INDEX

SUMMONS.

The State of New Jersey to Decker Building Material Company, William
(L. S.) D. Decker, Meyer Gendel.

YOU ARE SUMMONED to answer the annexed complaint of Fidelity Union Trust Co., in an action at law in the Essex County Circuit Court. AND TAKE NOTICE, that unless you file your answer to said complaint with the Clerk of the Circuit Court, at Newark, within twenty days after service upon you of this writ, and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, WORRALL F. MOUNTAIN, Judge of the said court at Newark, this tenth day of December, nineteen hundred and twenty-eight.

JOHN H. SCOTT,
Clerk.

WOLBER & GILHOOLY,
Attorneys.

(See notice endorsed upon annexed complaint.)

COMPLAINT.

Essex County Circuit Court

ESSEX COUNTY.

FIDELITY UNION TRUST CO., a corporation, *Plaintiff,* *vs.* DECKER BUILDING MATERIAL COMPANY, WILLIAM D. DECKER and MEYER GENDEL, *Defendants.*	*Action at at Law.* *Complaint.*

Plaintiff, a banking corporation organized under the laws of the State of New Jersey, with its banking office in the City of Newark, in the County of Essex, State of New Jersey, says that:

1. On July 24, 1928, the defendant, Decker Building Material Co., William D. Decker, president, made note in the amount of $700 to the order of Meyer Gendel, due three months after date at the National Newark and Essex Banking Co.

2. Before the same fell due it was duly endorsed by William D. Decker and Meyer Gendel and plaintiff acquired the same for a valuable consideration.

3. At the time that said note fell due it was duly presented for payment and protest fees of $2.36 were incurred.

4. No part of said note has been paid and the full amount with protest fees, interest and costs is still due.

5. A true copy of said note and certificate of protest are annexed hereto and made a part hereof.

Judgment will be demanded in the sum of $702.36, together with interest from July 24, 1928, and costs of suit to be taxed.

WOLBER & GILHOOLY,
Attorneys for Plaintiff.

UNITED STATES OF AMERICA,
STATE OF NEW JERSEY. } *ss.*

On the 24th day of October in the year of our Lord one thousand nine hundred and twenty-eight, at the request of Fidelity Union Trust Co., Newark, N. J., Berne F. Keppler, Notary Public, in and for the State of New Jersey, duly appointed, commissioned and sworn, residing in the Township of Union and State of New Jersey, did present the original note made by Decker Building Material Company, payable at three months after date for $710.73, dated July 24, 1928, and hereunto annexed, at the National Newark and Essex Banking Company, Newark, New Jersey, at Newark aforesaid, to bookkeeper National Newark and Essex Banking Company thereof, and of him demanded payment thereof, who then and there refused to pay the same; saying the maker was not present, and had not there left funds for that purpose. Payment stopped.

WHEREUPON, I, the said Notary, at the request aforesaid, did protest, and by these presents do

publicly and solemnly protest, as well against the drawer and endorsers of the said note, as against all others who it doth or may concern, for exchange, re-exchange and all costs, charges, damages and interest already incurred, and to be hereafter incurred for want of payment of said note, and on the 24th day of October A. D., 1928, I gave notice of said non-payment, to the maker and endorsers thereof by depositing said notice in the post office at Newark, N. J., directed and addressed to them at their residences or places of business, with postage prepaid thereon, before the hour of 6 P. M. of said day, viz: Decker Building Material Company, 513 Lyons avenue, Irvington, N. J.; Meyer Gendel, 53 Schuyler avenue, Newark, New Jersey; Wm. D. Decker, 513 Lyons avenue, Irvington, N. J.

THUS DONE AND PROTESTED in the City of Newark and state aforesaid in the presence of John Doe and Richard Roe, witnesses, *in testimonium veritatis.*

BERNE F. KEPPLER,
Notary Public.

Protest No. 48400, page No.

Complaint.

NOTE.

$700.00 Newark, N. J., July 24, 1928

Three months after date, we promise to pay to the order of Meyer Gendel seven hundred and 00/ dollars at the National Newark & Essex Banking Co.

Decker Building Material Co.
Wm. D. Decker, Pres.

Endorsed:
Wm. D. Decker
Meyer Gendel

Value received with interest.
Protest 48400 of Decker Building Material Co.

	$710.73
Interest,	
Notary's fee	2.00
Notices	.30
Postage on notices	.06
	$713.09

Dated October 24, 1928.

BERNE F. KEPPLER,
Notary Public.

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ESSEX COUNTY CIRCUIT COURT.

Fidelity Union Trust Co., a corporation,
Plaintiff,

vs.

Decker Building Material Company, William D. Decker and Meyer Gendel,
Defendants.

Action at Law.

SUMMONS AND COMPLAINT.

WOLBER & GILHOOLY,
Plaintiff Attorneys.
P. O. Address, 763 Broad St.,
Newark, N. J.

ANSWER OF DEFENDANT, DECKER BUILDING MATERIAL COMPANY.

Filed February 13, 1929.

ESSEX COUNTY CIRCUIT COURT.

FIDELITY UNION TRUST CO., a corporation, *Plaintiff,* *vs.* DECKER BUILDING MATERIAL COMPANY, a corporation, *et als.,* *Defendants.*	*Action at at Law.* *Answer of Defendant, Decker Building Material Company, a Corporation.*

The defendant, Decker Building Material Company, a corporation, having its principal office in the Town of Irvington, County of Essex and State of New Jersey, answering the complaint herein, says that:

1. It admits that it is the maker of the note, referred to in paragraph 1 of the complaint in this cause, but says that said note was executed and delivered contemporaneously with the making, execution and delivery of a contract, of which the following is a true copy:

July 24/28

In order to induce Decker Building Material Co. to give me a note of Seven Hundred Dollars to apply as paym't for Mapes Const. Co. for work cor Mapes & Eliz. Av. Newark I agree to complete all of the work as per my contract with Mapes, on or before Sept. 1- 1928 and in case of default on my part I agree to give back to Decker

the said note or if note is in other hands I agree to pay it and release Decker from any & all liability on said note.

M. GENDEL

Witness:

Wm. A. Decker

2. This defendant admits the allegations of paragraph 2, that before the note became due, it was endorsed by William D. Decker; this defendant has no knowledge or information sufficient to form a belief as to the allegations in paragraph 2 of the complaint that before the note became due, it was endorsed by Meyer Gendel, and therefore neither admits nor denies such allegations, but leaves the plaintiff to make such proof thereof as may be lawfully required; this defendant denies that the plaintiff acquired the said note for a valuable consideration before it became due.

3. This defendant denies the allegations of paragraph 3 of the complaint and paragraph 4 of the complaint.

4. This defendant admits that a true copy of the note (as alleged in paragraph 5 of the complaint) is annexed to the complaint, but denies the allegation of paragraph 5 of said complaint, that a true copy of the certificate of protest is annexed to said complaint.

FIRST SEPARATE DEFENSE TO COMPLAINT.

5. The defendant, Decker Building Material Company, a corporation, is a corporation of the State of New Jersey, organizing and existing

under the statute of the State of New Jersey, entitled, "An Act concerning corporations (Revision of 1896)," as supplemented and amended, and was such corporation on July 24, 1928.

6. Said note was executed by Decker Building Material Company, a corporation, for the accommodation and benefit of Mapes Construction Co., a corporation, and not for the benefit or advantage of, or as the result of any consideration paid to, or given to, said Decker Building Material Co., a corporation.

7. The plaintiff in this action at the time that it acquired said note had notice of, or by the use of reasonable diligence might have obtained knowledge of, the facts stated in paragraphs 5 and 6 hereof.

8. Said note was executed and delivered contemporaneously with the making, execution and delivery of the contract, referred to in paragraph 1 hereof.

9. The plaintiff in this action at the time that it acquired said note had notice of, or by the use of reasonable diligence might have obtained knowledge of, the facts stated in paragraph 8 hereof.

10. The aforesaid M. Gendel, whose full name is Meyer Gendel, did not complete the work, referred to in the contract mentioned in paragraphs 1 and 9 hereof, on or before September 1, 1928.

11. The plaintiff in this action at the time that it acquired said note had notice of, or by the use of reasonable diligence might have obtained knowledge of, the facts stated in paragraph 10 hereof.

SECOND SEPARATE DEFENSE TO COMPLAINT.

12. The plaintiff is not a bona fide holder before maturity of the note mentioned in the complaint.

THIRD SEPARATE DEFENSE TO COMPLAINT.

13. The plaintiff is not a holder in due course of the note mentioned in the complaint.

FOURTH SEPARATE DEFENSE TO COMPLAINT.

14. After the dishonor of the note, referred to in the complaint, the payee of said note, Meyer Gendel, on October 31, 1928, executed and delivered to the plaintiff his note, hereinafter for the sake of convenience called a "primary obligation," which primary obligation was discounted by the plaintiff and the proceeds whereof were used to extinguish the then existing balance due from said Meyer Gendel to the said plaintiff; as security for the payment of said primary obligation, the plaintiff did then and there, receive, or agree to receive, from the said Meyer Gendel, the note referred to in the complaint.

15. Whatever right, title or interest the plaintiff has in the note referred to in the complaint, is the result of the facts set forth in paragraph 14 hereof.

FIFTH SEPARATE DEFENSE TO COMPLAINT.

16. The allegations of paragraphs 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15 are hereby repeated.

17. Thereafter and on or about November 9, 1928, the plaintiff procured the aforesaid Meyer Gendel to institute an action on the aforesaid note against the maker thereof and William D. Decker.

18. Said action was commenced in the Essex County Circuit Court.

19. Upon answers being filed the action referred to in paragraphs 17 and 18 hereof, the plaintiff was informed of the fact of the filing of such answers, and, in an attempt to overcome the effect of such answers, the plaintiff caused this action to be instituted in the Essex County Circuit Court on or about December 10, 1928.

KANTER & KANTER,
Attorneys of Defendant,
Decker Building Material Co., a Corp.

Service of a copy of the within answer is hereby acknowledged this 13th day of February, A. D., 1920, and it is stipulated that the filing of the original thereof on or before February 14, 1929, shall be deemed as of in time.

WOLBER & GILHOOLY,
Attorneys of Plaintiff.

ANSWER OF DEFENDANT, WILLIAM D. DECKER.

Filed February 13, 1929.

ESSEX COUNTY CIRCUIT COURT.

FIDELITY UNION TRUST CO., a corporation, *Plaintiff,* *vs.* DECKER BUILDING MATERIAL COMPANY, a corporation, *et als.,* *Defendants.*	*Action at at Law.* *Answer of Defendant, William D. Decker.*

The defendant, William D. Decker, residing in the City of Newark, County of Essex and State of New Jersey, answering the complaint herein, says that:

1. He admits that Decker Building Material Company, a corporation, is the maker of the note, referred to in paragraph 1 of the complaint in this cause, but says that said note was executed and delivered contemporaneously with the making, execution and delivery of a contract, of which the following is a true copy:

July 24/28

In order to induce Decker Building Material Co to give me a note of Seven Hundred Dollars to apply as paym't for Mapes Const. Co. for work cor Mapes & Eliz. Av. Newark I agree to complete all of the work as per my contract with Mapes, on or before Sept. 1- 1928 and in case of default on my part I agree to give back to Decker

the said note or if note is in other hands I agree to pay it and release Decker from any & all liability on said note.

M. GENDEL

Witness:

Wm. A. Decker.

2. This defendant admits the allegations of paragraph 2, that before the note became due, it was endorsed by William D. Decker; this defendant has no knowledge or information sufficient to form a belief as to the allegations in paragraph 2 of the complaint that before the note became due, it was endorsed by Meyer Gendel, and therefore neither admits nor denies such allegations, but leaves the plaintiff to make such proof thereof as may be lawfully required; this defendant denies that the plaintiff acquired the said note for a valuable consideration before it became due.

3. This defendant denies the allegations of paragraph 3 of the complaint and paragraph 4 of the complaint.

4. This defendant admits that a true copy of the note (as alleged in paragraph 5 of the complaint) is annexed to the complaint, but denies the allegation of paragraph 5 of said complaint that a true copy of the certificate of protest is annexed to said complaint.

FIRST SEPARATE DEFENSE TO COMPLAINT.

5. The defendant, Decker Building Material Company, a corporation, is a corporation of the State of New Jersey, organizing and existing

under the statute of the State of New Jersey, entitled, "An Act concerning corporations (Revision of 1896)," as supplemented and amended, and was such corporation on July 24, 1928.

6. Said note was executed by Decker Building Material Company, a corporation, for the accommodation and benefit of Mapes Construction Co., a corporation, and not for the benefit or advantage of, or as the result of any consideration paid to, or given to, said Decker Building Material Co., a corporation.

