endorsee, merely for the purpose of remittance to him, in pursuance of the usual course of business between* the parties (Pollock *v.* Bradbury, 8 Moore P. C. C. 227); or was endorsed and delivered to the endorsee for collection for the benefit of the endorser (Denton *v.* Peters, Law Rep., 5 Q. B. 475); or that the endorsement was upon a consideration which was conditional, and was not performed. Goggerty *v.* Cuthbert, 2 B. & P., N. R. 170; Clanch *v.* White, 1 Bing., N. C. 414; Bell *v.* Lord Ingestre, 12 Q. B. 317. But such endorsement, *when made for an adequate consideration,* not only passes the interest of the endorser, but also amounts to an undertaking, unless qualified in express terms, that if the bill or note is not paid at maturity, and the endorser has due notice of dishonor he will pay it, which in law is a contract on the part of the endorser in favor of the endorsee, and

every holder to whom the bill or note is transferred. Chitty on Bills, 241; Story on Notes, Sec. 135; Edwards on Bills, 272, 284."

In the Supreme Court the bank attempted to distinguish *First National Bank of Roselle* v. *Dorvall,* 89 N. J. L. 298, by the assertion that that was an action by a bank against the maker *not the endorser* of a negotiable promissory note. That makes no difference, for an endorser may show that he is an accommodation endorser just as readily and by the same kind of proof as may a maker and no one of the cases draws any distinction between the maker and endorser and, as a matter of fact, the note which was charged to Beers' account which gave rise to the counterclaim, was a note *made by Beers.*

The bank also attempted, in the Court below, to argue the facts to indicate that Beers did not make the note or endorse the original notes for the accommodation of the bank. The difficulty with this is that *that* was the issue submitted to the jury and there was evidence, assuming it to be admissible, upon which the jury was justified as a matter of law in finding as it did that Beers' acts were for the accommodation of the bank.

In *United States National Bank of Superior, Wis.* v. *McCabe,* Supreme Court of N. D. (1928), 222 N. W. 474, the claim by the defendant was that the note was given solely for the accommodation of the bank. The Court found that the bank had advanced a corporation far in excess of what the Federal Statute would permit. The directors of the corporation then gave notes, one of which was in quesion in the suit, to assist the bank in making a showing to the examiner that the bank was complying with the statute. The Court held that there was no liability and said, at p. 476:

> "This court has held in the case of Anamoose National Bank *v.* Dockter, *et al.*, 216 N. W. 206, that 'notes made payable to a bank for the sole purpose of deceiving the bank examiner *are for the accommodation of the bank without consideration* and the bank as a going concern cannot recover thereon.'
>
> The lower court in passing upon the testimony found the statements of the defendant and the other witnesses who testified to the accommodation character of the note to be true. This finding is certainly not against the preponderance of the evidence. We need not pass on the issue of release. *The note having been made for the accommodation of the bank and the bank being a going concern, it cannot recover thereon;* therefore the judgment of the lower court is affirmed with costs and it is so ordered."

Proof that the note was given for the accommodation of the bank was by parol.

In *Anamoose National Bank* v. *Dockter,* the Supreme Court of N. D. (1927) 216 N. W. 206, 56 N. D. 33, the suit was brought upon a note held by the bank and the defendant alleged that it was given for the accommodation of the bank and was without consideration. The Supreme Court said, p. 206:

> "It was further alleged that the president of the bank represented to the defendants that the note of one Dockter was long past due, that the bank examiner had ordered it charged off the bank assets or fixed up in some manner satisfactory to the bank examiner, and at the same time promised and agreed with the defendants that they would never be called upon to pay or settle for the note mentioned in plaintiff's complaint."

The Trial Court granted a motion for judgment notwithstanding the verdict "upon the theory that it was error to admit in evidence the state-

ments of the defendants that they signed the notes for the accommodation of the bank to make them look good to the bank examiner, that the admission of such testimony was a violation of the rule that parol evidence is not admissible to vary the terms of the written contract."

The Supreme Court, after considering the cases, reversed and quoted the author of the note in Volume 5, Uniform Laws Annotated, Negotiable Instruments Act, pp. 171-172. The statement quoted by the North Dakota Courts appears on p. 241 of the new edition of 1930 and is as follows:

> "Evidence showing that the note was for the accommodation of the plaintiff does not trench on the rule that oral evidence cannot be used to vary the terms of a written contract" (and many cases are cited).

The Supreme Court of North Dakota said:

> "It is clear from the foregoing statement that a majority of this court were of the opinion that the question as to whether the note in suit was for the accommodation of the bank or for the accommodation of the publishing company was a question of fact for the jury, and, if the note was for the accommodation of the bank, it could not recover as a matter of law under the Negotiable Instruments Act and the decisions support the contention of the defendants."

It further said:

> "It is clear that there was no error in admitting evidence to prove that the bank was the accommodated party in the case at bar.
>
> The Federal Courts hold that the receiver of an insolvent bank stands in no better position than the bank as a going concern and cannot recover on paper made for the accommodation of the bank with intent to deceive the bank examiner. Rankin Receiver *v.* Bank, 208 U. S. 541, 28 Sup. Court 346, 52 L. Ed.

610; Yates Centre National Bank *v.* Lauber (D. C.) 240 Fed. 237; Cutler *v.* Fry (D. C.) 240 Fed. 238; Yates Centre National Bank *v.* Schaede (D. C.) 240 Fed. 240, affirmed (C. C. A.) 240 Fed. 241; Clay County Bank *v.* Keith, 85 Mo. Appeals 409."

It further said:

"It is an action between the parties, and *there is no way of determining whether there were creditors of the bank or whether there were any creditors or third parties injured by reason of the deceit practiced upon the bank examiner, and hence the bank cannot recover, for the reason as between the parties there was no consideration.* Eckman First Nat'l Bank v. Kelly, 30 N. D. 84, 152 N. W. 125, Ann. Cases 1917D 1044; Lucca First State Bank v. Casselton First National Bank, 44 N. D. 86; 176 N. W. 4.

In Uniform Negotiable Instruments Law, Ann. Vol. 5, Sec. 29, pp. 170-171, the authorities in support are collected and embrace the States of Alabama, Arkansas, California, Colorado, Connecticut, Iowa, Kansas, Massachusetts, Missouri, *New Jersey,* New York, North Dakota, Pennsylvania, Rhode Island, West Virginia, and there is a recent Iowa case not cited, viz., Smouse v. Waterloo Savings Bank, 198 Iowa 306, 199 N. W. 350, wherein it is held 'that notes made payable to the bank for the sole purpose of replacing "excess loans" in bank in anticipation of immediate examination by bank examiners, held for accommodation of the bank and without consideration, and could not recover thereon.' "

In *First National Bank of Reedley* v. *Reed,* Supreme Court of California, 244 Pac. 368, 198 Cal. 252, there was an action brought by a bank against the maker of a note. The maker contended that it was represented to him by the cashier and manager of the bank that the ex-

aminers were about to make an examination of the affairs of the bank and that the bank had honored overdrafts of the Reedley Canning Company to the amount of about $11,000 and that

> "The officers of the plaintiff were desirous of cleaning this account up and that they wanted defendant, as an accommodation to the said bank, to execute his note to the bank for $11,000 and that the said Reedley Canning Company would receive credit therefor, and that it would be simply a temporary affair and that the bank would guarantee to protect defendant against loss by reason of giving the said note. That on the date of the delivery of said promissory note to said bank by said defendant, said bank then and there credited the amount thereto, to wit, $11,000 on the said overdraft of the Reedley Canning Company and the said bank retained the said note."

The maker of the note was a stockholder of the Reedley Canning Company. It was claimed that the bank was not bound by the representations made by its cashier. The Court said:

> "The exception, holding, as it does, that the principal is not bound by the knowledge of his agent, has no application to a situation such as presented here wherein the principal is seeking to establish the liability of a third person. In the situation presented here the sole representative of the bank was the cashier and acting manager. *The bank cannot claim anything, except through him, and therefore, if it claims through him it must accept his agency, with its attendant notice of his knowledge of the facts as they actually existed. The bank cannot in one breath be heard to say that the cashier was without authority to bind itself as its agent, and accept the note upon condition that it was an accommodation note for which the defendant should not be liable, and in the next breath insist that*

it can avail itself of his act in taking the note. It cannot avail itself of only so much of the transaction as was beneficial to it, and repudiate the rest. If it relies upon the note, it must take it with the terms upon which the cashier took it, namely that the defendant should not be responsible. The bank must take the burden with the benefits, and by demanding performance of the contract the bank assumes responsibility for the instrumentalities—that is to say, the representations, promises, and conditions—through which the act was induced."

And again, p. 371:

"It follows from what we have said, that, Reed having given his note with the express understanding with the cashier and manager of the bank that he would not be called upon to pay the note, he cannot now, in a suit wherein the bank is plaintiff, and no rights of innocent third parties intervene be held liable. The finding of the trial court that there was no consideration for the note, based as it undoubtedly was upon the theory that Reed had loaned his credit to the bank, and not the Canning Company, is correct and supported by the evidence."

In *Empson* v. *Richter,* Supreme Court of Nebraska (1925), 204 N. W. 518, 113 Nebr. 706, action was brought by the receiver of a bank upon two notes executed by the defendants to the bank. It was claimed that the notes were given solely as accommodation to the bank and it was denied that there was any consideration. The testimony tended to show that the bank had been holding one Richter's past due notes for about $26,000 having as security a chattel mortgage on a mixed herd of cattle and that the cattle were not ready for the market and that the security was wholly inadequate and that the bank appreciated that a loss was inevitable and that the bank was not able to

carry the large loan and that in order to render its loss as light as possible, it was the desire of the bank that the cattle be kept a year longer in order that the younger cattle might become more valuable and that a better market might be secured. Under this state of facts, the bank solicited the defendant Mrs. Davis to sign notes aggregating $10,000 "as an accommodation to the bank to enable it to float the paper for a year till the stock grew more valuable". There was a direction of a verdict for the bank upon the ground that the facts indicated that the person accommodated was Richter and not the bank. The Supreme Court of Nebraska reversed and said:

> "While there is some reference in the cross-examination of Richter which seems to indicate that there was an extension of the time of payment of his indebtedness, we are of the view that a fair construction of the entire evidence tends to show that the extension, if any, was for the benefit of the bank rather than Richter. Mrs. Davis' testimony is very positive that it was distinctly understood between her and the bank that she was signing the notes as an accommodation to the bank, and that she was not to be called on to pay any part of the notes. The testimony of Mrs. Davis was not denied by anyone.
>
> "*It is fundamental that an accommodation maker or endorser is not liable to the party accommodated. The mere fact that Richter may have received some benefit out of the transaction does not necessarily determine that he was the accommodated party.* Under the evidence we think the trial court, if it had been requested to do so, would have been justified in directing a verdict for the defendant Davis. In any event, the court should have submitted the question at issue to the jury, and it erred in not doing so."

In *Smouse* vs. *Waterloo Savings Bank,* 199 N. W. 350, 198 Iowa 306, there was an action brought

by the makers of notes in the possession of the bank to cancel them. With respect to certain of the notes, it was claimed that they were given for the "avowed purpose of assisting the bank in making a showing to the examiner at the approach of an examination". The express intention between the parties at the time was to accommodate the bank in the manner suggested. The District Court directed cancellation and the Appellate Court said, 199 N. W., p. 354:

> "We are convinced upon the entire record that the seven notes of $5,000 each were given by appellee to appellant *solely as accommodation paper, that they were without consideration,* and that the decree of the trial court in respect thereto was correct and should be affirmed."

There was *affirmative* relief granted to the makers of the notes.

In *Peterson* v. *Tillinghast,* Circuit Court of Appeals for the 6th Circuit, 192 Fed. 287, an action was brought by the receiver of a national bank to recover upon two promissory notes. The claim of defendant was that the cashier of the bank had asked for the note to accommodate the bank stating that defendant would never have to pay. The claim of the receiver on the other hand was that the notes had been given for the accommodation of a third party. The Court below held against the defendant stating:

> "In the ordinary case of an accommodation note given to a national bank, it is against the theory and policy of the law and against the proper rules of public policy to permit the giver of the note to deny liability upon such note."

The Court of Appeals said, page 289:

> "We think the action of the Court below must be tested by the decision in Rankin *v.*

> City National Bank, 208 U. S. 541, 28 Sup. Ct. 346, 52 L. Ed. 610, affirming that of the Circuit Court of Appeals of the Eighth Circuit in the same case, though appearing in that Court in the name of the predecessor of Rankin as receiver, *viz*: Cherry *v.* City Nat. Bank, 144 Fed. 587, 75 C. C. A. 343."

It then considered that case and reversed the judgment below.

In *Central Bank & Trust Co.* v. *Ford,* the Supreme Court of Texas, 152 S. W. 700, held that evidence of an understanding that a note would not be enforced or create a liability was admissible to show that a contract evidenced by the note was invalid for want of consideration and that such testimony does not vary or alter the contract evidenced by the note, its effect being to show that there was no contract which could be enforced as valid.

In re Taskers Estate, 182 Pa. State, 122, 37 Atl. 924 (Pennsylvania) it was held that a finding that a note was discounted by a bank for the maker and not loaned to it by him for accommodation is not supported merely by the fact that the note was several times renewed.

In *First State Bank* v. *Morton,* 146 Ky. 287, 142 S. W. 694, Supreme Court of Kentucky, the question for decision was stated:

> "Can Morton rely upon the plea of no consideration, assuming for the sake of argument that the note was given for the purpose of deceiving the state bank examiner."

The Court held that there must be a consideration and that lack of consideration may be shown and that a total failure of consideration would bar recovery.

A number of cases were cited in the Supreme Court by the bank. We will attempt to distinguish them.

Bank of U. S. v. *Dunn,* 6 Peters, page 51, 8 L. Ed. page 316. In this case an attempt was made by Dunn to introduce testimony that he would not be held upon a note which he was endorsing *for the accommodation of the maker.* The Court held that such testimony was not admissible. The Court in its opinion says:

> "All cases agree, that *as between the parties* a total want of consideration or a partial failure of consideration *may* be shown."

Thompson vs. *McKee,* 5 Dak., page 172; 37 N. W., page 367. This case does not apply, for it clearly appeared that the note was endorsed *for the accommodation of a third party,* Wolfe, not the bank.

First National Bank vs. *Tisdale,* 18 Hun, page 151, affirmed in 84 N. Y., page 655. The note in suit was given by the defendant to take up a note and draft on which he was already liable as an endorser.

Davis vs. *Randall,* 115 Mass., page 547. In this case the drafts in suit were accepted for the accommodation of the maker, W. B. Fiske & Co., and not for the accommodation of the bank.

First National Bank vs. *Foote,* 42 Pac., page 205, 12 Utah, page 157. The Court refused to allow parol evidence of failure of consideration, because it was not pleaded.

Foley vs. *Emerald & Phoenix Brewing Co.,* 61 N. J. L., page 428. There was no attempt in this case to show that the endorser signed for the accommodation of the payee or that there was a failure of consideration, and the Court could not help but exclude testimony tending to show that payment was to be made in weekly installments and not according to the tenor of the note.

It is respectfully submitted that the Supreme Court erred in holding that there should have been

a direction of a verdict for the bank upon the ground that the contract indicated by the endorsement could not be altered by parol and that the cases which we have heretofore mentioned indicate that parol evidence *may* be introduced to show the fact that the endorsement was for the accommodation of the holder, the bank, and also that the acts of the president of the bank, the agent of the bank in this transaction, bound the bank.

The Supreme Court did not pass upon this latter point. It may however, be made here in support of the judgment of the Supreme Court, so that, before considering the other point upon which the Supreme Court based its judgment, we will consider:

II.

The president of the bank had authority to enter into the contract alleged and proved by Beers and found by the jury to have been made and the bank could not accept the benefit of the note and repudiate the detriment.

The counterclaim alleges the making of the contract. The answer of the bank to the counterclaim simply denies the making of the contract and sets up as a defense thereto that, if it was made, it was *ultra vires.*

No allegation is contained in the answer to the counterclaim that the officer of the bank making the contract had no authority to do so, and no proof was introduced at the trial, denying such authority. On the contrary, it appears that the transaction between Mechanic and the bank was entirely in the hands of Fleissner, the president and chief financial officer and the person in charge of the bank and the conduct of its business, and that it

was a transaction in the ordinary course of the bank's business and within the scope of the president's real and apparent authority.

