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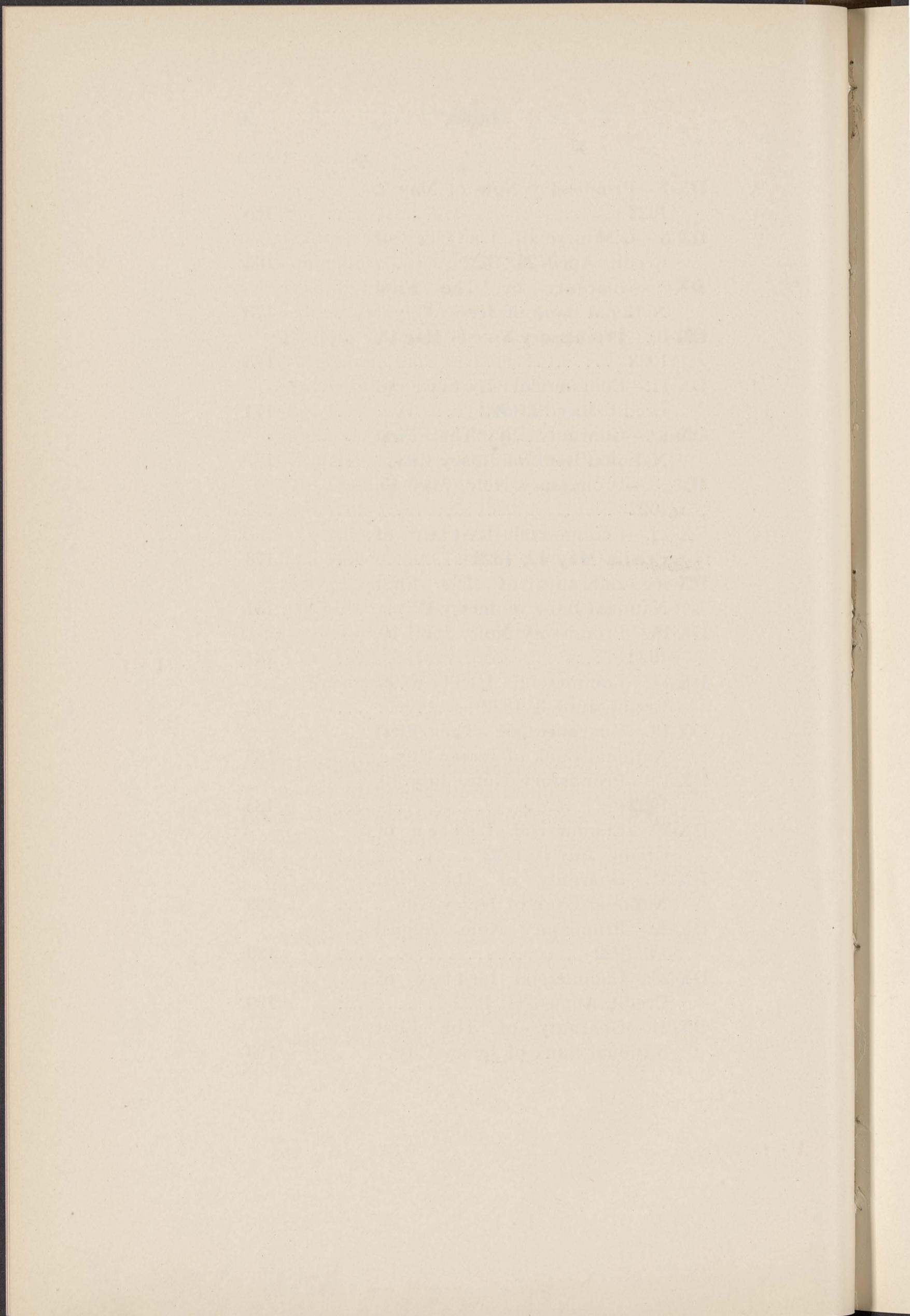
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Notice of Appeal.

(Filed August 8, 1930.)

In Chancery of New Jersey

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Between

JOHN ELIHU BODY, trading as
J. E. BODY & Co.,
Complainant,

and

DAVID LOEB, PHILIP LOEB and
JACOB LOEB, copartners trading
as LOEB BROS., ELLBEE FUR
TRADING CO. INC. and THE FIRST
NATIONAL BANK OF JERSEY CITY,
Defendants.

52-326.

On Bill, etc.

Notice of Appeal
of the Defendant,
The First
National Bank
of Jersey City.

20

The defendant, The First National Bank of
Jersey City, hereby appeals from the Final Decree
and from the whole and every part thereof made
in this Court, in the above stated cause, to the
Court of Errors and Appeals in the last resort in
all causes.

30

Dated, August 7th, 1930.

HEYMAN & HEYMAN,
Solicitors for the Defendant,
The First National Bank
of Jersey City.

BENJAMIN HEYMAN,
Of Counsel.

40

Petition of Appeal.

I concede there is good cause for appeal in the above stated cause.

BENJAMIN HEYMAN,
Of Counsel.

10 Service of the within Notice of Appeal is hereby acknowledged this 7th day of August, 1930.

McDERMOTT, ENRIGHT & CARPENTER,
Solicitors for Complainant.

Petition of Appeal.

(Filed August 11, 1930.)

20 NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

JOHN ELIHU BODY, trading as J. E.
BODY & Co.,
Complainant-Respondent,

and

30 THE FIRST NATIONAL BANK OF
JERSEY CITY,
Defendant-Appellant.

Sat Below:
BENTLEY, V.C.
BIGELOW, V.C.

In Equity.

On Appeal from
The Court of
Chancery.

Petition of Appeal.

The humble petition of The First National Bank of Jersey City, appellant in the above entitled cause, respectfully shows:

40 (1) That your petitioner finds itself aggrieved by a Final Decree made in the Court of Chancery of New Jersey, by the Hon. Edwin Robert Walker, Chancellor of the State of New Jersey, bearing

Petition of Appeal.

date the 12th day of May, 1930, in a cause wherein John Elihu Body, trading as J. E. Body & Co., is complainant, and David Loeb, Philip Loeb and Jacob Loeb, copartners trading as Loeb Bros., Ellbee Fur Trading Co., Inc., and The First National Bank of Jersey City, are defendants, in this respect: That the said Decree adjudges as follows: 10

“It is Now on this twelfth day of May, 1930, on motion of McDermott, Enright & Carpenter, solicitors for the complainant, by Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, ADJUDGED AND DECREED, and the said Chancellor doth, by virtue of the power and authority of this Court, hereby ORDER, ADJUDGE AND DECREE 20
 that Ellbee Fur Trading Company, Inc., David Loeb, Philip Loeb and Jacob Loeb, copartners now or formerly doing business as Loeb Bros., and the First National Bank of Jersey City pay to the complainant all sums of money that were in the account of Ellbee Fur Trading Company, Inc., in the First National Bank of Jersey City at the time the attachment hereinabove mentioned was levied upon the said account, to wit, on 30
 August 28, 1922 to wit, \$22,108.43, together with lawful interest thereon at six per cent, per annum, from and after October 22, 1922, (the date that said Bank relying upon the said indemnity agreement paid itself the remainder of the moneys in said attached account) a total to the date hereof of \$34,783.93, and that Ellbee Fur Trading Company, Inc., First National Bank of Jersey City, David Loeb, Philip Loeb and Jacob 40
 Loeb, copartners now or formerly doing

Petition of Appeal.

business as Loeb Bros., pay to the complainant the costs of this suit to be taxed, including a counsel fee of \$500.00, which is hereby allowed to the said complainant;

10

FURTHER ORDERED that upon receipt of the moneys directed by this decree to be paid to the complainant, or his solicitors, complainant or his solicitors shall deliver to the defendants a warrant for the partial satisfaction of the judgment recovered by complainant in the Hudson County Circuit Court against David Loeb, Philip Loeb and Jacob Loeb, copartners now or formerly doing business as Loeb Brothers, to the extent that the money paid, except costs in this Court, will satisfy the said judgment."

20

Your petitioner, The First National Bank of Jersey City, therefore prays that the said Decree of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden, and that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

30

HEYMAN & HEYMAN,
Solicitors for the Appellant,
The First National Bank
of Jersey City.

BENJAMIN HEYMAN,
Of Counsel.

Service of the within Petition of Appeal is hereby acknowledged this 7th day of July, 1930.

40

MCDERMOTT, ENRIGHT & CARPENTER,
Solicitors for Complainant-Respondent.

Bill of Complaint.

(Filed Aug. 29, 1922.)

IN CHANCERY OF NEW JERSEY.

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

10

(1) Complainant John Elihu Body, trading as J. E. Body & Co., is a resident and citizen of Cooma, Australia.

(2) That on the 25th day of August, 1922, a writ of attachment issued out of the Hudson County Circuit Court at the suit of the complainant as plaintiff against David Loeb, Philip Loeb and Jacob Loeb, co-partners now or formerly doing business under the firm name of Loeb Bros., and pursuant to the command of the said writ the Sheriff of the County of Hudson, N. J., did attach the rights and credits, moneys and effects, goods and chattels of the said defendants in two bank accounts in the First National Bank of the City of Jersey City, namely, in one bank account under the name of Loeb Bros., and in a second bank account in the said First National Bank of Jersey City standing in the name of Ellbee Fur Trading Co. Inc.

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30

(3) That the Sheriff of the County of Hudson did levy said writ of attachment on the First National Bank of Jersey City in the forenoon of August 28, 1922, at which time there was on deposit in the account of Ellbee Fur Trading Co., Inc. several thousand dollars, the amount of which is unknown to the complainant, and in the account in the name of Loeb Bros., there was a very small deposit, the amount of which is unknown to complainant; that the writ of attachment was issued for the sum of \$34,531.38, the amount of a

40

Bill of Complaint.

debt owing by the said defendants to the complainant.

10 (4) Complainant shows and charges that the moneys on deposit in the First National Bank of Jersey City aforesaid in the account of Ellbee Fur Trading Co. Inc. is in truth and in fact moneys owned by the defendants David Loeb, Philp Loeb and Jacob Loeb, co-partners now or formerly doing business under the firm name of Loeb Bros.

20 (5) Complainant further shows and charges that the defendants Loeb Bros. above named contracted the debt above mentioned with the complainant in the year 1920 and have not paid to the complainant anything on account thereof; that on January 13, 1921, the said David Loeb, Philip Loeb and Jacob Loeb caused a corporation to be formed under the laws of the State of New York by the name of Ellbee Fur Trading Co. Inc., with an authorized capital stock of \$15,000; that the said Loeb Brothers caused substantially all of their assets to be transferred to Ellbee Fur Trading Co. Inc., receiving therefor stock only, and that each of the said Loeb Brothers is an officer in the said Ellbee Fur Trading Co. Inc., and that all of the
30 stock of the said Ellbee Fur Trading Co. Inc. is held by the said Loeb Brothers, the amount of the holdings of each being unknown to complainant; that the name "Ellbee" is but the spelling of the initials "L.B.", being the first initials of Loeb Bros., and that the said Ellbee Fur Trading Co. Inc. has its office with Loeb Bros. at #158 W. 26th Street, New York City, and each have the same telephone number Watkins 1809.

40 (6) Complainant further shows and charges that

Bill of Complaint.

the said Loeb Bros, are insolvent and are unable to pay their just debts and particularly the debt of the complainant aforesaid, and that they have all or a substantial part of their assets concealed in the name of Ellbee Fur Trading Co. Inc. for the purpose of hindering and delaying their creditors, and particularly complainant. 10

(7) Complainant further shows and charges that the moneys in the account of Ellbee Fur Trading Co. Inc. in the First National Bank of Jersey City are moneys of the said Loeb Brothers, placed in the account of Ellbee Fur Trading Co. Inc. and outside of the State of New York for the purpose of hindering, delaying and defrauding their creditors, and particularly complainant. 20

Complainant is without adequate remedy in the Courts of Law and therefore prays:

(1) That the said David Loeb, Philip Loeb and Jacob Loeb, co-partners now or formerly doing business under the firm name of Loeb Bros., and Ellbee Fur Trading Co. Inc. and First National Bank of Jersey City, who are the defendants in this suit, may answer this bill of complaint and each statement therein made, but without oath. 30

(2) That the State's writ of injunction may issue enjoining and restraining the First National Bank of Jersey City from paying out any of the moneys on deposit in the account of Ellbee Fur Trading Co. Inc. and in the account of Loeb Bros. on checks, drafts or other instrument signed by Ellbee Fur Trading Co. Inc. or Loeb Bros.; that the defendant Ellbee Fur Trading Co. Inc., and each of its officers, servants and agents may be enjoined and restrained from drawing any checks, drafts or making any notes or in any way assigning, selling or 40

Bill of Complaint.

encumbering the account of Ellbee Fur Trading Co. Inc. in the First National Bank of Jersey City, N. J.

10 (3) That the said Loeb Bros. may be enjoined and restrained from drawing any checks, drafts or other instruments against their account in the First National Bank of Jersey City, and particularly from drawing any of such instruments against the account of Ellbee Fur Trading Co., Inc., in the First National Bank of Jersey City.

20 (4) That it may be adjudged and decreed that all of the moneys in the Ellbee Fur Trading Co., Inc., account in the First National Bank of Jersey City are moneys of the said David Loeb, Philip Loeb and Jacob Loeb, co-partners now or formerly doing business under the firm name of Loeb Bros., and that the said moneys in the said account are subject to complainant's attachment, and that the said moneys in the said account may be ordered to be paid by the First National Bank of Jersey City and the said defendants to the complainant or to the Sheriff of Hudson County.

30 (5) That it may be decreed that Ellbee Fur Trading Co., Inc., is a mere corporate shell in which the defendants Loeb Brothers within named have transferred and concealed all of their assets, moneys, goods, chattels, and effects, and that all of said moneys in said account are the moneys of the said Loeb Brothers.

40 (6) That the said defendants David Loeb, Philip Loeb and Jacob Loeb, co-partners now or formerly doing business under the firm name of Loeb Bros., may be compelled to make discovery as to their purpose in forming the Ellbee Fur Trading Co.,

Bill of Complaint.

Inc., after incurring the debt of the complainant within mentioned, and be decreed to disclose what they did with their assets, goods, chattels, effects and moneys.

(7) That the State's writ of subpoena may issue to the defendants within named in accordance with the course and practice of this court. 10

McDERMOTT, ENRIGHT & CARPENTER,
Solicitors for and of Counsel
with Complainant.

State of New Jersey, }
County of Hudson, } ss.:

BENEDICT WEISZ, of full age, being duly sworn, according to law, upon his oath deposes and says that he has read the foregoing bill of complaint, knows the contents thereof and that the matters and things therein contained are true as he verily believes. 20

Deponent further says that he is acting as agent in this matter for the complainant John E. Body and is Vice President of Jonas & Naumburg, Inc., of New York.

Deponent further says that he has caused an investigation to be made of Ellbee Fur Trading Co., Inc., and has learned that Ellbee Fur Trading Co., Inc., was incorporated under the laws of the State of New York January 13, 1921, with an authorized capital stock of \$15,000; that David Loeb is President of said Company, Philip Loeb is Vice President thereof and Jacob Loeb is Secretary and Treasurer; that Ellbee Fur Trading Co., Inc., has its office at No. 158 West 26th Street, New York; that is the same address of Loeb Bros., and that both have the same telephone of Watkins 1809. 30 40

Bill of Complaint.

Deponent believes that the said corporation is a mere corporate shell for the defendants David Loeb, Philip Loeb and Jacob Loeb.

BENEDICT WEISZ.

10 Subscribed and sworn to before me }
 this 29th day of August, 1922. }

CARL S. KUEBLER,
 Attorney at Law of
 New Jersey.

State of New Jersey, }
 County of Hudson, } ss.:

20 JAMES D. CARPENTER, JR., of full age, being duly
 sworn, according to law, upon his oath deposes and
 says, that he is a member of the firm of McDermott,
 Enright & Carpenter, Solicitors for J. E. Body &
 Co., the complainant within named; that deponent
 caused a writ of attachment to be issued out of the
 office of the Clerk of the Hudson County Circuit
 Court on the 26th day of August, 1922, in favor of
 the complainant and against the defendants David
 Loeb, Philip Loeb and Jacob Loeb, copartners now
 or formerly doing business under the firm name of
 Loeb Bros., for the sum of \$34,531.38; that the
 Sheriff of Hudson County levied said writ of at-
 tachment on the First National Bank of Jersey City
 in the forenoon of August 28, 1922, levying upon
 all the rights and credits, moneys and effects, goods
 and chattels of the defendants Loeb Brothers in
 the account in said Bank in the name of Loeb Bros.
 and also in an account in said Bank in the name
 of Ellbee Fur Trading Co., Inc. Deponent has
 40 learned that there is several thousand dollars in
 the account of Ellbee Fur Trading Co., Inc., but he

Answer of Loeb Bros.

does not know the exact amount thereof because the officials of said Bank will not disclose the same, and that there is a small amount in the account of Loeb Bros. Deponent is informed that there is not enough in both of the accounts to equal the amount for which the writ of attachment issued.

10

JAMES D. CARPENTER, JR.

Subscribed and sworn to before me }
this 29th day of August, 1922. }

BEATRICE I. GOLL,
Notary Public of N. J.

Answer of Loeb Bros.

(Filed Dec. 9, 1922.)

20

IN CHANCERY OF NEW JERSEY.

Between

JOHN ELIHU BODY, trading as J. E.
BODY & Co.,
Complainant,

and

DAVID LOEB, *et als.*,
Defendants.

On Bill &c.
Answer of Loeb
Bros.

30

The answer of defendants, Loeb Bros., of the City of New York and State of New York.

1. They admit paragraph 1 of the bill of complaint.

2. As to the allegations contained in paragraphs 2 and 3, they put complainant upon proof of same.

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Answer of Loeb Bros.

3. They deny that the moneys on deposit in the First National Bank of Jersey City in the account of Ellbee Fur Trading Co., Inc., is in fact money owned by these defendants as alleged in paragraph 4.

10

4. They deny that part of paragraph 5 which alleges that they contracted a debt with the complainant in the year 1920. They deny that they caused substantially all their assets to be transferred to Ellbee Fur Trading Co., Inc., receiving stock therefor, and further deny that each of these defendants is an officer in the said company, and that all of the stock of the said Company is held by them, but on the contrary say that the officers of the Company are and have been David Kellman, President and Jacob Loeb, Secretary and Treasurer, and that its stockholders were and still are David Kellman, owner of twenty shares, Lena Yahre, owner of nineteen shares, Molly Flyer, owner of ten shares and Jacob Loeb, owner of one share.

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4. They deny that they are insolvent of that they are unable to pay their just debts, specifically contending that they are not indebted to the complainant in any sum whatsoever. They further deny that all or a substantial part of the assets of Loeb Bros. are concealed in the name of Ellbee Fur Trading Co., Inc., as alleged in paragraph 6 of the complaint.

5. They deny the allegations contained in paragraph 7 of the bill of complaint.

40

SCHWARTZ & SCHWARTZ,
Sol'rs for Defendants,
Loeb Bros.

**Answer of The First National Bank of
Jersey City.**

(Filed October 18, 1922.)

IN CHANCERY OF NEW JERSEY.

Between

JOHN ELIHU BODY, trading as J. E.
BODY & Co.,
Complainant,

and

DAVID LOEB, *et als.*,
Defendants.

52-326.

On Bill &c.

Answer of First
National Bank
of Jersey City.

10

20

This defendant answering says:

1. On August 26, 1922, Ellbee Fur Trading Co., Inc., and Loeb Bros. were depositors in and creditors of this defendant, as will appear by the books of account of this defendant, which it is ready and willing to produce when and where it may be directed.

2. That on that day and prior thereto this defendant had guaranteed drafts or letters of credit for the Ellbee Fur Trading Co., Inc., and was subject to a liability thereupon exceeding the amount so then owing by this defendant to said Ellbee Fur Trading Co., Inc., and this defendant claims at all times the right to set off against said account or credit of Ellbee Fur Trading Co., Inc., any indebtedness of the Ellbee Fur Trading Co., Inc., to this defendant for and by reason of this defendant's liability upon said guaranteed letters of credit above mentioned.

30

40

Answer of First Nat. Bank.

3. Further answering, this defendant says that since August 26, 1922, letters of credit so guaranteed by it have been presented for payment, and have been paid by this defendant pursuant to its guarantee, approximating \$10,500., and that in the
10 ordinary course of business this defendant has set off and charged against the account of Ellbee Fur Trading Co., Inc., said sum of approximately \$10,500., all of which will appear by its books of account which will be produced when and where this court may direct.

4. This defendant further answering says that it has no knowledge or information that said credit or account of Ellbee Fur Trading Co., Inc.,
20 with this defendant is in fact the credit or account of Loeb Bros., but that this defendant has at all times dealt with and extended credit to Ellbee Fur Trading Co., Inc., without knowledge or information that Loeb Bros. had any interest in said corporation other than any interest which they or one or more of them may have had as stockholders, and that this defendant at no time prior to August 26, 1922, had knowledge that the complainant set up any claim that the deposit or credit of the
30 Ellbee Fur Trading Co., Inc., was in fact the deposit or credit of Loeb Bros.

5. And this defendant further answering admits that on August 26, 1922, it was indebted to Loeb Bros. as will appear by the books of account which will be produced when and where directed.

DAVID F. EDWARDS,
Solicitor for Defendant First National
Bank of Jersey City.

Answer of Ellbee Fur Trading Co.

(Filed Oct. 23, 1922.)

IN CHANCERY OF NEW JERSEY.

Between

JOHN ELIHU BODY, trading as J. E.
BODY & Co.,
Complainant,

and

DAVID LOEB, *et als.*,
Defendants.

52-326.

On Bill &c.

Answer of Ellbee
Fur Trading
Co., Inc.

10

This defendant answering says:

20

1. Said defendant, Ellbee Fur Trading Co., Inc., was duly incorporated under the laws of the State of New York, in January, 1921. That the stockholders were and still are David Kellman, owning 20 shares; Lena Yahre, owning 19 shares; Molly Flyer, owning 10 shares, and Jacob Loeb, owning 1 share.

2. This defendant denies that the moneys on deposit in the First National Bank of Jersey City in the account of Ellbee Fur Trading Co., Inc., is in fact money owned by the defendants, David Loeb, Philip Loeb and Jacob Loeb, copartners doing business under the firm name of Loeb Brothers.

30

3. This defendant denies that Loeb Brothers caused substantially all their assets to be transferred to Ellbee Fur Trading Co., Inc., receiving stock therefor, and it denies that each of the said Loeb Brothers is an officer in the said company, and that all of the stock of the said company is

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Amended Answer of First Nat. Bank.

held by Loeb Brothers, and on the contrary says that the officers of the company are and have been David Kellman, President, and Jacob Loeb, Secretary and Treasurer, and that its stockholders are as hereinbefore stated.

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4. This defendant denies that all or a substantial part of the assets of Loeb Brothers are concealed in the name of Elbee Fur Trading Co., Inc.

DAVID F. EDWARDS,
Solicitor for Defendant,
Elbee Fur Trading Co., Inc.

20

**Amended Answer of The First National Bank
of Jersey City.**

(Filed April 12, 1926.)

IN CHANCERY OF NEW JERSEY.

30

Between

JOHN ELIHU BODY, trading as J. E.
BODY & Co.,
Complainant,

and

DAVID LOEB, *et als.*,
Defendants.

On Bill &c.
Amended and
Supplemental
Answer of First
National Bank
of Jersey City.

This defendant answering says:

40

1. On August 26, 1922, Elbee Fur Trading Co., Inc., and Loeb Bros. were depositors in and creditors of this defendant, as will appear by the books of account of this defendant, which it is ready

Amended Answer of First Nat. Bank.

and willing to produce when and where it may be directed.

2. This defendant denies so much of paragraph 2 of complainant's complaint as alleges that the Sheriff of Hudson County "did attach the rights and credits, moneys and effects, goods and chattels of the said defendants in two bank accounts in the First National Bank of the City of Jersey City, namely, in one bank account under the name of Loeb Bros., and in a second bank account in the said First National Bank of Jersey City standing in the name of Ellbee Fur Trading Co., Inc." 10

3. That on that day and prior thereto this defendant had guaranteed drafts or letters of credit for the Ellbee Fur Trading Co., Inc., and was subject to a liability thereupon exceeding the amount so then owing by this defendant to said Ellbee Fur Trading Co., Inc., and this defendant claims at all times the right to set off against said account or credit of Ellbee Fur Trading Co., Inc., any indebtedness of the Ellbee Fur Trading Co., Inc., to this defendant for and by reason of this defendant's liability upon said guaranteed letters of credit above mentioned. 20

4. Further answering, this defendant says that since August 26, 1922, letters of credit so guaranteed by it have been presented for payment, and have been paid by this defendant pursuant to its guarantee, approximating \$10,500, and that in the ordinary course of business this defendant has set off and charged against the account of Ellbee Fur Trading Co., Inc., said sum of approximately \$10,500, all of which will appear by its books of account which will be produced when and where this court may direct, and has since the filing of 30 40

Amended Answer of First Nat. Bank.

its answer set off additional amounts against said account so that nothing remains due to the Ellbee Fur Trading Co., Inc.

10 5. This defendant further answering says that it has no knowledge or information that said credit or account of Ellbee Fur Trading Co., Inc., with this defendant is in fact the credit or account of Loeb Bros., but that this defendant has at all times dealt with and extended credit to Ellbee Fur Trading Co., Inc., without knowledge or information that Loeb Bros. had any interest in said corporation other than any interest which they or one or more of them may have had as stockholders, and that this defendant at no time prior to August 26, 20 1922, had knowledge that the complaint set up any claim that the deposit or credit of the Ellbee Fur Trading Co., Inc., was in fact the deposit or credit of Loeb Bros.

6. And this defendant further answering admits that on August 26, 1922, it was indebted to Loeb Bros. as will appear by the books of account which will be produced when and where directed.

30 DAVID F. EDWARDS,
Solicitor for Defendant First National
Bank of Jersey City.

Rejoinder.

(Filed Oct. 25, 1922.)

Complainant joins issue on the answer of the defendant Ellbee Fur Trading Co., Inc.

40 McDERMOTT, ENRIGHT & CARPENTER,
Solicitors of Complainant.

Rejoinder.

(Filed Oct. 25, 1922.)

Complainant joins issue on the answer of the
defendant First National Bank of Jersey City.

McDERMOTT, ENRIGHT & CARPENTER, 10
Solicitors of Complainant.

Case.

IN CHANCERY OF NEW JERSEY.

Between

JOHN ELIHU BODY, trading as J. E.
BODY & Co.,
Complainant,

and

DAVID LOEB, *et als.*, copartners,
etc. et al.,
Defendants.

On Bill &c.

20

Transcript of the testimony taken in the above-
stated cause, on final hearing, at the Chancery 30
Chambers in Jersey City, on Tuesday, April 13,
1926, at 10 o'clock in the forenoon, before His
Honor.

JOHN BENTLEY,
Vice-Chancellor.

APPEARANCES:

Messrs. McDERMOTT, ENRIGHT & CARPENTER,
by JAMES D. CARPENTER, JR., Solicitors,
JAMES J. FRANC, Esq. (of N. Y. Bar), of 40
Counsel, for the Complainant.

James O'Neill, direct.

DAVID EDWARDS, Esq., Solicitor, THEODORE RURODE, Esq., and BENJAMIN HEYMAN, Esq., of Counsel, for Defendants First Nat. Bank and Ellbee Fur Trading Company.

10

JAMES O'NEILL, sworn on behalf of the complainant, testified as follows:

Direct examination by Mr. Carpenter:

Q. Mr. O'Neill, you are Deputy County Clerk, employed in the County Clerk's office? A. Yes, sir.

20

Q. The County Clerk was subpoenaed to produce the original papers in the case of John Elihu Body against Loeb and others? A. Yes, sir.

Q. In the Circuit Court? A. Yes, sir.

Q. Have you brought them? A. Yes, sir (producing papers).

30

Mr. Carpenter: I now offer in evidence the original writ of attachment issued out of the office of the Clerk of the Hudson County Circuit Court, August 26, 1922, in the suit of John Elihu Body, Trading as J. E. Body & Co. against David Loeb, Philip Loeb and Jacob Loeb, copartners, now or formerly doing business under the name of Loeb Brothers, for \$34,531.38, recorded in the office of the Clerk of Hudson County, in Liber 9 of Attachments, page 107, on the 26th of August, 1922, at 10.07 a. m. The return says: "I executed the within writ on Monday the 28th day of August, 1922, at 10:15 a. m. in the forenoon of that day, as appears in the schedule hereto annexed. Thomas Madigan, Sheriff, by Joseph H. Murphy, S.D.S."

40

James O'Neill, direct.

And the return says: "By virtue of the writ of attachment hereto annexed, I, Joseph H. Murphy, a special deputy sheriff of the county of Hudson, in the presence of Dennis Stapleton, a credible person, on Monday, the 28th day of August, 1922, executed the said writ of attachment by going to the 1st National Bank of Jersey City, N. J. (Jacob Wortendyke, Ass't Cashier) and then and there, in the presence of Dennis Stapleton declared that he had attached the rights and credits, moneys and effects, goods and chattels, lands and tenements of David Loeb, *et al.*, copartners, &c., the said defendant in the suit of John Elihu Body, trading under the name of J. S. Body & Co. Thomas Madigan, Sheriff, by Joseph H. Murphy, S.D.S."

Attached is an inventory and appraisement of the rights and credits, moneys and effects, goods and chattels, lands and tenements of the defendant, made by virtue of the above-stated writ on him served on August 22 by Joseph H. Murphy, a special deputy sheriff of Hudson County and William Henry, an impartial freeholder of said county, to wit: All moneys now on deposit in the First National Bank of Jersey City, 15 Exchange Place, Jersey City, N. J. and standing in the name of Loeb Bros.; also all moneys now on deposit in the First National Bank of Jersey City, 15 Exchange Place, Jersey City, and standing in the name of Ellbee Fur Trading Company. Appraised value unknown. Thomas Madigan, Sheriff, by Joseph H. Murphy, S. D. S. William Henry, Freeholder."

James O'Neill, direct.

Mr. Carpenter: I now offer the affidavit on which the writ issued, sworn to the 25th of August, 1922, proving that the debt was \$34,531.38.

10 Mr. Carpenter: I now offer the complaint—or, by the way, it is shown here that there was an appearance and motion to quash, and denial thereof by Judge Swayze, an appearance signed by Daniel D. Loeb, attorney of defendant Loeb Bros. filed September 28, 1922. The complaint alleges that in the year 1920, and between February 9, 1920, and June 8, 1920, they were indebted, prior to the formation of this corporation, and an allegation that plaintiff's claim was later re-
20 duced to judgment.

The Court: If you offer these documents, you will have the records from which to argue, I take it?

Mr. Carpenter: I am just giving the dates. That is as far as I am going—the debt alleged between those dates when they expended certain moneys. Between February 9, 1920, and June 28, 1920, the plaintiff, at the special instance and request of defend-
30 ants, purchased for the defendants rabbit skins in Australia and advanced for their account for freight, insurance, packing, and other incidental charges, as shown on Exhibit A thereto attached. The plaintiff demands the same amount of money, with interest, from August 25, 1922.

Mr. Carpenter: I now offer in evidence the record of final judgment after trial, rule for final judgment, reporting case already
40 tried on May 8, 11, 12, and 13, 1925; that the

James O'Neill, direct.

jury returned a verdict in favor of the plaintiff and against the defendant for \$36,980.05.

Also judgment finally entered for that amount, \$36,980.05 and costs. Signed by Ackerson, Judge.

10

Q. Have you the record in the judgment roll, Mr. O'Neill, of the Circuit Court minutes? A. (The witness leaves the stand and produced a book.)

Q. You have produced the record of judgments as recorded in the Circuit Court minutes, Volume 70, page 464. Has that judgment been in any wise satisfied or reversed?

Mr. Heyman: I understand you are making an offer; I would like to be heard on that offer, if your Honor please.

20

Mr. Carpenter: I now offer the records of the cause above-mentioned and the record of the final judgment.

The Court: Mr. Heyman's question is, are you going to make any more offers of the records in the case?

Mr. Carpenter: That is all.

Mr. Heyman: Now, if your Honor please, I desire to object to this record, as against The First National Bank, upon the following grounds: Our contention in this case is that even though the defendants Loeb Brothers were indebted to the complainant in this suit prior to the time of the issuance of the writ of attachment, yet on their own bill of complaint it is clear that this evidence is not binding against this defendant, because in January, 1921, which is two and one-half years before the issuance and attempted

30

40

James O'Neill, direct.

10 levy in this suit, the Ellbee Fur Trading
Company, Inc, embarked in business and
commenced to do business with the First Na-
tional Bank of Jersey City, and regardless of
whether or not it was a creature for the pur-
pose of concealing the assets of the defend-
ant Loeb Brothers it still became and was in
name a distinct legal entity. It incurred ob-
ligations, conducted business, received and
paid out money and I still say that the at-
tachment could not be levied and was not
levied against the Ellbee Fur Trading Com-
pany, Inc. All the sheriff levied upon was
the interest of Loeb Brothers, and that is to
be determined after the payment of all the
20 debts and no more, because it is obvious that
Loeb Brothers were entitled to absolutely
nothing until the Ellbee Fur Trading Com-
pany creditors had been satisfied. And even
though Loeb Brothers have transferred their
assets to the Ellbee Fur Trading Company,
still after two and one-half years trading
under the name of the Ellbee that corpora-
tion became and was a distinct entity. And
30 I, therefore, object to the admission of this
evidence as against the bank as not binding.
And Mr. Rurode calls my attention to the
fact, if your Honor please, that there is ab-
solutely no allegation in this bill of com-
plaint concerning knowledge of fraud on
the part of the defendant Bank. There is
no allegation of any kind against the Bank,
except that it was a depositor. Now, we say
in the absence of absolute knowledge on the
40 part of the bank this evidence is not binding.

The Court: Of course, I don't know what

Gardner B. Leech, direct.

the proofs will disclose. Suppose that they disclose the fact that the Ellbee Fur Trading Company was a creature in fraud of creditors, this complainant included; suppose it should be shown that there were \$50,000 of the Loeb Brothers' money in the possession of the bank on account of the Ellbee Fur Trading Company— 10

Mr. Heyman: But that isn't the allegation here. The allegation here is that Loeb Brothers transferred all their assets to the Ellbee and received only the stock of that company. Now, if that is the case, then they are only interested in this company to the extent of the value of the stock after the payment of the debts of the corporation. I wish to have my objection noted at this time and ask your Honor to reserve decision on that until the testimony is adduced later on. 20

The Court: All right.