7. The plaintiff in this action at the time that it acquired said note had notice of, or by the use of reasonable diligence might have obtained knowledge of, the facts stated in paragraphs 5 and 6 hereof.

8. Said note was executed and delivered contemporaneously with the making, execution and delivery of the contract, referred to in paragraph 1 hereof.

9. The plaintiff in this action at the time that it acquired said note had notice of, or by the use of reasonable diligence might have obtained knowledge of, the facts stated in paragraph 8 hereof.

10. The aforesaid M. Gendel, whose full name is Meyer Gendel, did not complete the work, referred to in the contract mentioned in paragraphs 1 and 9 hereof, on or before September 1, 1928.

11. The plaintiff in this action at the time that it acquired said note had notice of, or by the use of reasonable diligence might have obtained knowledge of, the facts stated in paragraph 10 hereof.

SECOND SEPARATE DEFENSE TO COMPLAINT.

12. The plaintiff is not a bona fide holder before maturity of the note mentioned in the complaint.

THIRD SEPARATE DEFENSE TO COMPLAINT.

13. The plaintiff is not a holder in due course of the note mentioned in the complaint.

FOURTH SEPARATE DEFENSE TO COMPLAINT.

14. After the dishonor of the note, referred to in the complaint, the payee of said note, Meyer Gendel, on October 31, 1928, executed and delivered to the plaintiff his note, hereinafter for the sake of convenience called a "primary obligation," which primary obligation was discounted by the plaintiff and the proceeds whereof were used to extinguish the then existing balance due from said Meyer Gendel to the said plaintiff; as security for the payment of said primary obligation, the plaintiff did then and there, receive, or agree to receive, from the said Meyer Gendel, the note referred to in the complaint.

15. Whatever right, title or interest the plaintiff has in the note referred to in the complaint is the result of the facts set forth in paragraph 14 hereof.

FIFTH SEPARATE DEFENSE TO COMPLAINT.

16. The allegations of paragraphs 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15 are hereby repeated.

17. Thereafter, and on or about November 9, 1928, the plaintiff procured the aforesaid Meyer Gendel to institute an action on the aforesaid note against the maker thereof and William D. Decker.

18. Said action was commenced in the Essex County Circuit Court.

19. Upon answers being filed the action referred to in paragraphs 17 and 18 hereof, the plaintiff was informed of the fact of the filing of such answers, and, in an attempt to overcome the effect of such answers, the plaintiff caused this action to be instituted in the Essex County Circuit Court on or about December 10, 1928.

SIXTH SEPARATE DEFENSE TO THE COMPLAINT.

20. The note, referred to in the complaint in this cause, was not presented by the holder thereof upon the day whereon the same was made payable and at the place where the same was made payable, during the banking hours of the bank whereat the same was made payable.

21. Due notice of the dishonor of said note was not mailed to this defendant.

KANTER & KANTER,
Attorneys of Defendant,
William D. Decker.

NOTICE TO PLAINTIFF.

The plaintiff will please take notice that the defendant, William D. Decker, intends to dispute the fact of due presentment and the fact of due notice of dishonor of the note, referred to in the complaint in this cause.

KANTER & KANTER,
Attorneys of Defendant,
William D. Decker.

Service of a copy of the within answer is hereby acknowledged this 13th day of February, A. D. 1929, and it is stipulated that the filing of the original thereof on or before February 14, 1929, shall be deemed as of in time.

WOLBER & GILHOOLY,
Attorneys of Plaintiff.

NOTICE OF MOTION TO STRIKE OUT ANSWER, ETC.

ESSEX COUNTY CIRCUIT COURT.

FIDELITY UNION TRUST CO., a corporation, *Plaintiff,* *vs.* DECKER BUILDING MATERIAL COMPANY, a corporation, *et als.,* *Defendants.*	*Action at Law.* *Notice of Motion to Strike Answer and Separate Defenses and for Summary Judgment.*

To Messrs. Kanter and Kanter, Esquires, attorneys for defendants, Decker Building Material Co. and William D. Decker,
1060 Broad street, Newark, New Jersey.

Gentlemen:

PLEASE TAKE NOTICE that on Saturday, March 2, 1929, at 10 A. M., or as soon thereafter as counsel can be heard, at the Essex County Circuit Court, to be held at the Essex County Hall of Records, we shall apply to the Honorable Worrall F. Mountain, Judge of said court, or such Judge as may then be hearing Circuit Court motions for an order:

1. Striking out the answers filed by you on the ground:

(a) That they do not set up a legal defense.

(b) That they are sham and/or frivolous and are interposed merely for the purpose of delay.

2. To strike out that part of paragraph 1 of the answers filed by you referring to an alleged collateral agreement dated July 24, 1928, on the ground that they do not constitute a legal defense.

3. Striking out paragraph 2 with the exception of that part thereof admitting the endorsement of the note by William D. Decker, on the ground that they are sham and/or frivolous defense and are interposed merely for the purpose of delay.

4. Striking out paragraph 3 of the answers filed by you on the ground:

(a) That they are sham and/or frivolous and are interposed merely for the purpose of delay.

(b) And on the further ground that it does not constitute a legal defense as to the Decker Building Material Co.

5. To strike out paragraph 4 of the answers filed by you, with the exception of that part thereof admitting that a true copy of the note in question is annexed to the complaint on the ground:

(a) That they are sham and/or frivolous and are interposed merely for the purpose of delay.

(b) And on the further ground that it does not constitute a legal defense as to the defendant, Decker Building Material Co.

6. And Take Further Notice that at said time and place and before the said Judge we will move to strike out the first, second and third separate defenses on the ground that they are sham and/or frivolous and interposed merely for the purpose of delay.

7. The fourth separate defense on the ground:

(a) That they are sham and/or frivolous and interposed merely for the purpose of delay.

(b) That they do not constitute a legal defense.

8. The fifth separate defense for the reasons as to the first to fourth separate defenses inclusive.

9. The sixth separate defense on the ground that it is sham and/or frivolous and is interposed merely for the purpose of delay.

10. And Take Further Notice that we will also move for an order for summary judgment final against Decker Building Material Co. and William D. Decker and on said motion will submit affidavits attached hereto.

Respectfully,

WOLBER & GILHOOLY,
Attorneys for Plaintiff.

Affidavit of Charles Kammer.

ESSEX COUNTY CIRCUIT COURT.

FIDELITY UNION TRUST CO., a corporation, *Plaintiff,* *vs.* DECKER BUILDING MATERIAL COMPANY, a corporation, *et als.,* *Defendants.*	*Action at Law.* *Affidavit.*

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

CHARLES KAMMER, being duly sworn according to law, on his oath deposes and says:

I am an Assistant Vice President of the Fidelity Union Trust Company, the plaintiff in the above-entitled action and was the agent representing the bank in the transaction which is the subject matter of the above-entitled suit and am thoroughly familiar with all of the facts concerning the matter in so far as the Fidelity Union Trust Company is interested. On July 25, 1928 one Meyer Gendel presented to me the note of which a true copy is attached to the complaint filed in this matter which note was made by the Decker Building Material Co. and was at that time endorsed by William D. Decker. Mr. Gendel requested that the Fidelity Union Trust Company discount the note and place the proceeds thereof to his credit. I thereupon made an investigation as to the financial responsibility of the maker and the endorser Decker. The investigation consisted of my inquiring at the National Newark and Essex Bank-

ing Co. which was the bank where the note was made payable as to the financial rating of the said maker and endorser. As a result of the investigation I learned that the maker and said endorser were financially responsible and I thereupon discounted the note on behalf of the Fidelity Union Trust Company for the said Meyer Gendel and placed to the credit of said Gendel the sum of $699.95, which represented the discounted value of the note.

The said note has ever since the time that it was discounted been in the possession of the Fidelity Union Trust Company and at no time has it been out of its possession.

My attention has been called to certain allegations made by Decker Building Material Co. and William D. Decker in answers filed by them to the complaint filed in this matter. I deny particularly that I as the agent of the Fidelity Union Trust Company that transacted the business in connection with the note in question had any knowledge of a collateral agreement between the Decker Building Material Co. and Meyer Gendel such as is set up in paragraph 1 of the answers of said defendant. I further deny that I had any information or knowledge as to whether or not the Decker Building Material Co. was an accomodation maker of said note.

The only information I had in connection with the entire transaction was as a result of examining the note which on its face appeared to be in proper form and a negotiable instrument and the information I obtained from the investigation made by the bank where the note was made payable, where I learned that the maker and endorser were financially responsible. No person, other than myself, had anything to do

with the matter of this transaction on behalf of the Fidelity Union Trust Company.

On October 31, 1928 the said note of the Decker Building Material Co. having been dishonored prior thereto and on October 24, 1928 the said note was retained by the Fidelity Union Trust Company as collateral security on the note of the defendant Meyer Gendel, in the amount of $776.00 which note was in three months thereafter, and the proceeds of said note was credited to the account of Meyer Gendel but was not applied to extinguish or pay the amount due on the note of the Decker Building Material Co. which is the subject matter of this suit. The full amount of the note made by the Decker Building Material Co. is still due and has been due since the date it fell due and the same has not been paid in part or in full.

I, nor any one else on behalf of the Fidelity Union Trust Company, with authority in the premises, did not authorize Meyer Gendel or any else to institute a suit on the Decker Building Material Co. note in the Essex County Circuit Court on November 9, 1928. I, nor the Fidelity Union Trust Company, had any knowledge of that suit until receipt of a letter from Kanter and Kanter, attorneys, dated December 4, 1928. At the time of the receipt of said letter I had already instructed our attorneys Wolber & Gilhooly to institute suit on the note in question, and this suit instituted by our attorneys is the only one that was ever authorized by the bank.

There is still due and owing on the said note the sum of $700. principal and protest fee of $2.36 with interest from July 24, 1928.

Affidavit of Charles Kammer.

I am familiar with the contents of the answers filed on behalf of the defendants Decker Building Material Company and William D. Decker and I am firmly of the opinion that said answers are sham and/or frivolous and have been interposed by said defendants merely for the purpose of delay.

CHARLES KAMMER.

Sworn and subscribed to before
me this 16th day of February, 1929.

JOHN H. YAUCH, JR.,
A Master in Chancery of
New Jersey.

ESSEX COUNTY CIRCUIT COURT.

FIDELITY UNION TRUST CO., a corporation, *Plaintiff,* *vs.* DECKER BUILDING MATERIAL COMPANY, a corporation, *et als.,* *Defendants.*	*Action at Law.* *Affidavit.*

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

BERNE F. KEPPLER, being duly sworn according to law, on his oath deposes and says:

I am a Notary Public of the State of New Jersey and am employed by the Fidelity Union Trust Company, and it is my duty to present notes for payment and to give notices of dishonor in the case of notes and checks which are not honored.

On October 24, 1928 I presented for payment at the National Newark and Essex Banking Company, Newark, New Jersey, to Miss Rees, a bookkeeper of said institution, original note made by Decker Building Material Co. dated July 24, 1928, payable three months thereafter at the said National Newark and Essex Banking Co. in the amount of $700.00 endorsed by William D. Decker and Meyer Gendel. I made the presentment at 3:30 P. M. and payment thereof was refused because payment had been stopped by the maker. At the same time I learned that the address of the Decker Building Material Co. according to the records of the

National Newark and Essex Banking Co. was #513 Lyons avenue, Irvington, New Jersey.

On the same day as aforesaid, to wit October 24, 1928 and during banking hours I directed notices of protest of said note to the Decker Building Material Company at #513 Lyons avenue, Irvington, New Jersey, Meyer Gendel at #53 Schuyler avenue, Newark, New Jersey and William D. Decker at #513 Lyons avenue, Irvington, New Jersey. Said notices of protest were directed by me inserting the notices in envelopes addressed to the aforesaid parties at the aforesaid addresses respectively and each envelope had postage prepaid in the amount of 2c and the envelope bore the return address of the Fidelity Union Trust Company. Said envelopes with the notices therein were deposited in a United States mail box by me on the day and during the time aforesaid. Said notices were not returned by the Post Office authorities. Attached hereto is a true copy of certificate of protest made by me in connection with the said presentment and the giving of notices of protest.

BERNE F. KEPPLER.

Sworn and subscribed to before me this 20th day of February, 1929.

LOUISE RAIMO,
A Notary Public of New Jersey.
My Commission expires April 10, 1933.
(SEAL)

Affidavit of Berne F. Keppler.