The bank cited and relied upon certain cases which we will attempt to distinguish.

State Bank of Moore v. *Forsyth,* 108 Pac., page 914. In that case the defendant gave a note to the bank at the request of the cashier, to be substituted in the bank for the *personal notes of the cashier.* The cashier promised that the maker would not be held upon the note. The cashier turned in defendant's note, took out his own and received a surplus in cash. The Court held that it was clear, and admitted by the defendant, that the cashier in that case was not acting for the bank, *but for himself* and consequently such promise as the cashier might have made could not bind the bank.

West St. Louis Savings Bank vs. *Shawnee County Bank,* 95 U. S., page 557, 24 L. Ed., p. 490. The Court held that the cashier had no authority by virtue of his office to bind his bank as an accommodation endorser *on his own personal note* about to be discounted in another bank, but that the executive officer of a bank is presumed to have, in the absence of express restrictions, all the power necessary in the transaction of the legitimate business of the bank.

Bank of U. S. vs. *Dun,* 6 Peters, p. 51, 8 L. Ed. 316. The Court held that the president had no authority by virtue of his office, to make a promise to an endorser that he would not be held, but the endorsement was for the *accommodation of the maker of the note*—not the bank.

Bank of the Metropolis vs. *Jones,* 8 Peters, page 12, 8 L. Ed. 850. The Court held that the president had no authority to make a promise that an endorser *for the benefit of the maker* would not be called upon to pay the note where the bank was accepting the endorsed note in payment of a valid obligation already held by the bank.

Thompson vs. *McKee,* 5 Dak., p. 172; 37 N. W. 367, and the other cases which are cited by the bank are all cases in which the negotiable paper was made or endorsed by the defendant for the *benefit of a third party and not the bank and on which endorsements the bank advanced money.* These cases all hold that an officer of a bank has no power to promise not to hold an endorser, which is essentially different from the case at bar, for that is an act not within the ordinary course of the bank's business.

The bank accepted the benefit of the transaction and cannot repudiate the act of its president. We repeat the language of the Supreme Court of Cal. in *First Nat. Bank of Reedley* v. *Reed,* 244 Pac. 368, 198 Cal. 252:

> "The exception, holding, as it does, that the principal is not bound by the knowledge of his agent, has no application to a situation such as presented here wherein the principal is seeking to establish the liability of a third person. In the situation presented here the sole representative of the bank was the cashier and acting manager. *The bank cannot claim anything, except through him, and therefore, if it claims through him it must accept his agency, with its attendant notice of his knowledge of the facts as they actually existed. The bank cannot in one breath be heard to say that the cashier was without authority to bind itself as its agent, and accept the note upon condition that it was an accommodation note for which the defendant should not be liable, and in the next breath insist that it can avail itself of his act in taking the note. It cannot avail itself of only so much of the transaction as was beneficial to it, and repudiate the rest. If it relies upon the note, it must take it with the terms upon which the cashier took it, namely, that the defendant should not be responsible.* The bank must take the burden with the benefits, and by demanding performance of the contract the bank

assumes responsibility for the instrumentalities—that is to say, the representations, promises, and conditions—through which the act was induced."

The Court in its charge left the question of authority of the officers to the jury. "In other words, if you find that Mr. Beers made the notes or renewals at the request of the Broad & Market National Bank relying upon the bank's contemporary parol promise that he would not be held liable upon them, but that the bank would look to Jules Mechanic * * * and you find that this arrangement was made for the benefit of the bank solely for its accommodation you may find that the bank is not a holder for value and in that case Mr. Beers would be entitled to recover judgment at your hands."

Had the bank desired a more specific instruction with relation to agency, it should have requested it or have taken exception to the Court's failure to charge. This was not done.

There was no plea in the answer of lack of authority in the officers. The bank's by-laws were not a part of the State of Case as made up by the bank in the Supreme Court.

III.

The arrangement between Beers and the bank was not *ultra vires*.

The arrangement and agreement between Beers and the bank were pleaded by the bank to be *ultra vires* (First and Second Separate Defenses, pp. 20, 21) and it was contended in the Supreme Court that the judgment should be reversed on that ground.

The only cases cited by the bank stand for the proposition that a contract which is *ultra vires*

cannot be made by a corporation. This of course is fundamental.

The contract in the case at bar was not an *ultra vires* contract for the reason that the bank had the right and authority to loan to Jules Mechanic the money involved and to take such steps as it considered advisable to protect moneys which it had already advanced and which were in danger and there is no evidence of any restriction as to the method of loaning money or as to the method which the bank might take to protect the moneys already advanced to Mechanic. The arrangement was a proper and legal one and made to protect the interest of the bank.

The Supreme Court under its subdivisions 2 and 3, p. 214, in effect, stated that the agreement was *ultra vires* and referred to *Mausert* v. *Feigenspan,* 68 N. J. Eq. 671. That case states the general rule that the president of a corporation may without any special authority from the board of directors, perform all acts of an ordinary nature which by usage or necessity are incident to his office, and may bind the corporation by contracts in matters arising in the usual course of business, but that beyond that his official position gives him no more control over its property, funds or business, than any other director and this Court then said:

> "Any act done by him which is outside the scope of the powers which inhere in his office will not bind the corporation, unless it is shown that authority was conferred upon him for the purpose by the directors, either expressly or by their consent and acquiescence in permitting him to assume the direction and control of the business of the company. Stokes *v.* New Jersey Pottery Co., *supra.*"

This has nothing to do with strict *ultra vires* but goes to the matter of the authority of the representative of the bank to bind it which has al-

ready been considered under Point II, page 26, of this brief.

Many cases were cited by the bank in the Supreme Court to the effect that a contract which is *ultra vires* cannot be made by a corporation and that is conceded but the proof in the case at bar indicated that the bank was already involved with Mechanic in a large sum of money and the business of Mechanic was in such shape as that the president of the bank, whose duty it was to protect the assets of the bank conceived that, to protect moneys of the bank already invested, Mechanic could not be allowed to suspend and that it was in the interest of the bank that additional money be advanced. There is nothing to show that the president of the bank did not have absolute authority to protect the interest of the bank by the advancing of further funds.

The reason why Beers was asked to intervene for the bank and why the moneys were advanced in the manner in which they were was *not* to deceive the board of directors and lead its members to believe that the bank would be protected against loss upon the note by reason of his (Beers') unqualified endorsement, as stated by the Supreme Court (p. 215), but, in the language of the president of the bank as stated to Beers at the time (p. 37):

> "Mr. Fleissner (the president of the bank) said, 'We want to give him more money, but *we don't want to give it direct to Mr. Mechanic. We want to see that this money is paid to the building and loan association in a way to conserve it and to protect his assets'*, which consisted, I believe, wholly of real estate in Newark. I at first demurred and he said, 'You must do this for the bank', and I consented. I indorsed the note."

Had the contract been *ultra vires,* the bank could not avail itself of this defense upon the facts in

this case, for the jury must be assumed to have found that: a contract was made; Beers received no consideration thereof; it was done for the accommodation of the bank; Beers disbursed the moneys for the benefit of the bank and as its agent; the moneys had not been repaid to him.

In *Perkins* v. *Trinity Realty Co.*, 69 N. J. Eq. 723, Vice-Chancellor Garrison, relying on the cases of *Camden and Atlantic Railroad Co.* v. *Mays Landing, &c., Railroad Co.*, 48 N. J. L. 530 (Court of Errors and Appeals); *Breslin* v. *Fries-Breslin Co.*, 70 N. J. L. 274 (Court of Errors and Appeals) said:

> "Our courts, however, hold that the plea of *ultra vires* will not avail a corporation with respect to an act for which it has received consideration in any case where the *status quo ante* cannot be restored, and in such cases the corporation is estopped to set up the plea of *ultra vires.*"

This case was affirmed in this Court upon the opinion of Vice-Chancellor Garrison, 71 N. J. Eq. 304.

If the bank is to be permitted to convert to its own use Beers' funds which were on deposit in the bank in satisfaction of its note which the jury has found was given wholly as accommodation to it and for which Beers received no consideration, the bank is permitted to take advantage of its own wrong.

Furthermore, the determination of the Supreme Court was not that the agreement was *ultra vires* but that it was beyond the scope of the authority of the president. This is not *ultra vires.*

The First and Second Separate Defenses, which are the only ones which raise the matter of *ultra vires,* are strict pleas of *ultra vires,* that is to say that the bank itself was without power or authority to enter into any such agreement as it did.

The question of the power and authority of the president was, upon the testimony, to say the best for the bank, one for the jury but the Court was not asked to submit the matter to the jury by any requested charge.

IV.

The bank contended in the Supreme Court that the agreement between the bank and Beers was illegal and against public policy and the Supreme Court so held (p. 215) and that for that reason Beers could not recover.

The Supreme Court erred because

(a) The evidence did not disclose illegal or fraudulent purpose;

(b) Fraudulent purpose was not pleaded;

(c) It was the bank, not Beers, who was relying upon the alleged fraudulent contract.

In so holding, the Supreme Court stated:

> "So far as the plaintiff was concerned, it is apparent that he understood that the board of directors of the bank would, in all probability, refuse to discount Mechanic's note unless it was indorsed by some one whose financial responsibility was unquestionable. The purpose of the scheme engineered by him and the president was to deceive the board and lead its members to believe that the bank would be protected against loss upon the note by reason of his unqualified indorsement. The result of the scheme, if it had been carried out as the parties to it intended, would have been, as already indicated, the misappropriation of the bank's funds for the benefit of Mechanic as the result of the promise of the plaintiff, exhibited by his indorsement, but

> which, when made, he never intended to keep. It cannot be doubted that such misappropriation would have been a fraud in a legal sense upon the defendant bank; and this being so, the plaintiff could take no benefit from his illegal compact."

This statement of the Supreme Court, we submit, has no evidence to support it. The Court ignores the testimony of Beers with respect to the purpose of his injection into the transaction. He testified, as we have already stated (p. 37):

> "Mr. Fleissner (the President of the bank) said, 'We want to give him more money, but we don't want to give it direct to Mr. Mechanic. We want to see that this money is paid to the building and loan associations in a way to conserve it and to protect his assets,' which consisted, I believe, wholly of real estate in Newark. I at first demurred and he said, 'You must do this for the bank,' and I consented. I indorsed the note."

Beers was cross-examined in an attempt to show that he knew that the scheme contemplated deception but he says that:

> "I had reason to believe that he (the president of the bank) would make known the facts concerning that note" (p. 56).

and page 56:

> "Q. What I asked you is this: You knew that, when the bank examiner came there and looked at the books, he would find that note on the books as a valid asset of the bank? A. I don't know that. I had reason to believe that the president would do as he had promised to do—explain the situation—write it off."

He also said, page 68:

> "I positively felt that it was all right to do it in that way because the bank felt that

> it was, and because it was aiding the bank at a time when it needed aid,"

and page 70:

> "Q. How could they write it off at any time when it was listed as a debt due from you to the bank? What method did you think they had of writing such a valid debt off—valid on its face? A. I thought that what they should have done was this: The bank should set forth that *this money was originally disbursed by me, as I have already said to you, to conserve the assets of Mechnic, who was deeply indebted to the bank, and that the bank did not want Mechanic to have the money in his hands, but wanted me to disburse it. I thought they could show all of these facts to the examiner and that it should be written off.*"

Beers did not know Mechanic except through the bank (p. 82).

While Beers, as a director of the bank, signed certain reports to the controller of the currency (p. 83) he had nothing to do with the making up of those reports (p. 86).

Beers is corroborated by Schilling who kept the ledger in which the Mechanic account was entered (p. 88). He says that the funds, the proceeds of the note, were disbursed for Mechanic's account *at the direction of Fleissner, the president of the bank* (p. 89). There was no denial of the testimony of Beers and Schilling.

Fleissner, the president of the bank, who had charge of the transaction was not called. There is no evidence of which we are aware that, in the language of the Supreme Court, "the purpose of the scheme engineered by him (Beers) and the president (Fleissner) was to deceive the board and lead its members to believe that the bank would be protected against loss upon the note by reason of his unqualified indorsement."

The purpose of "the scheme" as testified by Beers, and there is no contradiction, was that Fleissner desired the transaction to take this course because "We don't want to give it direct to Mr. Mechanic. *We want to see that this money is paid to the Building and Loan Association in a way to conserve it and to protect his assets.*"

There is no evidence that, in fact, anybody was deceived. The testimony of Beers is to the effect that the President of the bank had promised to explain the situation and that he had reason to believe that it had been explained.

It may be that, because of the form which the transaction took, the Bank Examiner or the Comptroller of the Currency, or someone else would be deceived but there is not a scintilla of evidence that, in fact, they were deceived, nor is there any evidence we submit to support the conclusion of the Supreme Court that the *purpose of the scheme was deception.*

There was but little money involved. There is not a suggestion in the testimony that Fleissner, the president of the bank or Beers had any personal interest or any interest in Mechanic except to see that the bank's moneys already invested were protected to the extent possible. They may have erred in judgment but that is no proof of fraud or intended fraud.

There was nothing in the transaction at any time done or intended for any fraudulent or improper reason and the entire transaction between Mechanic and the bank and Beers, as agent of the bank, was, so far as the testimony went lawful and a legitimate transaction in the ordinary course of the bank's business.

Whether a transaction is so illegal (aside now from the question of strict *ultra vires,* which is not now being discussed, or illegality based upon a statute or some positive rule of law) as that

neither party can be afforded relief depends upon intent and purpose.

There is nothing *ultra vires* or illegal as matter of positive law, either statute or common, in a person giving a note to a bank for the accommodation of the bank. If there is anything illegal about it, it is because of the intent to deceive.

The rule is stated *13 Corpus Juris,* title "Contracts", page 516, sec. 473, as follows:

> "Where the direct object of the parties is to do an illegal act, the agreement is void, and it is immaterial that either or both did not know that the object was illegal, for as a general rule ignorance of the law is no excuse. An agreement, on the face of which no illegality appears, and of which neither the consideration nor the promise in itself imports any illegality, may nevertheless be made for an illegal purpose, and the agreement, although unobjectionable in its terms, may then be rendered void by the illegality of the purpose for which it is made, the illegal intention being common to both parties."

And in section 475, page 517, the statement is made:

> "Where an agreement is lawful on its face, or is capable of being executed in a lawful way, and the intention of one of the parties is that it be so executed, he is entitled to enforce it notwithstanding the other party intended an illegal act, if the first person was unaware of the illegal intention."

In the case at bar the testimony of Beers, which is not denied, is that the president of the bank had agreed to explain the circumstances under which this note was given and that he had reason to believe that the president of the bank had so explained it.

If, as matter of fact, there had been proof that someone had been deceived, by the fact that this

note was given, to his injury, *then* it may be that Beers would have been estopped to deny that he intended the fraudulent result, but there is no such evidence.

Cases which were cited under this point in the Supreme Court by the bank have no application.

In *State Bank of Moore* v. *Forsyth,* 108 Pac., p. 914, the testimony showed that the entire transaction was designed for the purpose of deceiving either the stockholders, the depositors or the bank examiner.

In *Pauly* v. *O'Brien,* 69 Fed. 460, it was held that the purpose of the parties was to substitute a note for a note of a third party which was due to get the old note "out of the past due notes". This was done at the solicitation of the National Bank officers, and, of course, there *was a consideration for the note.* The Court added:

> "If, however, this was not really the case, but that, in truth, the transaction was a mere trick to make it appear to the government and to the creditors and stockholders of the bank that it had a valuable note when in fact it did not have one, the result must be the same. * * * "

In *Rankin* v. *City National Bank,* 208 U. S., p. 541, 52 L. Ed. 610, Justice Holmes said:

> "The whole business from beginning to end was and was intended to be a mere juggle with books and papers to deceive the bank examiner.
>
> If the Guthrie bank had sued while it was a going concern, it could not have recovered, and the receiver stands no better than the bank."

We have no such situation as indicated in any one of these cases in the case at bar.

The mere fact that paper is given to a bank as accommodation to it does not make the plan unlawful.