Mr. Carpenter: I don't know whether your Honor wants to mark these records or not. Suppose we note on the record that they are received in evidence but not marked. Is that agreeable to you? 30

Mr. Heyman: Oh yes.

GARDNER B. LEECH, sworn on behalf of the complainant, testified as follows:

Direct examination by Mr. Carpenter:

Q. Mr. Leech, whereabouts do you reside? A. 173 Elwood Avenue., Newark, N. J.

Q. And by whom are you employed? A. R. G. Dun & Co., New York City. 40

Gardner B. Leech, direct.

Q. How long have you been employed by that company? A. Since 1919.

Q. And their business is what? A. Credit reporting agency.

10 Q. Do you know the defendants in this suit, namely, Jacob Loeb, David Loeb, and Philip Loeb, personally? A. I do.

Q. When did you first meet them? Can you tell us? A. Early in 1920.

Q. Whereabouts did you meet them? A. At various addresses in the fur market,—in 26th Street when they were in business there, and in 29th Street. The exact addresses have escaped my mind.

20 Q. Do you know where their address was in August 28, 1922? A. Yes, 158 W. 26th Street.

Q. Did you ever have occasion to make inquiries, in the course of your business with R. G. Dun & Company, of the corporation known as the Ellbee Fur Trading Company? A. Yes, at various times.

Q. Did you, in the year 1922, in the month of August, make any inquiries as to the Ellbee Fur Trading Company? A. Yes, I think I did.

30 Q. Well, can you give us the date? A. (Witness producing papers.) These are my field notes; may I refer to them?

Q. Notes made by you? A. Yes, sir.

Q. You may. A. The latter end of July or the early part of August, 1922, I consulted the Messrs. Loeb at that time, and I secured certain information—

Q. Where did you get that information? A. At their place of business.

40 Q. Where was their place of business? A. 158 West 26th Street.

Q. That is the same place that you gave me as

Gardner B. Leech, direct.

the address of Loeb Brothers? A. Yes; they were both occupying the same store at that time; both names appeared on the window, at any rate.

Q. Both names appeared on the window, you say? A. Yes.

Q. What inquiry did you make at that time. 10

Mr. Heyman: Now, if your Honor please, I object.

Mr. Carpenter: You are right about that; I withdraw the question.

Q. Whom did you see? Whom did you talk to?

A. I talked to the three men, David, Philip, and Jacob Loeb.

Q. What did you ask them and what did they tell you? 20

Mr. Heyman: I object to that, on the ground that it is all hearsay and cannot bind this defendant.

The Court: Well, I don't understand that evidence has to be binding on anybody to make it admissible. If it is something that tends to prove or to disprove facts in issue it is admissible. Furthermore, Prof. Wigmore harps from one end to the other in his work on evidence to the fact that if testimony is admissible for any one purpose it is admissible, no matter whether it is inadmissible in others. Certainly, what the defendants Loeb said to this witness is evidentiary against the Loeb. You won't deny that? 30

Mr. Heyman: Certainly not.

The Court: It certainly does not bind the First National Bank; I agree with you on that; but it is admissible as against the 40

Gardner B. Leech, direct.

Loebs. I am going to overrule the objection, but if I predicate any decision against the First National Bank on what one or more of these other defendants may have said I would commit a very grievous legal error.

10 Mr. Heyman: I also object to it on the other ground, that it is not competent and not at all relevant, so far as that corporation is concerned.

The Court: I will overrule that and deal with it at the end of the hearing.

Q. Did you state your purpose when you went to the office of the Ellbee Fur Trading Company?

20 A. Yes, I made the routine inquiries, as I have done in thousands of other cases.

Q. What did you ask for? A. I asked for a statement and where they purchased in the market here. I also asked them about the Ellbee at that time.

Q. Did you tell them that you were representing R. G. Dun & Company?

Mr. Heyman: I object to that on the ground as leading.

30 The Court: It is leading but harmless. I will allow him to answer this, but refrain from leading questions, Mr. Carpenter (addressing the witness). Did you tell them whom you represented?

A. Oh yes, I introduced myself with a card, and I had known them for years before that.

40 Q. And they knew you? A. Yes, I became fur reporter in 1920, and I used to get in to see Messrs. Loeb quite often; I would say two or three times a week, because at that time they were very active

Gardner B. Leech, direct.

in the rabbit market and they used to use us for reference.

Q. What did they tell you when you called at the office of the Ellbee Fur Trading Company, the latter part of July or August, 1922, as to who the officers of that corporation were? A. David Loeb— 10

Mr. Heyman: Tell us, first, where you got such information.

A. According to my records here, three officers consisting—

The Court: Of the three Loeb's?

A. Yes, sir, David, Jacob, and Philip Loeb. They were all three of them together and a number of other men, so far as I recollect. 20

The Court: Of course, Mr. Heyman, if you think there is anything to your objection to statements made by the Loeb's, your present objection that you have stated at length and Mr. Rurode's objection for the same reasons, will stand throughout all of this, so that you won't have to constantly reiterate your objection.

(Addressing witness.) Now, go ahead; what did they tell you? 30

A. I asked them about the Loeb Brothers, which I have already told you, and the Ellbee Fur Trading Company, and, as a part of our routine, to check over the officers, I asked them who the officers were, and they told me that David Loeb was President, Philip Loeb, Vice-President, and Jacob Loeb, Secretary and Treasurer, and that the First National Bank of Jersey City had their bank account. I always ask for a statement; we are interested in getting financial statements, of course. 40

Gardner B. Leech, direct.

Q. What did they tell you then, Mr. Leech? A. They said, to the effect, that the Ellbee had succeeded Loeb Brothers, and Loeb Brothers was practically inactive at that time. That is my recollection of it. They declined to make a statement; I didn't get any statement at that time.

10

Q. You mean as to their financial condition? A. Yes, sir.

Q. Did they give you a list of the directors or didn't you ask for that? A. No, I didn't ask for that.

Q. Just the names of the officers? A. Just the names of the officers, which they supplied, and the partners in the Loeb Brothers.

20

Q. And who were the partners in the Loeb Brothers that they gave you? A. David, Philip and Jack Loeb.

Q. You call him Jack Loeb; do you know what his correct name is? A. Jacob.

Q. How did you call him when you went in there, Jack, or Mr. Loeb, or how? A. Jack.

Q. Now, you said that both Loeb Brothers and the Ellbee Fur Trading Company were on the same floor?

30

The Court: The same office, and their names on the same door.

Q. Do you know what kind of business the Ellbee Fur Trading Company and what kind of business the Loeb Brothers were in? A. Practically the same kind. They were importers of rabbit or hare skins from abroad, principally from Australia.

40

Q. Do you know how long Loeb Brothers had been in that business? A. They had been in that business since about 1916, off and on. At one time they were located here in Jersey City in the fur

Gardner B. Leech, direct.

dressing business, and then they moved over to New York.

Q. And what business did they do in New York when they moved over there? Fur dressing business, or what? A. No, they discontinued that and became dealers in fur skins.

10

Q. Did they tell you when the Ellbee Fur Trading Company was organized? A. I haven't any record of that; I don't recall.

Q. Did they tell you what business the Ellbee Fur Trading Company was doing,—whether they were dressers of skins or whether they were dealers in the skins? A. They were both dealing.

Q. The partnership and the corporation were dealing? A. Yes.

Q. By "dealing" you mean buying and selling? A. Yes, that's right.

20

Q. And importing? A. Yes.

By the Court:

Q. Were Loeb Brothers still at that time dressing? A. No, sir; when they moved to New York they discontinued fur dressing and became dealers in furs and skins.

By Mr. Carpenter:

30

Q. Did you at any time ask Loeb Brothers what the condition of the market was in which they were dealing, in 1920, 1921 and 1922? Did you know?

Mr. Heyman: I object to that.

The Court: Answer that "yes" or "no," Mr. Leech. Well, it is perfectly harmless. He isn't going to get him to say whether they did or not. He isn't putting in the witness's mouth what he wants.

40

Gardner B. Leech, direct.

Mr. Heyman: The next question will, though. It is in a direct line.

10 The Court: That is, if he answers in the affirmative, the next question will be, "What did they say." That isn't informing the witness what counsel wants him to say. (Addressing the witness.) Did they? Answer that "yes" or "no."

A. Yes, sir.

20 Q. What did they tell you, and when was it, about? A. Why, I used to see them quite often, as I said, anywheres from one to three times a week, and at that time they were quite a factor in the rabbit skin line, and anybody who is an authority I always try to get some information from. The market in 1920, according to what they told me—this is my general recollection; of course, that is a number of years ago, I can't quote the actual words—they said, to the effect, the market was dropping sharply and business had shrunk and was headed for a period of readjustment. I consulted them about the number of accounts they sold and how they were paying, and they said some of them were renewing their notes and a few of them were paying as they matured. That, in general, is what our conversation was.

30 Q. Did you ask them at any time how they were affected by this effect on the market? A. Yes; they admitted they had lost money, both on the merchandise and on their receivables.

Q. Do you remember what year it was they told you that? A. I would say 1921 or 1922. We were quite intimate then; I used to see them often and talked things over with them.

40 Q. As a result of what these gentlemen told you

Gardner B. Leech, direct.

as to their connection with the Ellbee Fur Trading Company, did R. G. Dun & Company send out a statement showing that these men were the officers of the company?

Mr. Heyman: I object, on the same grounds as in my former objection. 10

Mr. Rurode: Further than that, he says, "as the result of what these men told you did you do certain things." How is that relevant here?

Mr. Carpenter: I don't know that it is. I just wanted to know, because if these men made the statement it was probably broadcast. That is all.

Mr. Rurode: How is this court concerned with that at all? 20

The Court: It isn't.

Mr. Carpenter: I will withdraw it.

Mr. Carpenter: I served on Mr. Edwards notice to produce the minute book, stock book, and stock transfer book, and a lot of other papers, such as the original bills of sale, assignments and documents whereby the property or money and all other items were conveyed the Ellbee Fur Trading Corporation at or between its incorporation and the date of the attachment. Have you got those papers here? 30

Mr. Heyman: Why some of them.

Mr. Carpenter: Mentioned in the notice which I served upon Mr. Edwards April 9th?

Mr. Heyman: I haven't got them.

Mr. Carpenter: Have you got the ledger and the check books?

Mr. Heyman: No. 40

Mr. Carpenter: Any books at all?

Jacob R. Wortendyke, direct.

Mr. Heyman: None at all.

Mr. Carpenter: The last time I saw them you had them up in the Court of Chancery. I would like to offer the notice to produce in evidence and have it marked.

10

(The same is marked Exhibit C-1.)

JACOB R. WORTENDYKE, sworn on behalf of the complainant, testified as follows:

Direct examination by Mr. Carpenter:

Q. Mr. Wortendyke, you are the Assistant Cashier of the First National Bank of Jersey City? A. I am.

20

Q. You are the gentleman, are you not, on whom the sheriff served the writ of attachment that was issued in this cause on the 28th of August, 1922?

A. I am.

Q. After that was served did you note, right on the account of the Ellbee Fur Trading Company and Loeb Brothers, anything regarding that attachment? A. I noted on the Loeb Brothers' account the attachment; at least, I had it done. And my memory is that I made a notation on the Ellbee Fur Trading Company account.

30

Q. What was the amount on deposit in the account of Loeb Brothers at the time that attachment was levied? A. Thirty-three dollars and some cents, I think it was.

Q. Mr. Wortendyke, did you bring up here to court the books in which that account is entered in the bank? A. I have a transcript of it.

Q. Just the transcript? A. Yes.

40

Q. I think we can use that for the time being. The balance in the account of Loeb Brothers on

Jacob R. Wortendyke, direct.

August 28th, at the time that attachment was levied, was how much? A. \$33.80.

Q. You permitted a check to be paid against that account the following day, didn't you? A. No, I guess that is a mistake in the date.

Q. Your transcript must be wrong, then? A. 10
The balance at the close of business on the 28th was \$33.80.

Q. But your transcript says there was drawn against that account \$57.59? A. No; but I think that was charged the day before.

Q. Then we had better have the book. It is small, but I just want to be accurate about these things. That doesn't amount to anything, but on some other item it may make a great deal of difference. Do you know what was the balance on deposit in the account of the Ellbee Fur Trading Company when that attachment was levied? A. 20
Twenty-two thousand odd dollars.

Mr. Carpenter: Have you got that transcript there?

Mr. Heyman: Yes (handing paper to counsel and counsel handing it to witness).

A. \$22,640.03. 30

Q. Was that with or without any accumulations of interest? A. No interest.

Q. Did you ever credit any interest in this account? A. No.

Q. Weren't they ever entitled to any? A. No.

Q. Now, I see by this transcript of the account that you have brought up here that it does not show the daily balance, day by day, does it? A. No.

Q. Just shows deposits in the right column and the charges against the account by offsets? A. 40
Yes.

Jacob R. Wortendyke, direct.

Q. I see on August 30th, 1922, there was a withdrawal from that account of \$701.50. A. That was an item deposited by the Ellbee Fur Trading Co. and returned protested.

10 Q. Have you got that? A. No, we haven't got that; it was returned to them.

Q. Where is the deposit of that item? A. Well, it is in some of these items here.

Q. It is in a larger deposit at a previous date? A. Yes.

Q. You had a right to charge that in because you had already paid it? A. We received it as a deposit.

20 Q. Isn't it a fact that right on your books where the account was carried, as soon as the attachment was made you wrote, or had a clerk write, right across the account "attached," and carried that right along to the end of the account? A. Yes.

Q. You were subpoenaed to produce all these papers? A. Yes.

Q. Have you the signature card that was given you at the time the Ellbee Fur Trading Company account was opened? A. I have, sir (witness producing paper).

30 Q. I show you a paper; what is that? A. That is the signature card of the Ellbee Fur Trading Company.

Q. And who was the man that opened that account in your bank? A. Jacob J. Loeb.

Q. And what was his position in the Ellbee Company? A. Treasurer.

40 Q. Now, I show you a paper, which is also produced by your attorney, and ask you what that is. A. That is a copy of the resolution controlling the account.

Jacob R. Wortendyke, direct.

Q. And shows who were the officers of the Ellbee Fur Trading Company as of that date?

Mr. Heyman: The paper speaks for itself.

A. The officer given here is Jacob J. Loeb, Secretary and Treasurer. 10

Q. Have you got any record showing who the President of that corporation is? A. No.

Q. Or who the Vice-President was? A. No.

Q. Did you ever ask for it? A. No.

Q. Have you any record showing who the directors were? A. No, sir.

Q. Wasn't it customary when a new corporation opened an account in your bank to get the names of the officers and directors? A. Not always, especially where there is a resolution controlling the account. 20

Q. That is a custom, isn't it? A. It is customary to ask for the name of the officer that controls the account and signs the checks.

Q. And that was supposed to be a copy of the resolution of the Board of Directors? A. It is a certified copy.

Mr. Carpenter: I would like to offer that in evidence, and also the signature card, your Honor. 30

The Court: The signature card of the First National Bank of Jersey City, showing that Jacob K. Loeb, as Treasurer, was entitled to draw against the deposits made in the account of the Ellbee Fur Trading Company, Inc., dated January 27, 1921, is offered in evidence.

(The same is designated Exhibit C-2 but not marked.) 40

The Court: Also certified copy of resolu-

Jacob R. Wortendyke, direct.

10 tion of the Board of Directors of the Ellbee
Fur Trading Company, authorizing Jacob
K. Loeb, as Treasurer and Secretary, to sign
the name of the company to all instruments
for the withdrawal of funds from its account
in the First National Bank of Jersey City,
dated the 26th of January, 1921, and sworn
to the 27th of January, 1921, before Daniel
D. Loeb, Master in Chancery of New Jersey.
(Admitted in evidence and designated Ex-
hibit C-3 but not marked.)

20 Q. Now, Mr. Wortendyke, I notice that this
blank form is not a form customarily used by your
bank, but it is a blank of the Manufacturer's Trust
Company? A. Well.

Q. Any particular reason why you didn't have
one of your own blanks used? A. No, except that
they brought this to us.

Q. Who brought it to you; do you know? A. I
couldn't tell you.

Q. Did you know the relationship between Dan-
iel D. Loeb and Jacob K. Loeb? A. No.

30 Q. I see on the signature card that this man was
introduced by D. D. Loeb; that is the lawyer in
Jersey City? A. Yes.

Q. And the same Daniel D. Loeb that took this
affidavit? A. Yes.

Q. You know Jacob Loeb a long while prior to
that, didn't you? A. Why, I did not, not to my
knowledge.

Q. Well, Loeb Brothers had had an account in
your bank for a long time before? A. Yes.

40 Q. Didn't you see that? Didn't it come to your
attention (showing witness card)? A. I don't
think Jacob Loeb's signature appears, but Loeb
Brothers' signature.

Jacob R. Wortendyke, direct.

Q. I show you a card; that contains the signature of Loeb Brothers' account, opened February 9, 1918? A. Yes.

Q. Who were authorized to sign checks for them? A. Philip Loeb or David Loeb.

Q. Now, as a matter of fact, do you know whether Jacob Loeb was a member of the firm at the time that signature was made? A. I do not. 10

Q. You know that Jacob Loeb is the youngest of the three brothers? A. I didn't know that they were brothers.

Mr. Carpenter: I would also like to offer this card in evidence.

The Court: It is the card of Loeb Brothers, bearing date February 6, 1918, bearing the signatures of Loeb Brothers written in two ways, Philip Loeb and David Loeb. 20

(Admitted and designated Exhibit C-4, but not marked.)

Q. Now, Mr. Wortendyke, when this account of the Ellbee Fur Trading Company was opened on January 27, 1921, do you remember who came in to open it? A. I do not.

Q. I see the first deposit is \$2,000 on January 27, 1921; a deposit of \$1,000 February 1, 1921; a deposit of \$2,910.62 on February 3d; and \$547.08 on February 11th. Now, is there any record showing where that money came from or how it came in the bank—whether it was cash or checks? A. Only by the deposit slips. 30

Q. You have those deposit slips? A. We have them in the bank.

Q. Assuming now they were checks from some other bank,—drawn on some other bank—would those slips show what bank they were drawn on? A. No. 40

Jacob R. Wortendyke, direct.

Q. What record would show it? A. The record would merely show that they were checks.

Q. What record would the bank have to show on what bank and through what bank they cleared?

A. Wouldn't have any record.

10 Q. I thought your clearing-house sheets would show it? A. The clearing-house sheet is all made up in bulk and these checks are assorted in various pigeon-holes and sent away.

Q. At this time, January, 1921, the Federal Bank was doing business? A. Yes.

Q. Would you be able to trace those particular checks through the Federal Reserve Bank? A. No.

Q. Why not? A. Because we would have no record of the bank upon which they are drawn.

20 Q. No, but you would have a record on what banks the \$2,000 check, and the check for \$2,900 were drawn? A. No.

Q. Sure about that? A. Yes, sir.

Q. How long would it take your clerks to dig out those first deposit slips? A. I couldn't tell you; it would take some time.

Q. Will you have that done this afternoon? A. Yes.

30 Q. And as many as you can find there in that first column. Now, this account of the Ellbee Fur Trading Co., from the time it was opened in January 27, 1921, became immediately a very active account? A. Yes, sir.

Q. And you say that this transcript which we have here is an accurate transcript? A. Yes.

Q. And shows everything that is shown on the account? A. Yes.

40 Q. Except the word "Attached," and that was written right on the books?

Jacob R. Wortendyke, direct.

Mr. Heyman: That wouldn't be in the account.

Mr. Carpenter: It was written right on the book.

Mr. Heyman: On the daily balance sheet, not on the account. 10

Q. Now, Mr. Wortendyke, I see here on this transcript of the Ellbee Fur Trading Company account is entered, on October 17th—

Mr. Carpenter: I merely bring this out on our case, rather than to have the defendant bring it out, because I understand you want all the evidence before you.

—October 17th, 1922, after this attachment, there is a debit there of \$10,587.13; and on October 22nd another debit of \$11,209.68; and on November 20th, a debit of \$2.91. Have you got the evidence as to what those debits were on those days? A. October 17th we charged against the letter of credit issued to R. Little & Co., Sydney, Australia, \$7,124.49, and a letter of credit issued to Turner Brothers, 800 pounds, or \$3,462.44. 20

Q. Now, you say you charged them against the account on those days? A. Yes, sir. 30

Q. No money had been withdrawn from this account between the date of the attachment on August 28th and the dates you have just mentioned? A. No.

Q. Now, what bank had actually written those letters of credit? A. The American Exchange National Bank had issued the letters of credit.

Q. Did your name appear on those letters of credit? A. On some of them, yes.

Q. Have you got the original letters of credit here? A. Those that we have here are copies. 40

Jacob R. Wortendyke, direct.

Q. That debit that you have made here on October 17 and October 22, were the dates when the letters of credit matured? A. Yes.

Q. Have you got the copies here?

10 Mr. Heyman: Not true copies. They are true copies on their face. I will send down immediately for them. Here are true copies, and the only difference is, they are all on the form of the American Exchange National Bank.

Mr. Carpenter: I think we can go ahead with these.

20 Q. Now, Mr. Wortendyke, the letters of credit you said were matured and you were called on for payment October 17th and 22nd; is that correct? A. Yes, sir; 1922.

Q. When those letters of credit were presented for payment there were documents accompanying them, weren't there? A. There were.

Q. What documents accompanied the letters of credit? A. Bill of lading, invoice, consular invoice, and health or sanitary certificate.

Q. And insurance policy certificate? A. Yes.

30 Q. Those documents covered the letter of credit which had been issued sometime before? A. Yes.

Q. And the invoice and charges on the shipment equal the amount of the letter of credit? A. Draft against that letter of credit.

Q. And when those documents came in what was done? A. They were delivered to the Ellbee Fur Trading Company.

40 Q. What were delivered to the Ellbee Fur Trading Company? A. The documents accompanying the draft.

Q. All the documents accompanying the draft? A. Yes.

Jacob R. Wortendyke, direct.

Q. And those documents, you have said, were a bill of lading for the goods, a health certificate, consular invoice showing what the goods cost, and an insurance policy?

The Court: And sanitary certificate.

10

Mr. Carpenter: I said health certificate.

A. Yes.

Q. Now, how was the bill of lading drawn and endorsed in each case, if you saw them? A. I saw them, yes. I couldn't tell you.

Q. They were so endorsed that they were controlled by the bank, were they not? A. Yes.

Q. They are negotiable on the bank's order? A. Yes.

20

Q. Now, then when those documents come in, Mr. Wortendyke—I mean your draft with the document attached— A. The draft didn't come at all. That was charged against us by the American Exchange National Bank.

Q. Have you got the dates? A. The 17th of October.

Q. The same day? A. The same day or the day before.

Q. You might have held them in each case 24 hours before you charged them off against the bank, mightn't you? A. We may have held them for delivery 24 hours.

30

Q. Didn't you hold them about a day before delivery? A. That I couldn't say, because I would have to get into communication with Loeb.

Q. Now, whom did you get in touch with when you got in touch with Loeb? A. We either wrote a letter to the fur trading company or telephoned them.

40

Q. You knew where they were? Their office was

Jacob R. Wortendyke, direct.

in the same office with Loeb Brothers, wasn't it?

A. I didn't know that. I didn't pay any attention to it.

Q. At any rate, did you have occasion to telephone to Loeb Brothers? A. No.

10 Q. Never did? A. I mean not on this.

Q. But you had telephoned previously? A. Never, to my knowledge; no.

Q. Did Loeb Brothers ever have any letters of credit in your bank? A. Yes.

Q. The same month as the Ellbee Fur Trading Company? A. Yes.

Q. And for the same character of merchandise? A. Yes.

20 Q. Of rabbit skins imported from Australia? A. That is my recollection.

Q. Now, when the drafts against the letters of credit were presented you say the American Exchange Bank in New York charged the amount of them against your account with them? A. Yes.

Q. They were your correspondents in New York? A. Yes.

Q. And you carried a daily balance with them? A. Yes.

30 Q. And when a draft was presented they charged the amount of the draft against your account? A. Yes.

40 Q. And after having taken up the draft in that manner they then sent the documents to you; is that right? A. Yes. I want to correct myself on these things. I see these are 90 days, sight. These documents were delivered, and on presentation of the draft, and they were accepted by the American Exchange National Bank. I couldn't tell you when that was, but it was sometime before the payment of the draft.

Jacob R. Wortendyke, direct.

Q. Some days? A. Yes, these were 90 days sight drafts.

Q. Then you had those documents in your hands several days before you delivered them? A. Several weeks.

Q. What documents are you now referring to, the bill of lading, consular invoice, and other documents already mentioned? A. Yes. 10

Q. Have you got anything showing when those documents came in? A. I think I have.

Q. What have you? A. Just a scratch book.

Q. Can you give us that this afternoon after recess? A. Yes.

The Court: You had better keep some record of what you want Mr. Wortendyke to bring here, or give him a list of what you want. 20

Q. Now, Mr. Wortendyke, did you at any time give any notice to Mr. Body, or his solicitors or attorneys, that these letters of credit, and drafts against the letters of credit, had come in, and that you had merchandise evidencing them, and that, nevertheless, it was your intention to charge those drafts against this account? 30

Mr. Heyman: I object, if your Honor please, first, on the ground that it is immaterial, irrelevant and incompetent; and, secondly, on the ground that there is absolutely no reason why this witness should have notified Mr. Body or his solicitor, because an injunction had been issued against his account and had been dissolved, and there was no reason in the world why we should, anyway, notify anybody that the papers were in our hands. 40

Jacob R. Wortendyke, direct.

The Court: I will overrule the objection and deal with it at the close of the case. There is no jury here. (Addressing the witness.) Now, did you give such notice to Body?

10

A. I did not.

Q. Or to his attorney? A. No.

Q. Now, Mr. Wortendyke, you charged nothing against this account of the Ellbee Fur Trading Company between the date of August 28th, when the attachment was levied, and the 17th of October, except this \$701 item and 50 cents on August 30th and \$1.50 on September 18th; is that right? A. Yes.

20

Q. When this letter of credit was applied for how was it issued by the American Exchange Bank? A. Because we don't issue them but guarantee them.

Q. What did you have from your customer, the Ellbee Fur Trading Company, at the time you guaranteed the letter of credit to the American Exchange Bank? A. We had these demand notes.

30

Q. In each case when a letter of credit was applied for you took a demand note from the Ellbee Fur Trading Company in an amount equal to the amount of the draft applied for? A. Yes, approximately.

Q. By "approximately" you mean approximately the same amount? A. Yes.

Q. I see the letters of credit are in pounds sterling? A. Yes.

Q. And you had to convert that into American dollars and estimate what that would be at the maturity of the credit? A. Yes.

40

Q. And in some cases it would be a little more than a pound sterling? A. Yes.

Jacob R. Wortendyke, direct.

Q. You didn't call those demand notes, then, until October 17th and October 22nd, did you? A. We did not.

Q. You didn't even call then before, did you? A. No.

Q. You just then charged off the amount of the letters of credit or the draft against the letter of credit, against the balance of the account on October 17th and 22nd? A. Yes. 10

Q. Did you ever, Mr. Wortendyke, make any attempt to ascertain what was the value of these goods covered by the bills of lading at the time these drafts came in? A. I did not.

Q. Were they worth at least the amount of the drafts?

Mr. Heyman: Oh, I object to that, if your Honor please. I don't see how that is material in any way at all. 20

The Court: What is the purpose of that?

Mr. Carpenter: To show that the skins were of a value equivalent to the amount of the notes, or worth at least as much or perhaps more; and if I can show they were worth more, so much the better.

Mr. Heyman: The answer that Mr. Wortendyke will make will probably be that he doesn't know anything about it. 30

A. That's right.

Q. Now, Mr. Wortendyke, did you take any steps to protect the bank, by reason of having arbitrarily charged the amount of those drafts against the bank account and at the same time surrendering the merchandise evidenced by the drafts and bills of lading to the Ellbee Fur Trading Company? 40

Mr. Heyman: I object.

Jacob R. Wortendyke, direct.

The Court: For the same reason?

10 Mr. Heyman: As immaterial and irrelevant, because his actions will speak for themselves. That would be a legal conclusion, whether he took any steps. He did
20 certain things; that's all. Now, what he did to protect the bank after he had charged off or after they were paid, is a matter for the Court to decide.

The Court: I think it does call for a conclusion.

Q. I will put it this way: Mr. Wortendyke, did you, before delivering that merchandise, or the documents evidencing it, to the Ellbee Fur Trading
20 Company demand a bond of indemnity from the Ellbee Fur Trading Company?

Mr. Heyman: I object. It makes no difference whether he demanded indemnity or not. The question is, did he, on that day, pay this draft, and if he did, did he charge it against the moneys in the bank, and whether or not that was a legal charge. That is the only question in this case.

30 Mr. Carpenter: We claim we had an attachment that tied up that account. The bank has seen fit to charge against that account, however, later-maturing obligations. In other words, drafts drawn against a letter of credit. Now, then, whether they had a right to do that, or whether they didn't, is a matter that your Honor has to decide what the legal effect of it was. They had
40 some demand notes that they had taken at the time the letters of credit were issued. They didn't demand those. I want to show

Jacob R. Wortendyke, direct.

that, later on when these documents were presented, they drew against the letters of credit, and I shall contend that they ought to have left the bank account intact for the attaching creditor. I want to show that they took an indemnity agreement satisfactory to themselves and then let the debtor have the goods, depriving us of our security by paying out the very money to which we looked for recourse, with their own knowledge. 10

Mr. Franc: We had that very question up in our court.

Mr. Carpenter: Mr. Franc tells me he had precisely the same question up in a case in New York, and has an opinion on it,—Spiro against the West Side Bank, and Mr. Franc says that this has been passed upon in New York. 20

Mr. Heyman: I desire to say this on my objection: Our argument is, that no attachment was ever levied against this account; that the sheriff couldn't in any way attach this account. It was impossible for him to attach this account. This account belonged to a separate entity in which the defendant had absolutely no right, title, or interest except as stockholders, and that the sheriff had no right to levy on this account. This injunction was issued, restraining the defendant from paying any money out of the accounts of Loeb Bros. and the Ellbee Fur Trading Company, in said bank; and further ordering that in the meantime and until the further order of the Court the said Loeb Bros. and the Ellbee Fur Trading Company be and they are hereby enjoined and re- 30 40

Jacob R. Wortendyke, direct.

10 strained from drawing any checks, drafts or
other paper against either of the accounts of
Loeb Bros. or the Ellbee Fur Trading Com-
pany, Inc., in the First National Bank of
Jersey City, and from withdrawing any can-
celled checks or vouchers against the said
accounts from the said bank, and the First
National Bank of Jersey City, its officers, ser-
vants and agents, be and they hereby are
enjoined and restrained from paying out any
moneys to any person from the said ac-
counts of Loeb Bros. and Ellbee Fur Trad-
ing Co., Inc., in said bank and from giving
to any person or persons any of the cancelled
or paid vouchers or instruments showing
20 payment against said accounts. Now, the
attachment was issued on August 28th; the
injunction was issued on the 29th, and it is
my contention that after this injunction was
dissolved by the Chancellor, on the advice of
Vice-Chancellor Fielder, that that released
that account and we had a right to use those
moneys for the purposes which they were
held, and it is immaterial whether or not we
took any further security.

30 Mr. Carpenter: (After making a lengthy
reply the Court said:)

The Court: Well, I think I have heard
enough argument on it, Mr. Carpenter. I am
going to overrule the objection. I don't
know what the law is; I hope to know more
about it after the case is closed. I am going
to let the question be answered and deal
with it, as I said before, when I come to
40 decide the case.

Jacob R. Wortendyke, direct.

Mr. Carpenter: Your Honor's mind won't be prejudiced by what has been said on the other side?

The Court: Not at all.

Q. Did you take a bond of indemnity before you turned those goods back to the Ellbee Fur Trading Company? A. Yes, we took an agreement. 10

Q. Will you produce it. A. It is there some place.

Q. Have you got the date when you received it? A. No, I have not.

Q. Have you got it here? A. Yes.

Q. (By the Court.) Do I understand that one of the things you will supply this afternoon is the date or dates on which you guaranteed these various letters of credit? A. Yes, sir; those are all here,—the date of the issue. 20

Q. The date of issue is indicated by the date in the upper right-hand corner? A. Yes.

Mr. Carpenter: This is a copy that Mr. Heyman has produced, which he says he will substitute for the original and produce the original later, so that we can check it. Suppose I read it to your Honor. 30

(The same is admitted in evidence and marked Exhibit C-5, and is read in full by Mr. Carpenter.)

Q. (Direct examination resumed.) Do you know, Mr. Wortendyke, who entered these goods in the Custom House? A. I do not.

Q. Did you ever learn? A. I may have known.

Q. Is there anything in your records to show? A. No.

Q. These promissory notes, I notice, are demand 40

Jacob R. Wortendyke, direct.

notes which you say you took when you guaranteed the letters of credit, never even had any revenue stamps on them, did they? A. No.

Q. And were never really effective notes? A. I guess they would be, yes.

10 Q. Now, Mr. Wortendyke, at the time of the taking of that agreement you did not think that the Ellbee Fur Trading Company was insolvent, did you?

Mr. Heyman: I object, if your Honor please, upon the ground that it makes no difference what he thought. The question is, what the fact was at that time.

20 Q. Let me put it this way: Did you, on August 28, 1920, believe that the Ellbee Fur Trading Company was insolvent?

Mr. Heyman: The same objection, if your Honor please.

Mr. Carpenter: I am meeting a contention in the letter of credit, whether or not they had any belief that the drawee was solvent or insolvent.

30 The Court: What difference does it make? What is there in the letter of credit?

Mr. Carpenter: I don't know that it does. I won't press it.

Q. After the execution and delivery to you of this indemnity agreement, Exhibit C-5, it was then that you turned these bills of lading and other documents back to the Ellbee Fur Trading Company? A. No, the documents were sent to the Ellbee Fur Trading Company at the date of the acceptance of the draft.

40 Q. And can you give me the date that this paper was delivered to you? A. No, I cannot.

Jacob R. Wortendyke, direct.

Q. Isn't it a fact that the goods, as soon as they entered the Custom House were delivered to the Ellbee Fur Trading Company on what is called a trust receipt? A. Well, we didn't have the trust receipt in those days.