UNITED STATES OF AMERICA,
STATE OF NEW JERSEY, } *ss.*

On the 24th day of October in the year of our Lord one thousand nine hundred and twenty-eight, at the request of Fidelity Union Trust Co., Newark, N. J., Berne F. Keppler, Notary Public, in and for the State of New Jersey, duly appointed, commissioned and sworn, residing in the Township of Union, and State of New Jersey, did present the original note made by Decker Building Material Company payable at three months after date for $710.73 dated July 24, 1928 and hereunto annexed, at the National Newark and Essex Banking Company, Newark, New Jersey, to bookkeeper National Newark and Essex Banking Company, at Newark aforesaid and of him demanded payment thereof, who then and there refused to pay the same; saying the maker was not present, and had not there left funds for that purpose. Payment stopped.

WHEREUPON, I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the drawer and endorsers of the said note, as against all others who it doth or may concern for exchange, re-exchange and all costs, charges, damages and interest already incurred, and to be hereafter incurred for want of payment of said note and on the 24th day of October, A. D., 1928, I gave notice of said non-payment, to the maker and endorsers thereof by depositing said notice in the post office at Newark, N. J., directed and addressed to them at their residences or places of business, with postage prepaid thereon, before the hour of 6 P. M. of said day, viz: Decker Building Material Company 513 Lyons avenue, Irvington, N. J.; Meyer Gendel, 54 Schuy-

ler avenue, Newark, N. J.; Wm. D. Decker, 513 Lyons avenue, Irvington, N. J.

THUS DONE AND PROTESTED in the City of Newark and State aforesaid in the presence of JOHN DOE and RICHARD ROE, witnesses,

In Testimonium Veritatis,

BERNE F. KEPPLER,
Notary Public.

Protest No. 48400 page No.

Protest 48400 of Decker Building Material Co.

	$710.73
Notary's Fee	2.00
Notices	.30
Postage and Notices	.06
	$713.09

Dated October 24, 1928.

Affidavit of Robert W. Wolfe.

ESSEX COUNTY CIRCUIT COURT.

FIDELITY UNION TRUST CO., a corporation, *Plaintiff,* *vs.* DECKER BUILDING MATERIAL COMPANY, a corporation, *et als.,* *Defendants.*	*Action at Law.* *Affidavit.*

ROBERT W. WOLFE, being duly sworn according to law, upon his oath deposes and says:

I am a practising attorney-at-law of the State of New Jersey and on or about November 9, 1928, I instituted suit at the Essex County Circuit Court on behalf of one Meyer Gendel on a note made by Decker Building Material Co., dated July 24, 1928 in the amount of $700. payable three months after date at the National Newark and Essex Banking Company. The said note bore the endorsements of William D. Decker and Meyer Gendel.

The said Meyer Gendel informed me, at that time, that he was the holder of said note, that payment had been stopped thereon, that the note was at the bank and that he would be able to obtain same.

Suit was instituted and bill of complaint was drawn based upon a true copy of said note which I had obtained from the Fidelity Union Trust Company, (American Branch).

The first information that I had as to the bank's interest in the note was obtained by me some time after the suit was instituted by me.

I thereupon immediately offered to discontinue said suit and this I am about to do.

At no time have I had possession of said note nor have I seen Meyer Gendel have possession thereof.

ROBERT W. WOLFE.

Sworn and subscribed to before me this 19th day of February, 1929.

JAY F. DAILEY,
An Attorney at Law of
New Jersey.

Service of the within notice of motion is hereby acknowledged this 21st day of February, A. D. 1929.

KANTER & KANTER,
Attorneys for Defendants Decker Building Material Co. and William D. Decker.

DEFENDANTS' AFFIDAVITS.

Filed March 2, 1929.

ESSEX COUNTY CIRCUIT COURT.

FIDELITY UNION TRUST CO., a corporation, *Plaintiff,* *vs.* DECKER BUILDING MATERIAL COMPANY, a corporation, *et als.,* *Defendants.*	*Action at Law. Affidavit.*

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

WILLIAM D. DECKER, of full age, being duly sworn according to law, on his oath deposes and says:

1. I am one of the defendants in the above-entitled cause and am also the president of Decker Building Material Company, a corporation, the other defendant therein; I am duly authorized to make this affidavit in behalf of the last-mentioned defendant. I have personal knowledge of the facts herein stated. This affidavit is furnished as an answer to the affidavits submitted for the plaintiff in the above-entitled action (in support of its motion to strike out the answers in this cause, and for summary judgment), in respect to questions of fact therein mentioned, and it is desired to be considered in addition to the legal arguments based upon the inefficiency of the affidavits of the plaintiff.

2. The defendant, Decker Building Material Company, a corporation, is a corporation of the State of New Jersey, organizing and existing under the statute of the State of New Jersey, entitled "An Act concerning corporation (Revision of 1896)," as supplemented and amended, and was such corporation on July 24, 1928. On the said last-mentioned date, Mapes Construction Company, a corporation, was engaged in the erection and construction of a certain building at the corner of Mapes avenue and Elizabeth avenue, Newark, N. J. The payee of the note, Meyer Gendel, was the painting contractor of the Mapes Construction Company, a corporation. That painting work, as I was told both by Meyer Gendel and the officers of the Mapes Construction Company, a corporation, was proceeding very slowly. The only interest which I or Decker Building Material Company, a corporation, had in the matter was that Decker Building Material Company, a corporation, was a creditor of Mapes Construction Company, a corporation. The officers of the Mapes Construction Company, a corporation, and Meyer Gendel, came to me and asked me to give my company's note to Meyer Gendel in order to induce Meyer Gendel to proceed more rapidly with his work for the Mapes Construction Company, a corporation. Thereupon, without consulting the board of directors of my company, I executed the note, mentioned in the complaint, and endorsed it. Contemporaneously with the execution and delivery of that note, Meyer Gendel executed and delivered a contract, of which the following is a true copy:

July 24/28.

In order to induce Decker Building Material Co. to give me a note of Seven Hundred Dollars to apply as paym't for Mapes Const. Co. for work Cor. Mapes & Eliz. Av., Newark, I agree to complete all of the work as per my contract with Mapes, on or before Sept. 1, 1928, and in case of default on my part I agree to give back to Decker the said note or if note is in other hands I agree to pay it and release Decker from any & all liability on said note.

M. GENDEL.

Witness:

WM. A. DECKER.

The facts hereinabove stated are the only consideration given for said note. Since the making of said note, I have been advised, and truly believe, that, as a matter of law, the maker of said note had no lawful power or authority to make such a note, which was purely for the accommodation and benefit of Mapes Construction Co., a corporation, and not for the benefit or advantage of, or as the result of any consideration paid to, or given to, said Decker Building Material Co., a corporation.

3. As a matter of fact, the aforesaid Meyer Gendel did not, on or before, September 1st, 1928, complete all of the work, referred to in the memorandum of July 24, 1928, quoted verbatim in paragraph 2 hereof. He also failed to return the note. Said Meyer Gendel, on November 9, 1928, brought a suit against me and Decker Building Material Company, a corporation, in the Essex County Circuit Court, founded upon the very

note whereon the plaintiff, in this cause, is now suing. Mr. Elias A. Kanter, of the law firm of Kanter & Kanter, was in charge of the defense of that suit for me and my company, and by a separate affidavit, accompanying this affidavit, will state what happened in the aforesaid suit instituted by Meyer Gendel, said suit having been instituted in the Essex County Circuit Court.

4. For obvious reasons, and principally because I was not present, I am not able to make any statement with regard to the facts stated in the first paragraph of the affidavit of Mr. Charles Kammer, the assistant vice-president of the plaintiff; the paragraph to which I refer commences with the words, "I am an Assistant Vice President," and ends with the words, "the discounted value of the note." I do, however, deny that the note involved in this suit has been in continuous possession of the plaintiff since July 25, 1928. The basis for this denial lies in the fact of the institution of the suit of Meyer Gendel (above referred to) and in the fact that some time around the latter part of October, 1928, Meyer Gendel informed me that he had had to "take up" that note from his bank, meaning the plaintiff bank, and wanted me to pay it. I am not certain about the date of this conversation with Meyer Gendel, but I do know that it occurred after the Mapes Construction Company, a corporation, had been adjudged an insolvent corporation, which was some time in October or November, 1928.

5. My relations with Meyer Gendel are today strictly unfriendly; I cannot get his deposition unless this Court will order the deposition to be

taken before a Supreme Court Commissioner or other officer. I would also like to have a deposition taken of Mr. Charles Kammer, the plaintiff's vice-president, for the purpose of bringing out certain facts which are in his personal knowledge and in the knowledge of the plaintiff bank; the facts sought to be established are that the bank is, as a matter of fact, not a bona fide holder for value of the note in suit; I would also like to have the records of the bank examined in substantiation of this statement.

6. I do not reside at No. 513 Lyons avenue, Irvington, N. J., and have never resided there. Neither is that address my place of business. The directory of the City of Newark for 1928, and the telephone book for that period, all disclosed that I lived, during 1928, where I still live, at No. 169 Clinton avenue, Newark, N. J. I never received the notice of protest which Berne F. Keppler, the notary public, in his affidavit, he says he addressed to me personally. I also believe that it is necessary to take the deposition of Berne F. Keppler, by the compulsory process of this court, to bring out certain facts which he fails to disclose in his affidavit, and also to show that the presentment of the note by him was in behalf of the then holder thereof, Meyer Gendel.

7. My co-defendant and I are presenting our defenses in this cause in good faith, and not for purpose of delay. A large part of the facts are peculiarly within the knowledge of persons who are hostile to me and my co-defendant, and their testimony can only be procured (unless the Court will order their depositions taken) at the trial of this cause. Both I and my co-defendant,

and each of us, are amply able to meet any judgment that may be rendered in this cause.

WM. D. DECKER.

Sworn and subscribed to before me this first day of March, A. D. 1929.

IRVING HODES,
A Notary Public of New Jersey.

ESSEX COUNTY CIRCUIT COURT.

FIDELITY UNION TRUST CO., a corporation, *Plaintiff,* *vs.* DECKER BUILDING MATERIAL COMPANY, a corporation, *et als.,* *Defendants.*	*Action at Law.* *Affidavit.*

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

ELIAS A. KANTER, of full age, being duly sworn according to law, on his oath deposes and says:

1. I am a member of the firm of Kanter & Kanter, attorneys of the defendants in the above-stated action, and am in personal charge of the defense in this cause. I am also in personal charge of the defense of the suit instituted in the Essex County Circuit Court by Meyer Gendel against the above-named defendants, hereinafter

referred to, in which suit Kanter & Kanter are the attorneys of the defendants.

2. Some time between November 9th and November 13th, 1928, there was brought to me a summons and complaint issued out of the Essex County Circuit Court in a suit wherein Meyer Gendel is the plaintiff and Decker Building Material Company and William D. Decker are the defendants. That suit was instituted by the plaintiff therein on the note that is described in the complaint in the above-entitled action, the allegation in the Gendel suit being that the plaintiff was the owner of the note. The record of that suit in the Essex County Circuit Court is Docket N. 1, page 461, No. 47958. For the sake of convenience, I refer to that suit hereafter as the Gendel suit.

3. Affidavits of merits were filed in the aforesaid Gendel suit on November 19, 1928, and answers were filed therein on November 30, 1928. Among the defenses raised by the answers in the Gendel suit were these (1) the note was executed without consideration; (2) the note was executed by the Decker Building Material Company, a corporation of the State of New Jersey, for the accommodation of Mapes Construction Company, and (3) Meyer Gendel failed to perform the terms of the contract, dated July 24, 1928, which contract is quoted in full in paragraph 2 of the affidavit of Mr. William D. Decker, which accompanies this affidavit. NO PLEADING WAS EVER FILED BY THE PLAINTIFF IN THE GENDEL SUIT IN ANY WAY DENYING, OR ATTEMPTING TO LESSEN THE EFFECT, OF THE DEFENSES RAISED IN THE ANSWERS AS ABOVE STATED.

The only defensive action taken by the plaintiff, Gendel, in that suit, was to move to strike out a counter-claim, asking for judgment for the return of the note in question. Judge Smith ruled that such a counter-claim was not permissible. I desire to offer in evidence the record of the Gendel suit, upon the argument of this motion, if it be necessary so to do.

4. On December 4, 1928, I sent a letter to the Fidelity Union Trust Company, of which the following is a true copy:

December 4th,
1 9 2 8

Fidelity Union Trust Co.,
(American Branch),
239 Springfield Avenue,
Newark, N. J.

Gentlemen:

On November 9th, 1928, Mr. Robert W. Wolfe commenced an action in behalf of MEYER GENDEL (whom we believe to be one of your depositors), in the Essex County Circuit Court, against Decker Building Material Co., a corporation of New Jersey, and William D. Decker, who are our clients, alleging in the complaint that Mr. Gendel was the owner of the note sued on, a copy whereof is as follows:

$700.00 Newark, N. J. July 24, 1928.
Three months after date we promise to pay to the order of Meyer Gendel
Seven Hundred .....DOLLARS
Payable at Natl. Bk. and Essex Bkg. Co.
Value received Decker Bldg. Material Co.
No. 65910 Due Wm. D. Decker, Pres.