In *Chicago Title & Trust Co.* v. *Brady,* 65 S. W., p. 303, 165 Mo. 197, the statement is made:

> "Yet as it also appeared from the evidence of the defendant himself, that the purpose for which they were so executed and delivered was simply to swell the apparent assets of the bank whereby the state bank examiners and others might be deceived as to the condition of the bank * * * plaintiff contends that defense is not maintainable. We find nothing in it *even tending to prove that the notes sued on were not accommodation paper. Being such, they were without consideration, which is always a defense to a suit between the immediate parties.* A receiver is in same position as his predecessor.
>
> *The contract here is a lawful one. Accommodation paper is not fraudulent or unlawful by reason of the fact that it swells the apparent assets of the person to whom it is given, and that others thereby may be deceived as to the financial condition of such person;* and the receiver in this instance is not repudiating the contract of the bank with the defendant, but is seeking to enforce it."

This Court has held in *First National Bank of Roselle* v. *Dorvall,* 89 N. J. L. 298, that there is nothing illegal in the mere fact that a note is given to a bank for its accommodation, and there are cases from other jurisdictions heretofore cited on p. 17 *et seq.* of this brief.

This defense of illegality was not pleaded. We have already stated that the only defense upon this subject pleaded was strictly *ultra vires* (pp. 20, 21) and we submit further that no proof was offered upon the subject and that, in any event, the question would have been one for the jury, if it involved intent, to be gathered from all of the

circumstances proven in the case and no request was made to the Court to submit the matter to the jury.

The Supreme Court treated the case as if Beers was suing upon an illegal contract. That is not the fact. Beers was suing to recover moneys which he had on deposit with the bank. His cause of action is made out without regard to the note or to any assumed illegal contract.

The bank relies upon the note as justification for the appropriation by it of the moneys which it had on deposit.

The effect is precisely the same as if the bank were suing upon the note.

The bank could not under the cases which we have heretofore mentioned have recovered on the note.

First National Bank of Rosselle v. *Dorvall,* 89 N. J. E. 298;

United States National Bank of Superior, Wis. v. *McCabe,* Supreme Court of N. D. (1928), 222 N. W. 474;

Anamoose National Bank v. *Dockter,* Supreme Court of N. D. (1927), 216 N. W. 206, 56 N. D. 33;

First National Bank of Reedley v. *Reed,* Supreme Court of California, 244 Pac. 368, 198 Cal. 252;

Empson v. *Richter,* Supreme Court of Nebraska (1925), 204 N. W. 518, 113 Nebr. 706;

Smouse v. *Waterloo Savings Bank,* 199 N. W. 350, 198 Iowa 306;

Peterson v. *Tillinghast,* Circuit Court of Appeals for the 6th Circuit, 192 Fed. 287;

First Nat. Bank v. *Morton,* 146 Ky. 287, 142 S. W. 694.

All mentioned on p. 13, etc., of the brief.

Chicago Title & Trust Co. v. *Brady,* 65 S. W., p. 303, 165 Mo. 197,

mentioned on p. 38 of the brief, and particularly *Rankin* v. *City National Bank,* 208 U. S., p. 541, 52 L. Ed. 610. The Supreme Court in the case at bar treated the case as if the contract that the endorser or maker of the note should not be liable was *the* illegal contract and that *that* contract could be separated from the note so that the note would stand as a legal contract in accordance with its terms.

But all of the cases hold to the contrary.

In *Rankin* v. *City National Bank,* 208 U. S., p. 541, 52 L. Ed. 610, where the attempt was by a receiver to enforce a note given under an agreement which was unquestionably illegal, for the whole scheme was for the purpose of deception, and where Justice Holmes said:

> "The whole business from beginning to end was and was intended to be a mere juggle with books and papers to deceive the bank examiner,"

the Court held that there could be no recovery and said:

> "In view of the statement of counsel, at the argument, to the circuit judge, that they did not contend that the contract was illegal, a disclaimer repeated to us, and in view of the possibility that the facts were found as they were with that agreement in view, we shall not consider that aspect of the case. *It would not help the plaintiff.* McMullen v. Hoffman, 174 U. S. 639, 43 L. Ed. 1117."

The Supreme Court of the United States treated the illegal portion of the contract, assuming it to be illegal, as a part of an entire con-

tract involving the note itself and the effect of the decision is that they cannot be separated.

If this contract and agreement were therefore illegal, the result would be that the bank could no more justify the withdrawal of the funds because of the existence of the note than it could recover upon the note if the suit were brought by it.

In the court below it was claimed by the bank that the decision should be governed by the Federal authorities. If it is to be so governed, then *Rankin* v. *City National Bank, supra,* controls.

It is fundamental that if a plaintiff can establish his cause of action without resort to the illegal contract there may be recovery.

13 Corpus Juris, sec. 445, p. 502.

It is said that the plaintiff cannot succeed where, although not required to resort to the illegal transaction to establish a *prima facie* case, he is compelled to resort to it to meet a complete *prima facie* defense. *13 Corpus Juris,* sec. 445, p. 502.

But that principle does not apply here, for to meet the claim of Beers the bank is obliged to rely upon *the note,* and Beers is not obliged, to meet that *prima facie* defense, to rely upon an independent illegal contract, for the illegality, as above stated, if it exists, inheres in the note itself and the bank can no more defend, as against a *prima facie* case for Beers, upon the note, in which the illegality inheres, than it can succeed in a suit instituted on the note.

We again advert to the fact that in *Smouse* v. *Waterloo Savings Bank,* 199 N. W. 350, 198 Iowa 306, mentioned on p. 22 of the brief, *affirmative* relief of cancellation of the notes was granted to those who had made the notes for the "avowed

purpose of assisting the bank in making a showing to the examiner at the approach of an examination".

Finally, we submit, however, that there is no illegality shown in this transaction and that if there were inferences to be drawn of illegality, those inferences were for the jury and not the Court and the bank did not request the Court to submit that matter to the jury.

It is respectfully submitted that the judgment of the Supreme Court reversing the judgment of the Circuit Court should be reversed.

Respectfully submitted,

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(4074)

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New Jersey Court of Errors and Appeals

Louis J. Beers, Plaintiff-Appellant, *vs.* Broad and Market National Bank, Defendant-Respondent.	On Appeal from Supreme Court.

REPLY BRIEF OF APPELLANT.

(Italics, etc., ours, except where otherwise noted.)

I.

On pages 4 and 5 of its brief, respondent criticizes Beers for not ascertaining whether Fleissner had carried out his promise to explain the situation to all concerned. That is beside the mark.

The Supreme Court held that the evidence disclosed, to such an extent as that it was not even a question for the jury, that the purpose of the entire transaction was fraud and the testimony mentioned by respondent, as to the statements made by Fleissner that he would explain the situation to all concerned, was elicited to show that there was no fraudulent intent on the part of Beers. Upon this point, which is the only one to which this testimony is directed, it is wholly immaterial as to whether there was an obligation upon Beers to ascertain if Fleissner had explained or if he attempted to ascertain whether he had explained.

This lack of action on Beers' part threw no light upon the question as to whether, in the inception, the transaction was fraudulent. The matter is considered under Point IV, page 33, of our original brief.

II.

From page 6 to page 13, and again on page 16, respondent considers in great detail the testimony of Beers and that of other witnesses and compares the statements of the various witnesses with the probabilities and written records apparently for the purpose of indicating where the truth lies, and finally, on page 16, it says: "We have adverted before to Beers' testimony as to its reliability and probabilities".

The reliability and probability of Beers' testimony, we submit, was not for the Trial Court or the Supreme Court nor is it for this Court. It was for the jury.

The net effect of the consideration of the testimony by respondent is that *respondent* has *demonstrated* that a jury question existed.

There are certain inaccuracies with respect to the facts, however, contained in respondent's brief upon this subject which we desire to point out.

Respondent says, on page 6, that Beers testified on pages 58 and 59 that the note transaction of $5,000 dated July 9, 1914, D-2, that is the bank note, was the *only* transaction that he had with Mechanic. He did not so testify. He said (p. 58, l. 23):

> "A. There was a transaction with the Building & Loan. I don't recall the exact date of that. I think that transaction took place subsequent to the making of this note, that is, the original note.

By the Court:

Q. Was that in connection with the property of his? A. Yes.

Q. You didn't represent the bank? A. No, I represented the Building and Loan."

And he said the same thing on page 59.

On page 7 of its brief, respondent says that Beers' testimony on page 62 to the effect that the bank subsequently advanced $6,200 to Mechanic cannot be correct, because Mechanic disappeared between March 9, 1917, and July 10, 1916, and Beers said that the $6,200 was given to Mechanic by Williams about 1919, and that in 1916 about $6,000 was given to Mechanic.

An examination of the testimony (pp. 62, 63 and 64), will clearly indicate that there was not any $6,600 *and* $6,000. The witness was referring to *one* sum of approximately $6,000, and he said (p. 63) that it was given to Mechanic in 1915, and his testimony is corroborated by that of Schilling (pp. 101, 102).

Williams was called for the bank (p. 119), and did not deny the statements of Beers and Schilling with respect to this approximately $6,000.

On pages 7, 8 and 9, respondent attempts to indicate that from D-17 it appears that Beers had paid out for the account of Mechanic, before he received the proceeds of the note, some $2,361.75, but, as respondent says (p. 6), "Exhibit D-17, taken in conjunction with the testimony of Beers and Schilling, a witness for the appellant, shows that D-17 does not set up the full account of the Jules Mechanic transaction as handled by Beers". Neither Beers nor Schilling were cross-examined by counsel for respondent upon the subject of this account, and, against any inference which may be drawn from it in its fragmentary condition, as contended by respondent, is the testimony of Beers

and Schilling, and the matter was one for the jury.

It is significant that, on page 6 of this phase of the case, respondent says that there was testimony to show that, "there was loaned to Mechanic by the Bank and disbursed by Beers an additional $6,000" (p. 101), which is the same $6,000 referred to by Beers on pages 62 and 63, with respect to which respondent says: "There is nothing in the evidence that shows at any time that Mechanic got $6,600. D-17 doesn't show it."

On page 12, respondent says that the "uncontroverted evidence in the case is that the two payments of $1,000 which were credited on account of the note were "made by Mr. Francis Williams out of his Account No. 2 and not made by the bank, as stated in appellant's brief, both of which payments were credited to the Beers' note".

It is not important now, because here again it was a question for the jury, but, if the Court will read the testimony of Williams taken before trial (p. 33), in conjunction with his testimony on cross-examination (pp. 132 *et seq.*), as to the source of the two payments of $1,000 each and as to what went into the Williams Account No. 2, the conclusion is irresistible, I submit, that Francis Williams Account No. 2 was one into which went moneys made by the bank which the bank had no right to make under the law. In his examination before trial (p. 34), when asked what the source of the funds were, he refused to answer on advice of counsel. He says checks were drawn to other directors at the same time the credits of $1,000 were made to Beers, but he has lost all the checks (pp. 132, 133, 134).

He would have the court believe that what went into this account were moneys which he made himself "insurance money, appraisal fees, moneys for assistance in selling real estate and things like that" (p. 135).

He *first* said that each director got the same amount but when a ledger sheet was looked at, it transpired (p. 139):

> "Q. Is there anything in this ledger account that would indicate that these directors got $2,000 in addition to the $263 and the $600? A. No.
> Q. Mr. Beers got that alone of the directors? A. It would appear so."

He is asked point blank whether usurious interest did not go into that account and the following occurred (p. 135):

> "Q. Were any moneys realized by the bank for discounts larger than six per cent. put in that account? A. (Witness hesitates.)
> Q. Can't you answer it? A. You bet I can answer it.
> Q. Answer it, then? A. No.
> Q. I suppose you mean to imply by that that there were no such moneys? A. I do.
> Q. In no single case? A. I do.
> Q. And you say that under your oath? A. I do.
> Q. Neither by the bank nor by any person connected with the bank in any manner, shape or form?
> Mr. Stewart: I object to that because the inquiry we are now following up is merely where the money in this account came from. Even if the bank did take, which Mr. Williams said it did not, usurious rates of interest on this or any other account, that would have nothing to do with this. As I understand the inquiry, it relates specifically to Mr. Williams' account No. 2.
> Mr. Lane: I assume the last question to apply to this particular account.
> The Court: Then I will admit it."

Why did he refuse to answer, when examined before trial, as to the source of the money which went into this account? Why were not the docu-

ments produced which would show both the source of the monies which went into the account and the expenditures from it? Why did he attempt to lead the court to believe, on his direct examination (pp. 124, 125), that each director got the same amount out of this account when it subsequently transpired, by an inspection of the ledger account, that that was not so (pp. 139, 140)? Why, if these were his own personal earnings, should he contribute them to other directors? Why did he hesitate (p. 135) when he was asked whether moneys realized by the bank charging more than 6% interest did not go into that account?

Williams was asked whether, after his testimony before trial he had not said, in the presence of the stenographer, that he would "rather go to jail than answer that question" (the source of the money which went into Francis Williams' Account No. 2, p. 136). He denied it.

Mr. Pedrick, the Master in Chancery, who took the testimony was called and stated that Williams did, in *his* hearing, say that he would rather go to jail than answer the question as to the source of the funds that were credited to the account of Francis Williams No. 2 (p. 145).

The jury were the judges as to what reliance should be placed upon the testimony of Williams. They saw him and observed his hesitation and other conduct on the stand. Credit was given by the *bank* for the $2,000 and all that Beers was told by Williams, who was then the president of the bank, was that "he had cut the note $1,000" (p. 49).

The jury had the right to find that the moneys which were used in the payment of the $2,000 on account of this note *were moneys of the bank.*

On page 22 of its brief, respondent says that, "A reading of the defendant's case indicates the uncontroverted fact that Beers, without objection

and with full knowledge and consent, allowed his share of moneys being distributed by Williams amongst the directors of the Bank (of whom Beers was one), to be applied to the Mechanic note on which Beers says he at all times disclaimed legal liability".

There is not a scintilla of evidence in this case that Beers had any knowledge, if it be the fact which is denied, that the moneys applied on this note were moneys to which Beers individually was entitled.

Respondent refers on page 10 and again on page 13 to mortgages taken from Mechanic by Beers in his own name.

The testimony is, from both Beers and Schilling, that these mortgages were taken *to protect the bank* and taken in his name only because the bank could not take a real estate mortgage (pp. 59, 60, 61, 99, 100, 101). Both witnesses testify distinctly that Fleissner, the president of the bank, instructed the drawing up of the bonds and mortgages and the taking of them in the name of Beers.

At page 13 the statement is made by respondent that the mortgages were assigned by Beers to a Miss Hart "without any authority from the bank". The following testimony appears (p. 60) on the examination of Beers:

> "Q. If these mortgages were given to secure the bank, why did you turn them over to Miss Hart and from Miss Hart to the American Mortgage and Realty Company? A. I said to Mr. Fleissner, 'Mr. Fleissner, I don't want to hold these mortgages', and Mr. Fleissner then said, that Mechanic did not have enough money with which to pay all of the building and loan arrears and that foreclosures were threatening and I said, 'I don't want to appear as the defendant in these foreclosure proceedings'. Fleissner said, 'Then turn them over to somebody else. Don't let

> the bank appear as a defendant', and I turned them over to Miss Hart. Then I thought it was unfair to have them in her name and then turned them over to the American Mortgage & Realty Company with Mr. Fleissner's knowledge and understanding."

Fleissner was president of the bank and in charge of this transaction.

And again (p. 61):

> "Q. As a lawyer did you think that was a good way to handle such a situation? A. It was pursuant to what Mr. Fleissner wanted and pursuant to the practice of the bank then. I believe the practice at that time was against taking mortgages in the name of any individual connected with the bank.
>
> Q. That is an assumption. A. It is not an assumption. I know it to be a fact."

Criticism is made by respondent (p. 13), of the statement in our brief (p. 7) to the effect that "the bank bought in several of the properties covered thereby (by the mortgages) to protect the amounts due on the mortgages", and the statement is made that the record does show that the statement was made by Williams, then president of the bank that the bank would buy in some of the properties and try to save something out of the wreck.

At the top of page 103, the statement is made by Schilling, "Several of the properties which they (the mortgages) covered *had been bought in by or for the bank.*"

We submit that the testimony of Beers (p. 37, *et seq.*) fully warrants the construction which we put upon it on page 3 of our brief, which construction is criticized on page 14 of respondent's brief.

We do not understand what the respondent means when it says that the Court did not charge

that if Beers signed as accommodation endorser for Mechanic, he could not recover, when the charge of the Court clearly indicates that Beers could *only* recover if he signed *solely for the accommodation of the bank.*

Respondent says (p. 15) that the Supreme Court "found *from the evidence that Beers endorsed the note to accommodate Mechanic,* in order that mechanic might get the benefit of the note".