Q. Were they delivered to the American Exchange National Bank on trust receipts with instructions? A. They were delivered to us and we delivered them to the Fur Trading Company. 10

Q. How about your letter of credit; will that tell you? A. No.

Q. Will it show anything about the acceptance of it? A. No, it does not.

Q. It was sometime between the 28th of August and the 17th of October, was it not, 1922, that the documents evidencing the goods were delivered to the Ellbee Fur Trading Company? A. No, they were delivered before the 28th of August, I think. 20

Q. Between the 28th of August and the 17th of October? A. No, I think they were delivered before the 28th of August.

Q. Have you a record of that? A. Yes, I think I have.

Q. Will you dig that up for us? A. Yes.

Q. Did you ever use trust receipts in the First National Bank? A. We do now. 30

Q. But you did not at that time? A. No.

Q. Now, Mr. Wortendyke, did you ever give any credit to the Ellbee Fur Trading Company, excepting as shown by these papers that are before you now? Ever lend money on promissory notes? A. We have.

Q. Did you ever take any financial statements from them? A. We have.

Q. Will you let me see what financial statements 40

Jacob R. Wortendyke, direct.

they gave to you—what credit information they gave you, or that came from the officers?

(Mr. Heyman hands paper to counsel.)

Q. This is dated the 6th of April, 1922? A. It is.

10 Q. It does not show any officers except Jacob?

Mr. Heyman: I object. The paper speaks for itself.

Mr. Carpenter: I offer it.

(Designated Exhibit C-6 but not marked.)

Q. Is that (Exhibit C-6) on a form of the bank?

A. Yes, sir.

20 Q. Now, Mr. Wortendyke, did you have other credit information concerning the Ellbee Fur Trading Company than the paper that has been produced and marked Exhibit C-6? A. I don't know whether there is any more credit information or not there.

Mr. Heyman: Here is the folder. (The witness looks over the papers in folder and then answers:)

This is the only credit information we have.

30 Q. Have you got any credit information as to the Ellbee Fur Trading Company from R. G. Dun & Co. in May, June, July, or August, 1922? A. No, we have not.

Q. What is the sheet I see before you here? What is the date of this one? A. That has nothing to do with this matter.

Q. Now, what notes did you discount for them?

40 Mr. Heyman: I object, if your Honor please. I don't see that that is material at all, what notes they discounted. I don't see how it is material. I don't want to drag this thing out.

Jacob R. Wortendyke, cross.

The Court: What is the purpose of it, to show the course of dealings between Loeb Bros. and the Ellbee Fur Trading Company?

Mr. Carpenter: It might do that. I don't know that it will.

Q. Were notes signed by anybody except Jacob Loeb, Mr. Wortendyke? A. I couldn't tell you that.

10

Q. Perhaps the record will show that. A. Here is a transcript of the bill book of the Ellbee Fur Trading Company.

Q. Are these the notes that you have spoken about? A. Discounted for the Ellbee Fur Trading Company, yes.

Q. It wasn't any of those notes on which the Ellbee Fur Trading Co. was the maker, was it? A. No.

20

Q. I see a note there made by the last one on the loan. A. Charles Cohen, and endorsed "Loeb Bros."

Q. What date was it? A. August 23, 1922.

Q. How much money? A. \$1,679.96.

Q. And this is a copy of it? A. Yes.

Mr. Carpenter: Why can't we substitute this and put it in the record?

30

Mr. Heyman: I object, on the ground that it is immaterial.

The Court: I overrule the objection. Let it be marked.

(The same is marked Exhibit C-7.)

Mr. Carpenter: Except as to those matters that Mr. Wortendyke is kind enough to look up, I will postpone the examination.

Cross examination by Mr. Heyman:

40

Q. Mr. Wortendyke, you have testified that on

Jacob R. Wortendyke, cross.

August 28th, 1922, the balance in the account of the Ellbee Fur Trading Company was— A. \$22,640.03.

Q. And against that you have charged for the protested item? A. Yes.

Q. How much? A. \$701.50.

10 Q. How much was the balance actually in hand on the 28th of August? A. \$22,620.03.

Q. That included that item? A. That came later.

Q. Did you give credit for that before it was paid? A. It was credited to their account when they entered the deposit.

Q. Now, are these all the original records of the bank which you have in this case? A. Yes.

Q. All the original records produced under the subpoena? A. Yes.

20 Q. Now, at the time that these letters of credit were issued were these guarantees or requests attached to them? A. They were.

Q. Are these the original papers? A. Yes.

Q. Where did you get these papers from? A. From the American Exchange Bank in New York.

Q. Whose property are they? A. The property of the American Exchange Bank.

Q. Each one was attached to the letter of credit as it is now? A. Yes.

30 Q. And signed by you and Mr. Spoerl? A. Yes.

Q. Is that the customary way for the issuance of letters of credit for your customers? A. It is.

Q. And upon the issuance of the letters of credit by the American Exchange Bank you received a copy of it, did you? A. We did.

Q. And are these the papers that you received from the American Exchange Bank? A. They are.

40 Q. When you received these copies what did you do? A. I gave the original to the Ellbee Fur Trading Company and retained the copy in our files.

Jacob R. Wortendyke, cross.

Q. And then what did you do in regard to security? A. Took a demand note for each one of those.

Q. And these are the original demand notes? A. Those are the original demand notes.

Q. Just as they were delivered to you? A. They are. 10

Q. At the time of the issuance of the draft? A. Yes.

Mr. Heyman: I don't know whether these are in evidence.

The Court: They have not been marked in evidence. Any objection to offering these copies?

Mr. Carpenter: I wonder if I could look at them during the noon hour? 20

Mr. Heyman: I should like to leave them in Your Honor's custody for the day. The American Exchange Bank would like to have them returned as soon as possible and we don't like to have them lost.

The Court: Those are the regular ones. Do you want to compare those, Mr. Carpenter?

Mr. Carpenter: No.

Mr. Heyman: They are all exactly alike, duplicate originals, if Your Honor please, not copies. 30

The Court: Except I understood you to say—

Mr. Heyman: The agreement on the back is the same on all but one of the copies. There is one copy of the agreement there.

The Court: And the endorsements on all of the originals are exactly the same as the one endorsement on the copy? 40

Mr. Heyman: Yes, exactly the same as the one endorsement on the copy.

Jacob R. Wortendyke, cross.

The Court: Why have me hold them? Why not let Mr. Wortendyke put them in his pocket?

Mr. Heyman: It may be necessary for Your Honor to see them.

10

Q. Suppose you explain for the record the final operation that took place with reference to these letters of credit.

Q. These letters are issued by the American Exchange Bank and they are guarantees by us. These letters of credit are returned, and these are 90 days sight, and these drafts—

20

Q. Just a minute before you get to the drafts: What happens to this piece of paper? A. The original letter of credit and a copy is given to the dealer—

Q. And that is who? A. The Ellbee Fur Trading Company.

30

Q. What does that do? A. That furnishes their agents, whoever they might be, with a letter of credit, and he, in turn, ships this merchandise, and sends this bill of lading, with a draft, to a bank in New York, or to the American Exchange Bank, together with a sight draft, and the bank accepts that draft.

Q. And they pay it? A. They do.

Q. To whom? A. To the one presenting it. Now, what they do with their original letter of credit and their copy I don't know, but they probably hand it to someone else.

Q. Of course, all of these letters of credit were issued and guaranteed by you prior to the service of any papers upon you in the attachment suit? A. Yes.

40

By Mr. Carpenter:

Q. These are what they call unconfirmed letters,

Daniel D. Loeb, direct.

as distinguished from irrevocable letters of credit?

A. How do you get that? I can't answer that.

Q. You don't know the difference between those letters of credit? A. No.

By Mr. Heyman:

10

Q. Are those letters of credit or your guarantee at any time rejected? A. I never knew one to be.

DANIEL D. LOEB, sworn on behalf of the complainant, testified as follows:

Direct examination by Mr. Carpenter:

Q. Mr. Loeb, you are an attorney and counsellor at law of the State of New Jersey? A. I am.

20

Q. I show you an exemplified copy and a photostatic copy of certificate of incorporation of the Ellbee Fur Trading Company, Inc., and the photostatic copy shows your signature; I ask you if you recognize that signature of Daniel D. Loeb as your signature. A. That is my signature.

Q. Do you remember incorporating the Ellbee Fur Trading Company? A. I know I incorporated it.

Q. Do you remember the occurrence? A. I do not.

30

Q. I show you a signature card of the Ellbee Fur Trading Company in the First National Bank of Jersey City, and ask you if you recognize the signature of Jacob B. Loeb? A. I think that is his signature.

Q. He is a cousin of yours? A. Yes.

Q. And David Loeb, Philip Loeb and Jacob Loeb are all brothers and cousins of yours? A. They are.

40

Q. I had a subpoena served on you yesterday,

Daniel D. Loeb, direct.

Mr. Loeb, asking you to produce any and all books and papers of the Ellbee Fur Trading Company that might be in your possession— A. And I told you, Mr. Carpenter, that I haven't got any.

10 Q. Do you know where the minute-book and stock book and record book of that corporation are? A. I do not know where they are.

Q. Have you any idea where any of the books, records or papers of that corporation may be? A. I have not.

Q. Do you know where David Loeb and Philip Loeb and Jacob Loeb are now? A. I do not.

Mr. Heyman: You mean at the present minute?

20 A. I don't know.

The Court: You mean their residence?

Mr. Carpenter: Yes.

A. No, I do not; I never call there.

Q. Do you know whether they are in Jersey City today? A. I have not seen them in Jersey City for some time, nor have I heard from them.

30 Q. Who retained you to incorporate the Ellbee Fur Trading Company, Inc.? A. I really do not recollect, but I know I had a conversation with Mr. David Loeb and Mr. Kellman, and also spoke to Mr. Jacob Loeb.

Q. He is Kellman's cousin? A. No, I don't think he is.

Q. Isn't he a cousin of yours? A. No, I think not.

Q. Now, this lady Lena Yahre; do you know whom she is related to? A. One of the Loeb's, not to me.

40 Q. She is a sister of Mrs. David Loeb? A. That's right.

Daniel D. Loeb, direct.

Q. And Molly Flyer was a sister of Mrs. Philip Loeb, was she not? A. I believe so.

The Court: They are the incorporators?

Mr. Carpenter: Yes, the three incorporators.

10

Q. Now, do you remember the first meeting of the incorporators of this company, the Ellbee Fur Trading Company? Have you any independent recollection of it? A. Their offices were over on 29th Street, in New York, and I believe the first meeting was held there. I never was to any other meeting after the first meeting. Everything was taken care of by the accountant.

Q. That was the same office that the Loeb Brothers had at that time? A. I believe so.

20

Q. Did you attend that meeting personally, Mr. Loeb? A. I did.

Q. Have you any records showing anything about that meeting? A. No, I left all the books there—I left everything there, because it was a New York corporation.

Q. Do you recollect now whether David Loeb was at that meeting? A. I don't think he was.

Q. Have you any recollection of it? A. He had nothing to do with the meeting that I know of.

30

Q. Do you know whether Philip Loeb was present? A. I don't know.

Q. Do you know who paid you for incorporating that company? A. Yes, the Ellbee Fur Trading Company.

Q. Do you remember how they paid it? A. I don't recollect, but I know it was incorporated.

Q. Was the money drawn out of the First National Bank? A. That I don't know; I presume so.

40

Q. Have you any records of this matter at all? A. No, I haven't.

Daniel D. Loeb, cross.

Q. Have you made a search for them? A. I went through my entire office. I only attended the first meeting and when that was held I was through with it.

10 Q. Now, Mr. Loeb, this certificate of incorporation says: (Counsel reads the certificate of incorporation in full.) Do you know what kind of business the partnership of Loeb Brothers was doing before this? A. Regular fur business, buying and selling furs.

Q. Was that the same kind of business that they were authorized by this company to do? A. I don't know whether it is the same kind of business but when I drew the certificate of incorporation I tried to cover everything I possibly could.

20

Mr. Carpenter : I now offer in evidence the exemplified photostatic copy of the certificate of incorporation.

(The same is marked Exhibit C-8.)

Cross examination by Mr. Heyman:

Q. You were present in court before Vice-Chancellor Fielder on the motion to dissolve the injunction in this case? A. I testified in that case.

30 Q. Did you see the books of the corporation in court on that day? A. I believe they were there. I am quite sure they were, because they had me point out, I believe, all the books relative to the turning over of the stock.

Q. You didn't take them away from the court room on that day, did you? A. No, sir.

By Mr. Carpenter:

40 Q. You didn't testify on that day? A. I believe I did, Mr. Carpenter.

Q. I wasn't there; I don't know.

James J. Franc, direct.

JAMES J. FRANC, sworn on behalf of the complainant, testified as follows:

Direct examination by Mr. Carpenter:

Q. Mr. Franc, you are a counsellor in the State of New York? A. Yes. 10

Q. And have your office at 20 Exchange Place? A. Yes.

Q. After the recovery of this judgment in the Hudson Circuit Court in New Jersey did you start suit on that judgment and reduce the matter to judgment in New York City? A. We did.

Q. What effort did you make to reduce it to judgment in New York?

Mr. Heyman: I object. The judgment roll itself is the only evidence of that. 20

Mr. Carpenter: This is the principal point I am getting at—

The Court: Suppose you get down to what you want to prove.

Q. Did you make any effort, and if so what, in the New York suit to get the books of the Ellbee Fur Trading Company, and the books of the Loeb Brothers? A. We did. 30

Mr. Rurode: I object. What difference does that make what they did over there.

Mr. Carpenter: I have given them notice to produce everything here today.

The Court: I suppose if it is shown that the books have been suppressed, it would seem to me rather a startling thing that the books of a corporation can't be secured.

Mr. Rurode: But if he wants to show where the books are he must show it by competent evidence. 40

James J. Franc, direct.

The Court: But I don't know what he is going to say.

A. We first procured an order for the examination of the books—

10 Mr. Heyman: I object. If there was any order issued out of the court I think that is the best evidence.

The Court: He can say that he secured an order, but he can't give the contents of it.

Q. (By Mr. Heyman.) Have you got a copy of that order? A. I have the order. (Witness leaves the stand to find it.)

20 The Court: I suppose Mr. Franc's testimony will require him some tittle time. We will take a recess now until two o'clock.

• AFTERNOON SESSION.

30 Q. Mr. Franc, before lunch you were asked if you had the order that was made directing that Loeb Brothers to testify in supplemental proceedings in New York; have you such a paper? A. Yes, I have three such orders.

Q. Are they copies or the originals? A. Original orders with the Judge's signatures on them.

40 Q. In what court? A. In the Supreme Court, in the matter of the supplementary proceedings in attachment of John Elihu Body, judgment-creditor, against David Loeb, Philip Loeb and Jacob Loeb. The first order was granted on July 7, 1925, for the examination of the judgment-debtors David Loeb, Philip Loeb and Jacob Loeb. The second order which I have before me was granted on the 11th of July, 1925, for the examination of Philip Loeb,

James J. Franc, direct.

and the third order is dated August 28th, 1925, for the examination of Philip Loeb.

I also have before me the original subpoena *duces tecum*, granted by one of the judges of the Supreme Court of the State of New York, addressed to the defendant Jacob Loeb, requiring him to produce various books, documents and papers of the partnership of Loeb Brothers and the Ellbee Fur Trading Company and Loeb Bros. Fur Corporation which was a corporation organized after the Ellbee Fur Trading Co. The subpoena is dated August 28, 1925. 10

Pursuant to those orders we examined Jacob Loeb on various occasions, and also commenced the examination of the judgment debtor David Loeb, and the judgment debtor Jacob Loeb refused to produce. 20

Mr. Heyman: I object.

A. (Continuing.) He failed to produce the books, papers and documents required by the subpoena which I have before me.

Mr. Carpenter: I offer that subpoena in evidence with the original affidavit of service attached. 30

Q. (By the Court.) Is this an original record?

A. Original record of the Supreme Court.

Q. How did you get it? A. According to our practice, we retain the original and serve a copy, exhibiting the judge's signature when we serve the copy.

Mr. Carpenter: Then, among other things I will say, it requires him to produce check books, bank books, check vouchers and other records of the account of Loeb Brothers with 40

James J. Franc, direct.

10 the State Bank of Brooklyn, New York, and
the First National Bank of Jersey City; the
ledgers, journals, cash-books, pay-roll books
and all other books of account of the Loeb
Brothers partnership; check stubs, bank
books, check vouchers and other records of
the Fur Trading Corporation with the First
National Bank of Jersey City; check stubs,
bank books, check vouchers and other rec-
ords of account of the Ellbee Fur Trading
Company with any and all other banks; min-
ute books of the stockholders and directors
of the Ellbee Fur Trading Corporation; stock
certificate books with cancelled stock certifi-
20 cates of the Ellbee Fur Trading Company;
ledgers, journals, cash-books, pay-roll books,
and all other books of account of the Ellbee
Fur Trading Company; any and all leases
of the premises 158 W. 26th Street, Borough
of Manhattan, of the Ellbee Fur Trading
Company, and other books and papers,
which it is not necessary to enumerate. The
subpoena is dated August 28, 1925, and is
signed by John B. Walsh, one of the justices
of the Supreme Court of the State of New
30 York.

Q. Now, have you here, Mr. Franc, the steno-
graphic record of the examination of David Loeb
and Jacob Loeb, pursuant to those orders? A. Yes.

Q. And is the stenographer here in the court-
room with her original notes? A. She is.

Q. She is the person who took the examination
in your presence? A. She is.

40 Q. Now, then, did either of those defendants
produce any of the books, records, or documents

James J. Franc, direct.

or papers of either Loeb Brothers or the Ellbee Fur Trading Corporation? A. They did not.

Q. Did you examine as to their failure to produce them? A. We, did, and we made an application to punish them for contempt of court, and the judge made an order referring it to a referee to hear and report, and that proceeding is still pending. 10

Q. Who was the judge of the Supreme Court? A. Judge Joseph N. Proskauer. I think I have a copy of the opinion here of the Justice, in which he said that the defendant-judgment debtor, Jacob Loeb—that his conduct and attitude was contumacious, and that there is ground for inference to be drawn upon the papers submitted that Jacob Loeb has contumaciously refused to produce the books, papers and documents in his possession and required by the subpoena *duces tecum* to be produced by him. 20

Q. And you say that matter is still pending before the master? A. Before the referee to hear and report.

Q. Now, did the defendants, Loeb Brothers, in that proceeding for contempt, or any of them, file an affidavit? A. They did. The contempt proceedings was against Jacob Loeb. 30

Q. He is the Secretary and Treasurer of the Ellbee Fur Trading Company? A. Secretary and Treasurer. He first refused to produce the papers, on the ground that he didn't have custody—

Mr. Heyman: I object to his characterization of any party to this suit.

A. Well, I have got the notice that was served.

Q. (By the Court.) You say he gave an explanation of why he didn't produce them? A. First, he 40

James J. Franc, direct.

10 refused to produce them, on the ground that he wasn't the custodian of the books of the Ellbee Fur Trading Company, and, later, it developed that he withdrew from that position and attempted to explain the absence of the documents and books on other grounds.

By Mr. Carpenter:

Q. Have you the affidavits that he made at that time? A. Yes, in opposition to the motion to punish him for contempt of court.

Q. Where did you get the paper that you have before you now? A. That was served on us by the attorneys for the Loeb Brothers in the proceedings in New York.

20 Q. Served when? A. Served on or about September 30, 1925, in opposition to our motion to punish the judgment debtor, Jacob Loeb, for contempt of court.

Q. Where is the original of that? A. The original is filed in the court and the copy is filed by Jacob Loeb's attorney.

Q. And this is the copy that was served on you? A. It is.

30 Mr. Carpenter: I would like to offer this in evidence as a declaration against interests of the said Jacob Loeb individually and as Secretary and Treasurer of the Ellbee Fur Trading Co.

Mr. Heyman: I don't think it is material at all.

The Court: He says that he has made declaration against interests. Do you want to see it?

40 Mr. Heyman: No, I don't want to see it; I

James J. Franc, direct.

don't care about it, but I don't see the materiality of it.

The Court: Well, as between these two companies, that is, Loeb Brothers and the Ellbee Fur Trading Company.

Mr. Heyman: This is an affidavit, as I understand it, in opposition to the petition to punish this defendant for contempt of court for failure to produce books. I don't know how it can affect the issue in this suit. I have no objection to the offer of proof, although he now says this affidavit of opposition is filed in the court and a copy served upon him. I don't require him to produce the original under the seal of the notary; that isn't the ground of my objection, but I don't see the materiality of it. 10 20

The Court: Well, part of the complainant's proof is to prove that the assets standing in the name of the Ellbee Fur Trading Co. were, in equity, the property of Loeb Brothers.

Mr. Heyman: Right.

The Court: Now, isn't a statement against interests, made by one of the partners, proper? 30

Mr. Heyman: Undoubtedly; but how can a man, in the absence of the books, make a statement which affects the corporation.

Mr. Carpenter: It gives a history of the Ellbee Fur Trading Company and Loeb Brothers.

Mr. Heyman: I will withdraw the objection.

Mr. Carpenter: I offer it. 40
(Admitted and marked Exhibit C-9.)

James J. Franc, direct.

10 The Court: I only want you to call my attention to such parts of it as you think are pertinent. The other side, of course, will be given ample opportunity to produce any other part that will explain the effect of what Mr. Carpenter reads.

20 Mr. Carpenter: He gave a part of the early history of this Loeb Brothers, claiming that they were in business at 476 Keap Street, Brooklyn, and remained in business "myself and shortly went out of business, and around the beginning of 1918 I joined my brother David and Philip as a salesman. There was a tacit understanding, however, that I would be taken into the firm some time and this understanding naturally leaked out to the trade, so that I was generally regarded as a partner, and after a while my brothers decided to consider me a partner."

30 "The firm of Loeb Brothers, fur dealers, remained in the said place of business, 31 West 29th Street, for about five years. In the early part of 1921, however, the firm was in difficulties and it was decided that the firm should go out of business and that a corporation should be organized to engage in the same line of business with my two brothers and myself as active men and some outsiders furnishing capital. The Ellbee Fur Trading Corporation was thereupon organized, the persons interested therein being, besides my two brothers and myself, a man by the name of D. Kellman, a Miss Mollie Flyer, a sister-in-law of my brother Philip, and a Miss Lena Yahre, a sister-in-law of my brother David.

40 I had a few shares in the said corporation

James J. Franc, direct.

and the rest of the stock was owned by the outsiders. To the best of my knowledge, neither my brother David, nor my brother Philip had any shares in the stock of the corporation.

“As I stated, it was intended that the firm of Loeb Brothers should go out of business entirely, but it was found thereafter, as a practical matter, it was not convenient to have the firm dissolved officially, for the reason that it was better known to the trade than the new corporation and that some merchants would rather sell to the firm than to the corporation. The firm thereupon continued a nominal existence, buying merchandise in its own name but really for the account of the Ellbee Fur Trading Corporation.”

“Early in 1922, the lease which the firm of Loeb Brothers had on the store at 31 West 29th Street expired and the Ellbee Fur Trading Corporation, which was located upon its premises at that address, moved to 158 West 26th Street, where it remained for about a year. During that year, the firm of Loeb Brothers continued its existence in the manner hereinbefore stated, engaging in business sporadically by buying occasionally merely as an aid to the Ellbee Fur Trading Corporation.”

Then the witness says here:

“In the early part of 1923, it was found that the capital which had been invested in the Ellbee Fur Trading Corporation was insufficient to conduct business, and we tried to get some more outsiders interested. We

James J. Franc, direct.

10 found a man by the name of Beckerman of Boston, who was willing to invest some money but declined to go into the old corporation, he having been advised by his attorney to organize a new corporation so as to make sure that there would be no old liabilities carried over into the new business. Thereupon, the new corporation of Loeb Brothers Fur Corporation was organized by Mr. Beckerman and myself, the old corporation of Ellbee Fur Trading Corporation being continued until about the end of that year when its capital was entirely wiped out by the failure of the firm of N. Witkin

20 which was indebted to that corporation in a large sum of money. Before that corporation went out of existence, the two corporations did business in the same premises, and I and my brothers were actively connected with both of these corporations in so far as actual conduct of the business was concerned, the outsiders being merely investors. The place of business occupied by these two corporations was the store and basement at

30 217 West 29th Street, where the Loeb Brothers Fur Corporation is still located."

Then it speaks here about his endeavor to locate the books in various places.

Now, there is another affidavit which is attached to this, of Philip Wittenberg, attorney-at-law, but we will not consider that in this.

40 Q. Now, Mr. Franc, did you ask either or both of these men what, if any, relationship there was between this man Kellman and Loeb Brothers? A. I did; I think I asked Jacob Loeb that.

James J. Franc, direct.

Mr. Heyman: May I ask your Honor to direct the witness not to volunteer.

Q. Did you also ask either or both of these defendants what Kellman did in the conduct of that business and what he got out of it? A. I did.

10

Q. Now, I am going to show you the stenographic report of the testimony and ask you what testimony he gave on that subject. Just read the question and answer. First, what witness was it? A. Jacob Loeb.

Mr. Heyman: Any statement in regard to that would be impeaching the testimony of one of his previous witnesses, Mr. Daniel Loeb, who testified here today.

20

Mr. Carpenter: He said he didn't know of any.

Mr. Heyman: He said Kellman was not related to Loeb.

The Court: I think exactly what he said was this, that he was not related to him, Mr. Loeb, and he didn't think he was related to the others.

Mr. Heyman: I object to reading the testimony in the record, on the ground that it has not been proved.

30

Mr. Carpenter: We have the stenographer here in court who took the testimony to prove it. I will withdraw the witness.

40

Miss Tamar Wollock, direct.

(MISS) TAMAR WOLLOCK, sworn on behalf of the complainant, testified as follows:

Direct examination by Mr. Carpenter:

10 Q. Miss Wollock, where do you live? A. In The Bronx.

Q. Are you a stenographer? A. I am.

Q. And do you take the testimony of witnesses in court proceedings? A. Proceedings, yes.

Q. Did you, at the request of Mr. Franc, take, stenographically, the testimony of David and Jacob Loeb in the discovery proceedings in New York? A. Yes.

Q. Have you your original notes? A. Yes.

20 Q. Did you transcribe from those original notes these two volumes of testimony which are in red book covers, and which are here before us today? A. Yes.

Q. Whose testimony is this (holding up book to the witness)? A. The large book is the testimony of Jacob Loeb and the smaller one, of David Loeb.

Q. These are sheets made by you from your original notes of that examination? A. Entirely by me.

30 Q. And what have you to say as to the correctness of the transcript you made in typewriting of the notes taken stenographically? A. I believe, to the best of my knowledge, they are accurate.

Q. Any question about it? You can refer to your notes? A. Yes.

Q. And check up on it? A. Yes.

Cross examination by Mr. Rurode:

40 Q. Where are your books? Let me look at your stenographic books. Show me the first one, will you. (The witness exhibits book to Mr. Rurode.)

Miss Tamar Wollock, cross.

Q. How old are you? A. Twenty-five.

Q. How long have you been writing stenography? A. About seven or eight years.

Q. Whom do you work for? A. Messrs. Franc & Becker.

Q. You are an office stenographer? A. I am a stenographer. 10

Q. You work in their office? A. I do.

Q. You don't go out in court, do you? A. I am not a court stenographer.

Q. You take dictation from Mr. Franc and Mr. Becker, I suppose? A. Yes.

Q. Most stenographers can read the notes of other stenographers; I don't know whether I can or not. What system do you write? A. I write Pitman. 20

Q. And you think these notes are accurate? A. I know them to be accurate, to the best of my knowledge.

Q. To the best of your knowledge, of course. A. Of course, we make mistakes, I think in common with most people.

Q. I suppose these lawyers talked pretty fast, didn't they, when you were taking this examination? A. No, not extraordinarily fast. 30

Q. Didn't these men get excited in cross examining the Loeb's—sometimes get pretty excited and talk pretty fast? A. Not more than usual.

Q. Still you think, notwithstanding that, you are absolutely positive you didn't make any mistakes? A. I wouldn't swear to that. I am generally accurate in my work and if there are any mistakes they are not material.

Q. You didn't read the testimony over after it was written? A. Mr. Loeb saw the testimony. 40

Miss Tamar Wollock, direct.

Q. How do you know that? A. I think they demanded a copy and it was furnished them.

Q. You only know that because somebody told you so? A. I remember furnishing them with the testimony. I am in the office.

10 Q. You don't know whether they read the testimony, do you? A. I presume they read it.

Q. That is only your presumption? A. I presume they read it.

Q. You didn't see them reading this testimony at any time, did you, after you transcribed it? A. I didn't carry the testimony to them or read it to them.

Q. You didn't read it to them, you say? A. No.

20 Q. All you did was to take certain testimony which you swear is accurate, and you transcribed it for Mr. Becker? A. Yes.

Q. You being Mr. Becker's office stenographer? A. Yes.

Q. That is correct? A. Yes.

Direct examination by Mr. Carpenter resumed:

30 Q. Did either of the Loeb's come back to you afterwards and ask you to correct any of the testimony? A. No; no question was made as to any of the testimony.

Q. Now, I will ask you what he testified, instead of having Mr. Franc tell it. Now, Miss Wollock, I show you, in the testimony of David Loeb, on page 13; I wish you would tell us what question was asked of him and what his answer was.

Mr. Heyman: Read it.

A. (Witness reading):

40 "Q. Now, will you tell us the circumstances under which you organized the

David Loeb—Read by Stenographer.

Ellbee Fur Trading Company. A. Yes, sir. When you see the papers from the State Bank—

“Q. Meaning the copy of the summons and complaint and the amended answer in the suit of the State Bank against Philip Loeb, Jacob K. Loeb and David Loeb, in the Supreme Court, New York County? A. Yes—you can see that we have remained without any money but with a lot of knowledge and a lot of experience. And then we didn’t know what is going to happen on the contingencies. We had a lot of commercial papers given away to the State Bank with our signature endorsed to them and we didn’t know, according to the conditions of the market, what is going to happen on the contingencies, that means on the signatures that we have signed on those notes or other trade papers, what you call them, what were given away to the State Bank. We didn’t know where we were standing. Money we didn’t have. The bank took everything away from us and they simply threw us out. First, they promised us when we gave them the merchandise away and the security or whatever they call it—the policies—they are going to repay us out as much as they can, but then they took everything away from us and we came back they asked us how much money we have. They knew that we had no money. I got ahold of my sister-in-law, Lena Yahre. She had a few dollars. And Mrs. Philip Loeb got his sister-in-law, Mollie Flyer, and also got a cousin of ours, Mr. David Kellman, and he having known us for so many years,

10

20

30

40

David Loeb—Read by Stenographer.

yet from the old country, and he knew the character of us and he felt along with us, and they organized the Ellbee Fur Trading whatever they call it, I don't know exactly.

10 "Q. Ellbee Fur Trading Company, Inc.? A. —that we should remain in business to take care of the business, but the money was given by those three people.

"Q. How much did David Kellman put up? A. I can't say exactly at the moment how much he gave.

"Q. What was the capital of the Ellbee Fur Trading Company, Inc.? A. You got the papers."

20 The Court: Is that Jacob?

Mr. Carpenter: This is David, who we say is the President.

Q. Now, turn to page 17. A.—

"Q. Were they citizens of the United States? A. I don't know.

"Q. Where was Lena Yahre born? A. She was born in the same city where I was born.

30 "Q. Where was that? A. In the same city —Dynow, Galicia. That was a province of Austria at that time.

"Q. If you know, where was Mollie Flyer born? A. Russia.

"Q. Was Lena Yahre related to you before you married her sister? A. No, sir; but we came from the same city.

"Q. Do you know when she came to this country? A. I can't say exactly the year.

"Q. Is she married now? A. No.

40 "Q. And she still lives with you at 1005 Eastern Parkway, Brooklyn? A. No, not now.

David Loeb—Read by Stenographer.

“Q. Where does she live? A. She lives with her parents.

“Q. Do you know the address? A. I don’t remember the number, but the street is Pulaski.

“Q. Between what streets? A. Between Tompkins Avenue and Throop Avenue. 10

“Q. Is she working at the present time? A. Yes.

“Q. And where is she working? A. That I don’t know.

“Q. Since when has she been working? A. I wouldn’t be surprised if since 1908. She must be here in this country, if I am not mistaken, since 1908.

“Q. And in what capacity since her arrival? A. What do you mean? 20

“Q. She was with you for a length of time? A. Not exactly long, but then she went to work.

“Q. She was in your employ in 1917 when your firm moved from Brooklyn to New York? A. I think I lived in Brooklyn, because 1917 I came back from Newark to Brooklyn and she must have been with me. 30

“Q. And she was in business with you, an employee? A. No, she was not in business with me. She went to work and stayed with me and I never charged her for any board.

“Q. Or lodging? A. Yes, or lodging, while she was with me.

“Q. You mean that while she lived with your household you never charged her for board or lodging? A. To my knowledge I never took a cent of Lena Yahre while she was boarding with me.” 40

David Loeb—Read by Stenographer.

Q. Page 18. A.—

10 “Q. Did she ever work for Loeb Brothers, the partnership, after you moved from Brooklyn to New York? A. No, sir; she never worked for Loeb Brothers.

“Q. What business was she working in at that time? A. I don't remember what she did four years ago—five years ago.

“Q. Well, why didn't you charge her for board and lodging? A. Because I didn't need her few dollars.

“Q. It was an act of kindness on your part? A. Yes.

“Q. Was she in good health? A. Yes, sir.

20 “Q. What was she earning at that time? A. I don't know exactly. I didn't ask her, but I know she was earning nice money.

“Q. As a matter of kindness you never charged her anything for board and lodging? A. I personally never charged her.

“Q. Is it not a fact that you didn't charge her because she could not afford to pay? A. I didn't need her few dollars.

30 “Q. Did she ever enter the employ of the Ellbee Fur Trading Company? A. Not to my knowledge.

“Q. You would know it, would you not? A. I should say I would.

“Q. Was she ever in the employ of Loeb Bros. Fur Corporation? A. No, sir.

40 “Q. Do you know in what capacity she is employed now? Has she not a trade? She must have some kind of trade if she is working. A. I don't know what trade she is working at. I know she was working those years.

David Loeb—Read by Stenographer.

I think, if I am sure, she was working on ladies' waists.

"Q. Ladies' waists in some factory in New York? A. In New York or Brooklyn.

"Q. Do you know the names of any of her employers? A. No, sir. 10

"Q. Do you know how much she was earning? A. I don't know.