Affidavit of Elias A. Kanter.

Endorsements

Wm. D. Decker,
513 Lyons Ave.
Irvington, N. J.

Meyer Gendel
54 Schuyler Ave.

In behalf of the defendants, we filed answers which answers, among other things, sought a judgment for the return of the note based upon a written contract made by Mr. Meyer Gendel which contract, in our judgment, makes the return of such note obligatory upon Mr. Gendel.

Since the filing of these answers, Mr. Robert W. Wolfe, attorney of Mr. Gendel, has asked us for permission to discontinue the suit, stating that your bank, and not his client, was the actual holder and owner of the note. This last mentioned statement of Mr. Wolfe's is at variance with the information in our possession, among which is the fact that the amount of the note (that had theretofore been discounted by Mr. Gendel's bank) had been charged back by such bank against the account of Mr. Gendel.

We would appreciate your advising us whether your bank claims to be the holder and owner of the note above mentioned, whether Mr. Meyer Gendel had discounted such note with you, whether he had placed such note with you for collection, and what amount, if any, you claim to be due to you by reason of such note from the maker thereof.

Frankly, we desire this information solely for the purpose of protecting our clients' in-

terests, as it may be necessary, in the event of your claiming to be the holder and owner of such note, to take some proceedings, affirmatively against your bank. Naturally, we are very reluctant to do so, and we would not be obliged to do so if you disclaim such ownership and holding. We believe that the original statement, made in the complaint, by Mr. Gendel, that he is the owner of the note, is the truth, and that the attempt to foist such ownership upon you is purely an afterthought, intended to circumvent the defenses raised by the answers.

A copy of this letter has been sent to Mr. Robert W. Wolfe, 24 Branford Place, Newark, N. J., attorney of Mr. Meyer Gendel. Of course, you will please understand that no reflection is intended upon Mr. Wolfe, as we consider him acting merely pursuant to advices and information given him by Mr. Gendel, his client.

Your immediate response to this letter will be highly appreciated.

Very truly yours,
KANTER & KANTER,
By: ELIAS A. KANTER.

EAK:JAG

I believe that the letter above quoted was received because Mr. Charles Kammer, vice-president of the plaintiff, refers to the fact of the receipt of our letter, dated December 4, 1928. No response was received to that letter, and in particular, I wish to emphasize that the plaintiff bank did not deny the truth of the claims made in that letter.

5. After the occurrence of the events above narrated, the above-entitled suit was instituted, the date of the commencement of the action being December 10, 1928, although service was not made until a few days thereafter.

6. During the pendency of this cause, and on or about December 28, 1928, I served a demand for a bill of particulars upon the attorneys of the plaintiff. Among the particulars required was the following:

> "A statement as to whether or not the plaintiff accepted from Meyer Gendel (after the note referred to in the complaint had been dishonored for non-payment) another note the proceeds of which were discounted by the plaintiff, and as a result of which discounting the balance then due from Meyer Gendel to the plaintiff was cancelled, and, if any note was received from Meyer Gendel by the plaintiff, after October 23rd, 1928, the date of such note, the amount of such note, the due date of such note, and the disposition of the proceeds, etc."

In response to this demand, the plaintiff furnished the following particulars:

> "After the dishonor of the note which is the subject matter of this suit, on which there was then due $710.73; and the dishonor of a note discounted for Meyer Gendel made by East Side Holding Co., on which there was then due $456.97, or a total on both of $1167.70, plaintiff on October 31, 1928, secured from Meyer Gendel a collateral form of note payable in three months of which both of the aforesaid notes were deposited as collateral security, which said collateral

form of note was for $776 and which was discounted by plaintiff; the proceeds being $775.85 which were credited to the account of Meyer Gendel and his said account was charged with $1167.70 plus protest fees and accrued interest."

7. In addition, in the aforementioned demand for bill of particulars, demand was made for the following particulars:

"A copy of the plaintiff's account with the defendant, Meyer Gendel, for the months of July, August, September, October and November, 1928."

"A tenor and terms of all agreements entered into between the plaintiff and Meyer Gendel with reference to the note referred to in the complaint in this cause, with a statement as to whether such agreements are evidenced by any written instruments, and, in respect to such agreements evidenced by written instruments, a copy of the written instruments."

"A copy of the note delivered by Meyer Gendel to the plaintiff, after the note sued on had been dishonored for non-payment, and a copy of all the collateral then assigned or delivered to the plaintiff contemporaneously with the execution and delivery of such note."

The plaintiff failed to furnish the particulars, mentioned in this paragraph. Thereupon, a notice of motion was given on January 19, 1929, returnable January 26, 1929, for an order compelling the plaintiff to furnish the above-quoted particulars. Mr. John H. Yauch, Jr., of the law firm of Wolber & Gilhooly, opposed the motion

which was argued before the Hon. William A. Smith, a Judge of the Essex County Circuit Court, who presided on January 26, 1929. Judge Smith ruled that the particulars demanded, although necessary in connection with the answers filed by the defendants, were not the proper subject matter of a bill of particulars. I pointed out to Judge Smith that the information might become extremely necessary, if the plaintiff should move to strike out the answers, and that the information was within the peculiar knowledge of the plaintiff. Judge Smith then stated that if such a motion that is, a motion to strike out the answers, were made, he would see to it that the interests of the defendants, who might not be able to give legally competent evidence in opposition to such a motion, should be amply protected. This eventuality, I fear, has now arisen.

8. When I was served with the notice of this motion to strike out the answers and to enter summary judgment, I at once sent a letter to Messrs. Wolber & Gilhooly of which the following is a true copy:

February 21st,
1 9 2 9

Messrs. Wolber & Golhooly,
763 Broad Street,
Newark, N. J.

Att: Mr. Yauch

Re: Fidelity Union v. *Decker Bldg., et als.*

Gentlemen:

We have just acknowledged service of notice of motion returnable March 2nd. The

writer, who is in personal charge of this matter, has already arranged to be absent from Newark on that date, and such arrangements cannot now be changed. For reasons with which Mr. Yauch is familiar, we believe that this motion should be heard by Judge Smith who has already made some rulings in this case and who is most familiar with it. Will you, therefore, in view of these reasons, have the motion continued to Saturday, March 9th?

Very truly yours,

KANTER & KANTER,

By: ELIAS A. KANTER.

EAK:JAG

On Saturday, February 23rd, Mr. Yauch called me on the telephone and stated to me that while he was very sorry to have to interfere with the arrangements that I had made for March 2nd, he would insist upon proceeding on that day, and that if I personally was to argue the motion, I would have to make arrangements accordingly. I urged upon Mr. Yauch the propriety of having Judge Smith dispose of this motion, by reason of his greater familiarity with the cause and because of the previous rulings, but Mr. Yauch stated that he wanted to proceed before Judge Mountain.

ELIAS A. KANTER.

Sworn and subscribed to before
me this 1st day of March,
A. D. 1929.

EMIL HERRIGEL,
An Attorney at Law of New Jersey.

ORDER FOR SUMMARY JUDGMENT.

Filed March 4, 1929.

ESSEX COUNTY CIRCUIT COURT.

FIDELITY UNION TRUST COMPANY, a corporation, *Plaintiff,* *vs.* DECKER BUILDING MATERIAL COMPANY, INC., WILLIAM D. DECKER, MEYER GENDEL, *Defendants.*	*Action at Law.* *Order for Summary Judgment.*

It appearing by the affidavits filed in this cause that the defenses made by the answers of the defendants, Decker Building Material Company, Inc., and William D. Decker, are sham, and the said defendants, after due notice, having failed to show such facts as entitled them to defend:

It is, on this 4th day of March, 1929, on motion of Wolber & Gilhooly, attorneys for plaintiff, and in the presence of Elias A. Kanter, attorney for defendants, Decker Building Material Co., Inc., and William D. Decker, Ordered that the defenses set up in said answers be stricken out and that final judgment be entered for plaintiff against the defendants, Decker Building Material Co., Inc., and William D. Decker, in the amount of $727.30, being the total amount due with interest up to date, together with costs of suit to be taxed.

An exception is allowed to the entry of this order to the defendants, Decker Building Material Co., Inc., and William D. Decker.

WORRALL F. MOUNTAIN,
Judge of the Essex County Circuit Court.

Damages	$..727.30
Costs	83.53
	$810.83

NOTICE AND GROUNDS OF APPEAL.

Filed March 13, 1929.

ESSEX COUNTY CIRCUIT COURT.

FIDELITY UNION TRUST CO., a corporation, *Plaintiff,* *vs.* DECKER BUILDING MATERIAL COMPANY, a corporation, *et als.,* *Defendants.*	*Action at Law.* *Notice and Grounds of Appeal.*

To Messrs. Wolber & Gilhooly, attorneys of the plaintiff:

Gentlemen:

PLEASE TAKE NOTICE that the defendants, Decker Building Material Company, a corporation, and William D. Decker, hereby appeal to the Court of Errors and Appeals from the order and judgment entered in the above-entitled action, dated March 4, 1929, and from so much thereof as adjudges that the defenses set up in the answers of the aforesaid Decker Building Material Company, a corporation, and William D. Decker, should be stricken out and ordering that judgment final should be entered in favor of the plaintiff for the sum of $727.30, damages, with costs of suit to be taxed, against the aforesaid defendants, Decker Building Material Company, a corporation, and William D. Decker, on the following grounds:

Notice and Grounds of Appeal.

1. The affidavits whereon the plaintiff's motion, resulting in the aforesaid order and judgment, were based, were not, in law, sufficient to permit the Essex County Circuit Court, or the Judge thereof, to strike out the answers of the defendants, Decker Building Material Company, a corporation, and William D. Decker, and to permit the entry of final judgment in favor of the plaintiff against the aforesaid defendants.

2. The affidavits submitted by the defendants, Decker Building Material Company, a corporation, and William D. Decker, in opposition to the motion resulting in the judgment and order hereby appealed from showed such facts as entitled the aforesaid defendants, Decker Building Material Company, a corporation, and William D. Decker, to defend the action.

Newark, N. J., March 13, 1929.

Yours, etc.,

KANTER & KANTER,
Attorneys of Defendants, Decker Building Material Company, a corporation, and William D. Decker.

Service of the within notice and grounds of appeal is hereby acknowledged this 13th day of March, A. D. 1929.

WOLBER & GILHOOLY,
Attorneys of Plaintiff.

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

New Jersey Court of Errors and Appeals

Fidelity Union Trust Co., a corporation, *Plaintiff-Respondent,* *vs.* Decker Building Material Company, a corporation, and William D. Decker, *Defendants-Appellants.*	*On Appeal.*

BRIEF OF DEFENDANTS-APPELLANTS.

Kanter & Kanter, attorneys and counsel of defendants-appellants.

Summary of the Issues.

This action was instituted by the plaintiff, Fidelity Union Trust Co., to recover judgment on a promissory note (State of Case, top of p. 5) made by Decker Building Material Co., and endorsed by William D. Decker and another.

The two mentioned defendants, who are the appellants in this cause, filed their separate answers; the answer of the Decker Building Material Company is printed on pp. 7-11 of the State of the Case; the answer of William D. Decker is printed on pp. 12-17 of the State of the Case. The plaintiff thereupon gave notice of motion to strike out those answers, on the grounds, in brief, that they were sham, frivolous, and constituted no legal defenses (State of Case, pp. 18-20); that motion was supported by affidavits (State of Case, pp. 21-30). Upon the argument of the motion, answering affidavits were filed (State of Case, pp. 31-44).

After the argument upon the motion, the Essex County Circuit Court ordered that "the defenses made by the answers of the defendants, Decker Building Material Company, Inc. and William D. Decker, are sham, and the said defendants, after due notice, having failed to show such facts as entitled them to defend," that such answers be stricken out and that final judgment be entered in favor of the plaintiff against the defendants-appellants (State of Case, p. 45). An exception to the entry of this order was allowed and entered (State of Case, top of page 46).

The present appeal is prosecuted to review the entry of the aforesaid order of final judgment. The grounds of appeal, as stated in the notice of appeal, are printed on p. 45 of the State of the Case, and are as follows:

1. The affidavits whereon the plaintiff's motion, resulting in the aforesaid order and judgment, were based, were not, in law, sufficient to permit the Essex County Circuit Court, or the Judge thereof, to strike out the answers of the defendants, Decker Building Material Company, a corporation, and William D. Decker, and to permit the entry of final judgment in favor of the plaintiff against the aforesaid defendants.