That was a question for the jury.

On pages 15 and 16 respondent says that the only person who could deny the testimony of Beers and Schilling was Fleissner and that "he was in Europe and could not be produced". We do not know where this appears in the record and if it does, why could not his testimony have been taken before trial or the trial be postponed? If the testimony of Beers and Schilling as to the statements made by Fleissner were not correct, it is inconceivable that the bank would not have taken some steps to secure the testimony of Fleissner, its own ex-president.

On page 13 of its brief, the bank relies upon the fact that Beers requested at one time that the interest on the notes be lowered from 6 to 5% and that he asked that notes be drawn for less than four months, etc., as evidence that Beers considered himself liable upon the notes.

As against that is the fact that, when Beers discovered that on these periodical renewals interest had been charged to his account, he protested and it was adjusted so that all the interest which had been charged to his account, to the penny, was included in the new notes (pp. 94, 95) and Schilling testified (p. 92) that, when Williams took charge of the bank he saw him about this note and Williams said "he knew there was a Mechanic transaction in the bank and that there was *some such arrangement* (Schilling says that he had told

Williams that the note was made by Beers for the accommodation of the bank and that it was a bank matter and that there was no liability upon it, that Beers was only carrying it temporarily), but he had not *officially* heard of it at the time". Schilling said that Williams said, "Have Mr. Beers renew the note and we will take that up before the next renewal." That was in March, 1915, and the testimony of Beers and Schilling is that from time to time the matter was taken up with Williams, but no adjustment was made, and it was after this that Beers was paid back the interest which had been charged to his account by having it included in the notes (pp. 94, 95). The explanation of Williams with respect to the paying back of this interest is not, we submit, at all convincing (pp. 130, 131, 132).

The note was charged to the account of Beers in November, 1919 (p. 128) and it is significant that the charging of this note to Beers' account was coincident with acrimonious discussions between Beers and Williams as to the control of the bank (pp. 138, 139).

We apologize for going into the evidence to the extent that we have, but we are obliged to do so because respondent considers the evidence for the purpose of indicating, as it says, page 6, that "Beers' testimony is not to be taken at its face value because of its many contradictions".

We submit again that the very fact that respondent has thought it necessary to so go into the evidence indicates that the question as to whether or not Beers was an accommodation maker or endorser for the bank or for Jules Mechanic is a question of fact for the jury. The jury had the right to believe Beers and Schilling and to wholly disbelieve Williams and the bank did not furnish them with the evidence of Fleissner either to believe or disbelieve. From the testimony of

Williams himself, the jury had the right to find that Williams knew of the transaction between Fleissner and Beers and ratified and confirmed it.

III.

Respondent says (p. 16) that Beers' position is that, "There was a contract which bound Beers to pay the note, but at the same time there was a collateral agreement which, since Beers is not being sued on the note, and the note itself is not involved in the suit which he is bringing, permits him to sue on the alleged collateral contract whereby, etc."

We reiterate that we never made any such contention and that that is *not* our theory and never was. Our position is and always has been, as indicated on pages 9 and 10 of our original brief, that Beers was an accommodation maker or endorser for the bank that all of the parol evidence was offered to show *that* fact. We never admitted that there was any "contract which bound Beers to pay the note", nor did we contend that "there was a collateral agreement". Our position was and is that the parol evidence was offered merely for the purpose of showing the relationship of the parties, *i. e.*, that the *bank* was the party accommodated and, as the party accommodated, could not recover.

We have distinguished the case mentioned by respondent on page 17, *et seq.* of his brief, *Johnson* v. *Ramsey,* 43 N. J. L. 279, at page 11 of our original brief.

Respondent must concede that parol evidence to show the relationship between the immediate parties to a note and whether one party signed for the accommodation of another and, if so, which party is admissible, but it attempts to avoid the

effect of that rule by the assertion that all of the cases are those, as it believes, "between a maker and payee or between a maker and an accommodation endorser, where the accommodation endorser was being sued by the maker". We know of no such limitation upon the rule.

In the case at bar, the immediate parties to the note were Jules Mechanic, Beers and the bank. Respondent is mistaken when it says that *all* of the cases referred to by us have been cases between "a maker and payee or between a maker and an accommodation endorser, where the accommodation endorser was being sued by the maker".

In the first place, we cannot quite see how a maker can sue an endorser, accommodation or otherwise.

In *First National Bank of Roselle* v. *Dorvall,* 89 N. J. L. 298, mentioned in our original brief, page 13, the note was made by Dorvall to himself. He was thus maker and payee. He then endorsed and became endorser. The bank then discounted and became the second endorser. The bank, as the second endorser, the discounter of the note, was suing Dorvall, who was both maker, payee and first endorser, and this Court disapproved the holding of the Supreme Court to the effect that no parol evidence could be introduced showing the relationship between Dorvall and the bank to be that of accommodation maker, payee and endorser.

In this case on the first note Jules Mechanic was the maker, Beers was the payee and the first endorser, and the situation is precisely the same, for legal purposes, as in *First National Bank of Roselle* v. *Dorvall,* 89 N. J. L. 298.

In *Chaddock* v. *Vanness,* 35 N. J. L. 517, mentioned on page 15 of our original brief, at page 520 the Court said:

> "As between *endorsee and his endorser,* or a subsequent holder without superior equities,

> parol evidence is competent to show that *the endorsement was for the accommodation of* the endorsee, or was made without consideration, * * *."

The right of the bank against Beers was not due to the fact that he was the payee of the note made by Mechanic, but to the fact that he was the endorser of the note. He was the endorser and the bank was the endorsee, and *Chaddock* v. *Vanness,* 35 N. J. L. 517, is authority to the effect that, as between these parties, parol evidence is admissible to show failure of consideration.

At several points in the brief respondent refers to the fact that absence or failure of consideration is a matter of defense as against any person *not a holder in due course, etc.*

The whole question in this case is whether the bank was a holder in due course.

A holder in due course is defined by the Negotiable Instruments Act as one who takes under the following conditions:

> "1. That it is complete and regular upon its face;
>
> 2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;
>
> 3. That he took it in good faith and for value;
>
> 4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

Parol evidence is admissible for the purpose of showing that the holder did not take in good faith and for value and that he had notice of an infirmity.

One who takes a note is not a holder in due course as against a party to the note who has signed the note for the accommodation of the holder, and all the parol testimony in this case was offered for the purpose of showing that Beers' endorsement upon this note was for the accommodation of the bank and *not* for the purpose of showing any collateral agreement, and, whether the bank was the party accommodated, was, we submit, under the evidence, for the jury.

IV.

We feel that respondent's Points I, II and III are sufficiently answered in our Points I, II, III and IV of our original brief and that we have distinguished all of the cases relied upon by respondent which are of any importance.

Conclusion.

We submit that the fundamental error of the Supreme Court is indicated by respondent in its brief, page 16, when it says that our argument is that "there was a contract which bound Beers to pay the note, but at the same time there was a collateral agreement which, since Beers is not being sued on the note, and the note itself is not involved in the suit which he is bringing, etc." If that were our argument, the Supreme Court was undoubtedly correct.

The error is in assuming that our argument presupposes that there ever was a contract which bound Beers to pay the note.

Our argument is that no such contract ever came into effect, because Beers signed only for the accommodation of the bank. Our reliance is

not upon any collateral agreement, but upon the want of a status between the parties other than that of an accommodation endorser for the benefit of the holder, which, in this instance, is the bank, which occupies the position of an endorser and holder.

Respectfully submitted,

WALTER BEERS,
MERRITT LANE,
Of Counsel for Appellant.

(4279) Pandick Press, Inc., 22 Thames St., New York, U. S. A.

New Jersey Court of Errors and Appeals

LOUIS J. BEERS, Plaintiff-Appellant, *vs.* BROAD AND MARKET NATIONAL BANK OF NEWARK, Defendant-Respondent.	Action at Law. On Appeal from New Jersey Supreme Court. Sat below: Gummere, C. J., Kalisch and Campbell, J. J. On Appeal from Essex Circuit Court. Mountain, J.–Jury.

BRIEF FOR DEFENDANT-RESPONDENT.

Statement of Facts.

Although the title of this action in this Court is as above stated, yet originally the parties stood in different relation to each other in the cause, the present plaintiff then being in the posture of a defendant. The following is the history of that circumstance and its change:

The Broad and Market National Bank of Newark, a corporation organized and existing under the laws of the United States and doing business in the City of Newark in the State of New Jersey, commenced an action in the Essex County Circuit Court against the said Louis J. Beers, in which it sought to recover the sum of $4,051.25, together with interest, which was the balance claimed to be due unto it on a certain promissory note whereof the said Beers was maker, to his own order, and discounted by the said Bank for the original sum of $5,800. Against the Bank's action the defendant filed an answer and a counterclaim consisting of eight counts. Although the answer practically admitted the charges contained in the complaint, yet in its last

paragraph it denied that the defendant owed the Bank anything, because of the fact that he, the defendant, claimed that the Bank was indebted to him in a greater sum than that claimed to be due unto it from him, and the substance of the defendant's claims against the plaintiff was set forth in the counterclaim. To the defendant's counterclaim the plaintiff in turn filed its answers denying that it was indebted to the defendant in any sum whatever. We respectfully direct the Court's attention to the first, second and third separate defenses against the defendant's counterclaim (pp. 20, 21 and 22, S. of C.). Issue was joined by the defendant on the aforesaid three separate defenses.

While the case was pending, awaiting trial, the Bank came into possession of certain dividends which it had declared payable to its stockholders (of whom the defendant, Beers, was one), together with other moneys on deposit with it in the account that Beers had with it, all of which aggregated an amount equal to the sum claimed by the plaintiff Bank in its complaint to be due to it, which sums it appropriated and thereby paid itself the note sued upon, so that at the time of trial, by agreement and stipulation between counsel for the respective parties, the statement was made to the Court that the plaintiff's note having been at that time paid in full by virtue of the aforesaid applications, the cause would proceed only on the defendant's counterclaim embodying solely the Jules Mechanic transaction. Thus the controversy was narrowed and limited to the defendant's counterclaim, with relation to which Beers proceeded in the capacity of a plaintiff and the Bank in the capacity of a defendant. For purposes of convenience the order of the parties was changed so as to show their true relation to each other in the cause (See Case, pp. 31-32).

These are the facts of the Jules Mechanic transaction:

Beers is a lawyer having been admitted to the Bar of this State at the June Term, 1901, and having practiced his profession continuously ever since in the City of Newark. The Broad and Market National Bank is a National Bank having been organized under the laws of Congress on the 14th day of November, 1910, and its affairs are and always have been managed by a Board of Directors elected annually by its stockholders. From the time of its organization, Beers was one of its stockholders and one of its directors. He is still a stockholder of the Bank and continued as one of its directors from 1910 until the annual election of 1920, which period of ten years covers the entire time during which the matters in controversy between the parties took place.

Shortly prior to July 9, 1914, one Jules Mechanic was a depositor in and borrower from the Broad and Market National Bank and on the said 9th day of July, 1914, *he made a note to the order of Beers for $5,000 with interest,* which note was endorsed by Beers, discounted with the Broad and Market National Bank and the proceeds of which, amounting to the sum of $5,000 were credited to Beers' account (See Exhibit D-2, Case, p. 172). At that time Christian Fleissner was the president of the Bank. Beers' explanation of the circumstances under which he endorsed the said note was elicited over objection and exception made by the Bank's counsel (See Case, pp. 36, 37) and constitutes the fact basis of Beers' position in this case. Upon the facts involved in that explanation, there largely rests the legal question of Beers' liability on said note and consequently on any.

The first six notes were made by Jules Mechanic to the order of Louis J. Beers and endorsed by

him. Between March 9, 1916, the date of Exhibit D-7, and July 10, 1916, the date of D-8 (State of Case, p. 175), Mechanic became a bankrupt (p. 90, S. of C.), and had left town (p. 67, l. 32, S. of C., p. 64, ll. 17-34). Thereafter, the obligation of Mechanic was renewed by Beers, by notes made by him to the order of himself, endorsed by him, or to the order of the Broad and Market National Bank. These notes, when they fell due, were charged to Beers' account in the Bank, as appears by the notation, as for example, on D-3: "Charge Louis J. Beers, Newark, N. J., March 10, 1915, Mechanic note" (p. 172, S. of C.). Beers' explanation appears on page 37 of the case, and we quote from the case the whole of the explanation:

> "A. In July, I think it was, 1914, at noon at the bank, Mr. Fleissner said to me that 'Jules Mechanic owes the bank a large sum of money and he tells me that he is in arrears with the demands of interest on mortgages covering his properties,' and that he owed for a lot of materials. There was a certain indebtedness against Mechanic that had to do with that property. Mr. Fleissner said, 'We want to give him more money, but we don't want to give it direct to Mr. Mechanic. We want to see that this money is paid to the building and loan associations in a way to conserve it and to protect his assets,' which consisted, I believe, wholly of real estate in Newark. I at first demurred and he said, 'You must do this for the bank,' and I consented. I indorsed the note. The proceeds of the note were applied to my account; and then I had Mr. Schilling of my office open an account in the ledger, which he did."

In the brief of the plaintiff-appellant, substantially quoting the testimony of the appellant, it is stated that "Fleissner had promised to explain the situation to all concerned and that he had

reason to believe that his promise was carried out''. But appellant fails to state that he was a member of the Board of Directors of the Bank at the time that this transaction took place and for six years thereafter, and presumably attended the meetings of the Board, and that he never took the trouble to find out whether the matter had been explained to the Board of Directors or whether any official action had been taken in regard thereto, or had brought the matter to the attention of the Board himself. His failure to testify that he had brought the matter to the attention of the Board or had made any endeavor to find out whether Fleissner, the President of the Bank, had kept his alleged promise, when it is considered that the appellant is a lawyer of long standing, speaks louder against him than volumes of testimony would.

The account above referred to by Beers in his testimony was made an exhibit in the case (See Exhibit D-17, Case, pp. 181-182). This account will indicate to the Court that the sum of $5,000 representing the proceeds of the said note appears as the fourth item on the right-hand side of the account and that Beers charges himself with that amount under date of July 9th. The account shows that this sum was mingled with and became part of other funds turned over to Beers by the said Jules Mechanic, all of which commingled funds totalled the sum of $12,587.57, all of which was disbursed by Beers. We deem it important at this point in our statement of facts to emphasize the importance of Exhibit D-17 in the light of the $5,000 discounted note of July 9, 1914, and in the light of Beers' testimony, that prior to 1914 there had been no business relations between him and Mechanic, excepting that one of Beers' building and loan associations had made Mechanic a loan and that with that excep-

tion there were no business relations between him and Mechanic of any kind prior to the discount of the note of July 9, 1914, and that at no time did Beers owe money to Mechanic or *vice versa* (See Case, pp. 35, 36 and 37).

Beers' testimony is not to be taken at its face value because of its many contradictions.

Beers testified that he only signed one Bank statement (p. 55), but, when presented with copies of the Bank statements submitted to the Comptroller of the Treasury, he admitted signing seven, which covered the entire period during which the transaction in question was being carried on the books of the Bank as a live asset (pp. 83-84).

On page 58, lines 11 to 29, and top of page 59, State of Case, Beers says that the $5,000 note, dated July 9, 1914 (D-2), was the only transaction that he had with Mechanic; yet it is evident that he had a transaction prior, when the $4,500 note, in June, 1914, was discounted, and that he paid out a long series of checks, running from June 12 to July 7, for Mechanic (See Exhibit D-17), and that he had taken mortgages *in his own name from Mechanic,* one mortgage dated June 14, 1914, recorded June 22, 1914, and a second mortgage dated June 30, 1914, recorded July 1, 1914 (S. of C., p. 81).

Further, Exhibit D-17, taken in conjunction with the testimony of Beers and Schilling, a witness for the appellant, shows that D-17 does not set up the full account of the Jules Mechanic transaction as handled by Beers. There is testimony to show that, in addition to the money with which Beers debits himself, there was loaned to Mechanic by the Bank and disbursed by Beers an additional $6,000 (p. 101, S. of C.), and that using D-17 as the basis of his claim that he paid out $13.58 "balance due" (see page 182, State

of Case), over and above any moneys which he received either from Jules Mechanic or the Bank.