"Q. You used the expression 'those years.' What do you mean by 'those years'? A. Around 1917.

"Q. How did she loan you the money for the Ellbee Fur Trading Company—how was the money loaned or paid by her? A. In cash.

"Q. You mean in specie? A. What? 20

"Q. You say in cash—you mean by bills and silver? A. I don't remember how she paid it, in bills or silver. I don't think she paid in silver.

"Q. Did she give you a check? A. No, she used to keep her account with Orliner Brothers,—and—

"Q. Who were they? A. They were bankers. 30

"Q. In New York? A. Yes, in New York, down at Clinton Street or Essex Street, and they failed, and they took all what she had—they took her money away, so that's why she gave me money. She must have given it in bills.

"Q. Do you recall her giving it to you? A. Positively.

"Q. How much did she give you? A. I don't remember exactly, but I know she gave me money. Whatever she gave me is marked. 40

David Loeb—Read by Stenographer.

“Q. You mean in the certificate of incorporation? It says that she paid for or subscribed for 20 shares of the capital stock of the company of the par value of \$100 each.

10 “(Mr. Loeb confers privately with Mr. Wittenberg.)

“Mr. Franc: I object to the witness speaking private to Mr. Wittenberg, his counsel, in the course of my examination of the witness.

“Mr. Wittenberg: He may speak to me privately if he wishes.

“Q. Do you recall what your sister-in-law, Lena Yahre, paid you? A. She did not pay me.

20 “Q. Whom did she pay? A. To the company.

“Q. But you said she gave you the cash. A. I was President.

“Q. When she gave it to you? A. Not to me, to the business.

“Q. Didn't you say that she paid you the par value of the stock in cash? A. I didn't say that she paid it to me.

30 “Q. You are sure it was paid in cash? A. I am sure of that.

“Q. How long prior to January, 1921, did her bankers, Orliner Brothers, fail? A. You want me I shall remember that? I am sorry. I will have to look that up.

“Q. You have some records? A. I have no records, but you can find records.

40 “Q. Did Mollie Flyer, to your knowledge, pay for the stock for which she subscribed, namely, 10 shares of the par value of \$100 each? A. I think she did.

Jacob Loeb—Read by Stenographer.

“Q. Were you present? A. I can’t remember exactly today what happened five years ago.

“Q. Did David Kellman pay the amount of his subscription, namely, \$2,000 for 20 shares of the par value of \$100 each? A. Yes. 10

“Q. Were you present when he paid? A. Well, I don’t remember exactly if I was present, but I know he paid.

“Q. Did he pay by check or cash? A. Check.

“Q. But you are not certain how Mollie Flyer paid, whether in checks or cash? A. I don’t know how she paid.”

Mr. Carpenter: That is down to the center of page 23. Then there is something introduced, in the way of an agreement between them and the State Bank of Brooklyn, and also some papers introduced in evidence, but I will call Mr. Franc on that. 20

Q. Now, then, the testimony of Jacob Loeb; have you got that there? A. Yes.

Q. Turn to page 20:

“Q. Were not all the old papers of Loeb Brothers—by the old papers I mean papers two years old and more—kept at 217 West 29th Street at the time of the trial in Jersey City? A. As I told you, I was not the custodian of those papers and I cannot tell you. 30

“Q. Whether or not you were the custodian, can you say whether some of them were kept at 217 West 29th Street? A. I cannot.

“Q. Do you know? A. I don’t know. 40

“Q. Did you ever know? A. I may have.”

Jacob Loeb—Read by Stenographer.

Q. Now, turn to page 22:

“Q. Do you recall that at one time there was in business a corporation known as the Ellbee Fur Trading Corporation? A. Yes.

10 “Q. That was organized January, 1921, was it not? A. I don’t remember.

“Q. What place of business did that company have? A. West 26th Street.

“Q. That was 158 West 26th Street? A. Yes.

“Q. You were secretary and treasurer of the corporation, were you not? A. Yes.

“Q. David Loeb was president? A. No, sir.

20 “Q. Never? A. I don’t remember; he may have been.

“Q. Didn’t you report to the State Tax Commission that you yourself, Jacob Loeb, were secretary and treasurer, and that the president was David Loeb and Philip Loeb was vice-president, and swear to the report before a notary public in 1922? A. Can I see the report?

30 “Q. I cannot show you the report; I can show you a copy. A. I would like to see the report or an authorized copy.

“(Witness is shown and inspects copy of a report.)

“Q. Is that correct? A. I don’t remember.”

Q. Also on page 24, relating to check stubs, &c.:

40 “Q. Have the check stubs, bank books and check vouchers of the account of the Ellbee Fur Trading Corporation in the First National Bank of Jersey City been preserved? A. I don’t think so.

Jacob Loeb—Read by Stenographer.

“Q. Have they been destroyed? A. Same answer—I cannot tell.

“Q. When did you last see them? A. Not for some time.

“Q. Where were they when you last saw them? A. At 158 West 26th Street, I should think. 10

“Q. Are you willing to make search to find out whether the various bank records of the Ellbee Fur Trading Corporation are in existence? A. Yes, sir.”

Q. Then from page 27:

“Q. As a matter of fact, the business of Ellbee Fur Trading Company was actively conducted, was it not, by David Loeb, Philip and Jacob Loeb? A. Yes.” 20

Q. Also on page 40:

“Q. The active managers of the Ellbee Fur Trading Company were yourself and your two brothers? A. The active workers? We worked for the Ellbee.

“Q. And it didn't have any active workers outside of yourself and employees? A. One more man. 30

“Q. Who was he? A. Mr. Kellman.

“Q. He was a salaried employee? A. I don't think so.

“Q. He didn't get any salary? A. No.

“Q. Did he get dividends? A. Sure; he was a partner in the business.

“Q. He was one of the stockholders? A. Yes.

“Q. And whatever he got out of the business was out of the dividends? A. There weren't any profits. 40

Jacob Loeb—Read by Stenographer.

“Q. Did you have a salary from the Ellbee Fur Trading Co.? A. Yes.

“Q. How much? A. I think \$75.

10

“Q. Did David Loeb have a salary from the Ellbee Fur Trading Co.? Were these salaries or drawing accounts? A. I don't know.

“Q. Did Mr. David Loeb have a salary? A. I suppose he did.

“Q. Do you know how much? A. No.

“Q. You were the treasurer? A. It was years ago.

“Q. Did Mr. Philip Loeb have a salary? A. Yes.

“Q. And Mr. Kellman? A. No.

20

“Q. You don't remember what the salaries were? A. Only my own.

“Q. When the Ellbee Fur Trading Co. commenced business was a new set of books of account opened up or did it continue the Loeb Brothers? A. A new set of books, absolutely.

30

“Q. When the Loeb Bros. Fur Corporation was organized was a new set of books opened? New concern and new books—new books in each case? A. New books for the new concern.

“Q. So that there should be books of account for Loeb Brothers partnership; there should also be books of account for the Elbee Fur Trading Co.; and there should be also books of account for Loeb Bros. Fur Corporation? A. Yes.

40

“Q. Will you produce the books of account of these three different corporations at the next hearing? A. If I can possibly do so.

Jacob Loeb—Read by Stenographer.

“Q. Do you know of any reason that would prevent you from doing it? A. No.”

Q. It then refers here to another record of a suit in New York. I am now turning to the bottom of page 166:

10

“Q. And did the fact that the claim was impending induce you and your brothers to organize the Ellbee Fur Trading Co.? A. There was no claim pending. It was all settled.

“Q. No, I mean when you organized the Ellbee Fur Trading Co. which was in January, 1921, you owed a large sum of money to the State Bank, didn't you? A. Yes, if the record says so.

20

“Q. You did, didn't you? A. I don't remember. Give me the date.

“Q. You organized the Ellbee Fur Trading Company by a certificate of incorporation filed in the office of the Secretary of State on January 13, 1921, and of which a duplicate executed original was filed in the office of the Clerk of the County of New York on January 15, 1921? A. Yes. And when do you say we settled with the bank?

30

“Q. In May, 1921. A. If we intended to do any credit business we would have to settle with the bank.

“Q. But you had organized the Ellbee Fur Trading Co. in anticipation of difficulty with the bank? A. No, sir.

“Q. In January, 1921, there was nothing past due? A. I cannot say now.”

Mr. Carpenter: That is all the testimony we need.

40

Miss Tamar Wollock, cross.

Q. Miss Wollock, was there presented to you and marked, an exhibit containing a summons and complaint of the State Bank against Loeb Brothers, and an answer filed by them in that suit? A. There was, yes.

10

Mr. Carpenter: Have you got it, Mr. Franc?

Mr. Franc: Yes. And the reply also, Mr. Carpenter. (Producing papers and handing them to counsel.)

Q. Do you remember who produced these papers? Do you know whether these were produced by Loeb Brothers, or their attorneys? A. They were produced by their attorneys.

20

Q. And given by him to whom? A. Given by him to Mr. Franc at the examination.

Q. And do you remember this exhibit marked the original exhibit? A. Yes.

Q. Who marked that? A. This is a copy that I made and I marked.

Q. From what did you make this copy? A. From the paper that they had at court.

Q. Is this the original that you made it from? A. Yes. It is marked with my initials "T. W."

30

Cross examination by Mr. Heyman:

Q. All of this testimony which you have produced under this red cover was taken by you? A. All of it.

Q. And transcribed by you into this book? A. Yes.

Q. You remember the following testimony:

40

"Q. And some of it was represented by merchandise in your store and some by merchandise in the warehouse, and they cleaned you out completely; is that it? A. According to the paper; you can see.

Further Loeb Testimony Read.

“Q. I am asking you the question. A. We were cleaned out. After this we were cleaned out.

“Q. After this agreement was executed Loeb Brothers had no assets? A. After we gave everything away to the bank we were cleaned out—no assets. 10

“Q. You had no merchandise? A. No.

“Q. You had no accounts receivable? A. Didn't amount to nothing.

“Q. How much? A. Didn't amount to anything, because if they would be any amount, a big amount, we would give it away to the bank.

“Q. You mean to the State Bank? A. Yes. 20

“Q. They took your notes receivable and acceptances and accounts receivable, too, didn't they, under this agreement? A. Well, I don't know. You have the agreement in front of you. You can read and see what the agreement says.

“Q. The agreement refers to the fact in clause 1 that your firm had, prior to the date of the agreement, assigned to the bank certain merchandise as collateral security. Is that the fact? A. If it is in the agreement it is the fact. 30

“Q. You don't quite understand me. A. Maybe.

“Q. Under this agreement you transfer absolutely all of the stock of goods that you had previously assigned to the bank merely as collateral? A. Pardon me, I don't understand that.

“Q. I want to explain it to you: The agreement in its first clause, clause 1, provides as 40

Further Loeb Testimony Read.

10 follows: 'The parties of the second part (that is, you and your brothers) hereby and herewith sell, transfer, assign and set over unto the party of the first part (meaning the bank) the balance of the goods and any interest therein, which goods were heretofore assigned by them to it as collateral security as aforesaid, still remaining in possession of the party of the first part.' Do you understand that? Furthermore, the agreement in one of its preambles recites that, 'Whereas, as security for such indebtedness the parties of the second part (meaning Loeb Brothers) have heretofore delivered unto the party of the first part certain goods, wares, and merchandise consisting of raw furs and skins.'

20

"Now, does that refresh your recollection as to what the transaction was first with the bank? A. What I want to say is this: Why did we fill out that agreement? If we filled out that agreement, what is the use of asking me these questions?

"Q. Do you understand the question? A. I say I don't understand it.

30 "Q. Mr. Loeb, the agreement in its recital refers to the fact that before the agreement was made, sometime before, Loeb Brothers had transferred certain raw skins and furs to the State Bank as collateral security for the indebtedness of Loeb Brothers to the State Bank. Do you understand that? A. I understand, yes.

40 "Q. Do you recall that that was the fact, that Loeb Brothers had assigned or transferred to the State Bank as collateral security certain raw skins and furs? A. What do you mean by collateral security?

Jacob R. Wortendyke, redirect.

“Q. As security, how it had been transferred. Had it been transferred absolutely at first? Do you understand? A. I don’t.

“Q. Do you know what it means to transfer absolutely, unconditionally? A. No.”

10

And so on. That is all.

Mr. Carpenter: I now offer in evidence the summons and complaint in the suit of the State Bank against Loeb.

(Admitted and marked Exhibit C-10.)

JACOB R. WORTENDYKE, resuming the stand, testified as follows:

20

Direct examination by Mr. Carpenter resumed:

Q. Now, Mr. Wortendyke, you have had a hard time, I understand, trying to get these papers? A. Yes, sir.

Q. Have you got the Ellbee Fur Trading Company record there? A. You want the record of the delivery of the documents?

Q. Yes. What do you find about that? A. Have you that schedule?

30

Q. Mr. Heyman has that.

(Counsel hands paper to Mr. Carptener.)

Q. Suppose you identify that book. A. This is just a memorandum of the letters of credit, together with the delivery of the documents.

Q. This is a daily record you keep, day by day? A. Oh no, just as these are issued.

Q. Is this one of the letters of credit that the bank issues? A. Yes.

40

Q. Let us go to the first one. A. That is made out July 9, 1922.

Jacob R. Wortendyke, redirect.

Q. That is the first one? A. Yes.

10 Q. Let us get those that are paid out before August 28. A. This is No. 1207 in favor of Robert Little & Co. 700 pounds. The original documents were delivered August 5th. These were apparently made to the Ellbee Fur Trading Company August 16th.

By Mr. Heyman:

Q. Duplicate was delivered August 16th? A. Yes.

20 Q. Will you please explain why duplicates were delivered. A. Well, they are issued in duplicate on the other side and are forwarded here. The original always usually has the consular invoice and the others have not. They come in series of three, usually.

Q. And the original is sufficient to admit the withdrawal of the merchandise? A. Oh, yes.

Examination by Mr. Carpenter resumed:

Q. This shows what? A. That on May 2nd it was issued.

30 Q. And it was entered in that book then? A. This is on August 29th.

Q. The number of it was what? A. S1207 to Robert Little & Co., Sydney, Australia, on account of the Ellbee Fur Trading Company, New York, June 1, 1922, 90 days sight draft, and it came in on July 11th, an invoice for that amount of goods, being goods to the value of 740 pounds 8 shillings and 9 pence; bill of lading issued by the steamship Easterner; and also invoice for 876 pounds; 17;3.

40 Q. What is this, Ellbee Fur Trading Co. A. C. Robinson? A. That was delivered to somebody from their office.

Jacob R. Wortendyke, redirect.

Q. (By the Court.) This is the signature of the man who received it? A. Yes.

Q. Now, on the right-hand side of this book, what does this 6800 mean? A. That is the amount of the note.

Q. And that amount of money, \$7,124.49 is what it is in English money? A. Yes. 10

Q. And that was paid you when? A. October 17, 1922.

Q. And that was paid on October 17, 1922, by a charge against the bank account? A. Yes, sir.

Q. Now, August 5th you got the invoice? A. Those are duplicates.

Q. When was this posted in this book, "Paid up to October 17th," October 17, 1922? A. Yes. 20

Q. Now, you got on that day, August 5th, an invoice for that amount of money, \$876? A. Consular invoice.

Q. And insurance policy and bill of lading ss. Easterner? A. Yes, sir.

Q. You got an invoice also of 740-8-9, total 1606-2-12; also got a consular invoice, with a certificate, and you got a second consular invoice, a third consular invoice, another insurance policy and a bill of lading on August 16th; what is this? A. That is a duplicate of this. That is another duplicate. 30

Mr. Heyman: That is a triplicate.

Q. August 16 you have got a triplicate in here? A. Yes.

Q. That is a triplicate bill of lading for 9 bales of rabbit skins. At any rate, you turned these papers over to the Ellbee Fur Trading Company on August 16th, 1922? A. Yes, sir.

Q. You just turned over the 3rd duplicate? A. I turned over everything. 40

Jacob R. Wortendyke, redirect.

Q. Here is another letter of credit, May 12th, to Robert Little & Company, Sydney, Australia, for account of Ellbee Fur Trading Company, June 15, 1922, 90 days' sight for cable charges? A. Cable charges \$6.04.

10 Q. Cabling that the letter of credit was issued?

A. Yes.

Q. Letter of credit was extended when? A. July 15th. That was the date of the original expiration.

Q. Extended one month? A. Yes.

Q. Now, then, you received August 30th what? A. Original bill of lading received July 23rd.

Q. One of the three issues? A. Yes.

20 Q. On what date? A. July 23, per ss. Cumberland.

Q. That means shipped on the Cumberland July 23? A. Yes, and delivered to the Ellbee Fur Trading Co. on the 10th of August, 1922.

Q. What was delivered on the 10th of August? A. These documents.

Q. Those came by registered letter, didn't they?

A. They came to us from the American Exchange Bank.

30 Q. Where is the copy you had by mail? A. They came by hand and by mail, too.

Q. Now, that was for 20 bales of rabbit skins. What is "R.L.C."? A. That is a mark.

Q. Here is a consular invoice 976, duplicate 977, and that is marked "Delivered 8-10-22"? A. Yes.

Q. What is this record of August 30? A. These are all duplicates.

Q. Still another duplicate? A. Yes.

Q. When were they delivered? A. August 30th.

40 Q. What is that on September 29th? A. This is the signature of Aaron Robinson.

Jacob R. Wortendyke, redirect.

Q. Now the next one. A. That is S1217.

Q. That was issued as a credit to Turner Bros., Dunedin, New Zealand; you received those documents when? A. July 10th.

Q. You received that day invoice for 781-7-6, a bill for 19-1210, and with it a health certificate, consular invoice, insurance bill, and bill of lading; what does this mean on the side here? A. That is some memorandums made when I was away. I don't know what that is. 10

Q. "London, Oct. 18, 1922 and Oct. 16, 1922"; what does that mean? A. That is when they were due in London.

Q. What were due? A. Drafts.

Q. The drafts were due in London on October 18th? A. Yes. 20

Q. When were these documents delivered to the Ellbee Fur Trading Company? A. On or about July 10th.

Q. Now, the 722 B. L., invoice 7380; what is this here? A. Mailed July 4th.

Q. Now, you have got up here "Paid 1017; is that the date you charged the amount against the account of the Ellbee Fur Trading Co.? A. Yes, that was charged to the account 3462-40-40. 30

Q. Here is 1234 in favor of Robert Little & Co., expiring August 15, 1922. A. Yes.

Q. There wasn't any draft on that letter of credit? A. Oh, yes, these drafts are drawn on or before—

Q. Now, then, there were 30 bales rabbit skins that came on that trip? A. 10 came in on the first bill of lading and 20 on the second.

Q. Now, what was the date that they received the documents on those two shipments? A. Well, around the 10th of August. They were delivered 40

Jacob R. Wortendyke, redirect.

to the Ellbee Fur Trading Company on the 10th of August.

Q. Now, when was that draft due and payable?
A. October 21, 1922.

10 Q. Now, the other draft of Turner Bros. New Zealand, when was that draft due, S 1217; due after August 28th, wasn't it, after the attachment? A. Yes.

Q. Now, then, the draft on letter of credit S 1216, was due after August 28th, wasn't it? A. Yes.

Q. And the draft on this first one of S 1208 was due July 7th and paid, so that that is not concerned in this controversy at all? A. No.

Q. Now, the one 1207; when was the draft on that due? A. On or about October 17th.

20 Q. And you didn't demand payment of any of these transactions until October 17th, at the earliest? A. No.

Mr. Heyman: He couldn't.

Q. Now, when you sent these documents over by mail, either the first, second or third copy, did you keep a copy of the letter by which you transmitted the copy? A. No.

30 Q. Didn't you have the regular form? A. No.

Q. How did you send them? A. Stuck them in an envelope.

Q. Without any letter at all? A. No.

Q. Did you keep a mailing book, or is this the only record you have? A. That's the only record we have.

Q. That is all the record you have regarding these letters of credit? A. Yes.

40 Q. Now, I just happen to catch "balance contract"; did you keep anything like that on this?
A. No, that contract is made by exchange.

*Jacob R. Wortendyke, recross.**Recross examination by Mr. Heyman:*

Q. I would just like to check each one separately. Which one is that? A. 1207.

Q. That is this? A. Yes.

Q. Just put that over there. Now, the next? A. 10
1216 is the next. Then 1217, and 259.

Q. 1234; have you got that? A. 1259 is missing. That is the copy we have; we haven't got the original here.

Q. What is S 1295, dated August 11, 1922, on Oscar Curtis, expires Sept. 10, 1922, 9 days sight, due Sep. 6, 1922? A. Cable \$19.13; cable \$6.70; cable \$1.60.

Q. Take invoice 816 pounds, specification sheet and guarantee of weight, consular invoice, insurance, bill of lading, steamship Ventura, 11 bales rabbit skins; now, will you be kind enough to tell us when that was received by you? A. The originals were received September 15, 1922, the duplicates, October 5th, and the triplicates October 24th. 20

Q. That covers all five? A. Yes.

By Mr. Carpenter:

Q. What was the date that those papers were delivered to the Ellbee Fur Trading Company? A. 30
The 15th of September, 1922.

Q. How were you paid for that, Mr. Wortendyke? A. We were paid for that by receiving notes.

Q. Have you got those notes here? A. No.

Q. Whose notes were they? A. Various notes. Those were the notes that were received in payment of various bills of lading.

Q. In other words, they were, presumably, a series of customer's notes that were made to the order of the Ellbee Fur Trading Co., or endorsed 40

Jacob R. Wortendyke, redirect.

to their order, and then deposited with the First National Bank of Jersey City? A. Yes.

(Offered and admitted in evidence and marked Exhibit C-11.)

10 Q. Now, Mr. Wortendyke, did the bank receive those negotiable instruments about the same time you got that so-called indemnity agreement? A. It did not.

Q. Before the indemnity agreement? A. After the indemnity agreement.

Q. About two weeks after? A. I don't know.

Q. Did you give them any cash when they deposited these notes? A. We didn't give them any cash at all; we took those in payment of the letters
20 of credit.

Q. How much did you realize on those bills receivable, which show an aggregate of about \$6,000? A. In the neighborhood of eleven or twelve thousand dollars.

Q. There were four of these that were protested for non-payment? A. Yes, sir.

Q. Now, was this money that you realized on these instruments used to pay subsequent letters of credit, or those already in effect at that time?
30 A. The money was used for those that had already been guaranteed.

Q. Did you later get any recovery on any of those protested ones? A. I think we did.

Q. So that you realized, all together, more than \$12,000? A. Well, we applied what we needed to paying the letters of credit.

Q. What did you do with the rest? A. Gave them a check back.

40 Q. Was there ever as much as a thousand dollars turned back? A. Never.

Jacob R. Wortendyke, redirect.

Q. Do you remember about when you turned this back to them? A. About the date of this.

Q. Now, I would like to know, Mr. Wortendyke, when those goods evidenced by the bills of lading arrived in this case with reference to the 28th of August. The bills of lading came through ahead of the goods, didn't they? A. Yes. 10

Q. The bank had some hold on those goods, even after you sent over the first lot of papers? A. I suppose so.

Q. You say you delivered these documents to the Ellbee Fur Trading Company on August 16th? A. Yes, sir.

Q. Whereabouts were the 9 bales of rabbit skins at that time? 20

Mr. Heyman: I object. It is immaterial where they were. We are only concerned with the documents.

Mr. Carpenter: I merely want to know what the situation was on August 28th.

Q. Where were the goods on August 28th? A. I don't know.

Q. Do you know whether they had been unloaded from the steamship? A. I don't. 30

Q. Did you have any separate written agreement or understanding with the Ellbee Fur Trading Company at the time you surrendered these documents mentioned in this?

The Court: That, of course, is subject to the same objection.

A. No, we had not that agreement, we only had a demand note.

Q. And you then, with nothing but the demand note in your hands, surrendered to the Ellbee Fur 40

Jacob R. Wortendyke, redirect.

Trading Company on August 16th all the collateral on this loan you had, namely, the bill of lading?

Mr. Heyman: I object to that.

10 A. We received nothing for this collateral except the demand note.

Q. Did you have in the hands of the bank at the time this attachment was levied on August 18th, 1922, any shipping documents, such as bills of lading and so forth, that accompanied the sight draft drawn against any of these goods? A. No.

Q. Did you ever demand any of those goods back? A. We did not.

20 Q. Why was it you didn't put with the regular account of the Ellbee Fur Trading Company a transcript of these various items that were given to you to collect and which you did collect after the 28th of August? A. Because I couldn't do it. They didn't go through the Ellbee Fur Trading Company account. We accepted them in payment of the bills of lading or drafts.

Q. What bills of lading? A. These.

Q. Which particular ones? A. Well, 1216 for 2,000 pounds, and S 1216 of \$9,932.20.

30 Q. Now, the next one. A. The next one was, Robert Little & Co. 1269 2,800 pounds, paid Nov. 9, \$11,921.03. 1295, Oscar Curtis, paid December 14, 1922, \$3,735.59.

Q. Were those all paid with the money in bank and the proceeds of the notes? A. Yes.

Q. Now, was there any agreement that these notes were taken in satisfaction of the liability of the bank on those letters of credit? A. No, taken in payment of the drafts.

40 Q. Who arranged that, Mr. Wortendyke; did you? A. No, I did not.

Jacob R. Wortendyke, redirect.

Q. Can you tell who did arrange it? A. No, I couldn't; I couldn't tell you whether the agreement provided for it or not.

Q. What do you say about the agreement? A. These notes were accepted in payment of drafts for these letters of credit.

10

Q. And that was for these drafts? A. Yes.

Q. And that is about \$27,000? A. More than that; about \$25,000.

Recess until 10 o'clock tomorrow.

Hearing of Wednesday, April 14, 1926, 10 A. M.

All counsel present as before.

20

JACOB R. WORTENDYKE, resuming the stand, testified as follows:

Examination by Mr. Carpenter (continued):

Q. Mr. Wortendyke, did you find those deposit tickets? A. I found two deposit tickets; that's all I could find.

Q. Now, the first deposit ticket you have produced is one of the Ellbee Fur Trading Company, dated February 28, 1921, of those checks of \$1,500, and another item of \$674.03, making a total of \$2,174.03, and that is stamped "Delivered by mail"? A. No, "Received by mail."

30

Q. That's right, "Received by mail"; and the second deposit ticket is of the same company, dated March 2, 1921, for the following items under the head of "Checks": \$94, and under that \$1,000; under that \$216.66; and, again, \$3,500, making a total of \$4,810.66; and in front of the deposit of \$1,000 and in front of the deposit of \$3,500 are the

40

Jacob R. Wortendyke, redirect.

words, in pencil, "certified." I suppose you have no independent recollection of that at all. A. No.

Q. It probably never came to you? A. No.

Q. Could you find any other tickets? A. No.

Q. Couldn't locate any others? A. No.

10 Q. You probably have them down in the vault.

A. They're some place down in the store-room.

Q. Now, Mr. Wortendyke, I'm a little confused about the transaction that took place with reference to these letters of credit, and I want you to try to straighten me out. How did you guarantee the American Exchange National Bank at the time that it issued these letters of credit; did you give them any written request to issue? A. We requested an issue, yes.

20 Q. Did you do that in writing? A. Oh yes, on our regular forms.

Q. Now, that is the only thing that you gave—this slip is the only thing that you gave the American Exchange National as showing your obligation to them, and it was upon this that they issued the letter of credit in each case? A. Yes, the only application.

30 Q. There was a separate letter called "an application"? A. Yes.

Q. Have you got one of those applications? A. I have not.

Q. That is kept by them? A. Yes.

Q. (By the Court.) Is there a guarantee contained in that form? A. No.

Q. Your blank is an application to them to issue the letter of credit? A. Yes.

Q. And that shows to whom it is to be issued, and the amount, and what the terms are? A. Yes.

40 Q. Is that signed at all by the Ellbee Fur Trading Co.? A. No.

Jacob R. Wortendyke, redirect.

Q. Not signed by them at all, just by your bank?

A. That's all.

Q. Did you keep a copy of that? A. No.

Q. Now, at the time you sent that over what did you get as evidencing the obligation of your customer to you by reason of that letter of credit—
by reason of your becoming obligated to the American Exchange? What did you get from your customer? A. Their demand note. 10

Q. Did you enter those demand notes in your note-book? A. No.

Q. Did you have in your bank a book in which you entered all bills that you purchased? A. We did.

Q. Or any notes that you received for collection? A. We did. 20

Q. Did you put these demand notes in those records? A. No, attach them to the letter.

Q. To show the obligation of the Ellbee Fur Trading Company to your bank? A. Yes.

Q. By reason of your having become obligated to the American Exchange National on those letters of credit? A. Yes.

Q. When did you first put a record on your books of your obligation, either on the sight draft or your obligation on the letter of credit? A. On the day I received the letter from the American Exchange Bank. 30

Q. What did you put on the books then? A. A record of the letter.

Q. In what book did you put that? A. Foreign exchange book.

Q. That you produced here yesterday? A. Yes.

Q. Take the one of June 8th; the amount on the second page of that is what you refer to as your obligation? A. Yes. 40

Jacob R. Wortendyke, redirect.

Q. Did you put a record of that letter of credit or obligation anywhere except in that book? A. No.

10 Q. Now, did you debit the Ellbee Fur Trading Company account with that amount of money? A. We did not.

Q. Or did you credit them with that amount of money, or an equivalent, at any time? A. I did not.

Q. Or did you credit them with the note? A. We did not.

Q. On June 9th you entered up the letter of credit of 3,000 pounds; that is evidenced by the first letter of credit, dated New York, June 8, 1922, No. 1234? A. Yes.

20 Q. Now, as a matter of fact, you had applied for the letter of credit before the day you put it in your book on the 29th? A. Either a day or two or three days before.

Q. Now, it is called "Commercial letter of credit," 1234? A. Yes.

Q. In fact, they were all commercial letters of credit? A. Yes.

30 Q. It wasn't until June 10th, the day after you entered your record up in your book that you got the demand note from the fur trading company? A. Yes.

Q. Why did you take a demand note for the amount of \$15,000 when the letter of credit was 3,000 pounds? A. That was an arbitrary amount to cover the letter of credit.

Q. Now, the rate of exchange on that day was a great deal less than \$5 a pound sterling? A. Yes.

Q. You simply took an arbitrary amount to more than cover the amount of the obligation? A. Yes.

40 Q. Now, did you ever charge the Ellbee Fur

Jacob R. Wortendyke, redirect.

Trading Company with the amounts of these demand notes? A. I did not.

Q. You made it a practice in 1922, as soon as you took a promissory note which was effective, or any demand note or any note that was effective, as soon as it became effective, to put on the stamp? A. Yes. 10

Q. Why didn't you put a stamp on these demand notes? A. Why, I couldn't really tell you.

Q. Whenever you took a customer's note as an obligation to the bank wasn't it your custom to either debit or credit the customer's account? A. It depends upon what the note was for.

Q. In the ordinary business transaction where you took the customer's note. 20

Mr. Heyman: I object, on the ground as immaterial. What difference does it make what a business man did in a transaction of that kind.

The Court: He is cross examining this witness.

Mr. Carpenter: I am really calling him out of the enemy's camp, that's all.

Mr. Heyman: But he is not a hostile witness. 30

Mr. Carpenter: No, he doesn't know what hostility is.

The Court: If he were a hostile witness it would be permissible to affect his credibility.

Mr. Carpenter: I don't want to affect his credibility.

Q. What in your bank is the customary, usual business transaction, to show that this is not as Mr. Heyman contends, a usual business transaction, or a usual transaction? 40

Jacob R. Wortendyke, redirect.

10 The Court: Of course, it isn't the usual transaction with which we are all so familiar; it was a transaction whereby the bank had placed its credit on behalf of this depositor and was taking its security. They might have taken, if fortunate enough, a mortgage, merely as a pledge.

Mr. Heyman: Yes, for ten times the amount and charged off the amount which we actually had to pay when these drafts came through.

20 Q. Let me put it this way: You had nothing else than these demand notes to indicate that the Ellbee Fur Trading Company ever promised to pay you what you might have to pay on the letters of credit? A. No.

Q. This is the next thing I want to clear up: When the draft drawn against this letter of credit came in it was a draft payable 90 days after sight, or after acceptance? A. To the American Exchange Bank.

30 Q. And that bank in accepting this draft—whatever draft was drawn against the letter of credit—acted as merely your agent in accepting it? A. Yes.

Q. And it was payable at your bank? A. No, sir.

Q. To the American Exchange? A. American Exchange. I really don't know where it was payable, but it was apparently accepted and payable at the office of the American Exchange Bank.

Q. You never saw the drafts? A. No.

Q. When was the first sight draft payable on any of these letters of credit? A. (Witness referring to book.) October 21st.

40 Q. October 21st was one of them? A. Yes, and October 17, another.

Jacob R. Wortendyke, redirect.

Q. None of these drafts matured before the first of October, did they? A. No.

Q. Now, on each one of these letters of credit documents came in after August 28th? A. September 15th there was one.

Q. That was a letter of credit issued August 11th, S 1295 for 665 pounds, as originally issued, and later increased on what date? A. I can't tell you exactly what date that was increased. 10

Q. But it was later increased to 820 pounds? A. Yes.

Q. Now, on September 15th you received documents on that? A. Yes.

Q. Consisting of an invoice for 816 pounds, specification sheet and guarantee, consular invoice, insurance, bill of lading for 11 bales of rabbit skins? A. Yes, sir. 20

Q. You have nothing to show what the value of those rabbit skins were except the invoice for the amount of 816 pounds? A. Yes.

Q. Have you got anything showing the date when the draft was accepted? A. I have not.

Q. Was it accepted before or after August 28th, 1920? A. I couldn't tell you that.

Q. Presumably, it was about September 15th, wasn't it? A. I imagine it was. 30

Q. A day or two before or a day or two after? A. Yes.

Q. Because the fact is, the documents came through with the sight draft and presumably they had to be forwarded right over to you within a day or two by the American Exchange Bank? A. That's right.

Q. Do you happen to know how long it would take for the merchandise to come from Australia by the ship? A. No, I don't. 40

Jacob R. Wortendyke, redirect.

Q. Now, can you give me the date after those documents came in on September 15th they were delivered to the Ellbee Fur Trading Co.? A. No, I can't. I imagine they were delivered immediately.

10 Q. September 15th or thereafter? A. Yes.

Q. Did your bank get anything in lieu of those documents when you surrendered them? A. No.

Q. Now, then, I would like you to tell me what was the purpose of this agreement C-5 that was dated on the 13th of October, 1922, and given by the Ellbee Fur Trading Company to the First National Bank. A. I don't know; probably the President of the bank.