2. The affidavits submitted by the defendants, Decker Building Material Company, a corporation, and William D. Decker, in opposition to the motion resulting in the judgment and order hereby appealed from showed such facts as entitled the aforesaid defendants, Decker Building Material Company, a corporation, and William D. Decker, to defend the action.

It is the purpose of counsel for the appellants to demonstrate that the order and judgment appealed from are erroneous and that such order and judgment should be reversed.

POINT I.

The affidavits in support of the motion to strike out the answers of the appellants were not, as a matter of law, sufficient to justify the striking out of the answers and the entry of the final judgment.

1. The point above made is merely a restatement of the first ground of appeal (State of Case, p. 48, ll. 1-12).

2. It will be observed that the order striking out the answers and entering summary judgment adjudged that "the answers * * * are sham, and the said defendants * * * failed to show such facts as entitle them to defend" (State of Case, p. 45, ll. 23-25). The court did *not* rule that the answers were insufficient in law; its sole ruling was that the answers were sham, that is, untrue in fact, and that the affidavits submitted by the defendants failed to show facts entitling them to defend. The action of the trial judge was necessarily predicated upon the following provisions of the statute and rules of court:

> "When an answer is filed in an action brought to recover a debt or liquidated demand arising:
>
> (a) Upon contract express or implied, sealed or not sealed; or,
>
> (b) Upon a judgment for a stated sum; or,
>
> (c) Upon a statute;
>
> the answer may be struck out and judgment final may be entered upon motion and affidavit as hereinafter provided, unless the defendant by affidavit or other proofs shall show such facts as may be deemed, by the judge hearing the motion, sufficient to entitle him to defend."
>
> P. L. 1912, p. 394, rule 57; S. C. R. 1913, rule 80.

"The motion to strike out shall be made upon affidavit of the plaintiff or that of any other person cognizant of the facts, verifying the cause of action, and *stating the amount claimed and his belief that there is no defense to the action.*" (Italics ours.)

P. L. 1912, p. 394, rule 58; S. C. R. 1913, rule 81.

3. We stress that in order to deprive a defendant of his right to trial by jury the least that should be required from a person attempting to take advantage of such procedure is to comply with the statutory provisions allowing such a privilege. The statute is plain (as quoted in paragraph 2 under Point I, above) that such notice of motion must be accompanied by an affidavit, of the plaintiff or person cognizant of the fact, among other things, stating "his belief that there is no defense to the action." **The affidavits in support of the plaintiff's motion do not contain any such statement.** Three affidavits were used by the plaintiff. One affidavit was by Robert W. Wolfe, printed on pp. 29-30 of the State of Case, in substance, stating that he is an attorney-at-law, that he brought suit upon the note at the request of Meyer Gendel who had informed him that he (Meyer Gendel) was the holder of the note, and that the affiant's first information of the plaintiff-bank's interest in the note was after the institution of that suit; the statutory requirement concerning the belief of the affiant "that there is no defense to the action" is not contained in this affidavit. Another affidavit, printed on pp. 25-28 of State of Case, was furnished by Berne F. Keppler, the notary public who swears to the facts touching upon the questions of presentment and notice of dishonor; the statutory requirement concerning the belief of the affiant "that there is no defense to the action" is not contained in this affidavit. The

only remaining, and in fact, the principal affidavit, is that of Charles Kammer, the vice-president of the plaintiff-bank (State of Case, pp. 21-24); that affidavit goes into the facts of the case, and in the final paragraph (State of Case, top of page 24), Mr. Kammer states "I am familiar with the contents of the answers * * * and I am firmly of the opinion that said answers are sham and/or frivolous and have been interposed by said defendants merely for the purpose of delay." Clearly, this expression of opinion is not what the statute or rule of court, rule 81 above cited and quoted, required. Mr. Kammer's affidavit gives his opinion on a legal question; it is not a statement of "his belief that there is no defense to the action."

The Supreme Court, speaking by the late Justice Katzenbach, has ruled on this question, using the following language:

> "An examination of the affidavits submitted by the plaintiff fails to show that the plaintiff, by an officer or authorized agent, has stated *its belief that there is no defense to the action. This is necessary.*" (Italics ours.)
>
> *Great American Indemnity Co.* v. *Gronowicz,* 142 Atl. 897, 898; 6 N. J. Misc. 821, 823; not yet officially reported.

4. In the foregoing analysis of the foregoing affidavits used by the plaintiff, we have analyzed *all* of the affidavits used by the plaintiff. As has been shown, none of such affidavits comply with the statutory requirement, as enacted in rule 81. We challenge counsel for the plaintiff to point out where, in any of the affidavits furnished by them, there is any statement of "belief that there is no defense to the action." Without such an averment in the affidavit, there was no statutory authority for the court to strike out the answers

and to enter summary judgment, and because the affidavits of the plaintiff were, in this respect, not legally sufficient, the order and judgment should be reversed.

POINT II.

The affidavits of the defendants-appellants showed such facts as entitle them to defend.

5. The point above made is merely a restatement of the second ground of appeal (State of Case, p. 48, ll. 12-20).

6. The statute and rule of court (quoted in paragraph 2 under Point I above), is that "the answer *may* be struck out * * * unless the defendant by affidavit or other proof shall show such facts as may be deemed * * * sufficient to entitle him to defend." Under this statute, the defendant is not required to establish his defense; he is required only to show such facts as entitle him to defend. Such facts were shown by the affidavits which were before the trial judge when the answers were stricken out and summary judgment entered. These facts, both, as shown in the affidavits of the defendants and in the affidavits of the plaintiff, will be hereafter more particularly pointed out.

7. In the affidavit of Mr. Kammer (State of Case, pp. 21-24), which affidavit was furnished by the plaintiff, that affiant, the vice-president of the plaintiff-bank, states that the plaintiff became the holder of the note on July 25, 1928. Particularly, he states:

> "I thereupon discounted the note on behalf of the Fidelity Union Trust Company for the said Meyer Gendel and placed to the credit of said Gendel the sum of $699.95, which represented the discounted value of the note." State of Case, p. 22, ll. 8-13.

Assuming such statement to be the truth, that does not make the bank a bona fide holder for value. The rule of law, supported by the citation of numerous and persuasive authorities, both in the United States courts and State courts, applicable to this situation, is thus stated in Corpus Juris:

> "Except, it seems, in England, and in Canada, it is settled that the mere discounting and crediting of the amount on the depositor's account, without making payment or incurring any increased obligations or liabilities, is not sufficient to make the bank a bona fide holder for value; * * *. And the rule has been applied, even when the bank applies the proceeds of the discounted paper to the payment of the depositor's indebtedness to the bank, although it has been held to be incumbent on the bank, in such a case, to show that it was expressly agreed that the avails should be so applied * * *. These rules are not changed by the provisions of the Negotiable Instruments Law * * *."
>
> 8 C. J. "Bills and Notes" Sec. 700 b. pp. 482-485.

8. The rule, applicable to this situation, is thus stated in Daniel's Negotiable Instruments:

> "Mere discount and credit do not of themselves constitute a bona fide purchaser for value. To occupy that position, the holder must have actually parted with something of value for the note. * * * Under several provisions of the statute (Negotiable Instruments Act) it is held that merely giving the transferee credit does not constitute the transferee a holder in due course. Thus, when a bank simply discounts a note and credits the amount thereof on the endorser's account, without paying him anything of value for it, such bank is not a purchaser

for value or a holder in due course as defined by the statute, * * *."

Daniel's Negotiable Instruments (1913 Ed.) Sec. 779b, pp. 907-908.

9. An examination of some of the cases, decided on this point of law in the light of the provisions of the uniform Negotiable Instruments Act indicates that the text of Corpus Juris is supported by the adjudicated cases. In the leading and well considered case of *Albany County Bank* v. *People's Co-Op. Ice Co.,* 86 N. Y. Supp. 773, where there is an exhaustive examination of the authorities, the head note to the case, correctly summarizing its conclusions, is:

"Placing the proceeds of a discounted note to the credit of an endorser at a bank is not payment therefor, so as to render the bank a holder in due course, within (Negotiable Instruments Act), providing that a holder in due course takes an negotiable instrument free from any defenses available to prior parties among themselves, and section 93, providing that, where the transferee receives notice of any infirmity in the instrument before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount paid."

Albany County Bank v. *People's Co-Op. Ice Co.,* 86 N. Y. Supp. 773; 92 App. Div. 47.

10. In the case of *Standing Stone National Bank* v. *Wasler,* 162 N. C. 53; 77 S. E. 1006, which arose under the Negotiable Instruments Act, the court held that where the evidence showed that a bank, suing on a note, merely credited its endorser's account, and did not show that the amount had been checked out, defenses or counter-claims available against the endorser could be proved, notwithstanding the provisions of the statute, under which, an endorsee is presumed to be a holder in due course. Recently,

Judge Oliphant, in the Mercer County Circuit Court, filed an opinion, in the case of *Hightstown Trust Co.* v. *American Equity Corporation,* 144 A. 599; 7 N. J. Misc. R. 135, enunciating the same rule of law. The same rule was observed in *McNight* v. *Parsons,* 136 Iowa 390; 113 N. W. 858; 22 L. R. A. (N. S.) 718, and in *Drovers' National Bank* v. *Blue,* 110 Mich. 31; 67 N. W. 1105.

11. It follows, from what we have said that the status of the plaintiff bank, as a matter of law, was *not* that of a bona fide holder for value.

12. The first defense necessarily raised by the Decker Building Material Company, in substance, was that the plaintiff bank was not a bona fide holder for value before maturity. This defense is stated in various ways: 1st, in paragraph 2 of its answer (State of Case, p. 8, ll. 20-23); 2nd, in the second separate defense and the third separate defense (State of Case, p. 10, ll. 1-15); 3rd, in the fourth separate defense (State of Case, p. 10, ll. 15-35); and 4th, in the fifth separate defense (State of Case, pp. 10-11). Aside from the plaintiff's own evidence, quoted at the beginning of paragraph 7 above, showing that, as a matter of law, it was not a bona fide holder for value before maturity, the evidence before the court, on the motion to strike the answer, was most complete and adequate to the effect that the plaintiff was not, in fact, a bona fide holder for value. Such evidence, in brief, was as follows:

A. The payee of the note, Meyer Gendel, some time prior to November 9th, 1928, instituted a suit on the note in question in the Essex County Circuit Court; an answer was filed in the Gendel suit, setting up the defenses of (1) no considera-

tion, (2) that the corporation maker was only an accommodation party, (3) that Gendel failed to perform the contract, pursuant to which the note was given, that is, a failure of consideration, and (4) that no pleading was filed by Gendel to minimize the effect of these defenses. See State of Case, p. 37, ll. 3-40. **None of these statements were contradicted.**

B. The present suit was instituted December 10th, 1928 (State of Case, p. 1, l. 20). Before the institution of this suit, the plaintiff was informed of the pendency of the Gendel suit and of the defenses raised therein (State of Case, pp. 38-39) and particularly of the fact that a return of the note was sought in the Gendel suit (State of Case, p. 39, ll. 10-15). This information was received by the plaintiff, and the plaintiff's suit was subsequently instituted (State of Case, p. 23, ll. 27-39). **None of these statements were contradicted.**

C. A demand for a bill of particulars was made upon the plaintiff (State of Case, p. 41, l. 10). Among the particulars demanded was a copy of the account of the plaintiff-bank with Meyer Gendel for the months of July, August, September, October and November 1928 (State of Case, p. 42, ll. 10-15). The plaintiff failed to furnish the particulars and a motion was made to compel the furnishing of the bill of particulars (State of Case, p. 42, ll. 33-38). Judge Smith, who presided at the time that that motion was argued, "ruled that the particulars demanded, although necessary in connection with the answers filed by the defendants, were not the proper subject matter of a bill of particulars," although it was then pointed out that the required information was within the peculiar

knowledge of the plaintiff (State of Case, p. 43, ll. 5-15). Judge Smith further stated that if "a motion to strike out the answers were made, he would see to it that the interests of the defendants, who might not be able to give legally competent evidence in opposition to such a motion, should be amply protected" (State of Case, p. 43, ll. 15-20). **None of these statements were contradicted.**

D. Upon being served with the notice of motion to strike out the answer, counsel for the defendants requested to have the date of the argument, on the motion to strike out the answers, continued to a date when Judge Smith "who has already made some rulings in this case and who is most familiar with it" would sit for the argument of motions, instead of it being argued before Judge Mountain (State of Case, p. 44, ll. 10-12). Counsel for plaintiff stated that he wanted to proceed before Judge Mountain (State of Case, p. 44, l. 30). **None of these statements were contradicted.**

THE FOREGOING FACTS, NONE OF WHICH WERE CONTRADICTED, WE RESPECTFULLY SUBMIT, SHOWED THAT THE PLAINTIFF BANK WAS NOT A BONA FIDE HOLDER FOR VALUE, THAT IT PERSISTED IN THE SUPPRESSION OF EVIDENCE WHICH WOULD EVEN MORE CLEARLY DEMONSTRATE THAT FACT, BUT AT ALL EVENTS, THE FACTS PRESENTED ENTITLED THE DEFENDANTS TO BE PERMITTED TO DEFEND THE ACTION. The fact that each, and both, of the defendants were "amply able to meet any judgment that may be rendered in this cause" (State of Case, bottom of p. 35; top of p. 36) was also

not contradicted. On all of this showing, it is respectfully urged that the action of the trial judge in striking out the answers and entering the summary judgment, was improper and erroneous.