On page 62 he refers to $6,600 given to Mechanic by Williams and says that the ledger will show it; but there is nothing in the evidence that shows at any time that Mechanic got $6,600. D-17 doesn't show it. Mechanic went bankrupt and disappeared between March 9, 1916 and July 10, 1916, and yet Mr. Beers (at the bottom of page 62), says that the $6,600 was given to Mechanic by Williams about 1919; and again (on page 63), that in 1916 about $6,000 was given to Mechanic, which does not show on D-17.

We call the Court's attention to the debit side of Exhibit D-17 and especially to the third item of debit there appearing. This item is dated June, 1914, and read, "Check of J. M. $4,431." J. M. stands for Jules Mechanic. With this amount Beers charged himself and it is the only item appearing in this account showing that he received any money from Mechanic or any other source prior to July 9, 1914. It will be noted that the first and second items of that debit side, though prior in position, are in fact subsequent in point of time.

An examination of the credit side of this ledger account shows that Beers claims credit for disbursements from June 12, 1914, up to July 9, 1914, of 28 items, all of which, excepting the 22nd and the 28th items were made to Jules Mechanic for various purposes. These 28 items total the sum of $6,792.75 so that from this account, balanced as of July 8th, it conclusively appears that Mechanic owed Beers on the 9th day of July, 1914, the sum of $2,361.75, so that when Mechanic's note to Beers' order (being the note out of which Beers' present claim arose), was discounted on July 9, 1914, by the Bank and placed to Beers' account, Beers consequently repaid himself out

of that money the aforesaid sum of $2,361.75, so that it was to Beers' interest to have the $5,000 note discounted for Mechanic.*

Inasmuch as there are no footings in Beers' account (D-17), as of the 9th day of July, 1914, we here state in our own way Beers' account (taken from Exhibit D-17), charging Beers with all receipts by him up to that date and crediting him with the 28 items disbursed by him. The difference between the amount that Beers received prior to the discount of the note of July 9, 1914 (Exhibit D-2), and the aggregate disbursement by him in behalf of Mechanic, amounted to the said sum of $2,361.75, which amount, according to Beers' account, was an overpayment by Beers in behalf and for the benefit of Mechanic. This overpayment constituted an indebtedness from Mechanic to Beers and was not repaid or offset until July 9th, when Beers received from the Broad and Market National Bank a credit to his account for $5,000, representing the discount of Exhibit D-2.

---

* This overdraft by Beers for Mechanic was all before the alleged arrangement between Fleissner and Beers which is alleged to have taken place July 9, 1914.

Statement as of July 9, 1914, before discount of $5,000 note (Exhibit D-2).

LOUIS J. BEERS

TO

JULES MECHANIC, Dr.

Cr.

Disbursements

1914				
June 12	Jules Mechanic	(13 Wd. B. & L.)	$	344.40
12	" "	(13 Wd. B. & L.)		344.56
15	" "	(K. of Pth.)		481.40
15	" "	(13 Wd. B. & L.)		154.00
16	" "	(Commonwealth)		531.16
17	" "	(Bankers)		253.60
18	" "	(Porter)		113.10
19	" "	(McCabe)		150.00
19	" "	(Doughty & Gould)		175.00
19	" "	(Demarest)		52.78
19	" "	(Clancy)		201.52
19	" "	(Bamberger)		125.41
19	" "	(Water)		220.57
20	" "	(Glasby)		500.00
29	" "	(Keer)		1,746.32
22	" "	(Beers rec. mtgs.)		18.85
23	" "	(Kinsey)		179.81
23	" "	(Granniss)		2.50
23	" "	(Kinsey)		3.60
26	" "	(Payroll)		150.00
26	" "	(Painter)		100.00
26	Cash to Torppey	(Tax statement)		5.00
July 3	Jules Mechanic	(Willette & Lawless)		500.00
3	" "	(Glasby)		200.00
7	" "	(Heller)		63.80
7	" "	(Schuchtman)		132.00
7	" "	(Sanitary Appliance Corp.)		36.87
7	Recording mortgage			6.50
				$6,792.75

Dr.

Receipts

1914		
June	Check of J. M.	$4,431.00
	Amount overpaid by Beers before discount of D-2 and which amount Mechanic owed to Beers	2,361.75
		$6,792.75

At this point it is significant to refer to the testimony of Mr. Edward A. Schilling, a lawyer employed in Mr. Beers' office who, according to the testimony of both Beers and Schilling, attended to the details of the Jules Mechanic transactions and accounts. On page 100 of the State of the Case, it will be observed that Schilling testified that in June, 1914, Beers received the proceeds of a $4,500 discount, such proceeds amounting to $4,431. (That is the item appearing as the third item on Exhibit D-17.) Schilling further testified that after getting the $4,431 into Beers' account, he made some checks in the matter and that he then spoke to Mr. Fleissner, the president of the Bank, and told him *"that the* $4,500 *was gone and that we had to have more money" and that he, Schilling, suggested that somewhere in the neighborhood of* $5,000 *was necessary and that "therefore this note (D-2) was credited to Mr. Beers' account for* $5,000."

At about the time the Bank discounted the $4,500 note for Mechanic, which appears as the third item on the debit side in D-17, "June, Check of J. M., $4,431" (See also p. 80 of State of Case), Beers took a mortgage from Mechanic, dated June 14, 1914, recorded June 22, 1914 (p. 80, l. 39, top of p. 81, State of Case), and according to Beers' testimony (p. 81), the second mortgage for $5,500 was dated June 30 and recorded July 1, and was from Mechanic to Beers.

It is well to note that this mortgage was taken some nine days before the $5,000 note made by Mechanic to Beers (D-2) was issued by Mechanic or endorsed by Beers or discounted by the Bank. This is also shown by Schilling's testimony on page 105.

The following is a schedule of the note Exhibit D-2 and its various renewals showing amount, date, due date, name of maker and name of endorser:

Exhibit No.	Amount	Date	Due Date	Maker	Endorser
D- 2	5000.	7- 9-14	11- 9-14	Jules Mechanic	Louis J. Beers
D- 3	5000.	11- 9-14	3- 9-15	" "	" "
D- 4	5100.	3- 9-15	7- 9-15	" "	" "
D- 5	5100.	7- 9-15	11- 9-15	" "	" "
D- 6	5100.	11- 9-15	3- 9-16	" "	" "
D- 7	5100.	3- 9-16	7-10-16	" "	" "
D- 8	5100.	7-10-16	11-10-16	LOUIS J. BEERS	LOUIS J. BEERS
D- 9	6101.84	11-12-17	3-12-18	" " "	" " "
D-10	6206.42	3-12-18	7-12-18	LOUIS J. BEERS (direct to bank)	No endorsement
D-11	6207.66	7-12-18	10-14-18	LOUIS J. BEERS (direct to bank)	No endorsement
D-12	6208.92	10-14-18	2-14-19	LOUIS J. BEERS (direct to bank)	No endorsement
	81.00	10-14-18	2-14-19	LOUIS J. BEERS (direct to bank)	No endorsement
D-13	5419.74	2-14-19	5-14-19	LOUIS J. BEERS	LOUIS J. BEERS
D-14	4501.94	5-14-19	8-14-19	LOUIS J. BEERS (direct to bank)	No endorsement
D-15	4000.	8-15-19	11-17-19	LOUIS J. BEERS (direct to bank)	No endorsement

It will be observed that when Exhibit D-7 of which Mechanic was the maker and Beers the endorser became due on July 10, 1916, Beers took up that note with a new note (Exhibit D-8) of which he was the maker to his own order and endorsed by him to the Bank. This was done by Beers for the reason that Mechanic had become bankrupt and had left the State (See State of Case, p. 64). Beers testified that he put in his own note because Mr. Fleissner asked him to do so "so that the Bank could carry it until it could more favorably write off the note" *and that he knew that that note was to be carried as an asset of the Bank* and that he continued that arrangement for a long time (See State of Case, p. 65).

Beers' witness, Schilling, testified that when Fleissner ceased to be president and Mr. Francis Williams succeeded him to the presidency of the Bank, he spoke to Mr. Williams about the Mechanic note and that Mr. Williams said that he had not been officially informed of the arrangement, but that later Mr. Williams told him, Schilling, that the note would be carried without liability to Beers.

It also appears as uncontroverted evidence in the case, that Beers' note, which at one time with accrued interest amounted to about $6,500 had been reduced to about $4,500 by two certain payments each for $1,000 *made by Mr. Francis Williams out of his account #2,* and not made by the Bank as stated in appellants' brief, both of which payments were credited to the Beers' note. The undisputed evidence in the case is that these two payments (See Exhibits P-2 and P-3) as well as other payments to Beers were made by Mr. Williams out of a certain fund made up of his personal profit from real estate transactions, insurance and appraisals and that he used such funds to reimburse seven of the directors of the Bank for losses sustained by them on the "Smith failure", a transaction in no way connected with the subject of the dispute in this case (See Case, p. 124). Beers was one of the seven directors who, under the voluntary arrangement made by Mr. Williams, were from time to time receiving sums of money to reimburse them for their losses. With the knowledge and consent of Mr. Beers, the two one thousand dollar payments which, but for the liability of the Mechanic-Beers note, would have been credited to Beers generally, were credited against the Beers-Mechanic note. Not only is there no evidence that Beers ever objected to these moneys being so credited, but in his own evidence and in that of his witness Schilling appears the proof that they assented thereto. *It is significant that Beers in his case on the counter-claim, as such counter-claim was finally narrowed and limited, sought to recover only the sum of* $4,500 *an amount which is the result of crediting the said two payments of one thousand dollars each against the Mechanic note of approximately* $6,500.

Again adverting to the mortgage which Beers took in his own name, and which he says he took

for the protection of the Bank, the testimony on pages 59, 60 and 61 shows that, without any authority from the Bank, he assigned them to a Miss Hart and subsequently they were assigned to the American Mortgage & Realty Co., which assignments had no statement of any kind in them that they were for the benefit of the Bank or that these parties held them as trustee for the Bank.

It further appears that neither Miss Hart nor the American Mortgage & Realty Co. had any connection with the Bank, and that the American Mortgage & Realty Co. was a corporation that Beers represented and in which he held stock.

Thowing some light on whether Beers considered himself liable on the original endorsement and on the note which he subsequently made (Exhibit D-8), it is to be noted that Beers requested, at one time, that the interest be lowered from six to five per cent., because the notes were mounting up too fast (p. 106, S. of C.), and he also asked for notes to be drawn for less than four months, in one instance to three months (p. 97) and in another instance to two months (p. 98).

Also, we feel that certain discrepancies in appellant's brief should be brought to the court's attention. The appellant, on page 7 of his brief, states that the Bank realized something on the mortgages which Beers claims he took for the benefit of the Bank, by the fact that the Bank bought in several of the properties covered thereby. There is no testimony that the Bank did buy in any of the properties or save anything out of the wreck. What the testimony shows (p. 102, S. of C.) is that Williams said to let the prior mortgagees go ahead with the foreclosures and that the Bank would buy in some of the properties and try to save something out of the wreck.

On page 3 of appellant's brief it is stated that the President of the Bank, Fleissner, acted as he

did because Mechanic was indebted to the Bank at that time in a large sum of money and the situation was such as that the Bank could not call the loan, Mechanic could not pay, and unless more money was advanced to Mechanic, Mechanic would fail and the Bank lose the money which it had already loaned to him.

The testimony of Mr. Beers (p. 37, S. of C., l. 15), does warrant the statement that Mechanic "owes the Bank a large sum of money". It does not warrant the balance of the statement. What Beers said that Fleissner had said was: "We want to see that this money is paid to the Building and Loan Associations in a way to conserve it *and to protect his assets*".

The appellant further, in his brief (p. 3), says:

> "What Beers, therefore, attempted to show, *and what the jury found to be the fact,* was that the original parties to this note were the Bank on the one side and Beers on the other, and that there was no consideration for the note, and that Beers was an accommodation endorser for the Bank, not for Mechanic. The matter was put to the jury, in the charge of the Court, in clear language. The Circuit Judge (page 156) said: 'The burden of proof is upon Louis Beers to show that when he made or endorsed those notes and delivered them or caused them to be delivered to the Bank, he did so in good faith (solely) for the accommodation of the Bank, though the transaction was for the benefit of Jules Mechanic.' "

The fact is the trial Judge charged two phases: First, if the endorsement were for the accommodation of the Bank, Beers could recover; secondly, if the note was not endorsed or made for the accommodation of the Bank, Beers could not recover. But it did not charge that if the endorsement was for the accommodation of Mechanic, that then Beers would be liable upon his endorse-

ment and could not recover. The Supreme Court, in its opinion (S. of C., p. 211, l. 16), found from the evidence that Beers endorsed the note to accommodate Mechanic, in order that Mechanic might get the benefit of the note. The Court's attention is drawn to this note for the purpose of asserting that the Circuit Court should be reversed for failure to charge the third proposition, but for the purpose of showing that the conclusion drawn by appellant in his brief, that the jury must have found that the Bank was the accommodated party, does not follow.

Appellant further says, in his brief (pp. 7 and 8), that the testimony makes it clear, and the jury, under the charge of the Court, must have found that the transaction originated with the President of the Bank, who sought to preserve the assets of Mechanic so that Mechanic might retain his financial ability and pay the Bank its loans, and that Mechanic's properties might thereby be held intact and safe for the Bank; and to make certain this result, Fleissner, the President, asked Beers to act for the Bank. This is a pure gratuitous assumption, not sustained by the testimony.

The brief of the plaintiff-appellant is based on the argument that the judgment of the Supreme Court results in Beers being held obliged to pay a note to the person whom he accommodated by endorsing it. A consideration of this statement requires the consideration of the testimony of Beers and Schilling, and secondly, a consideration of the law as applied to the facts.

The only persons who could testify as to the alleged arrangement between Fleissner, the President of the Bank at the time the $5,000 note (D-2) was endorsed by Beers, and Beers, are Fleissner, Beers and Schilling, the latter not being present at the conversation, but claiming to have had conversations with Fleissner which would tend to

support Beers' claims. At the time of the trial below Fleissner was in Europe and could not be produced. Therefore, Beers' testimony could not be controverted except by the probabilities of such an arrangement having been made and by the credit to be given to his testimony in this particular, in view of all his testimony taken together.

We have adverted before to Beers' testimony as to its reliability and probabilities.

Beers' statement of why he endorsed the note (p. 37, S. of C.) is not at all convincing, because his endorsement was totally unnecessary to accomplish the purpose, as is amply illustrated by the way the $4,500 note, discounted earlier in June, 1914, was handled (see Exhibit D-17). That note was made by Jules Mechanic, placed to his credit, and he drew a check for the amount of the note less the discount, viz.: $4,431, to Louis J. Beers; and had it not been that the Bank desired the endorsement of a party financially responsible, the $5,000 note of July 9, 1914 could have been handled the same way.

The gist of the argument of the appellant is that at the time the $5,000 note was taken (Ex. D-2) there was a written instrument, in the form of a note, upon which Beers originally was an endorser, and, in later renewals, after Mechanic had left for parts unknown, was the maker. There was a contract which bound Beers to pay the note, but at the same time there was a collateral agreement which, since Beers is not being sued on the note, and the note itself is not involved in the suit which he is bringing, permits him to sue on the alleged collateral contract whereby he may recover moneys which he alleges, in his counterclaim, were paid out for the use of the Bank and at its request.

The first point of the argument of the appellant is that the rule that the contract of endorse-

ment cannot be altered by parole has no application in the instant case, and endeavors to show that the Supreme Court misapprehended the theory which led the Trial Court to permit oral testimony to be introduced with respect to the alleged agreement.

We submit that it makes no difference what the theory of the Trial Court was. The question is: Is it permissible to permit evidence of a collateral contemporaneous agreement with regard to the liability of the maker or endorser of a note, the agreement allegedly having been made prior to or contemporaneous with the endorsement? So far as our courts are concerned, it seems that the case of *Johnson* vs. *Ramsey,* 43 N. J. Law, page 279, is dispositive of this question, unless the Negotiable Instrument Act changes the law there laid down.

Appellant tries to distinguish the case of *Johnson* vs. *Ramsey,* 43 N. J. Law 279. The fact is that, when Beers endorsed the first note of $5,000 (Exhibit D-17), his account, as shown in Exhibit D-17, was, as before stated, overdrawn over $2,300, and by means of the discount of this $5,000 note Beers was thus enabled to reimburse himself for what he had theretofore paid out. Certainly this must be conclusive proof that Beers was not an accommodation endorser for the benefit of the Bank.