20 Q. Was that Mr. Edwards? A. Yes.

Q. Do you know who drew the agreement? A. I do not. Probably Mr. David F. Edwards.

Q. Why do you say Mr. David F. Edwards? A. Because he was counsel for the bank at the time.

30 Mr. Theodore Rurode: I will state now that I drew it. Nobody suggested it to me; I did it out of an abundance of caution, so that if we paid this money to ourselves, as I claim we had a right to do to set off any debt, and any court held otherwise at any time and we wanted to charge the Ellbee Fur Trading Company with that amount, they couldn't set up that we paid ourselves out of funds on deposit with us.

Mr. Carpenter: And you did that for the First National Bank, that's all?

Mr. Rurode: Yes.

40 Q. Now, Mr. Wortendyke, I see that this agreement is signed by D. Kellman, President of the Ellbee Fur Trading Co., although it is dated the

Jacob R. Wortendyke, redirect.

13th of October, 1922, and by Jacob Loeb, as Secretary; did you make any inquiry to see who, in fact, was the president of that corporation at that time? A. I did not.

Q. Or ask for certified copies of their resolutions? A. I did not.

10

Mr. Heyman: That copy has the seal of the corporation on it, Mr. Carpenter.

Mr. Carpenter: But it is not acknowledged.

Q. What was the date that those customers' notes were demanded from the Ellbee Fur Trading Company, Mr. Wortendyke, as shown on Exhibit C-11? A. I couldn't tell you.

Q. Now, the aggregate of those notes, all together, was around \$25,000, wasn't it; or \$11,000 and \$12,000, was it? A. (After figuring on paper.) About \$21,000 or \$22,000.

20

Q. Now, did you at any time lend any money to the Ellbee Fur Trading Company on the note of that company alone? A. No, we did not.

Q. Did you at any time lend any money to that company on its notes endorsed by anybody—I mean, endorsed either by Loeb or somebody else? A. No.

30

Q. You also had in the bank not only the notes shown on C-11 that were delivered to you in October, but you also had a series that are shown on Exhibit C-7 that came in on July 27 and August 23rd, did you not? A. We did.

Q. These on Exhibit C-7, were they purchased by the bank? A. They were discounted by the bank.

Q. And are the amounts of those notes shown on the transcript of the account of the Ellbee Fur Trading Company? A. Only in a total.

40

Jacob R. Wortendyke, redirect.

Q. Can you tell me where it appears on that account, Mr. Wortendyke? Was it before or after the date of the notes paid by the customer? A. What do you mean? They were discounted before maturity.

10 Q. And the proceeds credited to the Ellbee Fur Trading Company account? A. Yes.

Q. So that you didn't have any money coming in on that for the Ellbee Fur Trading Company after the attachment? A. No.

Q. Whatever came in came in to you? A. Yes.

Q. Now, Mr. Wortendyke, when the bank received these customer's notes from the Ellbee Fur Trading Company on October 27th and November 9, as shown by Exhibit C-11, in what book or record of the bank did you enter them? A. In the discount book and the bill book of which that is a transcript.

20 Q. This has at the top "Cashier's Account"; does that correspond with the bill book? A. That is a part of the bill book.

Q. Now, then, was the agreement between the bank and the Ellbee Fur Trading Company, respecting these notes shown on Exhibit C-11, made with you as representing the bank or somebody else? A. No.

30 Q. Somebody else? A. Somebody else, yes.

Q. Were you present when it was made? A. I was not.

Q. With whom was the agreement made—what representative of the bank—as shown by this exhibit, before the notes were turned over to them? A. I couldn't tell you that.

40 Q. At the time that the first of these notes was received by the bank on October 27, 1922, had the

Jacob R. Wortendyke, redirect.

bank demanded payment of the Ellbee Fur Trading Co. of any money? A. They had not.

Q. On November 9th when you got the second lot of these notes shown on Exhibit C-11, had the bank demanded any payment from the Ellbee Fur Trading Company? A. They had not.

10

Q. They were just really turning over to the bank additional security that you demanded, to secure the bank for the amounts of those drafts that were drawn against the letters of credit? A. They were turned over in payment of the drafts which we guaranteed.

Q. All of the drafts drawn against those letters of credit had matured before October 27th, 1922, hadn't they? A. The last one I think matured in December.

20

Q. Have you got the amount of that draft, Mr. Wortendyke? A. It was charged to us by the American Exchange Bank on December 6th.

Q. What was the amount? A. \$3,700.

Q. That was the Curtiss transaction? A. That was the Curtiss transaction. I think that was \$3,740—3740 odd dollars.

Q. That was \$1295? A. Yes.

Q. Now, then, the date that you charged off two items against the Ellbee Fur Trading Company account, namely, October 17 \$10,587.13, and October 22, \$11,209.68, had you before making those write-offs or charge-offs made any demand on the Ellbee Fur Trading Company for payment? Or did you just charge them off? A. Just charged them off.

30

Q. Can you say whether or not those were the dates on which the two drafts \$290 sight drafts matured? A. No; I can tell you pretty near. October 17th was the letter of credit No. 1207 for \$7,124.49 and No. 1217 for \$3,462.44.

40

Jacob R. Wortendyke, redirect.

Q. Aggregating how much? A. \$10,586.93.

Q. Now, then, on October 22nd two drafts matured that aggregate \$11,209.68? A. One draft.

Q. And the amount you charged off included interest and all your charges? A. Yes.

10 Q. And the amount of money you paid on the draft as well? A. Yes.

Q. How much money was due you, or to become due you, on October 22nd on your outstanding guarantee? A. After the charge?

Q. Yes, after the charge. A. About \$25,000. \$25,607.36.

Q. That was what remained on October 22nd after charging off those two amounts on October 17, and 22? A. Yes.

20 Q. Now, in satisfaction of that amount, \$25,607.36, you took the notes receivable as shown by Exhibit C-11, which were given to you by the Ellbee Fur Trading Co. on October 27th and November 9th; is that right? A. Yes.

Q. Between October 22 and October 27, when you got the first bunch of these notes did any other obligation of the Ellbee Fur Trading Company become due? I mean, any other obligation constituting a part of the \$25,607.36? A. No.

30 Q. Then everything had matured excepting that draft which had become due on the 6th of September— A. No, wait a minute; you are talking about October, 1922.

Q. I say October 22nd there remained due you already drafts that matured thereafter? A. Yes.

40 Q. Everything had matured by that time, excepting this draft that became due September 6th; am I right about that? A. No, I don't quite get you on that. No, there was due after October 22nd approximately that amount of unpaid guarantee drafts.

Jacob R. Wortendyke, redirect.

Q. The last one became due, December 6th, you said? A. Yes, that came due December 6th.

Q. But the Curtiss draft had matured on or prior to October 22nd? A. November 9th was the last credit.

Q. There was a draft that matured on November 9th? A. Yes. 10

Q. I slipped that; what one was that? A. R. Little & Company, Sydney, Australia.

Q. How much was that? A. \$11,921.03.

Q. That matured November 9th, 1922?

Mr. Heyman: The last draft is S 1269.

Q. And then the next one was one of December 6th? A. December 6th.

Q. That was how much? A. \$3,735.59. 20

Q. Now, isn't a fact, Mr. Wortendyke, that some others had matured before October 22nd that you weren't able to cover or at the time you got these notes receivable on October 27th?

The Court: What do you mean by "cover"?

Mr. Carpenter: Well, this amount in the bank account theoretically covered the amount of their claim, and I am wondering what other obligations had matured. 30

Q. What was the next obligation that matured before November 9th? Here is another one I call your attention to, a letter of credit, 1216, R. Little & Company, for 2,000 pounds. When did that mature, the draft against that one? A. October 17th.

Q. Well, that is one you haven't given us. A. Wait a minute; that was paid October 28th. 40

Q. Matured October 28th—on draft 1216, for how much money? A. \$9,950.75.

Jacob R. Wortendyke, redirect.

Q. That included all of your charges, interest and everything? A. Yes, sir.

10 Q. Now, have you made this so-called offset—the last one of October 22nd? What was the amount of obligations of the Ellbee Fur Trading Company to you that had matured? A. I didn't quite get you, Mr. Carpenter; I don't understand that.

Q. Well, in other words, On October 22nd, when you charged off the last draft against the account were there any other obligations to the bank that had matured that aggregated \$25,607.36 on that day, or did they all fall due later? A. Fell due later.

20 Q. Had any checks of the Ellbee Fur Trading Company gone to protest before October 22, 1922?

Mr. Heyman: I object to that. What difference does it make.

Mr. Carpenter: I want to show the payment of their obligations—how prompt they were.

Mr. Heyman: I still object as immaterial. What difference does that make?

30 Mr. Carpenter: It would make a difference if they were letting their obligations go to protest, or that the bank had any knowledge that they were insolvent and unable to pay their debts.

The Court: On the marshalling of assets.

Mr. Carpenter: The preferential transfer of these accounts receivable by the Ellbee Fur Trading Company to the bank.

40 Mr. Heyman: There is no question of payment involved in this case. It is immaterial whether they preferred themselves, because they had a right to prefer themselves.

Jacob R. Wortendyke, redirect.

The Court: I am going to sustain the objection.

Mr. Carpenter: You don't think that I am entitled to that?

The Court: No.

Q. Now, the Ellbee Fur Trading Company at no time went into bankruptcy, did it? 10

Mr. Heyman: I object to that, on the ground that this witness is not competent to say whether or not they did.

Q. To your knowledge? A. No.

Q. You never heard of it? A. I never heard of it.

Q. Did the Ellbee Fur Trading Company, to your knowledge, ever suspend payment? A. Not to my knowledge. 20

Q. Have you got any correspondence, Mr. Wortendyke, between the bank and the Ellbee Fur Trading Company, regarding any of these matters? A. I have not.

Q. Have you looked to see whether there is or not? A. I am sure there is not.

Q. Have you any correspondence with David or Philip Loeb about this transaction? A. No.

Q. Was your dealings with them personally, or over the telephone, or otherwise? A. I would say, always by word of mouth. 30

Q. What did you do, Mr. Wortendyke, with any of these customer's notes shown on Exhibit C-11? I see that there are records of four of them being protested; what was done with those four protested notes? A. Well, I can't tell you that. I can tell you what probably was done with them: They were notified and taken up.

Q. The bank then got all of those twenty-three thousand and some odd dollars? A. It did. 40

Jacob R. Wortendyke, redirect.

Q. Were they taken up by the Ellbee Fur Trading Company? A. I presume so.

Q. When they were taken up I suppose the protest fees were paid by whoever took them up? A. Yes.

10 Q. You haven't any record of who that was? A. No.

Q. And you said this was being kept as a separate account by the bank? Didn't you say that? A. Separate card as a memorandum.

Q. Without charging it to anybody; you just added it to the obligation? A. The notes were returned with the protest certificate, and they were carried until they were taken up.

20 Q. And that is what you did in this case? A. That is what I presume was done. That is our regular course.

Mr. Heyman: I want to ask Mr. Carpenter whether he desires us to prove the fact that the records were moved twice between the period of 1921 and 1926. I understand that all of these records which we have produced were moved from here across the street and back again.

30 Mr. Carpenter: I am not questioning anything that Mr. Wortendyke says at all.

Mr. Heyman: I want to show why, on such short notice it is impossible to get these slips.

Examination by the Court:

40 Q. Mr. Wortendyke, will you explain this letter-of-credit business; or, will you tell me this: You, upon the application of the depositor request the American Exchange Bank to issue letters of credit, and, I understand from your general testimony,

Jacob R. Wortendyke, recross.

that thereupon you became liable—you guarantee impliedly, not actually but impliedly guarantee that bank? A. Yes.

Q. Now, when the assignor sends on his bill of lading and all the other paraphernalia, that was all that was presented, was it, to the American Exchange Bank? A. Yes. 10

Q. And taken by that bank and transmitted to you? A. Yes.

Q. Why was it it came to you? A. Because they opened credit for us at our request for the account of our dealer.

Q. They treat you exactly as if you were the borrower and you were the assignee? A. Yes.

Mr. Heyman: Does your Honor see the language of this request, "as our agents"? 20

The Court: Yes.

By Mr. Heyman:

Q. Does the First National Bank have an actual written guarantee from the American Exchange Bank of the payment of the letter of credit? A. Yes.

Mr. Carpenter: Complainant offers New York Stock Corporation Law, Section 55, and calls the Court's attention to the following provisions in Section 55: 30

Each director shall be a stockholder unless otherwise provided in the certificate of incorporation or in a by-law adopted by a stockholders' meeting.

Section 60 of that law provides:

The directors of a stock corporation may appoint or elect from their number a president. 40

Case.

That was the law of 1920 and subsequent. Now, with that and the evidence that I have offered we rest.

Mr. Heyman: The defendants rest.

10

(Stenographic report of remarks of court at close of final hearing, Apr. 14, 1926, by A. R. Bailey, official shorthand reporter Chancery Court. This is hasty transcript for convenience of counsel and not for publication.)

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30

The Court: The facts I think are very simple—that this is a creditor's bill to reach the assets of a debtor. I will say this to you, Mr. Heyman, that I have no quarrel with anything in your brief on the subject of distinct personalities of the Ellbee Fur Trading Company. I don't consider that of any moment, as I understand the theory of the complainant's bill. This might just as well have been behind some natural individual, but they happened to choose a corporation. Usually, of course, a man puts assets in the name of his wife, or some relative or trusted friend. I am convinced from the testimony that the defendants met, after having become indebted to the complainant and conceived the scheme of defrauding him by erecting the barrier of the Fur Trading Company and investing all their assets therein. After hearing the testimony and admissions made by these people, there is enough in this to convince me that it is a fraudulent scheme.

40

That being so, it seems to me it is only a question as to whether or not the complainant has an equity to be enforced under the doctrine of marshalling. I understand Mr. Carpenter maintains that the bank had two ways in which it might satisfy its

Case.

claim against the Loeb (of course, now I am assuming that the Loeb and the Loeb Company are one and the same), and that one of his claims is, the bank could have resorted to another source of revenue to pay itself, but chose to take the only fund or property of the other defendants that the complainant knew of, and thereby wiped the company out of all opportunity to satisfy its debt. Is that it? 10

Mr. Carpenter: That is a part of it. * * * They had no right to take assets as they did. I think we can argue that now.

The Court: And not wait to put in any briefs?

Mr. Carpenter: Yes.

The Court: I don't think I will hear argument at this time. I have this other case waiting to be finished. I think even after I have heard the arguments I might not be able to come to an immediate decision, and if that is so it would be much more helpful for me to have written briefs. 20

Mr. Carpenter: I will not have to brief, then, the question of identity of Loeb Brothers?

The Court: It will resolve itself, then, into two questions of law,—the right to set-off and to marshal. I do not understand that the effort made by the sheriff to attach the money in the account of the Loeb Company, not a party to the attachment proceeding, could be effective. That is why you came into this court. I don't think there is any dispute about that, Mr. Heyman. 30

Mr. Franc: In New York, the practice is, if the attaching officer is willing to go ahead he can disregard the entity in whose name the debtor has placed his property, but you can go in and reach it with a bill in equity, as in this case. 40

Mr. Rurode: Maybe so, where there is tangible

Exhibits.

property that he can physically take hold of; but if he takes my property I can sue him for damages. But when he comes in and seeks something at any time he has got to have garnishee proceedings. That is the law in New Jersey.

10 Mr. Heyman: I understand that it has to be based entirely upon a suit.

The Court: Of course there must be a judgment or attachment to maintain a creditor's bill.

Exhibit C-1.

(Notice to Produce.)

IN CHANCERY OF NEW JERSEY

20

JOHN ELIHU BODY, trading as J. E. BODY & Co., <i>Complainant,</i> <i>v.</i> DAVID LOEB, <i>et als.</i> , <i>Defendants.</i>	On Bill &c. Notice to Produce.
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30

To DAVID F. EDWARDS, Esq.
 Solicitor of Defendant,
 Ellbee Fur Trading Company, Inc.

TAKE NOTICE that you as solicitor of Elbee Fur Trading Company, Inc. and defendant Ellbee Fur Trading Company, Inc., are hereby required to produce on the trial of the above entitled cause the following books, papers, and documents of defendant Ellbee Fur Trading Company, Inc.:

40

(1) The said defendant's copy of its Certificate of Incorporation.

Exhibits.

(2) Said defendant's Minute Book from the time of the organization of said Company to the date hereof.

(3) Said defendant's stock certificate book showing the issuance and cancellation of all shares of stock from the date of the organization of said Company to the date hereof, and showing all transfers of stock, and present stockholders of said Company. 10

(4) Said defendant's stock ledger and transfer book.

(5) Said defendant's ledgers, cash books, journals, check books and bank deposit books from the date of the incorporation of said company to the date hereof. 20

(6) All original bills of sale, deeds and agreements whereby all and every item of real and personal property was conveyed to said corporation at and between its organization and to the date of the attachment herein, and in particular all bills of sale and other instruments from David Loeb, Philip Loeb and Jacob Loeb, partners trading as Loeb Bros., or one or more of them, to Ellbee Fur Trading Company. 30

(7) Also all evidences of moneys paid by the said David Loeb, Philip Loeb and Jacob Loeb, or any or either of them, or Loeb Bros. to Ellbee Fur Trading Company, Inc. at and after its organization.

(8) Also all of said defendant's pass books, particularly in the First National Bank of Jersey City.

(9) Also all defendant's cancelled checks on all 40

Exhibits.

of its bank accounts, and particularly its account in the First National Bank of Jersey City.

10 (10) Also all of said defendant's originals or copies of leases and assignments of leases for the premises occupied by defendant from the time of its incorporation to the date hereof, and all agreements respecting the occupancy of the premises occupied by said defendant from its organization to the date hereof.

Respectfully yours,

McDERMOTT, ENRIGHT & CARPENTER,
Solicitors for Complainant.

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Exhibit C-2.

(Signature Card of Ellbee Fur Trading Co.)

AUTHORIZED SIGNATURES OF
JAN. 27, 1921
ELLBEE FUR TRADING CO.

30

President.
JACOB K. LOEB Treasurer.

Secretary.

Address 31-W. 29th St. N. Y.

Introduced by _____

D. D. LOEB
FOR the FIRST NATIONAL BANK,
JERSEY CITY.

40

*Exhibits.***Exhibit C-3.****(Resolution of Ellbee Fur Trading Co.)**

At a duly constituted meeting of the Board of Directors of the Ellbee Fur Trading Company Inc. held at the office of the Company, on Jan. 26 1921 the following resolutions were unanimously adopted: 10

RESOLVED, That

Jacob K. Loeb
(Here insert name)

Treasurer & Secretary
(Here insert office)

of this corporation is/are hereby authorized to sign the name of the corporation to any and all checks, drafts, notes, acceptances and other negotiable or non-negotiable instruments and orders for the payment and withdrawal of any and all moneys, credits, items and property at any time held by the First National Bank of Jersey City, N. J. for the account of this corporation, in the following manner: First National Bank of Jersey City, N. J. 20

FURTHER RESOLVED, That endorsements on behalf of this corporation upon any and all checks, drafts, notes and other negotiable and non-negotiable instruments of every kind deposited by or on behalf of this company with said Trust Company for credit, or for collection or otherwise, may be made by any one of the foregoing persons, or by rubber stamp; 30

FURTHER RESOLVED, That any one of the foregoing persons is hereby authorized without further notice or resolution, to sign or endorse in the name of this corporation, any and all notes or other negotiable instruments for discount with or sale to said First National Bank of J. C.; 40

Exhibits.

10 FURTHER RESOLVED, That said First National Bank of J. C. be and hereby is authorized to honor any checks or drafts or other negotiable paper signed in the manner aforesaid, in the name of the corporation, payable to the order of any of said persons, including the person or persons so signing, or endorsed by any one of them in the name of this corporation for the personal use of them or any of them, including the person or persons so signing or endorsing the same;

20 FURTHER RESOLVED, That any one of the foregoing persons is authorized to act for this corporation in all matters and transactions relating to any of its business with said First National Bank of Jersey City, N. J.

FURTHER RESOLVED, That all the foregoing authorities shall be and continue in full force and effect until revoked by written notice of such revocation, signed by the proper officer of this corporation actually received by said First National Bank of Jersey City.

30 I hereby certify that the foregoing is a true copy of resolutions adopted by the Board of Directors of the Ellbee Fur Trading Company Inc. at a meeting of the said Board of Directors on the 26 day of Jan., 1921, and entered upon the regular minute book of said corporation.

(Seal of corporation)

Secretary.
JACOB K. LOEB
Secy.

Exhibits.

State of New Jersey }
 County of Hudson } ss.

Jacob K. Loeb being duly sworn, deposes and says: I am the Secretary of the Ellbee Fur Trading Co., the above named corporation; that as such officer I keep the corporate minute book and seal of said corporation and I know of my own knowledge the foregoing certificate is, and the contents thereof are, true and that the resolutions therein recited were adopted by the Board of Directors of said Company. 10

JACOB K. LOEB

Sworn to before me this 27th }
 day of Jany. 1921 } 20

DANIEL D. LOEB
 M. Ch. of N. J.

Exhibit C-4.

(Signature Card of Loeb Bros.)

AUTHORIZED SIGNATURES OF
FEBY 11 1918 30

LOEB BROS. _____

LOEB BROS. Philip Loeb

LOEB BROS. David Loeb
Furs

Address 75 Richard St. Brooklyn

Introduced by _____

FOR THE FIRST NATIONAL BANK,
JERSEY CITY. 40

*Exhibits.***Exhibit C-5.****(Agreement.)**

MEMORANDUM OF AGREEMENT made between the Ellbee Fur Trading Co., Inc. a corporation of the State of New York, party of the first part, and the First National Bank of Jersey City, party of the second part, witnesseth:

10

Whereas the party of the first part is a depositor in and a creditor of the party of the second part, the amount of said deposit and credit being approximately Twenty-two thousand dollars, as will appear by the books of account of the party of the second part, and

20

Whereas this relationship and this deposit and credit existed on August 28th, 1922 at the time of the service upon the party of the second part hereto of a notice by the Sheriff of the County of Hudson levying upon all the right, title and interest of David Loeb, Philip Loeb and Jacob Loeb, co-partners then or formerly doing business under the firm name of Loeb Brothers, in said credit and account of the party of the first part hereto, and

30

Whereas on August 28th, 1922 and prior thereto the party of the second part had guaranteed drafts or letters of credit for the use and benefit of the party of the first part and was subject to a liability thereupon exceeding Fifty thousand dollars, and since which time the letters of credit of the Ellbee Fur Trading Co., Inc. so guaranteed by the party of the second part have been presented for payment, and have been paid by the party of the second part, pursuant to its guarantee, approximating Ten Thousand, five hundred dollars, which

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the party of the second part in the ordinary course of its business is entitled to set off and charge

Exhibits.

against the said deposit or account above referred to of the party of the first part,

NOW THEREFORE, this agreement witnesseth that if the party of the second part shall set off and charge against the account of the party of the first part above specified, the said amount so paid by it on the guaranteed letters of credit above referred to, and shall in the future set off and charge against said account any subsequently maturing guaranteed letters of credit of the party of the first part, which it, the party of the second part, may be called upon to pay under its guarantee, and it should be adjudicated that any right which the party of the second part had to offset the indebtedness due to it by reason of said payment of the guaranteed letters of credit was subject and subsequent to the attachment and the levy there under as above set forth in an action brought in the Hudson County Circuit Court by John Elihu Body, trading as J. E. Body and Co. that the said Ellbee Fur Trading Co., Inc. will hold harmless the said First National Bank of Jersey City from any loss which it might or could sustain, and the said party of the first part agrees that if any suit or suits is brought against it by the party of the second part for or on account of its payment under said guarantee or for the collection of any demand notes which may be given as evidence of the liability of the Ellbee Fur Trading Co., Inc. on said letters of credit, that it, the party of the first part will not plead or set up as a defense in any action at law that it, the party of the second part, has been paid by reason of its exercise of the right to set off moneys due to the party of the second part against the said account of the party of the first part so levied upon as aforesaid.

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Exhibits.

IN WITNESS WHEREOF, the party of the first part has caused these presents to be signed by its president and attested by its secretary and its corporate seal to be hereto affixed the thirteenth day of October, Nineteen hundred and twenty-two.

10

ELLBEE FUR TRADING CO., INC.

By D. KELLMAN

President

Attest JACOB LOEB

(Corp. Seal)

Secretary.

20

30

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Exhibits.

Exhibit C-6.

(Financial Statement of Ellbee Fur Trading Co., Inc.)

Federal Reserve Bank of New York Statement Form.

FIRM
Statement of ELLBEE FUR TRADING COMPANY, Inc.
Business Fur Importers Address 158 West 26th Street, N. Y. C.

10

To First National Bank of Jersey City, N. J.

We make the following statement of all the assets and liabilities of our firm at the close of business on.....and give other material information for the purpose of obtaining advances on notes and bills bearing our signature or indorsement, and for obtaining credit generally on present and future applications.

(PLEASE ANSWER ALL QUESTIONS AND FILL IN ALL BLANKS)

ASSETS		LIABILITIES	
Cash on Hand and in Banks	1,120.34	Accounts Payable	1,157.88
Accounts Receivable	9,455.35	Notes Payable to Banks .....	.....
Notes Receivable	10,506.27	Notes Payable to Others	5,838.00
Merchandise	29,175.85	Deposits .....	.....
Other Quick Assets (Itemize) .....	.....	Other Current Liabilities (Itemize) .....	.....
Dep. Gas Co.	30.00	Loans Pay.	4,110.80
Loan Rec.	200.00		
Quick Assets .....	.....	Current Liabilities .....	.....
Land and Buildings .....	.....	Mortgages .....	.....
Machinery and Fixtures	467.50	Other Deferred Liabilities (Itemize) .....	.....
Other Assets (Itemize) .....	.....	
		Current and Deferred Liabilities .....	.....
		Net Worth	39,848.63
Total	50,955.31	Total	50,955.31

20

Merchandise. On what basis valued, cost or market? Cost
Finished \$.... Unfinished \$.... Raw \$29175.85
If any goods are on consignment, state amount and circumstances —

Sales and Profits Last Fiscal Year. Net sales \$242,035.24 Net profits \$.....

Accounts and Notes Receivable. State amounts and circumstances:

- (a) If any are past due or doubtful No.
- (b) If any are pledged No
- (c) If any amounts are due from members of the firm, employees, branches or similar sources No

Bonds and Stocks. State general character and whether readily salable at value stated —

Insurance. Fire, on Buildings \$.....
Merchandise \$27,000.00 Life, in favor of firm \$.....

Contingent Liability. As indorser \$.....
As guarantor \$..... No accounts or notes receivable have been sold, discounted or assigned with our endorsement or guarantee except as follows: —

Accounts and Notes Payable. If any are past due state amounts and circumstances—None
During last fiscal year current liabilities were at a maximum (\$.....) on.....
and at a minimum (\$.....) on.....

Mortgages and Other Liens. State due date of mortgages and on what assets a lien —
.....Is mortgage a lien on any current assets?

If any other liens on assets, state amount and circumstances —
Reserves and Depreciation. State what provision is made.....

30

40

We hereby certify that the foregoing figures are taken from the books of our firm and that they and the statements contained on both sides of this sheet are true and give a correct showing of our financial condition.

Signed this 6 day of April 1922

Firm Name Ellbee Fur Trading Co. Inc.
By Jacob K. Loeb
(Member of Firm) Sectry.

(OVER)

Exhibits.

(Back of Financial Statement of Ellbee Fur Trading Co. Inc.)

Date of Partnership..... Date of Expiration.....

General Partners			Special Partners		
Name	Amount Contributed	Net Worth Outside this Business	Name	Amount Contributed	Partner Until
.....
.....
.....

10

If the firm has any branch offices state location and how accounts are handled.....

If the firm or any member is connected with any other business, state nature of the business and extent to which interested.....

What is the practice of the firm in regard to trade discounts?.....

20

Are books audited by a certified public accountant?—Yes. Give date of last audit—April 1922.

Location and Description of Land Owned	Estimated Value	Assessed at	Mtgd. for	Insured for
.....
.....
.....
.....

Title. The legal and equitable title to all pieces of above described real estate is solely in the name or names of one or more of the members of the firm, except as follows:.....

30

(The balance of this space may be used for printing any questions desired to be asked amplifying statement of condition as shown on opposite page)

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*Exhibits.***Exhibit C-8.****(Certificate of Incorporation of The Ellbee Fur Trading Company, Inc.)**

We, the undersigned, David Kellman, 310 E. 4 Stanton Street, New York City, Lena Yahre, 1005 Eastern Parkway, Brooklyn, N. Y., and Mollie Flyer, 25 Lewis Avenue, Brooklyn, N. Y., desiring to form a corporation, under the laws of the State of New York, pursuant to the provisions of the Business Corporation Law, all of us being of full age and all of us being citizens of the United States and all of us being residents of the State of New York, do hereby certify that: 10

1—The name of the proposed corporation is THE ELLBEE FUR TRADING COMPANY, INC. 20

2—The purposes for which said corporation is to be formed are to make and manufacture, sell and dispose of all raw and dressed furs and skins and wearing apparel made of fur and to be engaged in the fur business and to carry on and conduct fur dyeing and fur cleaning, to acquire and sell, lease and hold, real-estate that may be necessary in the conduct of said business and to do all other things that can be conveniently done in conjunction with the proposed business aforesaid. 30

3—The amount of the capital stock of the said corporation is Fifteen Thousand (\$15,000.) Dollars, all of which shall consist of common stock.

4—The number of shares of which said capital stock shall consist is One hundred and fifty (150) shares of the par value of One Hundred (\$100.) Dollars. The amount of capital with which said corporation will begin business is Five Thousand (\$5,000.) Dollars. 40

Exhibits.

5—The principal business office is to be located in the Borough of Manhattan, City of New York, County of New York and State of New York.

10 6—The duration of said corporation is to be perpetual.

7—The number of directors is three (3), all of whom are citizens and residents of the State.

8—The names and post office addresses of the directors for the first year are as follows:

	NAMES.	POST OFFICE ADDRESSES.
		East 4
	David Kellman,	310 Stanton Street New York City
20	Lena Yahre,	1005 Eastern Parkway Brooklyn, N. Y.
	Mollie Flyer,	25 Lewis Avenue, Brooklyn, N. Y.

All of the above directors are citizens of the United States and all are residents of the State of New York.

30 9—The names and post office addresses of the subscribers to this Certificate and the number of shares of stock which each subscriber has agreed to take are as follows:

	NAMES	POST OFFICE ADDRESSES.	NO. OF SHARES.
	David Kellman	Stanton St., New York City,	20
	Lena Yahre,	1005 Eastern Parkway, Brooklyn, N. Y.	20
	Mollie Flyer,	25 Lewis Avenue, Brooklyn, N. Y.	10

40 IN WITNESS WHEREOF, We have made, signed,

Exhibits.

sealed and acknowledged this Certificate in triplicate the 7th day of January, 1921, in the year, One Thousand and Nine Hundred and twenty-one.

MOLLIE FLYER	(L.S.)	
LENA YAHRE	(L.S.)	10
DAVID KELLMAN	(L.S.)	

Signed, sealed and delivered
in the presence of

DANIEL D. LOEB

State of New York)
County of New York) ss.:

On this 7th day of January, Nineteen Hundred and Twenty-one, before me, a Notary Public of Kings County personally came, David Kellman, Lena Yahre and Mollie Flyer, to me known and known to me to be the individuals described in and who executed the foregoing certificate of Incorporation, and they severally acknowledged to me that they executed the same.

H. R. KOREY	
Notary Public #3	
Kings County	30
Cet. Registered in N. Y. Co. #26	
Term Expires Mch 30/26.	

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*Exhibits.***Exhibit C-9.****(Affidavit of Jacob Loeb.)**

(Made in New York Suit.)

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SUPREME COURT,

NEW YORK COUNTY.

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In the Matter
of
Supplementary Proceedings JOHN
ELIHU BODY,
Judgment-Creditor,
against
DAVID LOEB, PHILIP LOEB and
JACOB LOEB,
Judgment-Debtors.

County and State of New York: SS

JACOB LOEB, being duly sworn, deposes and says:
I am one of the judgment debtors herein.

30

I have heard read the affidavits on this motion
to punish me for contempt of court for alleged
wilful refusal to answer questions put to me by
counsel for the judgment creditor herein, and for
alleged wilful refusal to produce certain docu-
ments in pursuance of a subpoena issued by this
court and served on me in this proceeding, and
know the contents of said affidavits.

40

The statements therein contained to the effect
that I have willfully refused to answer any proper
question put to me upon this examination, or have
refused to produce any book, paper or document

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mentioned in the said subpoena and in my custody or under my control, are absolutely false and untrue. I have neither refused to answer any proper question put to me in the course of the said examination nor have I purposely given any evasive answer. On the contrary, during the entire course of this examination, I have sought to facilitate the same, and have given truthful answers to all questions put to me as I understood them. 10

If in the course of the examination I answered that I did not remember certain things, it was due to the fact that I actually at the time, remembered the correct answers to these questions but was afraid of giving haphazard answers that might turn out to be incorrect. A good many of the questions put to me I could have answered correctly if given sufficient time to recollect the facts and circumstances inquired into, but the manner in which counsel for the judgment creditor have conducted this examination, coupled with the threats made by counsel for judgment creditor, made it impossible for me to give those answers at the time the questions were put. 20

The questions put to me by examining counsel, covered a long period of time and the transactions of various firms and corporations, and it naturally required a very good memory to remember all the dates and facts referred to. I am not blessed with a particularly good memory, nevertheless I could have given correct answers to many of the questions if given a chance; but examining counsel never gave me a chance to collect my thoughts; jumped from one subject to another, put his questions in general terms, the purport of which I did not always get; and most of the questions were 30 40

Exhibits.

shouted at me in a manner quite bewildering. In addition to that, there was a deliberate attempt to terrorize me constantly, an attempt which commenced even before the examination in this proceeding started. Some time before the examination started, and on the occasion of the service of one of the papers on me, one of the attorneys for the judgment creditor, I believe it is Mr. Franc, told me that before he was through with me, he would send me to jail, and I verily believe that the examination herein is conducted not for the purpose of obtaining information on the business of the various firms and corporations mentioned in the examination, but for the sole and exclusive purpose of possibly catching me in a statement of an untruth by a slip of the tongue, and then attempt to proceed against me either by contempt of court or criminally. In order to effect said purpose, examining counsel have deliberately, in my opinion, framed questions in such a manner as to lead me into error, at least that is the impression these questions have made on me. This impression was enhanced by the fact that the examination was always conducted, not by one counsel, but by the whole staff of two lawyers, and at least one assistant and one stenographer. I could never understand the necessity for the presence of this staff at the examination, and the manner in which the examination was conducted, necessarily created the impression for me that it was not information that was sought from me, but incrimination of some kind or another, all of which tended to cause me to lose the little memory of the facts which I possessed, and to make it impossible for me to answer correctly such questions as I apparently could answer quite correctly, and which

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I am quite willing to answer to the best of my recollection as will appear further below.