13. The other defenses against the note, as far as Decker Building Material Company alone is concerned, were both substantial and meritorious; they were also substantiated by the affidavits in opposition to the motion to strike the answers. Before taking up an extended discussion of such other defenses, we desire to call attention to the following provision of our Negotiable Instruments Act:

> "Absence or failure of consideration is matter of defense as against any person not a holder in due course; and partial failure of consideration is a defense pro tanto whether the failure is an ascertained and liquidated amount or otherwise."
>
> Sec. 28, "Negotiable Instruments" 3 C. S. p. 3738.

It is also the law of this State, as pointed out by Justice Pitney, in *People's National Bank of New Brunswick* v. *Schepflin,* 73 L. 29, particularly at page 35, 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," that was between the immediate parties to a promissory note its real character may always be shown," that "if the payee sues upon it it may be proved that the note was really given for his accommodation," and that "save for the law merchant, the real character of a note might be shown even as against a holder in due course." These principles of law were applicable to the plaintiff, and to the case at bar, because the plaintiff was not a bona fide holder for value.

14. With these principles of law as a background, the Decker Building Material Company, among other things, pleaded that it was a corporation of the State of New Jersey and that the note in question was executed by it "for the accommodation and benefit of Mapes Construction Co., a corporation, and not for the benefit or advantage of, or as the result of any consideration paid to, or given to, said Decker Building Material Co., a corporation" (State of Case, p. 9, ll. 1-14). This plea was substantiated by an affidavit verifying those facts (State of Case, p. 32); **this affidavit was not contradicted.** The powers of a New Jersey corporation are defined in sections 1 and 2 of the Corporation Act. The power of becoming a surety, guarantor, or accommodation maker or endorser is not included in the enumeration of powers. Furthermore, as was said by Chief Justice Gummere:

> "It is difficult for us to perceive how a corporation may assume an obligation by acquiescence in an illegal act perpetrated in its name, when an express contract by it to perform such illegal act would be ultra vires and void. We say 'an illegal act,' because it seems clear that a promise on the part of a corporation to pay, out of its corporate funds, commissions to a broker for negotiating a sale of stock belonging to one of its stockholders, would be an absolute betrayal of its trust; for corporate funds, after the payment of corporate debts and legitimate corporate expenses, are held by the corporation as trustee for its stockholders, and the use of any part of those funds for the benefit of a single stockholder would be a fraud upon other stockholders to the extent of the moneys so appropriated."
>
> *Vogel* v. *Atlantic Tar & Chemical Works, Ltd.*, 101 N. J. L. 99.

The language of this Court in the Heidler case, below cited, is also apropos in this connection. This Court, speaking by Justice Parker, said:—

> "A much more serious question is not raised at all, either by pleadings, evidence or argument. *We mention it to avoid any inference of our giving countenance, even sub silentio, to the idea that a corporation may lawfully execute a bond* secured by mortgage on its property, to the detriment of its creditors and stockholders, *as a pure accommodation to* one of its officers or stockholders, *as a pure accommodation to* one of its officers or stockholders, or indeed *any one* else. *This is precisely what was done in this case;* the corporation made the bond and mortgage to secure the debt of Rose. *The law is settled to the contrary.* (Citing authorities and cases in the New Jersey courts.)" (Italics ours).
>
> *Heidler* v. *Werner & Co.*, 97 N. J. E. 505.

While the language just quoted was not necessary for the decision of the Heidler case, it was nevertheless a correct statement of the law. The defendant, Decker Building Material Company, although the evidence was uncontradicted, was, through the erroneous action of the trial court, prevented from asserting, in bar of the action, against the plaintiff who is not a bona fide holder that the note sued on was, as to the Decker Building Material Company, ultra vires and void.

15. Another substantial defense, as far as Decker Building Material Company alone is concerned, was the fact that the note was executed without consideration. We believe that this already sufficiently appears from what has been said in paragraph 14 above, but will be more fully discussed in connection with the defense of failure of consideration, discussed in the next paragraph.

16. Another substantial defense, as far as Decker Building Material Company alone is concerned, was pleaded in the "first separate defense to complaint" (State of Case, pp. 8-9), in legal effect, a plea of failure of consideration for which the note was given. The facts were the note was delivered by the Decker Building Material Company, to the payee, Gendel, contemporaneously with the delivery of the following contract, made by Gendel:—

July 24/28

In order to induce Decker Building Material Co. to give me a note of Seven Hundred Dollars to apply as paym't for Mapes Const. Co. for work cor Mapes & Eliz. Av. Newark I agree to complete all of the work as per my contract with Mapes, on or before Sept. 1-1928 and in case of default on my part I agree to give back to Decker the said note or if note is in other hands I agree to pay it and release Decker from any & all liability on said note.

M. GENDEL.

Witness:
WM. A. DECKER

The foregoing stipulation is printed at the bottom of page 7 of State of the Case, and is referred to, and pleaded, in the answer of Decker Building Material Company (State of Case, p. 9, lines 20-25); the fact that Gendel did not perform that contract is also pleaded (State of Case, p. 9, lines 30-35). In verification of this answer, an affidavit was furnished, substantiating the facts so pleaded (State of Case, pp. 32-33): **such facts were not contradicted.** The action of the trial court in striking out such defense as being sham, in the face of the fact that it was not contradicted, was erroneous, and, of course, prejudicial.

17. The individual defendant, William D. Decker, was an endorser of the note and was sought to be charged in that capacity. He also pleaded all the defenses that were pleaded by the maker, which we have already discussed; what we have said in respect to those defenses, as applicable to the maker, is intended to apply to the endorser, William D. Decker. The plaintiff pleaded (paragraph 3 of the complaint) that the note "was duly presented for payment" and, in paragraph 5 of the complaint, that a "copy of said * * * certificate of protest are annexed hereto and made a part hereof." These allegations were denied by paragraphs 3 and 4 of the answer (State of Case, p. 13, lines 25-35); and by the "sixth separate defense to the complaint" (State of Case, p. 16, lines 20-30), the question of presentment and the proper mailing of notices of dishonor were further put in issue. Because of the separate notice (State of Case, p. 17, lines 1-10), it became incumbent upon the plaintiff, pursuant to section 21 of the Evidence Act, to establish the facts concerning presentment and notice of dishonor by competent evidence, exclusive of the notary's certificate. The notary's affidavit is that he mailed a copy of the notice of protest to William D. Decker at #513 Lyons Avenue, Irvington, N. J. (State of Case, p. 26, lines 10-12). The affidavit of William D. Decker is that #513 Lyons Avenue, Irvington, N. J., was neither his residence, nor his place of business, but that he lived at #169 Clinton Avenue, Newark, N. J., and that he did not receive the notice of protest which the notary said was mailed (State of Case, p. 35, lines 15-18). At the very least, this raised an issue of fact, and the trial judge could not say, as a matter of law, that

this answer was sham. The action of the trial court, therefore, in striking out the answer of William D. Decker was also erroneous and prejudicial.

18. It seems to us that the case at bar, is within the reasoning of *Perloff* v. *Island Development Co.,* where in a situation similar to that presented by the instant case, the Supreme Court, speaking by Justice Campbell, said:—

> "Without going into any extended details, the situation is this: * * * These are all factual questions, which, in my judgment, should not be decided by me upon this motion upon the affidavit proofs before me."
> *Perloff* v. *Island Development Co.,* 133 Atl. 178, 4 N. J. Misc. 473; not yet officially reported.

The motion to strike the answer was denied in the case just cited, and for substantially the same reasoning, the Supreme Court reversed a summary judgment, entered in the Essex County Circuit Court in the case of *Maurer* v. *Hahn,* 6 Adv. Rep. 337, 140 Atl. 273, not yet officially reported. In that case, Justice Parker's opinion points out that the facts "at least raises a fair jury question," and because the trial court ignored that fact, the judgment was reversed and the case was remanded to take its ordinary course. The reasoning of Justice Minturn in *Muhlenbeck* v. *Town of West Hoboken,* 2 N. J. Misc. 7 (not yet officially reported), is very applicable to the case at bar. The Court, speaking by Justice Minturn, said:—

> "To warrant the court in striking out a *plea* as false or sham, it *must be so palpably false or insufficient in law as to enable the court to conclude that the defendant is seeking delay or trifling with the process of the law.* Fidelity Insurance *v.* Wilkes-Barre Railroad Co., 120 Atl. Rep. 734. When to

> decide the question it becomes necessary to take testimony to enable the court to determine the relative merits of the controversy, or the justice or injustice of the defense, the defendant's constitutional right to a jury trial requires that the motion to deprive him of his defense be denied." (Italics ours)
>
> *Muhlenbeck* v. *Town of West Hoboken*, 2 N. J. Misc. 7, 8, not yet officially reported.

We respectfully submit that the facts which were before the trial judge, upon the motion to strike the answers, were far from "palpably false"; as was pointed out, the facts relied upon by the defendants were, in the main, uncontradicted. Some testimony which the defendants could not produce was peculiarly within the knowledge of the plaintiff and could be obtained only after issue joined by serving interrogatories or at the trial of the cause by calling witnesses. Under all these circumstances, and particularly in view of the unquestioned financial responsibility of each and both of the defendants, it was manifestly improper to deprive the defendants of their constitutional right to a jury trial. The propriety of the judge (who decided the motion) taking jurisdiction of that motion and, in effect, ruling contrary to a previous determination of another judge at the same circuit who had already expressed his views upon the question involved, particularly when the answering affidavits showed the prior ruling and the importance of referring the motion to the original judge, is also, it seems to us, subject to criticism.

CONCLUSION.

Summarizing our argument, we urge that it was established, both as a matter of law and fact, that the plaintiff was not a bona fide holder for value of the note; certainly, at the very least, this was an arguable jury question. With the plaintiff not being a bona fide holder for value, the defenses, which were not contradicted, to the effect that the corporation's accommodation note was ultra vires and void, and to the effect of lack and failure of consideration, were complete and adequate defenses. Such defenses were also adequate defenses in favor of the endorser, William D. Decker. As far as the endorser was concerned, a jury question was also presented as to whether the notice of dishonor had been mailed, and, if so, whether properly mailed. On the entire case, therefore, the defendants showed facts which, in the language of the statute, "entitled them to defend." The trial judge, in ruling to the contrary, and in striking out the answer and entering summary judgment, committed error, and for this reason the order and judgment should be reversed and a venire ordered.

Respectfully submitted,

KANTER & KANTER,
Attorneys for and of Counsel
with Defendants-Appellants.

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

New Jersey Court of Errors and Appeals

Fidelity Union Trust Co., a corporation, *Plaintiff-Respondent,* *vs.* Decker Building Material Company, a corporation, and William D. Decker, *Defendant-Appellants.*	*On Appeal.*

BRIEF OF PLAINTIFF-RESPONDENT.

WOLBER AND GILHOOLY, attorneys of plaintiff-respondent.

JOHN H. YAUCH, Jr., of counsel.

Summary of Issues.

The subject matter of this action is the promissory note which appears on page 5 of the State of Case. An examination of the note will show that it is regular on its face and a negotiable instrument.

The signature of the endorser William D. Decker was affixed to the instrument simultaneously with the execution thereof (State of Case, p. 32, ll. 32 and 33). The day after the note was made it was acquired by the Fidelity Union Trust Co., a banking corporation organized under the laws of the State of New Jersey, the plaintiff-respondent, from the payee Meyer Gendel, by unqualified endorsement.

Simultaneously with the acquiring of the note, the bank placed to the credit of the checking account which the payee had with it, the principal

amount of the note, less discount (State of Case, p. 22, ll. 8 to 13).

The promissory note was presented for payment at the place where it was made payable on the day it fell due to wit, October 24, 1928, and the maker thereof had ordered that payment be stopped (State of Case, p. 25, ll. 34-38).