In the case of *Johnson* vs. *Ramsey, supra,* the parties stood in the same situation, so far as the application of law is concerned, as in this case.

Case sub judice

The maker was J. M. Johnson—Mechanic
The payee was J. R. Johnson—Beers
The endorser was J. R. Johnson—Beers
The next endorser was Ramsey—Bank

In each instance the note was discounted for the benefit of the maker. In the instant case, it was primarily for the benefit of the maker, and secondarily, it is claimed by the appellant, for the benefit of the Bank.

In the *Johnson-Ramsey* case, no consideration moved to Johnson for his endorsement.

In the present case, it is alleged no consideration moved to Beers for his endorsement.

In the *Johnson-Ramsey* case, the endorsement was at the request of Ramsey.

In the present case, it is alleged that the endorsement was at the request of the Bank.

In *Johnson* vs. *Ramsey, supra,* on page 284, the Court says that the theory adopted in the case of *Johnson* vs. *Martinus,* 4 Halst. 144, which is the same theory that the appellant endeavors to advance in this case, would result as follows:

> "that the endorser, in a suit against him by his immediate endorsee, may show by witnesses that when he made such endorsement the understanding was that he did not guarantee the genuineness of the antecedent signatures, or some of them; that he did not promise that the note, on due presentment and notice, would be paid according to its tenor, *or that he himself was to be exempted from all responsibility.* It is, I think, very plain that such a doctrine as this, if it should prevail, would very materially impair the efficiency and value of commercial paper as an instrument of commerce."

And on page 286, referring to the case of *Phillips* vs. *Preston,* 5 How. 278:

> "To show in what distinct terms this admission is made, and also the rule of decision, the following quotation will suffice. Alluding to the extrinsic testimony, the opinion says: 'Were the action on the notes, and this evidence offered to contradict them,

> it would be entirely different, because in an action on a note, parol testimony is not competent to vary its written terms, and, probably, not to vary a blank endorsement by the payee from what the law imports. * * * So between contending parties likewise, all prior conversation is supposed, as far as binding, to be embodied in the written contract. * * * But the parol evidence here is not offered in any action on the note, or to alter its terms or its endorsement; nor is any prior or contemporaneous conversation offered to vary the note or its endorsement in an action founded on either of them. But it is offered to prove a separate contract, which was made by parol, and is of as high a character as the law requires, and this evidence is plenary and entirely satisfactory to substantiate the separate contract.' * * *''

Chief Justice Beasley then says:

> "Now, what seems to me impossible to concede is that on the facts stated there existed two legal contracts—an oral one and a written one. How can this be so, when the one is contradictory of the other? The written contract bound the first endorser, with reference to the rights of the endorsee, to pay the whole note; the oral contract bound him to pay only half. Such stipulations relate to the same subject matter, and they cannot stand together, and the consequence is it must be conclusively presumed that the parties did not intend to establish such inconsistencies."

It will be noted that the other cases cited by the appellant in support of his Point I, that parol evidence may be admitted as between parties to a promissory note to show want of consideration, are all (we believe) between a maker and payee or between a maker and an accommodation endorser, where the accommodation endorser was being sued by the maker.

We will consider the sections of the Negotiable Instruments Act, 16, 24, 28, 29, 68 and 196, cited in the case of *Peoples National Bank* vs. *Sheplen*, 73 N. J. L. 79. Section 16 relates to the necessity of delivery of the negotiable instrument to complete the contract, and says:

> "But where the instrument is in the hands of a holder *in due course*, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed."

Section 24 says:

> "Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration; * * *"

Section 28 provides:

> "Absence or failure of consideration is a matter of defense as against any person *not a holder in due course;* * * *"

Section 29 defines an accommodation party and says:

> "Such a person is liable on the instrument to *a holder for value*, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party."

Section 68:

> "As respects one another endorsers are liable *prima facie* in the order in which they endorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise."

Section 196 seems to have no application at all to the case in question.

Now, what is a holder in due course is set forth in Section 52, and the Bank's position would seem to meet all the requirements of that section.

We would call the Court's attention to the fact that the original note, D-2, was one made by Jules Mechanic to the order of Beers and endorsed by Beers and delivered to the Bank and apparently discounted by the Bank and placed to Beers' credit. So that there could be no question of the delivery, under Section 16.

As the Bank gave Beers credit, in his account, for $5,000 on this note, there could be no question as to the note being for a valuable consideration, under Section 24.

And if, as we contend, the Bank is a holder in due course under the provisions of Section 52, then, under Section 28, absence or failure of consideration could not be set up by appellant.

Under Section 29, it appears to us that Beers, the appellant, even though an accommodation endorser, nevertheless is liable, because the Bank is a holder for value, having advanced $5,000 on the note.

As Section 68 relates to endorsers and not to persons who must be endorsers because they are the payees of the note, we contend it has no applicability.

Counsel for the Bank objected to the questions designed and tending to elicit from Beers and his witness Schilling, evidence relating to any arrangements or conversations either with the Bank's President, Fleissner, or with his successor Williams, to the effect that no obligation was to attach to him, Beers, by reason of the Mechanic note endorsed by Beers or by reason of the note later made by Beers in substitution and renewal of the Mechanic note theretofore endorsed by him. The particular questions and lines of examination objected to are set forth in the grounds of appeal to the Supreme Court and appear in the State of the Case (pp. 204-209). These

objections were based on the grounds that (a) such evidence violated the Parol Evidence Rule; (b) that neither Fleissner nor Williams had any authority to bind the corporation by any such arrangements, assurances or agreements and (c) that such arrangements, assurances and agreements were *ultra vires.* These objections were overruled and the evidence objected to was received. Exceptions were in such instance duly noted.

At the conclusion of Beers' case, a motion for a non-suit stating in substance the aforementioned grounds of objection was made, which motion was denied.

A reading of the defendant's case indicates the uncontroverted fact that Beers, without objection and with full knowledge and consent, allowed his share of moneys being distributed by Williams amongst the directors of the Bank (of whom Beers was one), to be applied to the Mechanic note on which Beers says he at all times disclaimed legal liability.

At the conclusion of the whole case, counsel for the Bank moved for a directed verdict on the grounds urged by him in support of his motion for a non-suit, which motion was denied by the Court for the same reasons given by the Court in denying the motion for a non-suit. The jury found for the plaintiff for the sum of $6,032.55 damages, being the aforementioned sum of $4,500 with interest thereon from the time that the Bank applied the funds of Beers in satisfaction of the Mechanic note, upon which verdict judgment was entered. This appeal brings up for review that judgment and its legal propriety and the judgment entered by the Supreme Court on appeal to it.

Before proceeding with the argument, we desire to emphasize the fact that *the action was*

essentially one by Beers to recover from the Bank the sum of $4,500 *charged by the Bank against Beers' funds in payment and satisfaction of the note involved in the Mechanic transaction, which note at one time amounted to approximately* $6,500 *and that the theory of Beers' cause of action was a single one, to wit, that he received no consideration for endorsing the original note nor any of the renewals thereof and that the note was made by him for the accommodation of the Bank and under an oral promise made by the Bank's President, Fleissner, to the effect that he, Beers, would not be held liable on said note.*

We desire at this point to criticize the cases cited by the plaintiff-appellant in his brief, in regard to the parol evidence rule.

In the case of the *Peoples National Bank* v. *Schepflin,* 73 N. J. L. 29, it is to be noted that the quotation which the Court there takes from the case of *Mount* v. *Zisken,* 70 N. J. L. Journal 71, says:

> "*As between the immediate parties to a promissory note*, its real character may always be shown. If the payee sues upon it, it may be proved that the note was really given for his accommodation."

In the case at bar, the suit is not by the payee against the maker, nor by a subsequent endorser against a prior endorser, but is a suit by a prior endorser against a subsequent holder. Further along on page 35 of the case, the Court says:

> "Even with respect to parties capable of contracting, it is well settled that the rule against varying the terms of a written instrument by parole evidence does not apply at all to evidence tending to show as *between the parties* that the contract was void for want of consideration."

The case of the *Peoples National Bank* v. *Schepflin* was a case in which the suit was brought by the payee of the note against the makers.

The first count of the plaintiff's (Beers') counterclaim is for money paid to the use of the plaintiff and is based on the money which he paid out in July, 1914, the proceeds of a promissory note made by Jules Mechanic to Louis J. Beers, for $5,000.00, endorsed by him, and discounted by the Bank. The second count is for money paid to Jules Mechanic and his creditors by the defendant, at the request of the plaintiff, and is based on the same transaction as the first count. The third count is based on the same transaction, but makes the basis of the claim that the Bank requested the defendant Beers to borrow upon his note the sum of $5,000.00. As a matter of fact, it was not Beers' note upon which the money was borrowed, but Mechanic's note. All the aforementioned counts are based on Exhibit D-2, page 172. The fourth count is on an account stated for money advanced by Beers to Mechanic, at the request of the plaintiff, in the sum of $6,001.81, which is the amount of the note D-7, page 176, and which note was the result of the original note D-2, having been carried along until July 10, 1916, when, Mechanic having left the state, Beers substituted his note for that of Mechanic. The notes mentioned in the fifth count are also notes which arose out of the original transaction D-2, as is the note mentioned in the sixth count, so that while the latter notes were made by Beers they arose out of the transaction in which Beers was the payee; Mechanic the maker, and the Bank a holder in due course. Therefore, the distinction above noted applies with full force.

In the case of *Morris County Brick Company* v. *Austin,* 75 N. J. L. 273, is a case where the maker of the note was one Virgil, drawn to the order of

the Morris County Brick Company, plaintiff, for the purchase price of bricks sold to Virgil through Austin. The defendant Austin was entitled to commissions on the sale. The plaintiff refused to pay Austin his commissions, unless Austin endorsed a note. The lower court directed a verdict for the plaintiff for the full amount. This was reversed and remanded for trial. A careful reading of this case shows that it has no application to the case at bar.

In the case of *First National Bank of Roselle* v. *Dorvall,* 89 N. J. L. 298, the suit was a note made by Dorval to his own order, payable at the banking house of the plaintiff, and endorsed by the defendant, and discounted by the plaintiff, and the evidence showed that the proceeds of the note were used for the benefit of the Bank, and that the note was made by the cashier of the Bank, inducing the plaintiff to sign the note as accommodation for it. But the Court very carefully says:

> "Assuming that the cashier had authority to bind the Bank, * * *"

This question of the right of the cashier to bind the Bank is treated elsewhere.

In the case of *United States National Bank of Superior, Wisconsin,* v. *McCabe,* Supreme Court of North Dakota, 222 Northwestern 474, the notes sued on were given by the defendant makers to the Bank, because it held notes of a company in which these men were directors, in excess of the legal limit which the Bank was authorized to loan to one individual. The Bank had collateral security of the company, and at the time it took the defendant's notes it neither advanced any money to them nor did it turn over to them any of the collateral which it held. These notes were made by the individual directors to the order of the Bank, so that the situation was a suit between the

immediate parties to the note and not, as in our case, by a subsequent endorser against a prior endorser. In addition, these notes were put in solely for the purpose of deceiving the Bank examiner as to the question of whether the Bank was conforming to the banking laws.

In the *Anamoose National Bank* v. *Dockter,* 216 Northwestern 206, is also a case where the note sued on had not been discounted by the Bank, nor had they parted with anything of value when they took the note, but it was put in purely for the purpose of deceiving the Bank examiners.

Without going further, a reading of each of the cases cited by the appellant, under Point I of his argument, will disclose that there is not, we believe, a single case in which the suit was brought by a prior endorser against a holder in due course, where the note was made by a third party, payable to such prior endorser.

It is stated in the brief of the appellant (p. 26) that the Supreme Court erred in holding that there should have been a direction of a verdict for the Bank, because

> "the acts of the President of the Bank, the agent of the Bank in this transaction, bound the Bank.
>
> "The Supreme Court did not pass upon this latter point."

We respectfully insist that the Supreme Court expressly, in its opinion, passed on this point, on pages 214 and 215, where the Court said:

> "The compact was illegal so far as the defendant Bank was concerned, for the reason that, in making it, the President was acting entirely outside the scope of his authority as such officer. His powers over its business and property are strictly those of an agent, delegated to him by the directors, who are the managers of the corporation and the persons

in whom the control of its business and property is vested. He may bind the corporation by contracts in matters arising in the usual course of business, but beyond this his official position gives him no more control over its property or funds than any other officer or director."

ARGUMENT.

We contend that the judgment of the Supreme Court should be affirmed and that the judgment of the Circuit Court was erroneous in that:

1st: The Circuit Court committed legal error in permitting, over objection, evidence to be given respecting alleged conversations both with Fleissner and with Williams to the effect that either or both had agreed that the plaintiff, Beers, was not to be held liable on the note made by Mechanic to the order of Beers and discounted by the latter with the Bank. Such evidence was inadmissible in that it violated the Parol Evidence Rule.

2nd: The Trial Court committed legal error in refusing to grant the defendant's motion for a non-suit, which was made on the grounds that at the conclusion of the plaintiff's case it appeared:

(a) That the plaintiff had failed to establish a legal cause of action against the defendant.

(b) The agreements and arrangements alleged to have been made by the Bank's Presidents, Fleissner and Williams, were made without the express or implied authority of the defendant.

(c) That the alleged arrangements and agreements made with said Beers by said Fleissner and Williams, could not bind the defendant Bank in that such arrangements and agreements were contrary to public policy and therefore illegal and unenforceable.

(d) That the agreements and arrangements alleged to have been made by Fleissner and Williams in behalf of the Bank could not bind the Bank in that such arrangements and agreements were ultra vires.

(e) Because it appeared that the defendant Bank did in fact pay consideration for the said note made by Mechanic and endorsed by Beers.

(f) Because it appeared that the defendant, Beers, did, in fact, receive consideration for endorsing the Mechanic note and for endorsing or making each and every renewal thereof.

3rd: The Circuit Court committed legal error in refusing, upon motion of defendant's counsel, to direct a verdict in its favor, because at the conclusion of the whole case, it was manifest, as a matter of law, that the plaintiff was not entitled to recover against the defendant and because there was no proper issue of fact to be submitted to the jury.

POINT I.

The Circuit Court erred in permitting the plaintiff to prove the alleged agreement, arrangement and assurance of the president of the defendant Bank to the effect that the plaintiff Beers would not be held liable on the Mechanic note. ***Such evidence was inadmissible because it violated the Parol Evidence Rule.***

The rule of law laid down and followed generally not only by the state jurisdictions, but also by the Federal courts, is that an endorser or a maker of a negotiable instrument cannot show by parol evidence that he signed or endorsed the in-

strument upon the assurance of the president or cashier of the Bank discounting the paper that he would not be liable thereon, because the effect of such testimony is to contradict the written agreement.

In *Bank of U. S.* v. *Dunn,* 6 Peters, page 51, the Supreme Court of the United States held that an endorser of a promissory note discounted with the plaintiff bank, could not offer parol evidence of the agreement and assurance made by the president and cashier of the bank that the endorser of the note would not be looked to for payment until security pledged would first be resorted to. The Court held that the defendant by his endorsement promised to pay the note at maturity if the maker should fail to pay it and that the only condition on which that promise was made was that a demand should be made of the maker when the note should become due and notice of dishonor given to the defendant, and that receiving testimony offered by the defendant as to the cashier's and president's promise was to contradict the promise which in law attaches to the act of endorsement and in fact to contradict the instrument. *This the Supreme Court said not only contradicted the instrument, but also tended to shake if not to destroy the credit of commercial paper.*

In *Thompson* v. *McKee,* 5 Dak. 172; 37 N. W. 367, it was held that an endorser or a maker of negotiable commercial paper could not prove by parol that he signed the instrument for the purpose of identification and upon the assurance of the president and cashier of the bank discounting the paper that he would not be liable thereon.

In *First National Bank* v. *Tisdale,* 18 Hun 151, affirmed in 84 N. Y. 655, the plaintiff bank sued upon a promissory note executed by defendants' intestate. The defense was that the note was

given without consideration and the defendants claimed and gave evidence tending to show that the note was delivered to the plaintiff bank at the request of the bank's officers, not to be paid by the maker but to represent that amount of assets, so that the bank might pass an expected examination by the bank examiner, and with the agreement that the bank should protect and care for the paper and that the maker would not be called on to pay it. *The Court held that the proffered evidence was incompetent and held further that the alleged agreement could not bind the bank for the reason that such agreement was beyond the authority of the bank's president to make* (citing and relying upon *Bank of U. S.* v. *Dunn, supra*).