That counsel for the judgment creditor are not honestly seeking information with reference to the matters inquired into, but merely trying to lay some kind of a trap for me, is evidenced by the fact that before the examination commenced, both I, myself, and my brother, David, who is one of the judgment debtors herein and was present with me at the time, as well as my attorney, Mr. Wittenberg, told Messrs. Franc and Becker, that my brother, David, was much more conversant than I am with the affairs of these firms and corporations, and should therefore be examined first, but counsel for the judgment creditor insisted on examining me first in face of the fact that they could get information much more easily from my brother, David. This naturally increased the impression that it was not information but incrimination that was being sought, and the atmosphere in which the examination was thereafter conducted was so tense and put me in such a nervous condition, that I sometimes forgot my own name, not to speak of certain dates and facts which I ordinarily remembered quite well, but which I could not the life of me remember at the time. So, for instance, I was asked as to the date of my marriage. It certainly has nothing to do with this case and I have no reason in the world for hiding that date, which is quite well known to me and which happens to be September 19, 1922, but at the time the question was put to me and particularly the way in which the question was put to me, was such that I could not, at the moment, recall the date to save my life.

This is true of the rest of the examination. I

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Exhibits.

was examined about two firms (there having been two firms of Loeb Brothers, and two corporations) about transactions extending over a period of more than ten years. I was not in a position then and am not in a position now to give all of the dates inquired into without great search of memory and possible consultation of old papers which I have not got at hand, but I could give approximately correct answers and there is not the slightest reason in the world why I should hide any of the facts or dates, and I was quite willing to give them to the examining counsel, and am quite willing now to give them to the court. I would have given them to examining counsel at the time the questions were put if I had been given a chance to recollect my thoughts, and if I were not in constant fear that a slip of the tongue leading me into some error, might result in such a prosecution as was threatened by Mr. Franc.

Examining counsel wanted to know the chronology of the existence of the various firms and corporations and their respective places of business. Here are the relevant facts:

The first firm of Loeb Brothers was organized, I believe, in the second half of 1914 or the early part of 1915. That firm consisted of my three older brothers, Louis, Davis and Philip. I was not a member of that firm, but I was employed by it in the capacity of office boy. That firm was engaged in the fur dressing business and its place of business was No. 135 Logan Avenue, Jersey City, New Jersey, for the first year and a half of its existence. From there the said firm moved to Kipp and Ross Streets, Newark, New Jersey, where it continued in business for about a year.

That firm was then dissolved, and my brothers,

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David and Philip went into business for themselves under the same name of Loeb Brothers, but in another business, namely, the fur dyeing business in Brooklyn, New York, the exact address being 476 Keap Street, Brooklyn, New York. That firm continued in that business only for about six months. I was connected with it as an all-around man in the factory. 10

Thereafter, my said two brothers, David and Philip, went into business as fur dealers in the City of New York, locating at No. 31 West 29th Street, Borough of Manhattan, City of New York, the business being conducted under the same name of Loeb Brothers, (to the best of my recollection that was in the early part of 1917) while I remained in the fur dyeing business, going into business on my own account at 76 Richards Street, Brooklyn, New York. I remained in business for myself for a few months only, and shortly I went out of business and around the beginning of 1918, I joined my brothers, David and Philip, as a salesman. There was a tacit understanding, however, that I would be taken into the firm some time and this understanding naturally leaked out to the trade, so that I was generally regarded as a partner, and after a while, my brothers decided to consider me a partner. 20 30

The firm of Loeb Brothers, fur dealers, remained in the said place of business, 31 West 29th Street, for about five years. In the early part of 1921, however, the firm was in difficulties and it was decided that the firm should go out of business and that a corporation should be organized to engage in the same line of business with my two brothers and myself as active men and some outsiders furnishing capital. The Ellbee Fur Trading Corpora- 40

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tion was thereupon organized, the persons interested therein being besides my two brothers and myself, a man by the name of D. Kellman, a Miss Mollie Flyer, a sister-in-law of my brother, Philip, and a Miss Lena Yahre, a sister-in-law of my brother, David. I had a few shares in the said corporation and the rest of the stock was owned by the outsiders. To the best of my knowledge, neither my brother David, nor my brother, Philip, had any shares in the stock of the corporation.

As I stated, it was intended that the firm of Loeb Brothers should go out of business entirely, but it was found thereafter as a practical matter, it was not convenient to have the firm dissolved officially for the reason that it was better known to the trade than the new corporation and that some merchants would rather sell to the firm than to the corporation. The firm thereupon continued a nominal existence buying merchandise in its own name but really for the account of the Ellbee Fur Trading Corporation.

Early in 1922, the lease which the firm of Loeb Brothers had on the store at 31 West 29th Street, expired and the Ellbee Fur Trading Corporation, which was located upon its premises at that address, moved to 158 West 26th Street, where it remained for about a year. During that year, the firm of Loeb Brothers continued its existence in the manner hereinbefore stated, engaging in business sporadically by buying occasionally merely as an aid to the Ellbee Fur Trading Corporation.

In the early part of 1923, it was found that the capital which had been invested in the Ellbee Fur Trading Corporation was insufficient to conduct business, and we tried to get some outsiders interested. We found a man by the name of Becker-

Exhibits.

man of Boston, who was willing to invest some money but declined to go into the old corporation, he, having been advised by his attorney to organize a new corporation so as to make sure that there would be no old liabilities carried over into the new business. Thereupon, the new corporation of Loeb Brothers Fur Corporation was organized by Mr. Beckerman and myself, the old corporation of Ellbee Fur Trading Corporation being continued until about the end of that year when its capital was entirely wiped out by the failure of the firm of N. Witkin which was indebted to that corporation in a large sum of money. Before that corporation went out of existence, the two corporations did business in the same premises, and I and my brothers were actively connected with both of these corporations, in so far as actual conduct of the business was concerned, the outsiders being merely investors. The place of business occupied by these two corporations was the store and basement at 217 West 29th Street, where the Loeb Brothers Fur Corporation is still located.

The Loeb Brothers Fur Corporation, the corporation which is still actively engaged in business, is capitalized at \$10,000.00 of which Mr. Beckerman furnished \$7500.00 and I and my wife furnished \$2500.00, the stock being issued to Mr. Beckerman and myself in the said proportions. The twenty-five shares representing the money invested by myself and my wife, were issued in my name but subsequently I transferred same to the name of my wife, she having refunded to me that part of the money which I had contributed. Mr. Beckerman is president and I am secretary and treasurer.

So much for the information sought to be elicited by examining counsel. As to the various books,

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papers and documents sought under the subpoena, the situation, of which the examining counsel were informed right at the beginning of the last examination, is as follows:

10 In 1922, the present judgment creditor, a fur broker in New South Wales, Australia, brought an action against the firm of Loeb Brothers for breach of contract for failure to accept merchandise, claiming damages of about \$37,000.00. This action was commenced in Jersey City and an attachment was issued at the time against the bank account which Loeb Brothers and Ellbee Fur Trading Corporation had in the First National Bank of Jersey City. Thereupon various steps were taken by the attorneys on our side to set aside said
20 attachment and various court proceedings were had. The action finally came to trial in May of this year and resulted in a judgment of about \$37,000.00 in favor of the plaintiff, which judgment is the basis of this proceeding. During the proceedings in connection with the steps to vacate the attachments and also at the trial of the action, the account books of Loeb Brothers as well as Ellbee Fur Trading Corporation were required by our attorneys' office as well as in court and they were
30 put at the disposal of the various attorneys and used from time to time by these attorneys. Some of these books had been delivered previously to our attorneys in Jersey City and whatever had not been delivered to our attorneys previously, were brought over to Jersey City at the time of the trial and to the best of my knowledge, all books of account, checks, stub, etc. of both Loeb Brothers and Ellbee Fur Trading Corporation were in the courtroom at the time of the trial of the action, and
40 were actually used by the lawyers for the plaintiff

Exhibits.

in the course of the trial. There were also a lot of fur skins in court which we had brought to prove our claim that we were justified in refusing to accept the merchandise. When the trial ended, my brothers and I naturally took the furs, believing that the attorneys who were handling the books were taking care of them, as most of them had been marked in evidence and were part of the court record. We did not care very much about the books as there was really nothing that we needed them for as both Loeb Brothers and Ellbee Fur Trading Corporation were out of business and nobody owed us any money nor did we owe anybody any money that would appear on these books. Both Loeb Brothers and Ellbee Fur Trading Corporation have paid all their merchandise creditors and do not owe anybody any money except that Loeb Brothers have this judgment against them and excepting also, that the State Bank claims a deficiency upon a certain loan secured by the deposit of certain furs. But the books of account in question have no bearing upon the latter claim. We were therefore, not interested even to inquire about these books until I was served with a subpoena in this proceeding. Thereupon I called up the office of Mr. John Milton who was our counsel in the said litigation, and found that Mr. Milton was away and nobody in the office knew anything about those books and papers.

The official record books of the Ellbee Fur Trading Corporation, such as minute books, stock books, etc. were not in court at the time of the trial of the action, but they were delivered to our attorneys and I believe, used in court upon some motion to set aside the attachment and I have not seen them since. I must say in this connection that as a mat-

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Exhibits.

ter of fact, I never had these books although I was Secretary of the company, as the same were in the office of the attorney who organized the corporation, a cousin of mine, Daniel Loeb of Jersey City. I have since inquired of him and he informed me that he did not believe that they were returned to him after the hearing which he said was had both in court and in the office of Messrs. McDermott & Enright, attorneys for the plaintiff, but that he was looking up the matter with an effort to locate them.

The only records which I was in a position and am in a position to produce under the subpoena issued by Mr. Justice Walsh are the official records of Loeb Brothers Fur Corporation, these books being in the possession of Mr. Louis B. Boudin who organized the corporation, he having been called in by Mr. Beckerman, and those books were produced at the last hearing.

All this was explained to the attorneys for the judgment creditor at the commencement of the last examination, and the record books of Loeb Brothers Fur Corporation actually given them for examination.

Notwithstanding this said explanation, Mr. Becker started his examination by making all kinds of insinuations and by attempting to terrorize me by shouting at me continuously and finally ordering me to go to the telephone to call up Mr. John Milton's office to order Mr. Milton to produce the books. Thereupon my attorney, Mr. Wittenberg interposed and stated that Mr. Becker had no right to shout at me nor order me about; that if requested to do so in a proper manner, he would facilitate in every possible way, the locating of the said books but that if he and I were not treated

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courteously, we would stand on our legal rights, and that we were not legally bound to act as errand boys for Messrs. Franc and Becker in trying to locate books which they think they want. In this connection, my attorney, Mr. Wittenberg, called the attention of the lawyers for Mr. Body, to the fact that when they were unable to serve me with a subpoena and so informed Mr. Boudin, Mr. Boudin voluntarily arranged for me to accept service of the subpoena, thus showing both our good faith as well as our disposition to courtesy, so long as the attorneys for Mr. Body acted with courtesy.

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When Messrs. Franc and Becker persisted however, in shouting and making threats and insinuations, Mr. Wittenberg told them that he withdrew the courtesy of his office and that further examination would have to proceed in court, so that the court would supervise same and protect us in our rights. In this connection, I respectfully call to the attention of the court, the fact that on a previous occasion when examination was conducted in court, the court sustained Mr. Wittenberg in his attitude in advising me that I had certain rights in this proceeding, and that I need not answer every question put to me by examining counsel. I repeat that at no time have I refused to answer any question put to me by examining counsel that had any relevance whatsoever to my business affairs or to the business affairs of Loeb Brothers or to any corporation I was connected with, nor

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have I ever refused to produce any book, paper or document that was in my possession.

JACOB LOEB.

10 Sworn to before me this 26th }
day of September, 1925. }

CORNELIUS LOWENTHAL,
Notary Public.

N. Y. Co. Clerk's No. 242, Register's No. 6035.

Kings Co. Clerk's No. 71, Register's No. 6025.

Commission expires March 30, 1926.

Exhibit C-10.

20 (Summons and Complaint—Suit of *State Bank v. Loeb Bros., N. Y. Supreme Court.*)

THE STATE BANK,
Plaintiff,

against

30 PHILLIP LOEB, JACOB K. LOEB and
DAVID LOEB individually and as
copartners trading under the
firm name and style of LOEB
BROS.,
Defendant.

} Summons.

To the above named Defendant:

40 YOU ARE HEREBY SUMMONED to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney within twenty days after the

Exhibits.

service of this summons, exclusive of the day of service. In case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated, New York, June 3rd, 1925.

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MAX SILVERSTEIN,
Attorney for Plaintiff,
No. 305 Broadway,
Borough of Manhattan,
City of New York.

SUPREME COURT,

NEW YORK COUNTY.

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THE STATE BANK,
Plaintiff,

against

PHILLIP LOEB, JACOB K. LOEB and
DAVID LOEB, individually and as
co-partners trading under the
firm name and style of LOEB
BROS.,

Defendants.

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The plaintiff by MAX SILVERSTEIN, its attorney, complaining of the defendants alleges:

1. That at all times hereinafter mentioned the plaintiff was and still is a domestic corporation duly organized under and by virtue of the laws of the State of New York.

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2. That at all said times the defendants were copartners trading under the firm name and style of LOEB BROS.

10 3. That heretofore and prior to the 23rd day of May, 1921, the plaintiff and defendants had numerous transactions, whereby the defendants borrowed sums of money from the plaintiff, and made payments thereon from time to time, and on said 23rd day of May, 1921, an account was had and stated between the plaintiff and defendants wherein and whereby it was found that there was then due and owing from the defendants to the plaintiff the sum of \$64,250, which said defendants promised and agreed to pay.

20 4. That on the said 23rd day of May, 1921, an agreement in writing was entered into between plaintiff and defendants respecting said indebtedness of \$64,250, a copy of which is hereto annexed and made part hereof.

30 5. That amongst other things it was provided in said agreement that the defendants jointly and severally would maintain and carry and pay the premiums required to be paid upon the policies of insurance in said agreement mentioned, so that
40 upon the maturity of said policies, the plaintiff herein would receive from the insurers named therein, the full sum of \$20,000, and it was further provided that in the event that the defendants or either of them should default in the payment of the premiums due upon said policies, that the plaintiff herein might receive and collect thereon whatever may be due and payable from the insurers named therein, and apply the same toward the aforesaid indebtedness of \$64,250, in which

Exhibits.

event the defendants jointly and severally agreed to pay any deficiency remaining after applying all sums received by plaintiff on account of said indebtedness as in said agreement provided.

6. That heretofore the defendants in violation of the terms of the said agreement of May 23, 1921, and the terms of the respective policies of insurance therein referred to, breached the same, and failed and omitted to maintain and carry said policies of insurance, and failed and omitted to pay the premiums required to be paid thereon when the same became due, in consequence of which said policies lapsed, and the plaintiff herein received only the cash surrender value thereof, and did not receive thereon the sum payable upon maturity thereof, to wit: \$20,000. 10 20

7. That the plaintiff has received in all on account of the said indebtedness of \$64,250, the sum of \$21,748.44, leaving a balance due and owing from the defendants to the plaintiff in the sum of \$42,501.56, and interest thereon from May 23, 1921.

8. By reason of the premises plaintiff has sustained damages in the sum of \$42,501.56, with interest thereon from May 23rd, 1921. 30

WHEREFORE, plaintiff demands judgment against the defendants for the sum of \$42,501.56, with interest thereon from the 23rd day of May, 1921, besides the costs and disbursements of this action.

MAX SILVERSTEIN,
Attorney for Plaintiff,
Office & P. O. Address,
No. 305 Broadway,
Borough of Manhattan, 40
City of New York.

Exhibits.

AGREEMENT made and entered into by and between THE STATE BANK, a banking corporation organized and existing under the laws of the State of New York, as party of the first part and PHILLIP LOEB, JACOB K. LOEB and DAVID LOEB, individually and as co-partners trading under the name and style of LOEB BROS., as parties of the second part.

WHEREAS, the parties of the second part are indebted to the party of the first part, in the aggregate sum of \$64,250, and

WHEREAS, as security for such indebtedness the parties of the second part have heretofore delivered unto the party of the first part certain goods, wares and merchandise consisting of raw furs and skins, and

WHEREAS the parties hereto have mutually agreed to adjust the indebtedness due and owing from the parties of the second part to the party of the first part in the manner hereinafter set forth.

NOW, THEREFORE, for and in consideration of the sum of One Dollar each to the other in hand paid, receipt whereof is hereby acknowledged and in consideration of the mutual promises and agreements herein contained, it is hereby stipulated as follows:

1. The parties of the second part hereby and herewith sell, transfer, assign and set over unto the party of the first part the balance of the goods and any interest therein which goods were heretofore assigned by them to it as collateral security as aforesaid, still remaining in possession of the party of the first part.

2. To have and to hold the same unto said party

Exhibits.

of the first part, its successors and assigns, absolutely free of any claim of redemption, accounting and otherwise on the part of the parties of the second part.

3. The parties of the second part hereby and herewith agree to assign unto the party of the first part the following policies of life insurance: 10

(a) Policy issued by the Travelers Insurance Co. of Hartford, Conn. #447,178 upon the lives of Philip Loeb, Jacob K. Loeb and David Loeb in the sum of \$2,000.00, annual premium \$104.84, payable April 12th of each year to April 12th, 1938.

(b) Policy issued by the Travelers Insurance Co. of Hartford, Conn. #447,179 upon the lives of Philip Loeb, Jacob K. Loeb and David Loeb in the sum of \$8,000.00, annual premium \$419.36, payable April 12th of each year to April 12th, 1938. 20

(c) Policy #6,954,961 issued by the New York Life Insurance Co., upon the life of Jacob K. Loeb for the sum of \$6,000.00, quarterly premium of \$164.96 payable on the 15th days of January, April, July and October of each year to April 15th, 1931.

(d) Policy #6,960,377 issued by the New York Life Insurance Co., upon the life of David Loeb in the sum of \$2,000.00, quarterly premium of \$56.58 payable on the 15th days of January, April, July and October of each year to April 15th, 1931. 30

(e) Policy #6,956,004 issued by the New York Life Insurance Co., upon the life of Philip Loeb in the sum of \$2,000.00, quarterly premium of \$55.58 payable on the 15th days of January, April, July and October of each year to April 15th, 1931. 40

4. The parties of the second part hereby and

Exhibits.

herewith jointly and severally covenant and agree to and with the party of the first part to maintain and carry said policies of insurance and each of them for the benefit of said party of the first part and to pay the premiums required to be paid upon
10 said policies of insurance as the same come due and to always comply with each and every term of said policies of insurance, to the end that said party of the first part should be lawfully entitled to receive the respective amounts of said policies of insurance as and when the same will mature.

5. It is hereby understood and agreed between the parties hereto, in the event any dividends are declared upon said policies of insurance, that the
20 amount of such dividends may be retained by the parties of the second part or applied by them in payment of the premiums due on said policies of insurance, providing the said parties of the second part pay said premiums, otherwise said dividends shall be retained by and belong to the party of the first part.

6. In consideration of all of the foregoing, the party of the first part hereby and herewith releases and discharges said parties of the second part and
30 each of them and each of their heirs, administrators, legal representatives and assigns of and from any claim upon the indebtedness due aforementioned or of and from any claim of whatsoever kind and nature existing to date.

7. It is hereby distinctly understood and agreed that in the event the parties of the second part or any or either of them should default in the payment of the premiums due upon said policies of
40 insurance when due and payable, or otherwise

Exhibits.

breach the terms of said policies, that then the party of the first part, at its option, may:

(a) Pay said premium and continue said policies until maturity or until such time or times that it desires to stop, and the said parties of the second part jointly and severally agree to repay the said premiums so paid on demand to the said party of the first part. 10

(b) Apply the amount realized by it upon the sale of the goods, wares and merchandise sold to it as aforesaid, together with the amount realized, if any, upon said policies of insurance, on account of the indebtedness \$64,250 due from the parties of the second part as aforesaid, together with accrued interest thereon and the parties of the second part shall then jointly and severally become liable for the deficiency, if any. 20

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals this 23rd day of May, 1921.

DAVID LOEB L. S.

PHILIP LOEB L. S.

JACOB K. LOEB L. S.

THE STATE BANK 30

By H. C. RICHARD L. S.

Pt

(Seal of The State Bank)

State of New York, }
 County of New York, } ss.:
 City of New York, }

CHARLES A. SMITH, being duly sworn, deposes and says that he is the vice-president of the plaintiff in the within action; that he has read the fore- 40

Exhibits.

going complaint and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

10 The reason why this verification is made by deponent is that he is an officer, to wit: the vice-president of the plaintiff, which is a domestic corporation, and is familiar with the facts and circumstances herein. And the sources of deponent's information and the grounds of his belief as to all matters not therein stated upon his knowledge are as follows: The books and records of the corporation.

CHARLES H. SMITH.

20

Sworn to before me this 3rd }
day of June, 1925. }

RUDOLPH (Signature illegible)

30

40

Exhibits.

**Stipulation Admitting Exhibits DX-1, 2, 3,
4, 5, 6.**

IN CHANCERY OF NEW JERSEY.

Between JOHN ELIHU BODY, trading as J. E. BODY & Co., <i>Complainant,</i> and DAVID LOEB, PHILIP LOEB and JACOB LOEB, copartners trading as LOEB BROS., ELLBEE FUR TRAD- ING Co. INC. and FIRST NATIONAL BANK OF JERSEY CITY, <i>Defendants.</i>	} 52-326. Stipulation.	10 20
--	--	--

It is hereby stipulated by and between the solicitors for the respective parties hereto that the attached copies of Applications for Letters of Credit are correct and true copies of the original applications made by the defendant, The First National Bank of Jersey City to the American Exchange National Bank for the issuance of all of the letters of credit mentioned in the testimony taken in the above case, and that the annexed copies be marked in evidence as Exhibits DX 1, 2, 3, 4, 5, and 6.

Feb. 28/27.

McDERMOTT, ENRIGHT & CARPENTER,
Solicitors for the Complainant.

DAVID F. EDWARDS,
Solicitors for the Defendant, 40
The First National Bank of
Jersey City.

*Exhibits.***Exhibit DX-1.****(Application for Commercial Letter of Credit.)**

Apr. 28, 1922.

10 The American Exchange National Bank,
New York,

Gentlemen:

Please open by cable your COMMERCIAL LETTER OF CREDIT as per particulars below for which we will duly sign your form of contract:

In favor of Robert Little & Co. of Sydney, Australia
Accredited Party.

Available by Drafts on New York
Bank or Place.

20 For Account of Ell Bee Fur Trading Co.
For Whose Account.

For not exceeding £1700
Amount.

Drafts Drawn at.....
Sight, Sixty, Ninety Days Sight, Etc.

Against Shipment of Rabbit Skins
Merchandise.

30 Shipment from Sydney, Australia to New York
Port of Shipment. Port of Entry.

Bill of lading to be dated not later than June 15th,
1922

Marine Insurance to be effected by Shipper

War Insurance to be effected by Shipper

(If Insurance is effected by applicant please state names of
Insurance Companies and give Policy Numbers.)

All Insurance to be in first class companies and policies
delivered to you if desired.

40

Exhibits.

DOCUMENTS TO ACCOMPANY DRAFTS:

Invoice Yes	Insurance Certificates Yes	
Bills of Lading Yes	Weight Certificate Yes	
Consular Invoice Yes	.....
Drafts to be drawn prior to June 15, 1922		10
Deliver documents when received by you to First National Bank J. C.		

Remarks

Yours truly,

THE FIRST NATIONAL BANK OF
 JERSEY CITY.
 J. WORTENDYKE, Asst. Cashier.

20

Exhibit DX-2.

(Application for Commercial Letter of Credit.)

May 12, 1922.

The American Exchange National Bank
 New York.

Gentlemen:

Please open by cable your Commercial Letter of Credit as per particulars below for which we will duly sign your form of contract: 30

In favor of Robert Little & Co. of Sydney, Australia.
 Accredited Party.

Available by Drafts on New York
 Bank or Place.

For Account of Ell Bee Fur Trading Co.
 For Whose Account.

For not exceeding £2000 Two Thousand Pounds
 Amount. Sterling 40

Drafts Drawn at.....
 Sight, Sixty, Ninety Days Sight, Etc.

Exhibits.

Against Shipment of 35 Bales of Rabbit Skins
Merchandise.

Shipment from Sydney, Australia to New York
Port of Shipment. Port of Entry.

10 Bill of Lading to be dated not later than June 15 —

Marine Insurance to be effected by Shipper
War Insurance to be effected by Shipper

(If Insurance is effected by applicant please state names of
Insurance Companies and give Policy Numbers.)

All Insurance to be in first class companies and policies
delivered to you if required.

DOCUMENTS TO ACCOMPANY DRAFTS:

	Invoice ✓	Insurance Certificates ✓
	Bills of Lading ✓	Weight Certificate ✓
20	Consular Invoice ✓	.....
	Drafts to be drawn prior to.....	

Deliver documents when received by you to be
delivered to the First National Bank J. C.

Yours truly,

THE FIRST NATIONAL BANK OF
JERSEY CITY.

30 By J. WORTENDYKE
Asst. Cashier.

Exhibit DX-3.

(Application for Commercial Letter of Credit.)

May 12, 1922.

The American Exchange National Bank,
New York.

Gentlemen:

40 Please open by cable your COMMERCIAL LETTER
OF CREDIT as per particulars below for which we
will duly sign your form of contract:

Exhibits.

In favor of Turner Brothers of Dunedin,
 Accredited Party. New Zealand.
 Available by Drafts on New York
 Bank or Place.
 For Account of Ell Bee Fur Trading Co. 10
 For Whose Account.
 For not exceeding £800 Eight Hundred Pounds
 Amount. Sterling.
 Drafts Drawn at.....
 Sight, Sixty, Ninety Days Sight, Etc.
 Against Shipment of Rabbit Skins.
 Merchandise.
 Shipment from Dunedin, New Zealand to New York
 Port of Shipment. Port of Entry.
 Bill of lading to be dated not later than June 1, — 20
 Marine Insurance to be effected by Shipper
 War Insurance to be effected by Shipper
 (If Insurance is effected by applicant please state names of
 Insurance Companies and give Policy Numbers.)
 All Insurance to be in first class companies and policies
 delivered to you if desired.

DOCUMENTS TO ACCOMPANY DRAFTS:

Invoice ✓	Insurance Certificates ✓	
Bills of Lading ✓	Weight Certificate ✓	30
Consular Invoice ✓	.....
Drafts to be drawn prior to.....		
Deliver documents when received by you to.....		

Remarks

Yours truly,

THE FIRST NATIONAL BANK OF
 JERSEY CITY.

By J. WORTENDYKE, Asst. Cashier. 40

Exhibits.

Exhibit DX-4.

(Application for Commercial Letter of Credit.)

June 7, 1922.

10 The American Exchange National Bank,
New York.

Gentlemen:

Please open by cable your COMMERCIAL LETTER OF CREDIT as per particulars below for which we will duly sign your form of contract:

In favor of Robert Little Co. of Sydney, Australia
Accredited Party.

20 Available by Drafts on New York
Bank or Place.

For Account of Ell Bee Fur Trading Co.
For Whose Account.

For not exceeding Three Thousand pounds Sterling
Amount.

Drafts Drawn at.....
Sight, Sixty, Ninety Days Sight, Etc.

Against Shipment of Rabbit Skins
Merchandise.

30 Shipment from Sydney, Australia to New York
Port of Shipment. Port of Entry.

Bill of Lading to be dated not later than Aug. 15th.

Marine Insurance to be effected by Shipper

War Insurance to be effected by Shipper

(If Insurance is effected by applicant please state names of Insurance Companies and give Policy Numbers.)

All Insurance to be in first class companies and policies delivered to you if required.

40

Exhibits.

DOCUMENTS TO ACCOMPANY DRAFTS:

Invoice	Insurance Certificates	
Bills of Lading	Weight Certificate	
Consular Invoice		
Drafts to be drawn prior to		
Deliver documents when received by you to		10

Remarks

Yours truly,

THE FIRST NATIONAL BANK OF
JERSEY CITY.

J. WORTENDYKE, Asst. Cashier.

20

Exhibit DX-5.

(Application for Commercial Letter of Credit.)

July 6, 1922.

The American Exchange National Bank,
New York.

Gentlemen:

Please open by cable your COMMERCIAL LETTER
OF CREDIT as per particulars below for which we
will duly sign your form of contract: 30

In favor of Robert Little and Co., Sydney Australia.
Accredited Party.

Available by Drafts on
Bank or Place.

For Account of Ell Bee Fur Trading Co., Jersey City
For Whose Account.

For not exceeding £2,800
Amount. 40

Drafts Drawn at 90 days sight.
Sight, Sixty, Ninety Days Sight, Etc.

Exhibits.

Against Shipment of Rabbit Skins
Merchandise.

Shipment from Sydney to New York
Port of Shipment. Port of Entry.

10 Bill of lading to be dated not later than July 30,
1922.

Marine Insurance to be effected by Shipper

~~War Insurance to be effected by Shipper~~

(If Insurance is effected by applicant please state names of
Insurance Companies and give Policy Numbers.)

All Insurance to be in first class companies and policies
delivered to you if desired.

DOCUMENTS TO ACCOMPANY DRAFTS:

20 Invoice X Insurance Certificates X
Bills of Lading X Weight Certificate X
Consular Invoice X
Drafts to be drawn prior to July 30, 1922.
Deliver documents when received by you to.....

Remarks

Yours truly,

The First National Bank of Jersey City
By J. Wortendyke, Asst. Cashier.

30

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Exhibits.

Exhibit DX-6.

(Application for Commercial Letter of Credit.)

Aug. 10, 1922.

The American Exchange National Bank 10
New York.

Gentlemen:

Please open by cable your Commercial Letter of Credit as per particulars below for which we will duly sign your form of contract:

In favor of Oscar Curtis
Accredited Party.

Available by Drafts on Sidney, Australia 20
Bank or Place.

For Account of Ell Bee Fur Trading Co.
For Whose Account.

For not exceeding £665
Amount.

Drafts Drawn at Ninety Days
Sight, Sixty, Ninety Days Sight, Etc.

Against Shipment of 11 Bales of Rabbit Skins
Merchandise.

Shipment from Sydney, Australia to New York 30
Port of Shipment. Port of Entry.

Bill of Lading to be dated not later than Sept. 10,
1922.

Marine Insurance to be effected by Oscar Curtis.

War Insurance to be effected by.....

(If Insurance is effected by applicant please state names of
Insurance Companies and give Policy Numbers.)

All Insurance to be in first class companies and policies
delivered to you if required.

Exhibits.

DOCUMENTS TO ACCOMPANY DRAFTS:

	Invoice 1	Insurance Certificates 1
	Bills of Lading 1	Weight Certificate 1
	Consular Invoice 1	.....
10	Drafts to be drawn prior to	
	Deliver documents when received by you to	

Remarks.

Yours truly,

THE FIRST NATIONAL BANK OF JERSEY CITY

C. A. SPOERL, Asst. Cashier.

ELLBEE FUR TRADING Co., INC.

By CELMA ROSEN.

20

Date Aug. 11/22.

Name First N. B. Jersey City.

Letter of Credit Line.....	\$.....
	\$20200

Unused Balance	\$25802	£23498	\$150,000.
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Acceptances	\$6000	£2388	\$ 15,000.
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With Loan or Discount Department ...	None
--------------------------------------	------

30

\$165,000

On Deposit \$35,000.

Request for New Credit \$ £665.

LETTER OF CREDIT DIVISION.

40

*Exhibits.***Exhibit DX-7.****(Promissory Note, May 2, 1922.)**

\$6800.00

Jersey City, N. J. May 2 1922

On demand after date we promise to pay to 10
 the order of Ourselves
 Sixty-eight hundred - - - - - Dollars
 Payable at The First National Bank of Jersey
 City, N. J.

THE ELLBEE FUR TRADING CO. INC.

Value Received

JACOB K. LOEB

No....Due.....

Secty. & Treas.

(Endorsements):

20

THE ELLBEE FUR TRADING CO. INC.

JACOB K. LOEB

Secty. & Treas.

JACOB K. LOEB

Exhibit DX-8.**(Commercial Letter of Credit, April 29, 1922.)**

THE AMERICAN EXCHANGE NATIONAL BANK 30
 NEW YORK.

Commercial Letter of Credit No. S. 1207#

£1,700#

New York April 29th, 1922.

To Messrs. ROBERT LITTLE AND COMPANY,
 SYDNEY, AUSTRALIA.

Dear Sirs:

We hereby authorize you to value on THE COM- 40
 Mercial Bank of Scotland, Ltd., London for ac-

Exhibits.

count of ELL BEE FUR TRADING COMPANY, JERSEY CITY, NEW JERSEY, to an amount not exceeding ONE THOUSAND SEVEN HUNDRED Pounds Sterling. Your drafts must be drawn at NINETY (90) DAYS sight and against the shipment of RABBITSKINS FROM SYDNEY TO NEW YORK. WEIGHT CERTIFICATE TO ACCOMPANY DRAFTS.

10

Insurance and War Risk to be effected BY SHIPPERS, CERTIFICATES TO ACCOMPANY DRAFTS.

Drafts under this Letter of Credit must be accompanied by Invoice and by Bills of Lading for such goods bearing date not later than June 15th, 1922, and filled up to the order of The American Exchange National Bank, New York.

20

One Bill of Lading and Consular Invoice must be sent direct to us by the Bank or Banker negotiating a draft under this Letter of Credit, attaching to the draft a certificate to that effect.

Drafts must state "Drawn against A. E. N. B. L/C No. S 1207#" and must be drawn and negotiated on or before June 15th, 1922.

30

And we hereby agree with the drawers, endorsers and bona fide holders of drafts drawn under and in compliance with the terms of this Letter of Credit that the same shall be duly honored upon presentation.