At the time that the promissory note was presented for payment, at the bank where it was made payable, the agent of the plaintiff-respondent, Berne F. Keppler, found from the records of the bank where the note was made payable, that the address of the defendant-appellant Decker Building Material Co. was No. 513 Lyons avenue, Irvington, New Jersey (State of Case, p. 25, ll. 37 to 40 and p. 26, ll. 1 to 2). On the same day the said agent of the plaintiff-respondent directed notices of protest to the defendant-appellants Decker Building Material Company and William D. Decker to No. 513 Lyons avenue, Irvington, New Jersey, and also to the defendant Meyer Gendel, by inserting said notices of protest in an envelope addressed to said parties at said addresses, with postage prepaid thereon and deposited in the United States Post Office (State of Case, p. 26, ll. 3 to 26). The telephone book and City Directory for the period in question carries the address of the Decker Building Material Company as No. 515 Lyons avenue, Irvington, New Jersey. The defendant-appellant William D. Decker is the President of the defendant-appellant Decker Building Material Company (State of Case, p. 31, ll. 25 to 29).

Simultaneously with the execution of the promissory note a written collateral agreement was entered into between the maker of the note, Decker Building Material Co. and the payee

thereof, Meyer Gendel (State of Case, p. 32, ll. 33 to 37, and p. 33, ll. 1 to 18). The promissory note and collateral agreement were independent instruments and no notice of the making of the collateral agreement was affixed to the promissory note. The bank, plaintiff-respondent had no knowledge of the existence of said collateral agreement until December 4, 1928 (State of Case, pp. 38, 39 and 40), the date of said notice was December 4, 1928 and the note in question had already been protested for non-payment on October 24, 1928 (State of Case, p. 25, ll. 34-37).

Judgment by default was entered against the payee of the note, Meyer Gendel, for the full amount due thereon.

Notice of motion was given to strike out the answers filed by the defendant-appellants (State of Case, pp. 18, 19 and 20), and annexed thereto were affidavits (State of Case, pp. 21 to 30). The defendant-appellants submitted answering affidavits (State of Case, pp. 31 to 44). The answering affidavits of the defendant-appellants contained no allegation that the proceeds of the promissory note in question, which were deposited to the credit of the payee, Meyer Gendel, were not withdrawn, subsequently.

The Circuit Court after considering the affidavits submitted and the argument made, entered an order finding the answers filed by the defendant-appellants to be sham and not containing such facts as entitled them to defend and thereupon ordered that the alleged defenses set up in said answers be stricken out and final judgment entered for the full amount due on said note (State of Case, pp. 45 and 46).

ARGUMENT.

POINT ONE.

The fact that the lower court found the defenses made by the answers of the defendant-appellants to be "sham," does not preclude an affirmance of the verdict, if in fact the answers should have been stricken out as "frivolous."

> *McCarty* v. *West Hoboken*, 93 N. J. L. 247;
> *Sculthorpe* v. *Commonwealth Casualty Co.*, 98 N. J. L. 845.

Defendant-appellants in paragraph 3 of Point One of their brief, urge that before they be deprived of their right to trial by jury, plaintiff-respondent should be required to comply strictly with Rule 57 P. L. 1912, as set out in their brief.

This Court has held in *Eisele, et al.* v. *Raphael*, 90 N. J. L. 219 as follows:

> "Striking out a sham or frivolous plea is not an infringement of the right of trial by jury."

Also in *Coykendall* v. *Robinson*, 39 N. J. L. 98.

Complaint is made that in the affidavits submitted by plaintiff-respondent, on the motion to strike-out, the specific words "There is no defense to the action," are not present.

Opposing counsel cites the opinion of the learned late Justice Katzenbach, in *Great American Indemnity Co.* v. *Gronowicz*, 6 N. J. Misc. 821 (not officially reported) Supreme Court, 1928. It appears that the basis of the Court's decision was the fact that by filing a reply reserving the right to move to strike the answer, an election was made. The remainder of the decision was apparently dicta. Justice Katzenbach apparently recognized that, by not referring to that portion

of his opinion, in the case of *Dunphey* v. *Weiner*, 7 N. J. Misc. 13. (Not officially reported.)

An examination of the affidavits submitted by the plaintiff-respondent on the motion, *will show that every possible defense raised in the answers were gone into and shown false or frivolous.* We submit that of itself was sufficient compliance with Rule 57. That method of showing that there was no defense, certainly carries more conviction, than the wholesale statement or deposition "that there is no defense."

The affidavit of Charles Kammer (p. 21, State of Case, at p. 24, ll. 1-10) sets forth "*I am familiar with the contents of the answers filed on behalf of the defendants Decker Building Material Company and William D. Decker and I am firmly of the opinion that the said answers are sham, and/or frivolous and have been interposed solely for the purpose of delay.*"

The appellants contend that statement to be a conclusion, what construction can be given to the words "that there is no defense"? That is also a conclusion. Was it the intention of the Court in making the rule (S. C. R. 1913, Rule 80) and the Legislature in enacting P. L. 1912, p. 394, Rule 57 to attribute a magical effect to the life giving words "That there is no defense." Was it the intention to constitute such words with the same power as "open-ses-a-me" as used in the Arabian Nights? Can one use no other words to express the same thought?

The affidavit of Kammer (p. 24, State of Case) concludes with the statement that the answers are sham and/or frivolous and are interposed merely for the purpose of delay. Can any one doubt that such words fairly and squarely state the thought of that deponent that it was

his belief, that the answers did not set up a defense? If the answers are sham and/or frivolous (using those words without their technical application), the contents thereof are not defenses.

We submit that there has been a complete and practical compliance with the requirements of P. L. 1912, p. 394, Rule 57.

The rules are considered as general rules for the government of the court; and their design is to facilitate business and advance justice, they may be relaxed or dispensed with by the Court in any case in the interest of justice. S. C. R. 218—Rule 5, Pr. Act 1912. Under our present practice the technicality of language has been eliminated and no prescribed words need be used in a given case.

show such facts as may be deemed
sufficient to entitle him to defend."

Opposing counsel correctly states the proposition, "that the defendant is required only to show such facts as entitled him to defend" (Appellant's Brief, p. 6, par. 6).

We respectfully submit that we searched, in vain, the answers and affidavits of defendants for any statement which showed plaintiff-respondent to be other than a bona fide holder for value, and for such facts as entitled them to defend.

The lower court on the argument, repeatedly asked counsel for appellants to point out in what particular the bank had notice or was not a holder in due course, for value. There is but the bold statement in the answers of both defendant-appellants (par. 2, pp. 8 and 13, State of Case) denying that plaintiff-respondent acquired said note for a valuable consideration before it became due.

his belief, that the answers did not set up a defense? If the answers are sham and/or frivolous (using those words without their technical application), the contents thereof are not defenses.

We submit that there has been a complete and practical compliance with the requirements of P. L. 1912, p. 394, Rule 57.

POINT TWO.

The citation from the statute referred to by appellants in their brief in Point Two, paragraph 6 answers the argument advanced by them under that point.

> "The answer may be struck out unless the *defendant* by affidavit or other proof shall show such facts as may be deemed * * * sufficient to entitle him to defend."

Opposing counsel correctly states the proposition, "that the defendant is required only to show such facts as entitled him to defend" (Appellant's Brief, p. 6, par. 6).

We respectfully submit that we searched, in vain, the answers and affidavits of defendants for any statement which showed plaintiff-respondent to be other than a bona fide holder for value, and for such facts as entitled them to defend.

The lower court on the argument, repeatedly asked counsel for appellants to point out in what particular the bank had notice or was not a holder in due course, for value. There is but the bold statement in the answers of both defendant-appellants (par. 2, pp. 8 and 13, State of Case) denying that plaintiff-respondent acquired said note for a valuable consideration before it became due.

Appellants cite many authorities from outside this State holding that mere discount and credit do not of themselves, constitute a bona fide purchaser for value and that to constitute a bank a holder for value it must be shown that the credit was absorbed by antecedent indebtedness or exhausted by subsequent withdrawals. One New Jersey case is cited for the proposition. *Hightstown Trust Co.* v. *American Equity Corp.*, 7 N. J. Misc. 135 (Not officially reported). In that case the question of forgery and fraud was involved and therefor it is not analogous.

But the appellants ignore the effect of the 59th Section of the Negotiable Instruments Act (3 C. S. 1910, p. 3741).

> *"Every holder is deemed prima facie to be a holder in due course."*

Plaintiff-respondent on the motion have the advantage of being *prima facie* a holder in due course. That was sufficient to make out its case. Did defendant-appellants show any facts sufficient to entitle them to defend? We think not.

Had the defendant-appellants shown that the proceeds of the note remained a credit in the account of Meyer Gendel at the time of the motion, then they would have come within the law as established by those cases, that hold, a bank discounting a note and placing the proceeds to the credit of the payee, which credit is not absorbed by antecedent indebtedness or exhausted by subsequent withdrawals, is not a holder for value and in due course, and in view of the 59th section of the Negotiable Instruments Act, defendant-appellants were required to show such facts to entitle them to defend. They did not controvert the *prima facie* case established.

Sladkin v. *Ruby*, Ct. E. & A. N. J. 103, N. J. L. 449.

> "The same rule is reached by a second avenue, there was no evidence offered sufficient to overcome the presumption that Mrs. S. was a holder in due course."

See also *Fisk Rubber Co.* v. *Pinkey*, 170 Pacific. 581-100 Wash. 220, wherein it was held mere denial of liability or plea of no consideration will not put the holder to a greater burden than to show that the instrument was acquired in due course.

The mere denial of the defendant-appellants was insufficient to meet the *prima facie* case.

It was held by Gummere, *C. J.* in *De Jonge* v. *Woodport Hotel and Land Co.*, 77 N. J. L. 233-72 Atl. 439.

> "By force of section 59 of the Negotiable Instruments Act of April 4, 1902 (P. L. p. 594) *every holder of a promissory note is deemed prima facia to be a holder in due course; i. e. among other things, that he took the note in good faith, and for value, without notice of any infirmity in the instrument, or defect in the title of the person negotiating it.* But that section further provides that, when it is shown that the title of the person who has negotiated the instrument was defective, the burden is on the holder to prove that he, or some other person, under whom he claims, acquired the title as a holder in due course."

This court also in the case of *Penbrook Trust Co.* v. *Weigand & Co.*, 100 N. J. L. 353 by the late Justice Katzenbach held:

> "Where a plaintiff produces at the trial the promissory notes upon which the action is instituted and proves the signatures of the payee and endorsers (the making of the notes having been admitted in the answer)

> and rests, it is not error for the trial court to refuse to grant a motion to non-suit, based on the grounds that the plaintiff had offered no proof of consideration to the maker, and no proof that the plaintiff is a holder in due course, as the Negotiable Instruments Law provides in section 24 (3 C. S. p. 3738) *that every negotiable instrument is presumed to have been issued for a valuable consideration and every person whose signature appears thereon to have been a party for value;* and in section 59 (3 C. S. p. 3741) *that every holder is deemed prima facie to be a holder in due course, until it is shown that his title to the instrument is defective.''*

Those cases apparently establish the law as contended by plaintiff-respondent. The affidavits submitted by it on the motion were sufficient considering the effect of section 59 of the Negotiable Instruments Law. There was no proof that its title to the note was defective, and therefor it was incumbent upon the defendant-appellants to prove that the funds had never actually been withdrawn by the payee, Meyer Gendel.

It would appear from an examination of the brief of the defendant-appellants, page 8, paragraph 10, that the case of *Standing Stone National Bank* v. *Wasler*, 162 N. C. 53; 77 S. E. 1006, answers our contention that the burden of proof was on the defendant-appellants to offer evidence that the funds had not been withdrawn from the payees' account with the plaintiff bank. However an examination of the case as actually set forth in the official reports discloses that the Supreme Court of North Carolina did not hold as counsel for defendant-appellants set forth in their brief. As a matter of fact the case is squarely in point with the argument advanced by plaintiff-respondent, and in that case Clark,

C. J. at p. 1010 of 77 S. E. Reporter held as follows:

> "The plaintiff is presumed to be a holder in due course unless fraud had been alleged and put in proof, in which case the burden would be thrown upon the plaintiff to show that it was a holder in due course. (Rev. section 2208) but no fraud was properly pleaded and there was no evidence to show it; therefore the plaintiff is entitled to recover as a holder in due course.
>
> The fact that the plaintiff went further and showed that it gave Reynolds credit on his checking account, raised no presumption of law that the money was afterwards checked out, or that it was not, though the lapse of two years might raise a presumption of fact that it was checked out. *But, no fraud having been alleged, the burden was not thrown upon the plaintiff to show that the money was not checked out. The plaintiff could rely upon the presumption that it was a holder in due course, and it was not required to prove actual payment.*"

At page 1009 the Court also held,

> "Prima facie the holder held in due course, and there is no proof to the contrary, and nothing to rebut the presumption, therefore, that it was a purchaser 'for value.' "

The Court referred to the following cases:

Tredwell v. *Blount,* 86 N C 33;
Bank v. *Bridgers,* 98 N C 72-3 S E 826;
Lewis v. *Long,* 102 N C 208-9 S E 637.