The case of *Davis* v. *Randall,* 115 Mass. 547, was an action by the receiver of a National Bank against the acceptor of bills of exchange. The defendant proved, under objection (the evidence being admitted to be considered *if* competent), that the drawer had obtained a loan from the bank and had secured the same by a real estate mortgage; that on applying to the bank for the money loaned the president of the bank requested the borrower not to draw the loan at once but to present drafts as the borrower might need the money so that the arrangements "would look more bankable" and that the bank would discount those drafts and that such paper would be regarded as accommodation paper and the acceptors would be regarded as accommodation acceptors and would not be looked to for payment or be held liable in any way on the said drafts or bills but that the bank would look to its mortgage securities. The defendant was induced to accept such drafts by relying upon the said assurance of the bank's president and with the understanding that this was done to oblige and accommodate the bank and that no liability at-

tached to the acceptor. This evidence *was not controverted* and a directed verdict was entered for the plaintiff in the trial court. Upon appeal, the Supreme Court of Massachusetts in affirming the judgment for the plaintiff held as follows:

> "The other defence relied upon is in substance that the defendant accepted the drafts in suit for the accommodation of W. B. Fiske & Co. and that before they were accepted the president of the bank orally agreed that the defendant should not be called upon to pay the drafts, but the bank would look to other securities which it held.
>
> The fact that the defendant accepted the drafts for the accommodation of the drawers is immaterial. They were discounted by the bank and the money advanced upon them. This was a sufficient consideration for the acceptance, and the defendant is liable as acceptor, unless the alleged agreement not to enforce them against him is a defence. But, if it was within the authority of the president to bind the bank by such an agreement (which need not be decided), we are of opinion that oral evidence of such agreement is not competent. It violates the rule of law that oral evidence is not admissible to control or vary the terms of a written contract.
>
> The acceptance of the defendant was an absolute promise to pay; it is not competent for him to contradict the written contract by proof of an oral agreement that he accepted the drafts upon the condition that he should not be called upon to pay them according to their tenor. Wright *v.* Morse, 9 Gray 337; Allen v. Furbish, 4 Gray 504, and cases cited."

In the case of *First National Bank* v. *Foote,* 12 Utah 157, 42 Pac. 205, the Court held that parol evidence was not admissible to show that at the time the defendants signed a note payable to the plaintiff bank, the cashier of the plaintiff bank told them that it was intended as a mere

matter of form and that the defendants would not be called upon to pay the note. This the Court held was evidence tending to negative the written promise and was therefore not admissible.

There are numerous other cases in which similar evidence was rejected by the courts on the principle that a cashier or president of a bank had no authority or power, express or by virtue of his office, to commit his bank to an agreement that the maker or endorser of commercial paper should not be held liable thereon. Those cases we will mention under that portion of our brief which discusses the subject of the power of the president of the defendant Bank in this case.

In the case of *Foley* v. *The Emerald & Phoenix Brewing Co.*, 61 N. J. L. 428, the Supreme Court had before it a suit by the payee of a negotiable promissory note against an endorser. There the proofs established an oral agreement made between the payee and the endorser before the note was signed by the endorser, which agreement involved the matter of the payment of the amount of the note in weekly instalments. The note was a demand note and altogether silent on the subject of instalment payments. Justice Dixon, speaking for the Supreme Court, said that the principle is firmly established in this State that the signature of a party to a negotiable promissory note

> "imports a precise agreement, constructed by the law merchant upon the tenor of the note, which cannot be varied by parol evidence of any preceding or contemporaneous oral arrangement."

See also cases of

Chaddock v. *Vanness,* 6 Vroom 517;
Johnson v. *Ramsey,* 14 Vroom 279;
Middleton v. *Griffith,* 28 Vroom 442.

The appellant relies on the authority of the case of *First National Bank of Roselle* v. *Dorvall,* 89 N. J. L. 298, 98 Atl. 476. A cursory reading of that case may perhaps suggest that that case is of some authority against the position we occupy. That, however, is not so. A study of that case leads to the conclusion that not only is it no authority against the propositions we advance, but is decidely good authority in our support. The Dorvall case was in its facts essentially different from the case at bar. It, the Dorvall case, was an action by a bank against the maker, *not the endorser,* of a negotiable promissory note. The defense was that the cashier of the plaintiff bank, acting for it, induced the defendant to sign the note as an accommodation to the bank upon the promise that the defendant would not be held liable thereon and would not be required to pay it. The Trial Court rendered judgment for the bank, which judgment was affirmed by our Supreme Court and by the Court of Errors and Appeals. There was evidence in the case tending to show that the arrangement was made not for the accommodation of the bank but to accommodate a person by the name of Dietz, who was not a party to the instrument. The Supreme Court rested its judgment on the reason that the obligation of an *endorser* of a negotiable promissory note could not be varied by parol testimony of an oral agreement made before or at the time of his endorsing the note. The soundness of this rule of law was not questioned by the Court of Errors but was held not to be applicable to that case for the reason that the defendant was the *maker* of the note and his defense was want of consideration. In the Dorvall case the moneys advanced by the bank as a consideration for the defendant's note were immediately used as a step towards accomplishing the purchase by the

bank of property which it desired to acquire. The bank suffered no detriment and in fact gave up nothing either to the maker of the note or to any other person. There was therefore a complete absence of consideration and that was the defense relied upon. In the case at bar, Beers did not assert that the note was not sustained by consideration, but contended merely that *he* received nothing as an endorser and that he endorsed the note *solely* for the accommodation of the Bank. Our answer to any attempt to make the Dorvall case apply to the case at bar is threefold:

1st: The note upon the faith of which the Bank parted with $5,000 was one where Beers was *not* the maker but only the endorser. The Dorvall case is expressly limited in its applicability to the case of a maker whose defense is want of consideration in the instrument itself.

2nd: There was no want of consideration in the instrument itself. It is an admitted fact in the case that the Bank discounted the note made by Mechanic and endorsed by Beers and gave Beers, by a credit to his account, the full sum of $5,000.

3rd: From Beers' own testimony it is obvious that his endorsement was made for the benefit of Mechanic who, according to Beers' testimony, could not obtain the advantage of the proceeds of the note except by means of his, Beers', endorsement. It will be recalled that Mr. Schilling, Beers' agent in the transaction, testified that before the $5,000 note was discounted he called upon Mr. Fleissner, the Bank's president, and said that he had exhausted the funds being used by him for Mechanic's purposes and that he needed more money to pay Mechanic's debts. Then again, it must be remembered that at the time Schilling called for more funds and before

the discount of Exhibit D-2, Beers had overpaid with his own funds of $2,361.75 while engaged in discharging Mechanic's liabilities. The discount of the $5,000 note produced not only the supply of additional funds for the purposes of Mechanic, *but also to repay and reimburse Beers to the extent of the said sum of $2,361.75.* How then can it be contended that Beers' endorsement was for the *sole* accommodation of the Bank when it is patent that it was not only for the benefit and accommodation of Mechanic, but also for his own benefit to the extent of $2,361.75?

4th: Beers did in fact receive a valid legal consideration for his contract of endorsement. He not only received by a credit to his own account the proceeds of said note, to wit, $5,000 which in our judgment was an ample consideration passing from the Bank to Beers, but he was enabled thereby to overcome and offset his personal overpayment of $2,361.75. Certainly to the extent of that sum of $2,361.75, a consideration passed from the Bank to Beers to the latter's own individual benefit and advantage. At this point may we again refer to the testimony of Mr. Beers on page 37 of the case, in which he says that it was in July that Mr. Fleissner, the Bank president, proposed that he, Beers, discount Mechanic's note. Before this occurred, Beers' agent, Schilling (see Schilling's testimony, p. 100), and prior to the 1st of July, called on Fleissner and said, "we had to have more money," and asked for another $5,000. This testimony of Schilling not only negatives Beers' assertion that it was the Bank president who first proposed the transaction, but also indicates that at the time the note, Exhibit D-2, was discounted, there existed the necessity for giving additional money to Beers, if for no other purpose, certainly to repay to Beers what he had already overpaid. Even on the 1st of July, nine

days before the $5,000 note was discounted and before Fleissner spoke to Beers about the discount, Beers had by a large sum of money (approximately $1,400) overpaid on his trust account with Jules Mechanic (Exhibit D-17).

A correct resume of the Dorvall case is that that case stands for the principle that parol evidence, similar to the kind offered by Beers and received over objection, is admissible only at the instance of a *maker,* whose defense is that there was no consideration for the note in that such note was made for the accommodation of the payee bank and under an agreement with the bank's officers that no liability attach to the *making* of the note, *provided, of course, that the authority of the bank's officer to make the agreement or arrangement is affirmatively established.* Justice Bergen, speaking for the Court of Errors and Appeals in discussing the admissibility of such parol evidence was most careful to use the language: "assuming that the cashier had authority to bind it, the bank."

The point that the cashier of the Roselle Bank had no authority to make the alleged agreement with Dorvall, was not raised in that case and was not passed upon, so that it may well be said that the Dorvall case stands for the proposition that where the cashier has no authority to make the kind of agreement under discussion, parol evidence of the making thereof is not admissible even at the instance of the maker or endorser or any other party to commercial paper. The controlling question therefore is whether or not the bank's officers had the authority to make the alleged agreement and assurance. That question we discuss in that portion of our brief which deals with the subject of the lack of authority on the part of the Bank's president.

POINT II.

The Trial Court committed legal error in refusing to grant defendant's motion for a nonsuit.

A.

At the conclusion of the plaintiff's case, plaintiff had failed to establish a cause of action against the defendant. This position necessarily involves a discussion of the other sub-divisions grouped under this, Point 2, of our brief. We therefore proceed to discuss the other subdivisions.

B.

Neither Mr. Fleissner, the president of the Bank, nor Mr. Williams, his successor, had any authority or power to agree with Beers that notwithstanding his contract of endorsement, no liability was to attach thereto and that he, Beers, would not be held accountable on the note.

The president or cashier of a bank and all its other officers and agents are limited to the exercise of those powers only which are granted to them by their principal or which by implication of law are necessarily incidental to the *proper* performance of their office. This is true not only with respect to officers but in a large measure with respect to the directors themselves. Officers or directors of a bank, exceeding their express or implied powers, may perhaps render themselves personally liable but cannot bind their principal, the bank.

The burden rested upon the plaintiff, Beers, to establish the authority of Mr. Fleissner to make the agreement and assurance relied upon by Beers. That authority could be found in one of

three ways: First, by power conferred by the by-laws and articles of association of the defendant bank, or secondly, by express resolution from the board of directors, or thirdly, in point of law *virtute officii.*

An examination of the respondent-appellee's exhibits consisting of the articles of association and the by-laws (Exhibits P-5, P-6) discloses no such power or authority vested in the president. Neither did Beers prove any act of the directors granting such authority. The question, therefore, of the president's authority to bind the bank by the manner of agreement under discussion is one that must be determined upon the simple question of law, whether or not a bank president has as a matter of law, *virtute officii,* the power to bind his principal, the bank, by an agreement of the kind under consideration. We say that no such authority exists in law and that the adjudicated cases on the subject deny the existence of any such authority in the president, cashier or other executive officer of a bank.

The leading case on this question is that of *State Bank of Moore* v. *Forsyth,* to be found in L. R. A. Vol. 28, New Series, page 501, decided by the Montana Supreme Court in 1910 (108 Pac. 914). That was an action by the bank against the maker of a promissory note. The defendant admitted the execution of the note but denied that it was given for any consideration and he affirmatively pleaded that the note was made at the express request of the plaintiff bank, without consideration and for the bank's accommodation. He also pleaded that at the time the note was made, it was agreed between him and the bank that he would not be required to pay the note and that he should not be liable thereon. The defendant proved that the cashier of the bank requested the defendant to execute

the note; that the defendant declined, stating that he could not pay the note if called upon to do so; that the cashier thereupon assured the defendant that the bank would not hold him responsible or liable on the note and that the defendant would never be asked to pay it and that he, the cashier, would look after it and that in reliance on those assurances, defendant made and delivered the note, receiving none of the proceeds thereof. The cashier's object in taking such paper was to pass inspection by a bank examiner. A verdict was found for the defendant in the court below. Upon appeal judgment was reversed with a direction to enter judgment in favor of the plaintiff bank. The Supreme Court considers as the second point in the case the question whether the bank was bound by the representations of its cashier that the defendant should not be called upon to pay the note. The Court after considering a number of authorities in support of its view *held, that the agreement of the cashier Thurston was, on its face, beyond the scope of his authority, and that the defendant was chargeable with notice thereof, and that "we hold that the cashier of a bank by virtue of his office, has no authority to make such an arrangement as that testified to by the defendant and that whoever accepts such an agreement and acts upon it does so at his peril."*

In the case of *West St. Louis Savings Bank* v. *Shawnee County Bank,* 95 U. S. 557, the Supreme Court of the United States held that a cashier, who is the ostensible executive officer of a bank, is presumed to have, in the absence of express restrictions, all the power necessary in the transaction of the *legitimate* business of banking, but that he has no power, by reason of his office, to bind his bank as an accommodation endorser of his own note and that such a transaction not being within the *usual and general powers* of his office, any per-

son who accepts an endorsement of that character must prove *actual authority before there can be a recovery.*

The case of *Bank of U. S.* v. *Dunn,* decided by the United States Supreme Court in 6 Peters 51, has already been discussed by us on the point of the parol evidence rule. We again refer to that case on the point now under discussion. There, it will be remembered, the president assured an endorser that the latter would incur no responsibility. The Supreme Court of the United States said:

> "The most decisive objection to the evidence is that the agreement was not made with those persons who have power to bind the bank in such cases. It is not the duty of the cashier and president to make such contracts, nor have they the power to bind the bank except in the discharge of their ordinary duties."

To the same effect is the case of *Bank of Metropolis* v. *Jones,* 8 Peters, page 12, in which the Supreme Court of the United States held that the president of the plaintiff bank could not bind the bank by an assurance to an endorser that he would incur no responsibility on his endorsement.

The case of *Thompson* v. *McKee,* 5 Dak. 172, 37 N. W. 367, above cited on another point, presented the situation where the cashier of the bank requested the defendant to place his name on the back of a draft for purposes of identification, assuring the defendant that no liability would result. A similar understanding existed with the president of the bank. The Court held that these facts constituted no defense for the reason that neither the president nor the cashier had any authority to make the agreement. Mr. Justice Spencer speaking for that Court said:

"It has been repeatedly held by the highest judicial tribunals that officers of banks have not the power to excuse or limit the legal obligations of persons to the banks they represent, by agreeing with them that they shall not be held liable or called upon to pay the obligations which they make, either as principal debtors or accommodation makers or indorsers, *and on the credit of which the bank has parted with its funds.*"

See also the following cases:

Claflin v. *Farmers' Bank,* 25 N. Y. 293;
Dedham Inst. v. *Slack,* 6 Cush. 408;
Gallery v. *National Exchange Bank,* 41 Mich. 169, 2 N. W. 193;
Payne v. *Commercial Bank,* 6 Smedes & M. 24;
Bank of Commerce v. *Hart,* 37 Neb. 197, 20 L. R. A. 780, 40 Am. St. Rep. 479, 55 N. W. 631;
Bank of Pennsylvania v. *Reed,* 1 Watts & S. 101;
Hodge v. *First Nat. Bank,* 22 Gratt. 51;
Cochecho Nat. Bank v. *Haskell,* 51 N. H. 116, 12 Am. Rep. 68;
Daviess County Sav. Asso. v. *Sailor,* 63 Mo. 24;
Sandy River Bank v. *Merchants' & M. Bank,* 1 Biss. 146, Fed. Cas. No. 12, 309;
Ellis v. *First Nat. Bank,* 22 R. I. 565, 48 Atl. 936;
German Sav. Bank v. *Des Moines Nat. Bank,* 122 Iowa, 737, 98 N. W. 606;
Mendel v. *Boyd,* 71 Neb. 657, 99 N. W. 493.

In the case of *Loomis* v. *Fay,* 24 Vermont 240, it was held that the agreement made by the president of a bank that the defendant should not be

liable if he endorsed certain notes to the bank, was not binding on the bank and that the president had no authority by virtue of his office to make any such agreement.