Faithfully yours,

THE AMERICAN EXCHANGE NATIONAL BANK

.....

Opened by cable through the Union Bank of Australia, Ltd. Sydney, May 1, 1922 with instructions to notify the beneficiaries.

40

Exhibits.

**(Customer's Agreement Printed on Back of Letter
of Credit.)**

CUSTOMER'S AGREEMENT.

New York April 29, 1922.

The American Exchange National Bank, New
York.

10

Dear Sirs:

In consideration of your issuing a Letter of
Credit substantially in the form appearing on the
reverse hereof I/we do hereby promise and agree
that, unless funds sufficient for the purposes hereof
shall have been previously deposited with you or
your correspondents named in said Letter of Cred-
it, I/we will, immediately upon receipt of advice
of the payment of any sight Draft and/or Drafts
drawn thereunder, pay to you at your office in
the City of New York the equivalent in cash of all
amounts so paid at the then current rate of ex-
change in New York for prime bankers, cable
transfers on London, together with all expenses
and charges incurred and a commission of $\frac{1}{2}$ per
cent, on the amount of such Draft or Drafts; and,
if the said Letter of Credit shall be availed of by
time Draft and/or Drafts, that, at least fourteen
days before the maturity thereof I/we will either
pay to you at your said office the equivalent; there-
of in cash at the then current rate of exchange
in New York for prime bankers' demand bills
payable in London, together with all said expenses,
charges and commissions or will deliver to you
prime bankers' demand bills payable in London,
satisfactory to you, sufficient to meet the same to-
gether with all said expenses, charges and com-
missions, or that at least two days before the

20

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Exhibits.

maturity thereof I/we will pay to you at your said office the equivalent thereof in cash at the then current rate of exchange in New York for prime bankers' cable transfers on London, together with all said expenses, charges and commissions.

10 In the event that any such funds are not in the hands of your said correspondents in time to meet said Draft and/or Drafts at maturity, I/we will pay interest upon the amount of such Draft and/or Drafts from maturity, until such funds are available in London. Interest at a rate satisfactory to you is to be allowed on funds deposited with you for the purposes hereof prior to the maturity of said drafts; interest where chargeable against

20 me/us is to be calculated at the rate of one per centum per annum above the Bank of England rate, current at the time and from time to time while any payment due hereunder is in default.

I/We do hereby recognize, admit and guarantee your ownership of all property acquired by means of said Letter of Credit and Drafts drawn thereunder, and your right to the possession of said property and the bills of lading and all other documents relating thereto, and to dispose of the same, by sale or otherwise, at any time in your discretion

30 and without notice to me/us. If the said property or the documents therefore shall be entrusted to me/us for any purpose whatsoever, I/we do hereby agree to hold the same in trust for you, as your property and subject to your order, and, provided you consent, with liberty to sell but not to pledge the same, and in the event of sale to deliver to you the proceeds thereof as soon as received and in the form received; but if I/we deposit funds with you

40 sufficient to pay all of said Drafts at maturity together with all said expenses, charges and com-

Exhibits.

missions, or purchase said property from you as herein provided and pay said expenses, charges and commissions, and discharge and pay all my/our other indebtedness, liabilities and obligations to you, then this trust shall thereupon cease and determine. On receiving said property in trust as aforesaid I/we will, on demand, lodge with you such security in cash, stocks, bonds, or other collateral as shall be satisfactory to you. . . . 10

I/We do further promise that all property acquired as aforesaid, shall without expense to you, be and be kept at all times fully insured in your favor against marine and/or war risks and/or loss or damage by fire and/or otherwise, and undertake to procure Policies of Insurance in terms covering from the time your interest attaches, the Underwriters and the forms of Policies to be satisfactory to you, and the Policies to be delivered to you promptly on demand. 20

I/We do further promise and agree, on demand, to purchase the said property from time to time, in whole or in part, at full value as invoiced, either before or after arrival.

It is understood and agreed that you may accept and/or pay the Draft and/or Drafts drawn under said Letter of Credit on presentation of one copy of Bill of Lading (whether with or without transshipment) together with copy of invoice and/or other documents as required by said Letter of Credit, or substitutes therefor satisfactory to you, and without regard to the order in which they may be drawn or presented, and without regard to the amount of any Draft (the total of all drafts not in any event to exceed the amount of said Letter of Credit); that you may act on the face of any Drafts and documents presented in connection with said 30 40

Exhibits.

Letter of Credit, and that you shall not be held responsible for the correctness, genuineness or validity thereof, for the description, quantities or quality of the property covered thereby, for the conditions or sufficiency of the insurance or the responsibility or solvency of the Underwriters, for any errors or delay in transmitting, or failure by others to transmit, messages or funds by cable, telegraph or otherwise or for any act or omission of the drawer of Drafts thereunder or the consequences thereof; that you need not take notice of any disputes or other matters arising in connection with the performance of any contract between the undersigned and the party to whom said Letter of Credit is addressed or other parties; and that in any proceedings brought by you against me/us in connection with said Letter of Credit or with this agreement, the date of any shipping document shall be deemed the date of any shipment or shipments referred to in said Letter of Credit or in this agreement, and the due execution, endorsement and negotiation of and the correctness, genuineness and validity of said Drafts, Bills of Lading, Policies of Insurance, and other documents upon which you have acted, shall be conclusively presumed as against me/us; always provided that the said Drafts and accompanying documents shall on their face conform to the requirements of said Letter of Credit.

Should it be mutually agreed that said Letter of Credit be extended, increased or otherwise altered the same shall be at my/our expense and risk; and all the terms hereof and my/our obligations hereunder shall remain in full force and effect notwithstanding.

I/We hereby agree that at any time on demand

Exhibits.

I/we will furnish collateral security against my/our obligations hereunder; and if I/we shall not forthwith furnish the same in form and amount satisfactory to you, then my/our obligations hereunder shall be and become at once due and payable, regardless of the due date of any Drafts drawn as aforesaid, and I/we do hereby promise to pay the amount of said Drafts to you forthwith, together with expenses and charges incurred or to be incurred, interest to the day of payment and your commission aforesaid. 10

I/we do further agree to indemnify and hold you harmless against any and all expense, loss and/or liability you may incur in connection with said Letter of Credit, with this agreement or with any shipment or other matter, or thing having to do therewith and also under any bond or undertaking into which you may be required to enter in the course of transportation, importation or exportation of the property aforesaid; and further, that in the event of my/our suspension, failure or assignment for the benefit of creditors, or the filing of a petition in bankruptcy, voluntary or involuntary, or the nonpayment of any indebtedness or non-fulfillment of any of my/our obligations to you, whether arising hereunder or otherwise, then all my/our obligations, indebtedness and liabilities whatsoever to you shall thereupon, without notice, mature and become due and payable forthwith; and that any moneys, securities and other property at any time in your possession belonging to any of the parties liable hereon to you, including deposits due from you to any of said parties and securities held by you in safekeeping for account of any of said parties, shall be held and treated as security for the payment of my/our obligations 20 30 40

Exhibits.

10 hereunder and also any other obligation, indebtedness and liability of the undersigned to you, whether due or not due, and you may at any time, at your option, set off the amount due or to become due hereon or on any other such obligations against any claim of any of said parties against you; and finally, that this agreement is to continue in force notwithstanding any change in the composition of any firm or firms, parties to this contract or drawers under said Letter of Credit, or the incorporation of a partnership.

20 It is further understood and agreed that your failure to exercise or enforce any rights hereunder and to require strict compliance with the terms hereof in any one or more instances shall not be deemed a waiver or relinquishment thereof; that all the provisions herein contained for your benefit and protection shall be available to and enforceable by your said correspondents as principals or otherwise; and that (except where payment at the rate for demand bills is above provided) the pound sterling shall be calculated at the rate of exchange in New York for prime bankers' cable transfers on London, existing when obligations hereunder become payable.

30 This agreement shall be construed according to the law in force in the State of New York.

(Signed) THE ELLBEE FUR TRADING CO. INC.

JACOB K. LOEB

Secty & Treas.

40

Exhibits.

Exhibit DX-9.

(Guaranty by The First National Bank of Jersey City.)

We hereby agree that Commercial Letter of Credit, S 1207 for £1,700, in favor of Robert Little and Company, Sydney, Australia, for account of Ellbee Fur Trading Company, a copy of which is attached, has been issued by the American Exchange National Bank, as our agents. 10

THE FIRST NATIONAL BANK
Jersey City, N. J.

J. R. WORTENDYKE
Asst. Cash. 20

Exhibit DX-10.

(Promissory Note, May 15, 1922.)

\$9000. Jersey City, N. J. May 15 1922

On demand after date we promise to pay to the order of The First National Bank J. C. Nine thousand - - - - - Dollars Payable at The First National Bank of Jersey City, N. J. 30

THE ELL BEE FUR TRADING CO. INC.

Value Received. JACOB K. LOEB
No....Due..... secty & treas.

(Endorsements):

THE ELL BEE FUR TRADING CO. INC.
JACOB K. LOEB Secty. & Treas.
JACOB K. LOEB 40

*Exhibits.***Exhibit DX-11.****(Commercial Letter of Credit, May 12th, 1922.)**

THE AMERICAN EXCHANGE NATIONAL BANK
128 BROADWAY
NEW YORK

10

Commercial Letter of Credit No. S 1216#

£2,000.00

New York May 12th, 1922

To Messrs. ROBERT LITTLE AND COMPANY,
SYDNEY, AUSTRALIA.

Dear Sirs:

We hereby authorize you to value on
THE COMMERCIAL BANK OF SCOTLAND, LTD., LONDON
for account of ELL BEE FUR TRADING COMPANY,
JERSEY CITY, NEW JERSEY to an amount not ex-
ceeding Two THOUSAND - - - Pounds Sterling.
Your drafts must be drawn at NINETY (90) DAYS
sight and against the shipment of ABOUT THIRTY
FIVE (35) BALES OF RABBIT SKINS FROM SYDNEY TO
NEW YORK. WEIGHT CERTIFICATE TO ACCOMPANY
DRAFTS.

20

Insurance to be effected } By Shippers, Certificates
War Risk to be effected } to Accompany Drafts.

30

Drafts under this Letter of Credit must be ac-
companied by Invoice and by Bills of Lading for
such goods bearing date not later than June 15th,
1922 filled up to the order of THE AMERICAN
EXCHANGE NATIONAL BANK, NEW YORK.

One Bill of Lading and Consular Invoice must
be sent direct to us by the Bank or Banker nego-
tiating a draft under this Letter of Credit, attach-
ing to the draft a certificate to that effect.

40

Drafts must state "Drawn against A. E. P. N. B.
L/C No. S 1216" and must be drawn and negotiated
on or before June 15th, 1922.

Exhibits.

And we hereby agree with the drawers, endorsers and bona fide holders of drafts drawn under and in compliance with the terms of this Letter of Credit that the same shall be duly honored upon presentation.

Faithfully yours,

10

THE AMERICAN EXCHANGE NATIONAL BANK,

.....

Vice Pres.
Asst. Cash.

.....

Asst. Cashier
Manager Foreign Department.

20

Opened by cable through the Union Bank of Australia Ltd. Sydney, May 12, 1922 with instructions to notify the beneficiaries.

30

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Exhibits.

CUSTOMER'S AGREEMENT

On the back of the foregoing letter of credit is a Customer's Agreement printed in full, identical with the form of Customer's Agreement, Exhibit DX-8.

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Exhibits.

Exhibit DX-12.

(Guaranty by The First National Bank of Jersey City.)

We hereby agree that Commercial Letter of Credit S 1216 for £2,000 in favor of Robert Little and Company, Sydney, for account of Ell Bee Fur Trading Company, a copy of which is attached, has been issued by the American Exchange National Bank, as our agents. 10

THE FIRST NATIONAL BANK
Jersey City, N. J.
J. R. WORTENDYKE
Asst. Cashier

20

Exhibit DX-13.

(Promissory Note, May 15, 1922.)

\$3600. Jersey City, N. J. May 15 1922

On demand after date we promise to pay to the order of The First National Bank Jersey City Thirty-six hundred - - - - - Dollars Payable at The First National Bank, Jersey City, N. J. 30

THE ELL BEE FUR TRADING CO. INC.

Value Received. JACOB K. LOEB
No....Due..... Secty. & Treas.

(Endorsements) :

THE ELL BEE FUR TRADING CO. INC.
JACOB K. LOEB, Secty. & Treas.
JACOB K. LOEB

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*Exhibits.***Exhibit DX-14.****(Commercial Letter of Credit, May 12th, 1922.)**

THE AMERICAN EXCHANGE NATIONAL BANK
128 BROADWAY
NEW YORK

10

Commercial Letter of Credit No. S 1217#

£800#

New York May 12th, 1922.

To Messrs. TURNER BROTHERS,
DUNEDIN, NEW ZEALAND.

Dear Sirs:

20

We hereby authorize you to value on
THE COMMERCIAL BANK OF SCOTLAND, LTD., LONDON
for account of ELL BEE FUR TRADING COMPANY,
JERSEY CITY, NEW JERSEY to an amount not exceed-
ing EIGHT HUNDRED - - - - Pounds Sterling
Your drafts must be drawn at NINETY (90) DAYS
sight and against the shipment of RABBIT SKINS
FROM DUNEDIN TO NEW YORK. WEIGHT CERTIFICATE
TO ACCOMPANY DRAFTS.

30

Insurance to be effected } By Shippers, Certificates
War Risk to be effected } to Accompany Drafts.
Drafts under this Letter of Credit must be ac-
companied by Invoice and by Bill of Lading for
such goods bearing date not later than June 1st,
1922, filled up to the order of THE AMERICAN EX-
CHANGE-PACIFIC NATIONAL BANK, NEW YORK.

One Bill of Lading and Consular Invoice must
be sent direct to us by the Bank or Broker nego-
tiating a draft under this Letter of Credit, attach-
ing to the draft a certificate to that effect.

40

Drafts must state "Drawn against A. E. P. N. B.
L/C No. S 1217#" and must be drawn and nego-
tiated on or before June 1st, 1922.

Exhibits.

And we hereby agree with the drawers, endorsers and bona fide holders of drafts drawn under and in compliance with the terms of this Letter of Credit that the same shall be duly honored upon presentation.

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THE AMERICAN EXCHANGE-PACIFIC
NATIONAL BANK,

.....

.....

Opened by cable through the National Bank of New Zealand, Wellington, May 12, 1922 with instructions to notify the beneficiaries.

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Exhibits.

CUSTOMER'S AGREEMENT

On the back of the foregoing Letter of Credit is a Customer's Agreement printed in full, identical with the form of Customer's Agreement, Exhibit DX-8.

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Exhibits.

Exhibit DX-15.

(Guaranty of The First National Bank of Jersey City.)

We hereby agree that Commercial Letter of Credit S 1217 for £800 in favor of Turner Bros., Dunedin for account of Ell Bee Fur Trading Company, a copy of which is attached, has been issued by the American Exchange National Bank, as our agents. 10

THE FIRST NATIONAL BANK
Jersey City, N. J.
J. R. WORTENDYKE
Asst. Cashier

20

Exhibit DX-16.

(Promissory Note, June 10, 1922.)

\$15000.00 Jersey City, N. J. June 10 1922

On demand after date we promise to pay to the order of Ourselves Fifteen thousand - - - - - Dollars Payable at The First National Bank, Jersey City, N. J. 30

THE ELL BEE FUR TRADING CO. INC.

Value Received. JACOB K. LOEB
No....Due..... Secty & Treas.

(Endorsements) :

THE ELL BEE FUR TRADING CO. INC.
JACOB K. LOEB
Secty. & Treas.
JACOB K. LOEB

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*Exhibits.***Exhibit DX-17.****(Commercial Letter of Credit, June 8th, 1922.)**

THE AMERICAN EXCHANGE NATIONAL BANK
 128 BROADWAY
 NEW YORK

10

Commercial Letter of Credit No. S 1234#

£3,000#

New York June 8th, 1922

To Messrs. ROBERT LITTLE & COMPANY,
 SYDNEY, AUSTRALIA.

Dear Sirs:

20

We hereby authorize you to value on
 THE COMMERCIAL BANK OF SCOTLAND, LTD., LONDON
 for account of ELL BEE FUR TRADING COMPANY,
 JERSEY CITY, N. J. to an amount not exceeding
 THREE THOUSAND - - - - Pounds Sterling.
 Your drafts must be drawn at NINETY (90) DAYS
 sight and against the shipment of RABBIT SKINS
 FROM SYDNEY TO NEW YORK, WEIGHT CERTIFICATE
 TO ACCOMPANY DRAFTS.

30

Insurance to be effected } By Shippers, Certificates
 War Risk to be effected } to Accompany Drafts.

Drafts under this Letter of Credit must be ac-
 companied by Invoice and by Bills of Lading for
 such goods bearing date not later than August
 15th, 1922 filled up to the order of THE AMERICAN
 EXCHANGE-PACIFIC NATIONAL BANK, NEW YORK.

One Bill of Lading and Consular Invoice must
 be sent direct to us by the Bank or Banker nego-
 tiating a draft under this Letter of Credit, attach-
 ing to the draft a certificate to that effect.

40

Drafts must state "Drawn against A. E. P. N. B.

Exhibits.

L/C No. S. 1234#" and must be drawn and negotiated on or before August 15th, 1922.

And we hereby agree with the drawers, endorsers and bona fide holders of drafts drawn under and in compliance with the terms of this Letter of Credit that the same shall be duly honored upon presentation. 10

Faithfully yours,

THE AMERICAN EXCHANGE-PACIFIC
NATIONAL BANK,

.....
.....

Opened by cable through the Union Bank of Australia, Ltd. Sydney, June 6th, 1922, with instructions to notify the beneficiaries. 20

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Exhibits.

CUSTOMER'S AGREEMENT

On the back of the foregoing Letter of Credit is a Customer's Agreement printed in full, identical with the form of Customer's Agreement, Exhibit DX-8.

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Exhibits.

Exhibit DX-18.

(Guaranty of The First National Bank of Jersey City.)

We hereby agree that Commercial Letter of Credit S 1234 for £3,000 in favor of Robert Little & Company, Sydney, Australia, for account of Ell Bee Fur Trading Company, a copy of which is attached, has been issued by the American Exchange National Bank, as our agents. 10

THE FIRST NATIONAL BANK
Jersey City, N. J.

J. R. WORTENDYKE
Asst. Cashier.

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Exhibit DX-19.

(Promissory Note, July 10, 1922.)

\$14000.00 Jersey City, N. J. July 10, 1922

On demand after date we promise to pay to the order of Ourselves
Fourteen thousand - - - - - Dollars
Payable at The First National Bank, Jersey City, N. J. 30

ELL BEE FUR TRADING CO. INC.

Value Received JACOB K. LOEB
No....Due..... Secty. & Treas.

(Endorsements) :

THE ELL BEE FUR TRADING CO. INC.
JACOB K. LOEB Secty. & Treas.
JACOB K. LOEB

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*Exhibits.***Exhibit DX-20.****(Commercial Letter of Credit, July 6th, 1922.)**

THE AMERICAN EXCHANGE NATIONAL BANK
128 BROADWAY
NEW YORK

10

Commercial Letter of Credit No. S 1259#

£2,800#

New York July 6th, 1922.

To Messrs. ROBERT LITTLE AND COMPANY,
SYDNEY, AUSTRALIA.

Dear Sirs:

20

We hereby authorize you to value on
THE COMMERCIAL BANK OF SCOTLAND, LTD., LONDON
for account of ELL BEE FUR TRADING COMPANY,
JERSEY CITY, N. J. to an amount not exceeding
TWO THOUSAND EIGHT HUNDRED POUNDS Sterling.
Your drafts must be drawn at NINETY (90) DAYS
sight and against the shipment of RABBIT SKINS TO
NEW YORK. WEIGHT CERTIFICATE TO ACCOMPANY
DRAFTS.

30

Insurance to be effected } By Shippers, Certificates
War Risk to be effected } to Accompany Drafts.

Drafts under this Letter of Credit must be ac-
companied by Invoice and by Bills of Lading for
such goods bearing date not later than July 30th,
1922 filled up to the order of THE AMERICAN EX-
CHANGE NATIONAL BANK, NEW YORK.

One Bill of Lading and Consular Invoice must
be sent direct to us by the Bank or Banker nego-
tiating a draft under this Letter of Credit, attach-
ing to the draft a certificate to that effect.

40

Drafts must state "Drawn against A. E. P. N. B.
L/C No. S. 1259#" and must be drawn and nego-
tiated on or before July 30th, 1922.

Exhibits.

And we hereby agree with the drawers, endorsers and bona fide holders of drafts drawn under and in compliance with the terms of this Letter of Credit that the same shall be duly honored upon presentation.

10

Faithfully yours,

THE AMERICAN EXCHANGE NATIONAL BANK,

.....

.....

Opened by cable through the Union Bank of Australia, Sydney July 6, 1922, with instructions to notify the beneficiaries.

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Exhibits.

CUSTOMER'S AGREEMENT

On the back of the foregoing Letter of Credit is a Customer's Agreement printed in full, identical with the form of Customer's Agreement, Exhibit DX-8.

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Exhibits.

Exhibit DX-21.

(Guaranty of The First National Bank of Jersey City.)

We hereby agree that Commercial Letter of Credit S 1259 for £2,800 in favor of Robert Little and Co. for account of Ell Bee Fur Trading Co., a copy of which is attached, has been issued by the American Exchange National Bank, as our agents. 10

THE FIRST NATIONAL BANK
Jersey City, N. J.

J. R. WORTENDYKE
Asst. Cashier

20

Exhibit DX-22.

(Promissory Note, August 14, 1922.)

\$3690# Jersey City, N. J. Aug. 14, 1922

On demand after date we promise to pay to the order of First National Bank
Thirty-six hundred ninety - - - - - Dollars
at The First National Bank, Jersey City, N. J.

30

THE ELL BEE FUR TRADING CO. INC.

Value Received JACOB K. LOEB
No....Due..... Secty. & Treas.

(Endorsements):

THE ELL BEE FUR TRADING CO. INC.
JACOB K. LOEB Secty. & Treas.
JACOB K. LOEB

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*Exhibits.***Exhibit DX-23.****(Commercial Letter of Credit, August 11th, 1922.)**

THE AMERICAN EXCHANGE NATIONAL BANK
NEW YORK.

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Commercial Letter of Credit No. S. 1295#

£665# New York, August 11th, 1922

To MR. OSCAR CURTIS,
SYDNEY, AUSTRALIA.

Dear Sirs:

20

We hereby authorize you to value on
THE COMMERCIAL BANK OF SCOTLAND, LTD., LONDON
for account of ELL BEE FUR TRADING COMPANY, NEW
YORK CITY to an amount not exceeding SIX HUN-
DRED SIXTY FIVE - - - - - Pounds Sterling.
Your drafts must be drawn at NINETY (90) DAYS
sight and against the shipment of ELEVEN BALES OF
RABBITSKINS FROM SYDNEY TO NEW YORK. WEIGHT
CERTIFICATE TO ACCOMPANY DRAFTS. MARINE INSUR-
ANCE TO BE EFFECTED BY SHIPPER, CERTIFICATES TO
ACCOMPANY DRAFTS.

30

Drafts under this Letter of Credit must be ac-
companied by Invoice and by Bills of Lading for
such goods bearing date not later than September
10th, 1922, and filled up to the order of The Amer-
ican Exchange National Bank, New York.

One Bill of Lading and Consular Invoice must
be sent direct to us by the Bank or Banker nego-
tiating a draft under this Letter of Credit attach-
ing to the draft a certificate to that effect.

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Drafts must state "Drawn against A. E. N. B.
L/C No. S 1295#" and must be drawn and nego-
tiated on or before September 10th, 1922.

And we hereby agree with the drawers, en-

Exhibits.

dorsers and bona fide holders of drafts drawn under and in compliance with the terms of this Letter of Credit that the same shall be duly honored upon presentation.

Faithfully yours,

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THE AMERICAN EXCHANGE NATIONAL BANK,

.....

Vice Pres.
Asst. Manager Foreign Dpt.
Asst. Cash.

.....

Asst. Cash. for Foreign Department.

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Opened by cable through the Australian Bank of Commerce, Sydney, August 11, 1922 with instructions to notify the beneficiary.

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Exhibits.

CUSTOMER'S AGREEMENT

On the back of the foregoing Letter of Credit is a Customer's Agreement printed in full, identical with the form of Customer's Agreement, Exhibit DX-8.

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*Opinion of V. C. Bentley.***Exhibit DX-24.****(Guaranty of The First National Bank of Jersey City.)**

We hereby agree that Commercial Letter of Credit S 1295 for £665 in favor of Mr. Oscar Curtis, for account of Ell Bee Fur Trading Company, a copy of which is attached, has been issued by the American Exchange National Bank, New York, as our agents. 10

THE FIRST NATIONAL BANK
Jersey City, N. J.

C. A. SPOERL
Asst. Cashier.

20

Opinion of V. C. Bentley.

(Not filed.)

August 16, 1927.

McDermott, Enright & Carpenter, Esqs.,
Heyman & Heyman, Esqs.,

Gentlemen,

Lack of a stenographer renders it impracticable to do more than outline the decision that should be entered in *Body v. Loeb et als.* If an appeal is taken I will more fully express my reasons after vacation or I will do so upon request. 30

There remains no doubt in my mind that Ellbee Fur Trading Co. was a contrivance to hinder, embarrass and delay the complainant. It seems to me that there is scarcely any of the usual badges missing. But, of course, there is no proof to implicate the defendant bank therein. 40

Opinion of V. C. Bentley.

10 The modification of the original restraint by the injunctive order is not binding on the court after final hearing and, indeed, might have been modified for the single reason that plenary protection, *pendente lite*, was afforded by the proceedings at law.

20 This is a very different case from that disclosed in *Jackson v. Hooper*, 76 N. J. Eq. 592. There, an attempt was made to carry on the business of a partnership under the cloak of corporations and then to strip the separate entities of all their property and rights because of the violation of the provisions of a perfectly illegal compact. Here, there is no denial of a separate entity in the form of the above named corporation. Of course, The Ellbee Fur Trading Co. is a distinct creation. But the gravamin of the bill on this point is that it was brought into being and has been used for the purpose of taking title to the property of individual defendants so as to conceal it from their creditors. If such property was now in the possession of that company, I would not hesitate to deal with it. *Bank v. Beatty*, 77 N. J. Eq. 252.

30 The important consideration is to determine the point of priority as between the complainant's attachment lien and the so-called banker's lien of the First National Bank. Under our law (4 C. S., 4836) a banker certainly has a right to set off a matured claim against its debt to its depositor. The authorities seem to be uniform that the supervening insolvency of the depositor, accelerates and matures the claim. But there seems to be no case that goes so far as to permit a bank to secure priority on a claim under a note not yet due and, thus, defeat the lien of an attaching creditor in the absence of insolvency or fraud on the part of the

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Opinion of V. C. Bigelow.

depositor against the bank in securing a renewal of the credit. The claim of the First National Bank did not mature at the giving of the demand notes.

The property in the name of the Ellbee Co. was the property of the Loeb's in the eyes of this court.

There should be a decree in accordance with the prayer of the bill.

10

Yours very truly,

JOHN BENTLEY

Opinion of V. C. Bigelow.

(Filed May 2, 1930.)

IN CHANCERY OF NEW JERSEY.

20

Between

JOHN ELIHU BODY, Trading as J. E.
BODY & Co.,
Complainant,

and

DAVID LOEB, *et als.*, Copartners,
etc., et al.,
Defendants.

On Bill, &c.
Opinion.

30

May 2, 1930.

MCDERMOTT, ENRIGHT & CARPENTER, Solicitors, JAMES D. CARPENTER, JR., JAMES J. FRANC (of New York Bar), of Counsel, for the Complainant.

DAVID EDWARDS, Solicitor, BENJAMIN HEYMAN, of Counsel, for Defendants First National Bank and Ellbee Fur Trading Company.

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Opinion of V. C. Bigelow.

OPINION.

BIGELOW, V. C.:

10 The complainant is a citizen and resident of Australia. The individual defendants, the Loeb, are citizens and residents of the State of New York, and the defendant Ellbee Fur Trading Company is a corporation of that State. The defendant First National Bank, is a corporation of the United States located in Jersey City.

20 Some years ago the Loeb became indebted to complainant in a large sum. After incurring this debt, they organized the Trading Company and transferred to it their assets and business. Thereafter, in 1922, the complainant sued out of the Hudson Circuit Court a writ of attachment against the Loeb and a levy was made thereunder against the bank account of the Trading Company in the First National Bank of Jersey City. This account then amounted to \$22,108.43.

30 The following day, the bill of complaint in this cause was filed in aid of the attachment in order to establish that the bank account was, in equity, the property of the Loeb. In 1925, complainant recovered judgment in the attachment suit for \$36,981.05.

At the time of the levy, the First National Bank was liable as guarantor upon letters of credit which had been issued by a New York bank in favor of the Trading Company. Eventually the First National Bank had to pay upon its guarantee more than the amount of the attached account; it seeks to offset against the attached account the debt of the Trading Company to it.

40 The present suit was heard by the late Vice-Chancellor Bentley. He decided that the Loeb

Opinion of V. C. Bigelow.

formed the Trading Company for the purpose of defrauding complainant and that, as between those parties, the attached bank account was in equity the property of the Loeb's and subject to appropriation to pay their debts. He also decided that, as between complainant and the First National Bank, the former had priority and that the bank account should be rendered by the Bank to complainant in payment of the debt of the Loeb's. But before a decree was signed, the Vice-Chancellor permitted the Bank to raise an additional point which remained undecided at the time of his death. Counsel for the Bank argue that because complainant is a non-resident alien and the Bank is a domestic corporation, the latter should be preferred and should appropriate to the payment of its own debt the money on deposit with it even though, were complainant a citizen of New Jersey, he would be entitled to the money on deposit with the Bank. In support of this contention, they cite *Disconto Gesellschaft v. Terlinden*, 127 Wis. 651, 106 N. W. 821, 15 L. R. A. (N. S.) 1045; affd. 208 U. S. 570, 28 S. C. 337.

In that case Terlinden, a German subject, who was indebted to the Disconto Gesellschaft, a German bank, was declared a bankrupt in a proceeding instituted in Germany, and fled to Wisconsin. While there, he became indebted to a citizen of Wisconsin, Umbreit. The German bank attached assets of Terlinden discovered in Wisconsin and Umbreit intervened in that proceeding. It appeared that the bank had made an agreement with the trustee in bankruptcy to transfer to the trustee whatever it might recover in the attachment suit, to be administered in Germany as part of the bankrupt estate.

Opinion of V. C. Bigelow.

10 The Wisconsin Supreme Court held that the resident of Wisconsin should be preferred; that the alien was not entitled to maintain its action as a matter of right but only on the ground of comity, and that it was the duty of the State to protect its citizen by preventing the removal of the assets of his debtor found within the State in order that he might be able to satisfy his claim in the State of his domicile. The United States Supreme Court held that the question was not one of absolute right but was one of comity to be determined by the public policy of Wisconsin.

20 The public policy of the State of New Jersey determines whether or not the lien of complainant should be subordinated to the claim of the First National Bank of Jersey City.

30 This Court, in cases of insolvency of a foreign debtor, sometimes appoints an ancillary receiver to administer the assets within the State if there be resident creditors. But the purpose is not to prefer the resident creditors or to obtain for them a greater dividend upon their claims than non-resident creditors receive. The object of the court in such cases is to secure to the domestic creditors equality. *Irwin v. Granite State Provident Assn.*, 56 N. J. Eq. 244, 38 A. 680. *Moore v. Bonnell*, 31 N. J. L. 90.

40 The statutes and published decisions of the courts of this State may be searched in vain for indications of a policy to deprive a non-resident alien of a lien which he has secured on property in this State or to subordinate his lien to the claim of a resident of this State. In particular, the Attachment Act of 1901, 1 Comp. Stat. 132, discloses no such policy. The benefits of that act are expressly extended to "any plaintiff whether resident

Opinion of V. C. Bigelow.

in this State or not." As was said of the Death Act of 1848:

"The legislature has power to include non-resident aliens and they are within the natural and ordinary import of the language employed. Neither the context nor the corrective purpose of the Statute suggests any reason for a restrictive interpretation." *Cetofonte v. Camden Coke Co.*, 78 N. J. L. 670, 75 A. 913.

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The complainant Body extended credit to American citizens. They attempted to defraud him. He established the legality of his claim by the judgment of a court of this State. Despite the fact that his domicile is on the other side of the world, he pursued his remedy here with the utmost vigor and secured a lien on his debtors' property. To deprive him of his lien merely because he is non-resident alien would be shocking to fair play. It would also be poor business, for no American could hope to obtain credit abroad if it were the policy of the courts of this country to postpone the claims of foreign creditors until the debts of our own citizens had been satisfied.

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I will advise a decree for complainant.

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*Final Decree.***Final Decree.**

(Filed May 12, 1930.)

IN CHANCERY OF NEW JERSEY.

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Between

JOHN ELIHU BODY, trading as J. E.
BODY & Co.,
Complainant,

and

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DAVID LOEB, PHILIP LOEB and JACOB
LOEB, copartners now or for-
merly doing business as LOEB
BROS., ELLBEE FUR TRADING COM-
PANY, INC., and FIRST NATIONAL
BANK OF JERSEY CITY,
Defendants.

52-326.

On Bill &c.
Final Decree.