And again at page 1009 the Court refers to *Joveshof* v. *Rockey,* 58 Misc. Reporter 559-109 N. Y. Supp. 818.

> "It is held upon the section of the Uniform Negotiable Instrument law providing that negotiable instruments shall be deemed to have been issued for a valuable consideration, and the section making failure of con-

> sideration a matter of defense against any person not a holder in due course, *the burden is on the defendant,* even in such cases, to show want of consideration. The Court says that, whatever might have been the difference in the decisions prior to the Uniform Negotiable Instruments law, it is now well settled that 'the presumption that the endorser of a negotiable note is a bona fide holder is not repelled merely by proof that the paper, as between the immediate parties, was without consideration.' "

Again at the end of page 1009 the Court definitely and conclusively decided the point, by stating:

> "It is true as we have already said, that if it is shown that the bank merely gave the endorser credit on his checking account, and that the money has not been checked out, the presumption is rebutted. *But the burden is on the defendant to show this.*" (Cases cited.)

Should the Court be of the opinion that the bank, the plaintiff-respondent, was required to show the withdrawal of the proceeds of the note, by its customer and the payee. Then we point to the fact that the payee Meyer Gendel is a party defendant in this suit and that default judgment was obtained against him. If the proceeds were not actually withdrawn by Gendel, he would not be indebted to the bank. The affidavit of Kammer (p. 23, l. 37, State of Case) is that, at the time of the making of the affidavit, there was due and owing on the note the face amount thereof with interest from date thereof. That is proof that the Court can consider to decide that the bank actually parted with the principal of the note. (See also p. 23, State of Case, ll. 17 to 20.)

The rule of law apparently laid down in cases cited by appellants apparently conflicts with the decision of this court made in 1884.

Hoffman, et al. v. *First National Bank of Jersey City,* 46 N. J. L. 604.

It was there held:

> "A check deposited by general endorsement of payee, and passed to his credit on the books of a bank, becomes the property of such bank, and may be legally transferred to a bona fide creditor."

The same rule applies to notes. If the bank could transfer good title it certainly must possess good title itself.

The note in question was negotiated by the defendant Meyer Gendel, by unqualified endorsement (p. 5, State of Case). It was not endorsed to plaintiff-respondent for collection. The principal of said note was placed in the account of Gendel and plaintiff-respondent thereby became his debtor for the amount of the deposit. It has been definitely established that the legal relationship between a bank and a depositor is that of debtor and creditor.

Section 25 of the Negotiable Instrument Act provides:

> "Value is ~~not~~ ANY consideration sufficient to support a simple contract."

The promise to pay on the part of the bank certainly is consideration to support a simple contract. So that assuming that the burden was on the plaintiff-respondent to show affirmatively that the proceeds of the note, were actually withdrawn from the account of the payee, and assuming further that the affidavit submitted did not fairly show that in fact the proceeds were withdrawn; we believe that notwithstanding there

was consideration given by plaintiff-respondent to constitute it a holder for value in due course.

Appellants make much of the statements contained in their brief p. 9, paragraph 12a. The fact that the payee Meyer Gendel instituted suit on the note in question and that the defendant-appellants herein filed certain answers in that suit, does not affect the position of the bank. Plaintiff-respondent has no control over any one that feels inclined to institute a suit.

The fact is that at the time Gendel instituted suit he was not a holder of the note. See State of Case, p. 23, ll. 21 to 35. The Gendel suit was brought by him without the bank's consent.

Counsel for appellants emphasize the point that the plaintiff-respondent does not deny the statements contained in Point II, paragraph 12a, page 9 of their brief. The bank was a stranger to those matters, how could it be expected to deny matters which they had no control over?

Appellants on page 10 of their brief, paragraph B point to a letter (State of Case, p. 38, l. 20) which was directed to the bank by the attorneys for appellants under date of December 4, 1928. At that time plaintiff-respondent had parted with the proceeds of the note. It was discounted on July 25, 1928. By the time said letter was written the note in question had been protested for non-payment (State of Case, p. 25, l. 26) and attorneys for plaintiff-respondent had been instructed to institute suit. Said letter was a futile gesture which is entirely immaterial.

Counsel for appellants in their brief, pages 10 and 11, paragraphs c and d refer to bill of particulars, the alleged statements of the Court, etc. All of which are not the proper subject

matter of a brief. They are attempting by their argument to add to the record. The only proper proof of those matters are, the demand for the bill of particulars; bill of particulars and the order denying order for further particulars. Those papers are all filed in the original docket of the Circuit Court. Appellants have not seen fit to incorporate them in the record of this case. We submit that this court should not take the recollection of counsel as proof of matters which the record of the case actually shows. Those matters are also entirely immaterial.

At page 11 of the appellants' brief it is stated that the bank, "persisted in the suppression of evidence." Counsel had available means to determine what the facts were. In addition a full statement of the entire transaction was made in the affidavits filed by plaintiff-respondent.

The argument made on pages 12 and 13 of appellants' brief, that Decker Building Material Company, being a corporation, could not be held legally responsible on a note on which it was accommodation maker, would be a good defense, if true. But by the affidavits submitted by defendant-appellants on the motion, set forth such facts that showed the Decker Building Material Co. to have received consideration for making the note. (See affidavit of William D. Decker, State of Case, p. 32, ll. 15 to 40.)

The affidavit recites that the Decker Building Material Co. had money coming on the job on which Meyer Gendel was performing painting work. The Decker Company could not get its money until the job was complete. The completion of the painting by Gendel was necessary before Decker Company could receive its money due on the job. Gendel would not go ahead with

his work until he was assured of payment. Therefor the note made by Decker Building Material Co. which is the subject matter hereof. There was consideration passing to the maker Decker Building Material Co., *i. e.* the acceleration of the payment of its bill. It therefore is not an accommodation maker within section 29 of the Negotiable Instruments Act which is as follows:

> "An accommodation party is one who has signed the instrument as maker, etc. without receiving value therefor * * *."

On page 15, paragraph 16, appellant's brief, is set forth a copy of a collateral agreement alleged to have been made simultaneously with the execution of the note. The note however is negotiable on its face and no notice of such collateral agreement is contained on it. There was no proof that the bank, plaintiff-respondent, had actual notice thereof. It is therefore elementary that it is not bound by the collateral agreement.

The last point made by the defendant-appellants concerns the endorser, William D. Decker. It is contended that William D. Decker did not receive notice of protest of the note and that therefor being an endorser he is excused from liability.

The affidavit of Berne F. Keppler (pp. 25 to 26, State of Case) sets forth that on October 24, 1928 he presented the note for payment at the bank where it was made payable and that payment thereof was refused because payment had been stopped by the maker. The deponent states that at the time of presenting the note at the bank where it was made payable, that he learned from the bank, the address of the Decker Building Material Co. according to the records

of that institution and that it was 513 Lyons avenue, Irvington, New Jersey.

The deponent says that on October 24, 1928, being the date when the note fell due, and during banking hours, he directed notices of protest to the Decker Building Material Company at #513 Lyons avenue, Irvington, New Jersey, William D. Decker, at the same address and Meyer Gendel at #53 Schuyler avenue, Newark, New Jersey, and that said notices of protest were inserted in envelopes addressed to the aforesaid parties at the aforesaid addresses, respectively, and each envelope had postage prepaid thereon in the amount of 2c and that the envelope bore the return address of the Fidelity Union Trust Company. That said envelopes with the notices therein, were deposited in a United States Mail Box by the deponent, at the time aforesaid. That said notices were not returned by the Post Office authorities.

The affidavit of the defendant William D. Decker, (State of Case at page 35, paragraph 6) sets forth that he does not *reside* at #513 Lyons avenue, Irvington, New Jersey, and never *resided* there. That statement may be correct because it was alleged that it was his *business address.* But Mr. Decker continues on in his affidavit to state that that address was not his place of business and that the directory of the City of Newark for 1928 and the telephone book for that period, all discloses that *he lived* during 1928 at 169 Clinton avenue, Newark. The Court will please notice that the deponent does not say that the telephone book for the year 1928 and the directory of the City of Newark for 1928 does not give his *business address* as #513 Lyons avenue, Irvington, New Jersey.

The contents of the telephone book and city directory could be taken official notice of by the Court and this point could not be controverted and the address of the Decker Building Material Company as set forth in the telephone book for 1928 and also in the city directory for that period is #515 Lyons avenue, Irvington, New Jersey.

The mailing of the notice of protest to the buisness address of the endorser was sufficient according to section 108, Negotiable Instruments Act, subdivision II *"If he live at one place and have his place of business in another, notice may be sent to either place;"*

The point has been repeatedly decided in New Jersey, that it is immaterial whether or not notice is received, if in fact it was actually mailed in the manner provided by the statute.

Section 108 of the Negotiable Instrument Act provides that where no address is added to the signature on the note it must be sent as follows:

1. Either to post office nearest his place of residence or where he is accustomed to receive letters.

2. *If he live in one place and have his place of business in another, notice may be sent to either place.*

3. If he is sojourning in another place, notice may be sent to the place where he is sojourning.

Plaintiff-respondent was required to make reasonable inquiry as to the addresses of the endorsers on the note and its inquiry at the bank where the note was made payable, as to the address of the Decker Building Material Co., of which William D. Decker is president, was a

reasonable inquiry and the dispatching of notice to the address supplied by the bank where its note was made payable, as set forth in the affidavit of Berne F. Keppler, (State of Case, p. 25) was in compliance with the requirements of the Negotiable Instruments Act.

A case which appears to be in point was decided by the Court of Appeals of New York which State has also enacted the Negotiable Instruments Act in the same form as it exists in New Jersey; namely *Requa* v. *Collins,* 51 N. Y. 144 where the Court held as follows:

> "In order to charge an endorser it is not necessary that he should actually receive notice of protest. It is sufficient that such notice has been properly served. If the service be by mail and the endorser has not indicated where notice may be served upon him by writing the place under his signature on the back of the note, the notice must be addressed to him at his place of residence. But in case the holder does not actually know the endorser's place of residence, the notice may be addressed to the place where, *after diligent inquiry, he is informed and believes he resides.*"

We also allege that the defendant, William D. Decker had actual notice of the dishonor of the note. In that case, no notice of protest was required. William D. Decker was the president of the Decker Building Material Co. at the time that his company *stopped payment* on the note.

CONCLUSIONS.

Summarizing the contents of this brief we urge that:

1. The requirements P. L. 1912, p. 394, Rule 57 and S. C. R. 1913, Rule 80 were complied with. The words "That there is no defense to the

action'' and those words alone, need not be used to express the thought that the defendant has no defense. Any other words importing the same meaning may be used, and a practical compliance with the rule will result.

2. The plaintiff-respondent was a bona fide purchaser for value and occupied that position with reference to the provisions of the Negotiable Instruments Act. Those cases holding that discounting of a note and crediting the proceeds thereof to the account of the payee does not constitute the transfee a holder in due course, are not dispositive of the point, because of section 59 of the Negotiable Instruments Act, P. L. 1902, page 594 which provides that every holder of a promissory note is deemed prima facie to be a holder in due course. That section of the act placed the burden on the defendant-appellants of showing that the funds were not actually withdrawn and that therefor no consideration was passed by the plaintiff-respondent for the note.

3. Collateral agreement made by the payee with the maker of the note is not binding on the plaintiff-respondent because no notice thereof was actually given to the plaintiff-respondent and the note in question was regular on its face and a negotiable instrument in form.

4. The acts of the payee, after the acquiring of the note by the plaintiff-respondent are not binding upon it.

5. Defendant-appellant Decker Building Material Co. was not an accommodation maker because it received consideration for making the note in question.

6. The requirements of the Negotiable Instruments Act, respecting notice of dishonor to en-

dorsers were complied with by the mailing of a notice of dishonor to the place of business of the endorser. The address of the place of business having been obtained by inquiry at the bank where the note was made payable, and the telephone book and directory carrying the same address.

We submit that the allegations contained in the answers of the defendant-appellants were glaring in their legal insufficiency and were sham and that the lower court was justified in striking out the answers and entering summary judgment and that therefore the order and judgment should be affirmed.

Respectfully submitted,

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