In *Kennedy* v. *Otoe National Bank,* 7 Neb. 59, the president of a bank agreed that the maker of a promissory note payable to the president to be discounted at the bank, would not be required to meet the note. This agreement was held not to bind the bank and as being in excess of the president's authority.

To the same effect is the case of the *First National Bank* v. *Tisdale,* 18 Hun 151, above-cited on another point.

See *Mead* v. *Pettygrew,* 11 S. D. 529, 78 N. W. 945. There the president of a bank agreed with the purchaser of the bank's stock that a note given in payment for such stock would not be enforced. The Court held that that agreement could not bind the bank because of the president's lack of power to make it.

In *Fowler* v. *Walch,* 119 Appellate Div., page 542 (104 N. Y. Supp.), the president of a bank discounted with his bank a note made jointly by himself and others. Assuming to act for the bank, he agreed with his co-makers that they were to be relieved of their liability under such note. This agreement was held to be beyond the powers of his office.

In *Hodge* v. *First National Bank,* 22 Gratt (Va.) 51, the Court held that a bank president has no inherent power to bind his bank by an admission that a promissory note held by the bank was intended merely as a voucher.

In the case of *First National Bank* v. *Lowther-Kaufmann Oil Co.,* 66 W. Va. 505, 66 S. E. 713, 28 L. R. A. (N. S.) 511, the Supreme Court of Appeals of West Virginia held that a cashier of a National Bank has no authority to bind his bank

by an agreement made with the endorsers of a promissory note to the effect that each of the endorsers should be liable only for a proportion of the debt.

Mr. Thompson in his work on corporations (Vol. 2, 2nd Ed., Sec. 1532) says:

> "The principal limitation on the powers of a cashier is that his acts must be within his ordinary duties. It cannot be assumed that he is authorized to do every act within the powers of the bank. His implied authority is limited to acts done in the usual and ordinary course of business, and cannot be extended to cover unusual or extraordinary transactions. For the transaction of such business, special authority must be conferred upon him by the directors."

Morse on Banks and Banking (Sec. 167 of 4th Ed.) in discussing the implied powers of a bank cashier, says:

> "It can never be pretended that he (the cashier) has any incidental powers to bind the bank by declarations or admissions which are made beyond the scope of his duties. Thus, his statement or promise given to a person who is about to put his name as indorser upon a note which the bank has agreed to discount, to the effect that such person will not be held liable or shall not be looked to by the bank, is altogether inoperative and void as an undertaking of the bank." See also Bolles, Modern Law of Banking, page 361.

The same limitation which exists in law on the powers of a cashier of a bank exists with relation to the powers of a president of a bank. See Morse on Banks and Banking, Section 174, and cases cited in support of the text.

All of the cases above referred to are directly in point and fully support the contention here made.

C.

The alleged arrangements and agreements made with said Beers by said Fleissner and Williams could not bind the defendant Bank in that such arrangements and agreements are contrary to public policy and therefore illegal and unenforceable.

Beers was a director of the Bank. He knew that the Mechanic notes endorsed by him, and thereafter his own notes to replace the former notes were discounted by the Bank and the proceeds placed to the credit of his own account and that they were carried by the Bank as an asset (See Case, pp. 64, 65). He knew that the bank examiner would find these notes as assets of the Bank (See Case, p. 69). He signed and swore to a number of financial statements of the Bank that were furnished to the Government and published in the newspapers, during the time that said notes were carried by the Bank as an asset (See Case, pp. 83-84 and Exhibit P-7).

It is a misdemeanor to make a false entry in any book, report or statement of the Bank. See Section 5209 of the National Bank Act.

Under these circumstances, we contend that Beers is estopped from setting up that arrangement, and is estopped from claiming to be relieved from his endorsement in that the arrangement and agreement between Beers, a director of the Bank, and Fleissner, the president of the Bank, was an unlawful one, either designed to give to the Bank the deceptive appearance of carrying as an asset the live and valuable paper of Beers or necessarily and inevitably having that deceptive result. The leading case on this question is that of *State Bank of Moore* v. *Forsyth,* 108 Pac., page 914, above discussed on another point. In many respects that case is strikingly like the case at bar. The Court con-

sidered the conduct of the bank's cashier, Thurston (which conduct was like that of the Bank's president Fleissner in the case at bar), as a palpable attempt to defraud the bank of which he was cashier and that the conduct of the defendant made it possible for the bank cashier to consummate the fraud. In the Thurston case, the Court said that it would be a most dangerous holding if the defendant could escape his liability on the ground that the note was made for the accommodation of the bank. The Court discusses the statute which makes it a crime to subscribe or exhibit false papers with intent to deceive the bank examiner and proceeds to say:

> "The defendant was chargeable with knowledge of this statute, and with notice that it was Thurston's purpose to violate it. How can it be possible for a man of ordinary intelligence to suppose that a request for an accommodation note for a large amount, made by a cashier, is intended to be for the benefit of the bank? Notes are ordinarily given to a bank for the purpose of borrowing money therefrom. *We can conceive of no circumstances under which a bank can require an accommodation note on its own account for any legitimate purpose. It seems to us that the mere request carries notice that the purpose for which such paper is intended to be used is not a lawful one. What legitimate end could possibly be served by carrying in a bank commercial paper which was not to be paid under any circumstances? Obviously none. The only possible design would be to deceive someone, either the stockholders, the depositors, or the bank examiner, who acts for them in the name of the state.*"

In the case of *Pauly* v. *O'Brien,* 69 Fed. 460, the Court held that if the defendant executed his note to the bank under an agreement that the defendant was not to be held liable thereon and

the note was carried as a live asset of the bank, that the defendant could not escape his legal liability and that if

> "the transaction was a mere trick to make it appear to the government and to the creditors and stockholders of the bank that it had a valuable note when in fact it did not have one, the result must be the same; for, when parties employ legal instruments of an obligatory character for fraudulent and deceitful purposes, it is sound reason, as well as pure justice, to leave him bound who has bound himself. It will never do for the courts to hold that the officers of a bank, by the connivance of a third party, can give to it the semblance of solidity and security, and, when its insolvency is disclosed, that the third party can escape the consequences of his fraudulent act. * * * It would require more credulity than I possess to believe that the defendant, when his brother, who was the bookkeeper of the bank, came to him with the proposition of its vice-president, in its every suggestion and essence deceptive and fraudulent, did not know its true character and purpose. So far as appears, Naylor was a total stranger to him. Why should be execute his note to take up the note of Naylor? What moved him to do it, except to enable the officers of the bank to supplant the overdue note of Naylor with a live note, which he now insists was without consideration and purely voluntary, but which enabled the bank officers to make a deceptive, and therefore fraudulent, showing of assets."

It requires very little argument to indicate that if Beers (the director), and Fleissner (the president), could agree amongst themselves that the Bank should part with five thousand dollars on the apparent faith of Beers' note, and thereafter have the note carried as a live asset, constantly included amongst the assets reported to the Fed-

eral Bank examiner (in a number of instances in reports bearing the signature of Beers himself) and Beers could escape liability, then it is well within the powers of a president to ruin a bank by conduct of that kind. Needless to say that the very statement of the proposition and of its effect indicates the unlawfulness of the arrangement and the danger that it presents to the public's commercial interests. Stockholders, depositors and all persons dealing with a bank, which is a *quasi*-public institution, have a right to assume that every note and documentary obligation held and carried by the bank is a valid and subsisting obligation in law. They have a right to rely upon the apparent truth of the bank's statements. To make that reliance subject to defenses of the kind interposed by Beers in this case would be to shake, if not altogether to destroy, the faith of the public in commercial paper generally and in banking institutions particularly. The welfare of society depends largely upon the stability of its banking agencies, and anything that tends to endanger that stability or disturb the public's confidence therein, if it be an agreement or an arrangement, is unlawful and unenforceable.

In support of the point that where a bank officer induces a person to make and deliver a note to a bank, or to endorse a note already made and deliver it to a bank, for the purpose of deceiving the Bank Examiner, the maker or endorser may not defend on the ground that the note was made solely for the accommodation of the bank.

> *Bandel* vs. *Shaw* (1924), 115 Kan. 185, 222 Pac. 62.
>
> "To call such a transaction the mere execution of an accommodation note for the benefit of the Bank is a euphemism which might satisfy a Machiavelli or a Talleyrand, but lawyers and judges would hardly be jus-

tified in the use of language so lacking in definite precision."

In this case, the Court further said:

"A promissory note given to a Bank for the purpose of padding the Bank's assets to deceive the Bank Commissioner is not an accommodation note within the meaning of the Negotiable Instruments Act."

To like effect are the following cases:

Luverne State Bank vs. *Dailey* (1924), 51 N. D. 688, 200 N. W. 793;
Armstrong First National Bank vs. *Smith* (1925), 199 Iowa 1277, 203 N. W. 802.

A case which is quite closely in line with the case under consideration is that of *German American State Bank* v. *Watson* (1917), 99 Kan. 686, 163 Pac. 637. There the Court held:

"Where a Bank desires to make an additional loan to a customer, but cannot do so because it has already loaned him as much as the law permits, and for that reason induces another person to give his note for the amount, promising to hold him harmless in the matter, in legal contemplation the borrower who receives the money, and not the Bank which pays it out, is the party for whose accommodation the note is signed."

The case of *Nalitzky* v. *Williams,* 237 Fed. 892, is a case which is illuminating. In this case, the Bank Examiner had directed the Bank to take out a certain single named paper of one Nalitzky, or to procure an endorser on the paper. The Bank induced one Nalitt to endorse the paper, and subsequently, when the paper came due, the Receiver of the Bank sued Nalitt as well as the maker. Nalitt sought to set up an agreement with

the officers of the Bank that he was not to be held liable and that he was only an accommodation endorser, and the Court said:

> "This defense has no merit either in fact or in law. The accommodation was to Nalitzky and not to the Bank, and although the Bank knew that Nalitt received no consideration for his endorsement, this is a matter of no importance."

Citing cases.

D.

The alleged agreement between Beers and the Bank's President Fleissner could not bind the Bank for that such agreement was ultra vires.

Necessarily this contention is in a sense coupled with the point already discussed that the alleged agreement was void in that it was against public policy. It requires no argument to prove that no corporation can be bound by an agreement that is essentially unlawful for the reason that every unlawful undertaking by a corporation is *ultra vires*. There is, however, a broader principle involved in determining that the agreement under discussion was *ultra vires*.

The Supreme Court of the United States in the case of *Central Transportation Co.* v. *Pullman Car Co.*, 139 U. S. at page 48, in fixing a test for determining whether or not a contract is *ultra vires*, says:

> "The clear result of these decisions may be summed up thus: The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action

> can be maintained upon them in the courts, and this upon three district grounds: the obligation of every one contracting with a corporation, to take notice of the legal limits of its powers; the interest of the stockholders, not to be subjected to risks which they have never undertaken; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law."

At page 59 of the *Pullman* case, the United States Supreme Court says:

> "A contract of a corporation, which is *ultra vires,* in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it."

In the case of *Best Brewing Co.* v. *Classon,* 185 Ill., page 37; 57 N. E., page 20, the Court said:

> "The general rule is that a corporation can do only those acts which are within the scope of its charter, and, if the signing of the bond in question as surety was an act not originally within the express or necessarily implied powers of the corporation, it is void, and no subsequent act could make it valid by way of estoppel."

In the case of *Pittsburgh* v. *Keokuk,* 131 U. S. page 371 (at page 384), the Supreme Court of the United States said:

> "The reasons why a corporation is not liable upon a contract *ultra vires,* that is to say, beyond the powers conferred upon it by the legislature, and varying from the objects of its creation, as declared in the law of its organization, are: 1st: The interest of the public, that the corporation shall not transcend the powers granted. 2nd: The interests of the stockholders, that the capital shall not be subjected to the risks of enterprises not contemplated by the charter, and therefore not authorized by the stockholders in subscribing for the stock. 3rd: The obligation of every one, entering into a contract with a corporation, to take notice of the legal limits of its powers."

See also the leading case of *Pearce* v. *Madison & Indianapolis Railroad,* 21 Howard 441.

This question of *ultra vires* should be determined on the authority of the Federal cases, particularly the decisions of the Supreme Court of the United States. The reason for this was laid down in the case of *Chemical National Bank* v. *Havermale,* 120 Cal. 601 (65 Amer. State Rep. 206), in which the Court said:

> "That applicant is, and at all times mentioned in the complaint was, a national bank duly incorporated under the laws of the United States, as distinctly alleged in the complaint, and therefore the question as to the power of the appellant to subscribe for, purchase or own shares in said savings bank is one that must be determined by the laws from the statutes of the United States and as to the construction of those statutes in that regard we must look to the Supreme Court of the United States, just as that court looks to the decisions of this court for construction given to our own statutes where no Federal question is involved."

Another illustration of this is found in *First National Bank* v. *American National Bank,* 173

Mo. 153, 72 S. W. 1059, which was a case of a national bank guaranteeing an accommodation note of one of its customers, and where the defendant was not held liable on the guarantee, the Court said:

> "The powers of a national bank under the National Banking Act are essentially matters for Federal construction and interpretation and whatever rules may obtain in the several states as to the power of corporations under state statutes, all State courts must yield to the decisions of the Supreme Court of the United States, construing the powers of the national banks under the National Banking Act."

The Court then proceeds to show that the Supreme Court of the United States has decided that a national bank has no more power to bind itself that a draft drawn on its customer will be paid and when sued on such contract it can plead *ultra vires,* and the fact that the other party to the contract has performed his part of it does not estop the bank from so pleading. The Court concludes this opinion in these words:

> "It will be no profit in this case to consider the rules of law adopted by the several States bearing upon the power of banks organized by authority other than the Federal Government, to enter into such contracts or to impose the defense of *ultra vires* after the other party to the contract has fully performed it; for the decisions of the Federal courts treat of such contracts as void and unenforceable as to national banks, and this Court is in duty bound to defer to those Federal decisions."

The above case was stated with approval and followed in a Georgia case, *First National Bank* v. *Monroe,* 135 Ga. 615, 69 S. E. 1123, and has become the doctrine of the Georgia courts.

This same principle that the theory of the Federal courts should be followed in cases involving national banks was reiterated in a somewhat analogous situation, in the case of *Curtis* v. *Davidson,* 150 N. Y. S. 305, where, in determining the rights of set-off in a suit by a receiver of a national bank, it was held that the rule prevailing in the Federal courts should be followed.

See also

National Bank v. *First National Bank,* 61 Fed. 809;

National Bank of Brunswick v. *Sixth National Bank,* 212 Pa. 230 (61 Atl. 889);

Fowler v. *Sculley,* 72 Pa. 456, 13 Amer. Rep. 699;

Branwell v. *Sixth National Bank,* 28 Pa. Sup. Court 415;

Appleton v. *Citizens Central National Bank,* 101 N. Y. Supp. 1027.

We conclude this point by saying that there is nothing in the charter and in the by-laws of the Broad and Market National Bank that sanctions an agreement by the Bank's president that commercial paper, regular on its face, duly discounted and sustained by the consideration of the full payment of the face of the note by the Bank, shall not be enforceable against the person making such paper. Such an agreement is inherently vicious and in palpable conflict with the proper and lawful business purposes of a banking institution. Beers must be held to have known that the corporation could not bind itself in the manner in which Fleissner agreed that it should be bound. Beers must be held to have known of the limitations of the Bank's powers, not only because all persons are so held, but particularly because he was a lawyer and a director of this very Bank for ten years. He must be held to have known that

the agreement that he was making with Mr. Fleissner was wholly void, not only because Fleissner had neither express nor implied authority to make it, but also because the corporation itself had not the power to make an agreement of the character testified to.

POINT III.

The Trial Court erred in denying the defendant's motion for a directed verdict in its favor.

This point involves the propriety of the Trial Court's denial of the motion made by the Bank's counsel for a directed verdict in favor of the Bank. We say that the denial of that motion constituted error, because at the conclusion of the whole case there was no proper issue of fact to be submitted to the jury and because at that stage of the case it appeared as a matter of law that Beers should not recover against the Bank.

In support of this point, we here adopt the various arguments and contentions made by us under Point II of this brief, in which we discuss the Trial Court's refusal to grant the motion for a non-suit.

Conclusion.

We stand upon each and every point in this brief advanced and we say that upon each and all of such points the judgment of the Circuit Court under review is erroneous and should be reversed and the judgment of the Supreme Court sustained.

Respectfully submitted,

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