30

This cause coming on to be heard in the pres-
ence of McDermott, Enright & Carpenter, solicitors
for the complainant, David F. Edwards, solicitor
for defendant, Ellbee Fur Trading Company, Inc.,
David F. Edwards and Heyman & Heyman, solici-
tors for defendant, First National Bank of Jersey
City, and the defendants David Loeb, Philip Loeb
and Jacob Loeb, copartners now or formerly do-
ing business as Loeb Bros., not appearing, and the
Court having examined the pleadings and taken
proofs orally and in open Court, and having heard
and considered the argument and briefs of counsel
thereon;

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And the Court being satisfied and finding as facts
that the defendants David Loeb, Philip Loeb and
Jacob Loeb, copartners now or formerly doing

Final Decree.

business as Loeb Bros., in the year 1920 contracted a debt with the complainant, and that on January 13, 1921, the said David Loeb, Philip Loeb and Jacob Loeb caused a corporation to be formed under the laws of the State of New York, under the name of Ellbee Fur Trading Company, Inc., and that the said Loeb Bros. caused substantially all of their assets to be transferred to Ellbee Fur Trading Company, Inc., receiving therefor stock only, and that each of said Loeb Brothers was an officer of Ellbee Fur Trading Company, Inc.; that all of the capital stock of the said Ellbee Fur Trading Company, Inc. was held by the said Loeb Brothers; and that the said Loeb Brothers concealed all of their assets in the name of Ellbee Fur Trading Company, Inc. for the purpose of hindering, delaying and defrauding their creditors, and particularly the complainant, and that Ellbee Fur Trading Company, Inc. was a mere corporate shell for the copartnership of Loeb Bros.;

And that on August 26, 1922, the complainant caused to be issued out of the Hudson County Circuit Court a writ of attachment against David Loeb, Philip Loeb and Jacob Loeb, copartners now or formerly doing business as Loeb Bros., and that pursuant to the command of the said writ of attachment the Sheriff of the County of Hudson, New Jersey, did on August 28, 1922, in due form of law, levy the said writ of attachment on the First National Bank of Jersey City, and did then and there attach in due form of law the rights and credits, moneys and effects, goods and chattels of the defendants David Loeb, Philip Loeb and Jacob Loeb, copartners now or formerly doing business as Loeb Bros., in the account of the said Ellbee Fur Trading Company, Inc., and the Court finding as a fact

Final Decree.

10 that there was on deposit in an account of the Ell-
bee Fur Trading Company, Inc. in the First Na-
tional Bank of Jersey City at the time of the levy
of the said writ of attachment the sum of \$22,108.43,
which was the property of the said David Loeb,
Philip Loeb and Jacob Loeb, copartners now or
20 formerly doing business as Loeb Bros.; that there
were on August 28, 1922, no obligations of Ellbee
Fur Trading Company, Inc. or of David Loeb,
Philip Loeb or Jacob Loeb to First National Bank
of Jersey City which were then matured, due and
payable, and that the instruments in form demand
notes of Ellbee Fur Trading Company, Inc. then
held by First National Bank of Jersey City were
not then in fact matured, due and payable obliga-
30 tions, but were held by the said Bank merely as
evidence; that defendant First National Bank of
Jersey City was not guilty of any fraud or collu-
sion with any other defendant in this cause, and
that it had no knowledge of any of the matters or
things alleged in the bill of complaint prior to the
levying of the attachment and the filing of the bill
herein;

And the Court further finding as a fact that on
30 October 13, 1922, the First National Bank of Jersey
City took from the Ellbee Fur Trading Company,
Inc. an indemnity agreement indemnifying the
Bank in the event it should charge against the
amount in the account of the Ellbee Fur Trading
Company, Inc. in said Bank, the amount of drafts
drawn against letters of credit which matured after
the levying of the said attachment, and the said
Bank after taking the said indemnity agreement
having paid itself on October 17 and October 22,
40 1922, out of the balance in the said attached ac-

Final Decree.

count the entire balance therein on obligations maturing after the levying of the said attachment;

And there being no evidence that at the time of the levying of the said attachment the said Ellbee Fur Trading Company, Inc. was insolvent;

And the Court further determining that the attachment so as aforesaid levied on behalf of the complainant was prior to all claims made and asserted by the First National Bank of Jersey City against the said deposit in the name of Ellbee Fur Trading Company, Inc., and the said complainant having in due form of law on May 13, 1925, recovered a judgment in the Hudson County Circuit Court in the said attachment action in his favor and against the said David Loeb, Philip Loeb and Jacob Loeb, copartners now or formerly doing business as Loeb Bros., in the sum of \$37,393.68, inclusive of costs:

It is Now on this twelfth day of May, 1930, on motion of McDermott, Enright & Carpenter, solicitors for the complainant, by Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, ADJUDGED AND DECREED, and the said Chancellor doth, by virtue of the power and authority of this Court, hereby ORDER, ADJUDGE AND DECREE that Ellbee Fur Trading Company, Inc., David Loeb, Philip Loeb and Jacob Loeb, copartners now or formerly doing business as Loeb Bros., and the First National Bank of Jersey City pay to the complainant all sums of money that were in the account of Ellbee Fur Trading Company, Inc., in the First National Bank of Jersey City at the time the attachment hereinabove mentioned was levied upon the said account, to wit, on August 28, 1922 to wit, \$22,108.43, together with lawful interest thereon at six per

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Final Decree.

cent, per annum, from and after October 22, 1922,
(the date that said Bank relying upon the said in-
demnity agreement paid itself the remainder of the
moneys in said attached account) a total to the
date hereof of \$34,783.93, and that Ellbee Fur Trad-
10 ing Company, Inc., First National Bank of Jersey
City, David Loeb, Philip Loeb and Jacob Loeb,
copartners now or formerly doing business as Loeb
Bros., pay to the complainant the costs of this suit
to be taxed, including a counsel fee of \$500.00,
which is hereby allowed to the said complainant.

FURTHER ORDERED that upon receipt of the
moneys directed by this decree to be paid to the
complainant, or his solicitors, complainant or his
20 solicitors shall deliver to the defendants a war-
rant for the partial satisfaction of the judgment
recovered by complainant in the Hudson County
Circuit Court against David Loeb, Philip Loeb and
Jacob Loeb, copartners now or formerly doing
business as Loeb Brothers, to the extent that the
money paid, except costs in this Court, will satisfy
the said judgment.

E. R. WALKER
C.

30 Respectfully advised:

J. O. BIGELOW
V. C.

Exhibit C-7.

LIABILITY LEDGER

Discount Line	Ell Bee Trading Co.		Name	Ell Bee Fur Trading Co.	
When dis- counted.	Maker	Endorser Guaranty Collateral	Maturity	Bills Rec.	Demand Loans
1922					
July 27	Blenner & Siegel	Kritzman & Newman	Aug. 10	541.57	Paid
	Jacob J. Human		Sept. 10	1000.00	Protested Retd 9/13
	Chas. Cohen		Oct. 1	1339	Paid
	J. H. Stein		Aug. 10	727.20	Paid
	Blenner & Siegel		Oct. 1	507.50	Protested Retd 10/5
	Jacob J. Human		Aug. 10	1000.00	O. B. Paid 8/10
Aug. 23	Silbowitz & Juarewitz	Max Rosenberg	Oct. 4	2000.00	Paid
	J. Schwartz		Nov. 11	799.95	Paid
	" "		" 26	799.95	Paid
	Kreitman & Newman	N. Witken	Dec. 24	1750	Paid
	Chas. Cohen	Loeb Bros.	Nov. 18	1679.96	Paid

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Exhibit C-11.

LIABILITY LEDGER

		Name		Cashier Acct.		
When dis- counted. 1922	Maker	Endorser Guaranty Collateral	Maturity	Bills Rec.	Demand Loans	
10	Oct. 27	Metzger & Cohen	Ell Bee Fur Trading Co.	Nov. 10	800	P
		Mendoza Fur Dyeing Works	"	" 16	1250	P
		N. Witkin	"	Dec. 1	1000	P
		A. Khul & Sons, Inc.	"	15	1735.25	P
		N. Witkin	"	20	1500	OB Retd 12/21
		B. Schwartz A. Nemser	"	28	107.50	Prot 12/28 ret 12/30
		Freda C. Spiegel, Inc.	"	Jan. 12	1642.23	P
		Schechter & Haspil	"	25	2020	P
	Nov. 9	N. Witkin	"	Nov. 20	1000	P
		Scharf Gelfand & Topper	"	23	380	P
		J. Joseph	"	23	650	P
		Denckob Singer Co., Inc.	"	Dec. 5	560	P
20		Abcleb & Rushman	"	8	977.07	Prot 12/8 ret 12/1
		B. Schwartz A. Nemser	"	10	107.50	P
		Winkler Bros.	"	14	666.67	P
		Max Rosenberg	"	18	905.25	P
		Benj. Schwartz	"	18	580.75	P
		Joe Keller, Inc.	"	28	521.77	Prot 12/28 ret 12/1
		M. Remmeyer	"	29	1000	Prot 12/29 ret 1/2
		Jacobs & Goche	"	29	1037.52	P
		Chas. Cohen	"	29	1046.52	P
		" "	"	Feb. 7	1282.38	P
		Winkler Bros.	"	Jan. 14	666.67	P
		" "	"	Feb. 11	666.66	P
					9154.98	
					12047.76	
30						
40						

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New Jersey Court of Errors and Appeals

OCTOBER TERM, 1930—No. 125.

Between

JOHN ELIHU BODY, *trading as*
J. E. BODY & Co.,
Complainant-Respondent,

and

THE FIRST NATIONAL BANK OF
JERSEY CITY,
Defendant-Appellant.

On Appeal from
Chancery.

**BRIEF OF McDERMOTT, ENRIGHT &
CARPENTER, FOR COMPLAIN-
ANT-RESPONDENT.**

This appeal is taken by one of three defendants from a final decree advised by Vice-Chancellor Bigelow in the Court of Chancery on May 12, 1930, which decree adjudged that certain moneys in the bank account of defendant, Ellbee Fur Trading Company, Inc., in the appellant Bank were subject to a writ of attachment levied by the Sheriff at the suit of complainant-respondent on the Bank on August 28, 1922. The decree directed the Bank to pay the money levied upon to the complainant.

The complainant's attachment action was against David Loeb, Philip Loeb and Jacob Loeb, copartners trading as Loeb Brothers, and the attachment was levied on the account of Ellbee Fur Trading Company, Inc., because the complainant alleged that the Ellbee Fur Trading Company,

Inc., was incorporated by Loeb Brothers after they became indebted to complainant in a large amount, and that Loeb Brothers concealed their assets in the Ellbee Fur Trading Company to hinder, delay and defraud the complainant and other creditors in the collection of their debts.

The day after the Sheriff levied the writ of attachment on the Bank, the action below in the Court of Chancery was commenced, and the Bank was served with process. The prayer of the bill was that it might be decreed that Ellbee Fur Trading Company, Inc., was a mere corporate shell in which the defendants, Loeb Brothers, transferred and concealed all of their assets, and that all said moneys in said account are the moneys of the said Loeb Brothers; that it might be decreed that all the moneys in the Ellbee Fur Trading Company, Inc., account in the Bank are moneys of Loeb Brothers and subject to the complainant's attachment, and that said moneys may be ordered paid by the Bank to the complainant or to the Sheriff of Hudson County.

The Ellbee Fur Trading Company, Inc., defended the suit on the ground that it was a legal entity separate from Loeb Brothers and that its assets were never assets of Loeb Brothers, and were not fraudulently transferred to it for the purpose claimed by complainant. (See answer of Ellbee Fur Trading Company, Inc. Record, p. 15.) The answer of Loeb Brothers was a mere denial (p. 11).

The First National Bank defended the suit on the same ground and on the additional grounds that if there was such a fraudulent transfer, the Bank nevertheless had at all times and particularly at the time of the attachment a right of set-off against the attached bank account by reason of the Bank's liability upon certain letters of credit mentioned therein which the Bank had

guaranteed on behalf of the Ellbee Company. (See amended and supplemental answer of the First National Bank, Record, pp. 16-18.)

The complainant's position with reference to the Bank's claim of a right of set-off is that the Bank had no such right in priority to the attachment, because the drafts accepted under the letters of credit which it later attempted to set-off had not matured when the levy was made.

The complainant contends that under the circumstances no right of set-off or lien existed at the time when the attachment was levied, either by virtue of the general principles of equity or by virtue of contract; and that when the drafts matured the complainant had acquired a prior right by his attachment. The complainant further contends that any right of set-off the Bank may have had at the date of the levy of the writ was waived and abandoned by the Bank's taking an indemnity agreement and not attempting any set-off until the maturity of the drafts.

At the conclusion of the trial on April 14, 1926, Vice-Chancellor Bentley decided the issue of fraudulent transfer in favor of the complainant as follows:

"I am convinced from the testimony that the defendants (the Loeb brothers) met, after having become indebted to the complainant, and conceived the scheme of defrauding him by erecting the barrier of the Fur Trading Company and investing all their assets therein. After hearing the testimony and admissions made by these people, there is enough in this to convince me that it is a fraudulent scheme" (Record, p. 118, ll. 20 to 35).

After Vice-Chancellor Bentley had filed an opinion finding in favor of complainant on all issues, defendant Bank asked and was accorded a re-

argument, particularly on the point that complainant, a non-resident and alien, should not be permitted to seize property within this jurisdiction by attachment to the detriment of a resident creditor.

Vice-Chancellor Bentley had not decided this question at the time of his death.

Thereafter the cause was taken up by Vice-Chancellor Bigelow, who adopted the findings of Vice-Chancellor Bentley on the matters decided by him. Vice-Chancellor Bigelow decided the new question as to right of complainant to attach in this jurisdiction in favor of the complainant (Record, p. 196), and he advised the decree (Record, p. 200).

Between February 9, 1920, and June 28, 1920, the complainant, a resident of Cooma, Australia, at the special instance and request of the defendants, Loeb Brothers, purchased for the said defendants rabbit skins in Australia and advanced moneys for their account for the purchase price of the merchandise and also for freight, insurance, packing and other charges. Loeb Brothers refusing to repay the complainant the moneys advanced by him for their account, complainant commenced an action at law by attachment in the Hudson County Circuit Court, issued August 26, 1922, and the Sheriff, on August 28, 1922, levied said attachment on the bank account of Loeb Brothers amounting to \$33.80 and the bank account of Ellbee Fur Trading Company, Inc., amounting to \$22,108.43 in the First National Bank (Record, pp. 21, 22, 35, 202). The writ authorized a levy for \$34,531.38. The action at law after a trial resulted in judgment for Body against Loeb Brothers for \$36,980.05, damages and costs (Record, p. 23).

The said Loeb Brothers were in the business of trading in raw and dressed furs and skins on

26th Street and then 29th Street, New York City. On August 28, 1922, their address was 158 West 26th Street (Record, p. 26). They were residents of New York. After they had incurred this large debt to complainant they caused the Ellbee Fur Trading Company, Inc., to be incorporated in New York by Mollie Flyer, sister-in-law of Philip Loeb, Lena Yahre, sister-in-law of David Loeb, and David Kellman, a cousin of the three Loeb (Record, p. 77; Certificate of Incorporation, p. 131). The Certificate recited that the amount of capital with which the Company would commence business was \$5,000 (p. 131). The name "Ellbee" is a mere spelling of the initials "L. B." of Loeb Brothers.

Mr. Leach of the credit reporting agency of R. G. Dun & Co., testified that he knew the three Loeb Brothers and had met them in all of their places of business and secured credit information from them, and that the Ellbee Fur Trading Company, Inc., occupied the same place of business as Loeb Brothers; both names were on the windows (p. 27); and when he inquired in behalf of R. G. Dun & Co. for the names of the officers of Ellbee Fur Trading Company, Inc., in a conversation with David, Philip and Jacob Loeb, they told him, when they were together, that David Loeb was President, Philip Loeb, Vice-President and Jacob Loeb, Secretary and Treasurer of Elbee Fur Trading Company, Inc., and that their bank account was in the First National Bank of Jersey City (p. 29). They also told Mr. Leach that the Ellbee Fur Trading Company, Inc., had succeeded Loeb Brothers, and that Loeb Brothers were practically inactive at that time. They declined to make a financial statement. The partnership and corporation were in the same kind of business (p. 30, l. 31). The Loeb told him that the market was dropping sharply and business had

shrunk and was headed for a period of readjustment. They admitted they had lost money both on merchandise and on their receivables (p. 32).

The signature card that Ellbee Fur Trading Company, Inc., gave the Bank showed the Treasurer was Jacob K. Loeb. The resolution of the Board of Directors of Ellbee Fur Trading Company, Inc., given to the Bank, showed that Jacob K. Loeb was Secretary and Treasurer, but it did not give the names of the other officers (pp. 122 and 123).

The Ellbee Fur Trading Company, Inc., as shown above, commenced business with a capital of \$5,000, which Jacob Loeb testified in supplementary proceedings was paid in by Lena Yahre, Mollie Flyer and David Kellman (Record, pp. 82 and 83). The business was actually conducted by David, Philip and Jacob Loeb (p. 85, l. 20), and the only persons who drew salaries were the three Loebes (p. 86). There were no profits and Kellman got nothing from the business (p. 85).

After Loeb Brothers, the partnership, had incurred this large debt to the complainant in the first half of 1920, they caused the Ellbee Fur Trading Company, Inc., to be incorporated January 7, 1921, and thereafter conducted the business in the name of the corporation.

On or prior to April 29, 1922, the Ellbee Company, which had then an account with the appellant First National Bank, applied to this Bank for a letter of credit in favor of Robert Little and Company, Sydney, Australia, in the sum of £1,700.

The First National Bank did not itself issue letters of credit, but its New York City correspondent, the American Exchange National Bank, did. Accordingly, the First National Bank, ascertaining in whose favor the letter of credit should be issued and for what amount, took from the Ellbee Company a demand note for each letter

of credit in an arbitrary amount large enough to evidence the amount of the letter of credit and cover any fluctuation in the rate of exchange. For instance, if a letter of credit were desired for £1,000, the Bank would take a demand note for \$5,000 or \$6,000, a purely arbitrary amount (Record, p. 104).

The testimony of Mr. Wortendyke is undisputed and clearly establishes that such notes were taken solely for the purpose of evidencing the liability of the Ellbee Company to the First National Bank by reason of its having caused its correspondent to issue the letter of credit. The First National Bank had no other document from the Ellbee Company evidencing its liability to the First National Bank by virtue of the transactions involving the issue of these letters of credit. Mr. Wortendyke makes it clear in his testimony that these demand notes were not taken as notes by the Bank and they were never held or used as notes, nor were any rights ever asserted by the Bank under any of the demand notes, nor was payment of any of them ever demanded; they were never entered in any of the Bank's records as notes, nor were they entered in the Ellbee Company's account with the Bank. In short, they were never treated as notes or obligations for any purpose whatsoever except to evidence a contingent liability as above stated (Record, pp. 104 and 105). After taking the demand notes the First National Bank caused the Ellbee Company to fill in and sign the forms of customer's agreement for letters of credit of the American Exchange National Bank of New York City. The customer's agreement was then forwarded by the First National Bank to the American Exchange Bank so that the letter of credit might be issued. The customer's agreement ran in favor of the American Exchange Bank and the name of the First National Bank does not at all appear therein (Record, p. 167).

In accordance with the application, a letter of credit was issued by the American Exchange Bank. The original and two copies were sent to the First National Bank, which kept a copy for its files and gave a copy and the original to the Ellbee Company (Record, p. 56, l. 40). At the time each letter of credit was issued the First National Bank took from the Ellbee Company a demand note fixed arbitrarily large enough to cover all drafts to be drawn under the letter at any probable rate of exchange at the maturity of such drafts (Record, p. 46 and p. 104).

Thereafter, and in the same routine manner as set forth above, the Ellbee Company applied for and obtained the following additional letters of credit:

May 12, 1922, letter of credit No. S 1216 for £2,000 in favor of Robert Little and Company, Sydney.

May 12, 1922, letter of credit No. S 1217, for £800 in favor of Turner Brothers, Dunedin, N. Z.

June 8, 1922, letter of credit No. S 1234 for £3,000 in favor of Robert Little and Company, Sydney.

July 6, 1922, letter of credit No. S 1259 for £2,800 in favor of Oscar Curtis, Sydney.

August 11, 1922, letter of credit No. S 1295 for £665, later increased to £820, in favor of Oscar Curtis, Sydney.

(See Record, pp. 156 to 172.)

To the copies lodged with the two Banks of all of the customer's agreements, except that of April 29, 1922, No. S 1207, was annexed a statement in the following form:

“We hereby agree that Commercial Letter of Credit #S for in favor of for account of Ellbee Fur Trading Company, a copy of which is attached, has been issued

by the American Exchange National Bank, as our agents.

THE FIRST NATIONAL BANK
JERSEY CITY, N. J.”

(See Exhibit DX-9, Record, p. 173.)

This statement was attached to duplicates in the hands of each of the two Banks, but was not attached to any documents delivered to the Ellbee Company or to any documents delivered to holders of the letters of credit. It was a private arrangement between the two Banks, and so far as appears was unknown to and unassented to by anyone else (p. 56, ll. 20 to 30).

Thereafter, drafts addressed to the American Exchange Bank were drawn against these letters of credit. These drafts, accompanied by the documents of title, were accepted by the American Exchange Bank, payable by it ninety days thereafter in New York City. All the drafts were paid at maturity by the American Exchange Bank. When the drafts were accepted by the American Exchange Bank it notified the First National Bank, at the same time forwarding this Bank the title documents. The First National Bank surrendered the documents to the Ellbee Company against the latter's plain receipts. When the American Exchange Bank paid the drafts at maturity in October and November following the attachment, they simultaneously charged the amounts thereof against the account of the First National Bank, which in turn charged the same amounts against the attached account of the Ellbee Company (Record, pp. 56, 57, 58).

It may fairly be assumed that the merchandise purchased with the avails of the letters of credit and represented by the title documents amply secured the two Banks. However, the defendant Bank saw fit to surrender the title documents to

the Ellbee Company against its plain receipts; not (as is the common practice in such transactions) against trust receipts. Nor did the Bank in any case, even after the attachment, require the substitution of any form of collateral security as a condition for surrendering the title documents. Instead the Bank, in the instances where title documents were given up by it after the attachment, chose to rely on being able to secure payment either by defeating complainant's claim to priority under his attachment and so appropriating the Ellbee's deposit to payment, or, by looking to Ellbee to indemnify the Bank pursuant to its wholly unsecured indemnity agreement taken by the Bank after the attachment and in recognition thereof. Thus at the behest of Ellbee the Bank gave up the merchandise security that it held and elected to endeavor to assist Ellbee by paying for the newly purchased merchandise at the expense of the old merchandise creditor, the complainant; all with full notice of the nature of complainant's claim (pp. 48, 51, 126-128). The indemnity agreement will be discussed below.

On the 28th day of August, 1922, when the Sheriff levied the attachment for \$34,531.38, the Ellbee Company had a balance of \$22,640.03 to their credit in their account with the First National Bank (p. 35, l. 30). This balance was, on August 30, 1922, reduced to \$21,918.53 by the return of one item of \$701.50 which had been deposited for collection and which was on that day returned protested (Record, p. 36, ll. 1 to 5).

Thereafter, drafts for the following sums matured, and on the dates stated below, without previous demand for payment, they were charged off by the First National Bank against the attached account:

October 17, 1922.....	\$ 7,124.49
October 17, 1922.....	3,462.44
October 22, 1922.....	11,209.68
November 20, 1922.....	2.91
	<hr/>
Total.....	\$21,799.52
	<hr/>

(See Record, p. 41, ll. 10 to 30.)

Thus it will be seen that none of the drafts, with respect to which the attempted set-off was made, had matured at the time of the attachment and none of them did so mature until October 17 and 22 following the attachment in August, 1922 (p. 42, ll. 18 to 22).

The attempted set-off of these charges wiped out the attached account almost completely, so that we need not consider any drafts maturing thereafter.

On October 13, 1922, after the attachment was levied, the First National Bank took from the Ellbee Company a so-called indemnity agreement (Exhibit C-5, Record, p. 126), the terms of which were that the Ellbee Company would indemnify the First National Bank if the Bank should set-off the attached account and it should later be determined that the attachment was prior to the right of set-off, in which case the Ellbee Company also agreed that it would make no claim of payment on account of the Bank's unsuccessful attempt at set-off (Exhibit C-5, p. 126). See Point III, below, for a full discussion of the indemnity agreement.

Also, after the attachment was levied and during October and November, the Bank received from the Ellbee Company customer's notes of the aggregate value of about \$25,000, on which the Bank realized at least \$11,000 to \$12,000 (p. 98, l. 25). It then turned back to the Elbee Company something less than \$1,000 which it collected on

the customer's paper above the balance due it (p. 98, ll. 30 to 40). In no event did the Bank have any right to turn back this collateral or cash. Its obligation was to hold this collateral for the protection of both the Bank and the complainant.

The Court will observe that the Bank was not willing to take the risk of applying the attached account against the obligation of the Elbee Company until it received the indemnity agreement of October 13, 1922 (Exhibit C-5), although \$10,500 of the drafts had matured between August 28, 1922 (the date of the attachment), and the date of said indemnity agreement.

On August 28, 1922, when the Sheriff levied the attachment the Bank wrote the word "attached" on this account and did not attempt to disregard this levy until after October 13, 1922, when it received all the protection from liability for so doing that the indemnity agreement could give (Record, pp. 34 and 36).

There is no evidence that Ellbee Fur Trading Company, Inc., was ever insolvent prior to the end of the year 1923, when it suffered severe losses (Record, p. 115). See Financial Statement given the Bank (Record, p. 129).

On May 13, 1925, complainant recovered judgment in the attachment suit for the full amount of his claim, to wit: \$36,980.05, and costs, from which judgment no appeal was taken (p. 23).

The appellant urges that there is no proof that Loeb Brothers actually transferred any assets to the corporation. In this the appellant is mistaken.

It must be remembered that the books of both partnership and corporation have vanished (pp. 84 and 85) and that the corporation was formed at a time when Loeb Brothers were heavily indebted, not alone to this complainant, but to The State Bank of New York City. Under such circumstances naturally but little direct evidence is

obtainable and the Court below was justified in drawing inferences rather freely. Its finding that "Loeb Brothers concealed all of their assets in the name of Ellbee Fur Trading Company, Inc.," is warranted by the evidence (p. 201, l. 18).

The evidence is strongly suggestive of there having been a valuable good will of the partnership which passed to the corporation. Loeb Brothers were quite a factor in the trade (p. 32, l. 18). Jacob Loeb in his affidavit said that some of the customers preferred to trade with the partnership rather than the corporation so the partnership continued, its name remaining on the office window (p. 27, l. 8) and traded for account of the corporation (p. 140, ll. 1 to 28).

That substantial assets in addition to good will existed and were transferred to the corporation, being withheld in the settlement made by Loeb Brothers with The State Bank made May 23, 1921 (Exhibit C-10 at p. 150), four months after the incorporation of Ellbee Fur Trading Company, Inc., may also be inferred from the evidence. Jacob Loeb testified that the corporation *made no profits* (p. 85, l. 40). It paid substantial salaries or drawing accounts to the Loebes (p. 86, l. 1, etc.). Yet between January, 1921, when it was incorporated (p. 87, ll. 22 to 30) with \$5,000 cash capital (pp. 82, 83, 131, l. 40), and April 6, 1922, when the corporation made a financial statement to the appellant Bank, it acquired a net worth of about \$40,000 (Exhibit C-6, p. 129). Merchandise account alone totalled over \$29,000, and accounts and notes receivable over \$39,000. These assets must have been derived in part at least from Loeb Brothers. They could have no other source. The statement of Jacob Loeb that there were no profits has support in the growth from \$5,000 alleged cash capital to \$40,000 net worth in only a little over a year on a gross business of only \$242,-

035.24! (Financial Statement, Exhibit C-6, p. 129.)

If it were true that the corporation was capitalized from outside sources and with new capital, it is quite correct that assets derived from such sources ought not to be held liable for payment of the partnership creditors, unless on the theory of intermingling of assets. But in the case at bar the decree below decides that the new stockholders were the nominees or dummies of the Loeb brothers, for it finds that "all of the capital stock of the said Ellbee Fur Trading Company, Inc., was held by the said Loeb brothers" (p. 201, l. 15).

Such finding is warranted by the facts as to relationship of the nominal stockholders to the Loeb brothers (p. 77, l. 35; p. 60, l. 32, etc.; p. 70, l. 34), by the fact that there was no change whatever in the possession of the property and management of the business, the Loeb brothers remaining in full control (p. 29, ll. 32 to 38, and p. 85, ll. 10 to 30), by the fact that the earnings of the corporation were paid out in salaries or drawing accounts to the Loeb brothers, the nominal stockholders receiving nothing as "there weren't any profits" (p. 85, l. 30, etc.).

Other facts point the same way. That the corporation was the direct successor of the partnership appears by identity of name, of place of doing business, and of the business conducted.

In fact, the partnership was so closely interwoven with the corporation that it continued to do business in its own name for account of the corporation.

Jacob Loeb testified that after the corporation was formed Loeb Brothers continued to trade "for the account of" the corporation (p. 71, ll. 18 to 35), thus showing that the corporation assumed partnership obligations to customers.

The corporation discounted a note endorsed by Loeb Brothers (p. 55, ll. 22 to 29, Exhibit C-7), and presumably drawn to their order. It is not printed in the record.

The Loeb brothers told R. G. Dun & Co. that the corporation "had succeeded Loeb Brothers and Loeb Brothers was practically inactive at that time" (p. 30, ll. 1 to 10).

POINT I.

Complainant properly attached the credit in the Ellbee Company account with the Bank, and the decree below with respect thereto is in all respects correct.

Appellant's brief overlooks, or ignores, the fraud on the part of the Loeb Brothers, which was the basis for the complainant's action in the Court of Chancery.

The bill of complaint was in the nature of a creditor's bill, in aid of the complainant's attachment. The complainant proved that the Loeb Brothers were indebted not only to him, but also to The State Bank of New York City, in large sums of money at the time they formed the Ellbee Fur Trading Company, Inc., and transferred their assets and the good will of the copartnership of Loeb Brothers to the Ellbee Fur Trading Company, Inc., and continued their business in the name of the Ellbee Fur Trading Company, Inc.

Complainant alleged and proved that the formation of the corporation, the transfer of the assets of Loeb Brothers to it and the conduct of the business of Loeb Brothers in the name of the corporation by the same three partners of Loeb Brothers, were done fraudulently to hinder, delay and defraud complainant in violation of "An

Act concerning fraudulent conveyances and to make uniform the law relating thereto" (Chapter 213, P. L. 1919, p. 500). This Act provides, paragraph 9, that:

"Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or mediately from such a purchaser:—

(a) Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim, or

(b) Disregard the conveyance and attach or levy execution upon the property conveyed."

Complainant's debt was incurred between February 9, 1920, and June 28, 1920 (Record, p. 22). The Ellbee Company was formed the following January (Record, p. 133), and the attachment was levied August 28, 1922 (Record, p. 21).

In the bill of complaint the fraudulent formation of the corporation was alleged (par. 5, p. 6); it was charged that the Loeb Brothers are insolvent and unable to pay their debts, and particularly the debt of the complainant, and that they have all or a substantial part of their assets concealed in the corporation for the purpose of hindering, delaying and defrauding their creditors; that the moneys in the account of the corporation in the appellant Bank were placed in the account, outside the State of New York, for the purpose of hindering, delaying and defrauding their creditors (par. 7, p. 7), and that the Ellbee Fur Trading Company, Inc., is a mere corporate shell in which the Loeb Brothers have transferred and concealed all their assets, and that all of said

moneys in said account are the moneys of Loeb Brothers (par. 8, p. 8).

Although both Loeb Brothers and Ellbee Fur Trading Company, Inc., filed answers to the bill of complaint (see p. 11 and p. 15), no one appeared for the defendants Loeb Brothers at the trial, although counsel did appear for Ellbee Fur Trading Company and the Bank (Record, p. 20).

Not one of the three Loeb brothers appeared or testified at the trial to dispute any evidence offered by complainant, nor did the defendants cause their depositions to be taken, and the Bank rested its case upon the case of complainant.

This Court speaking by Judge Dill in *Washington National Bank vs. Beatty*, 77 N. J. Eq. 252, said:

“When an existing creditor attacks the conveyance, and shows that his debt was incurred before, and was existing at the time when the conveyance was made, the law, without further proof, raises a conclusive presumption of fraud so far as that creditor is concerned.

“When, however, the conveyance is attacked by a subsequent creditor, he must prove fraud as a fact—that is, an actual fraudulent intent to defraud some creditor.”

In *Babirecki vs. Virgil*, 97 N. J. Eq., 315, this Court speaking by Mr. Justice Katzenbach said:

“The burden of proving, when attacked as fraudulent, the consideration of a deed, where no consideration was paid at the time of the conveyance, is upon the grantee” (at p. 319).

The theory of appellant's brief is that since the Ellbee Fur Trading Company, Inc., was a corporate entity, the moneys in its account in the appellant Bank cannot be reached by a creditor of the Loeb Brothers, who sought by means of the corporation to defraud their creditors, without

actual proof that the moneys in the account were in fact moneys that came directly out of the pockets of the Loebes.

The law for obvious reasons does not impose any such burden upon a creditor in favor of a fraudulent debtor.

The extensive quotations from the English case of *Salomon vs. Salomon* in XLV Weekly Reporter, 194, are not at all in point, because that was not a case where the Company was formed for an unlawful purpose in fraud of creditors. It is plain from the language of the opinion, particularly that portion quoted on page 36, lines 5 to 15, of appellant's brief, that if the Company was formed for an unlawful purpose or in order to achieve an object not permitted by the objects of the act, the appropriate remedy would seem to be to treat the Company as a nullity.

Regardless of what may be said in the case of *Salomon vs. Salomon*, quoted extensively in appellant's brief, it is unnecessary to theorize as to what the law in New Jersey is. It is settled by Chancellor McGill in *Stockton vs. Central Railroad*, 50 N. J. Eq., p. 52, at p. 73, *et seq.*

In that case a statute of this State forbade a railway lease to a foreign corporation until a law should be enacted which would approve such a lease, but it did not prohibit a lease to a domestic corporation. The foreign railway corporation had promoted the organization of a small domestic railroad company. Except for a few shares, the entire capital stock of the domestic corporation was owned by the foreign corporation. A contract was entered into to which there were three parties, the two above mentioned railway corporations and a third railway corporation which was to be lessor. In form the agreement was a lease from the third corporation to the domestic railway corporation, but the performance of the

agreement was guaranteed by the foreign corporation.

The Chancellor had no hesitation in "piercing the corporate entity" and looking to the real nature of the transaction.

He quoted (at p. 75) from Lord Mansfield in *Johnson vs. Smith*, 2 Burr. 962:

"It is a certain rule that a fiction of law shall never be contradicted so as to defeat the end for which it was invented, but for every other purpose it may be contradicted."

The Chancellor then continued as follows:

"It follows from the conclusion reached, that the intervention of the Port Reading Company as nominal lessee is but a device to disguise the real nature of the transaction. It is demonstrated as clearly as words could state it, that the object of the transaction was to place the Central Railroad within the Philadelphia and Reading Railroad system. The Central's reliance was not upon the small unfinished road, with a comparatively petty capital and little or no valuable assets, but upon the Philadelphia and Reading Railroad Company that estimated its assets at \$200,000,000. It is sticking in the bark to say that in this transaction the Philadelphia and Reading Railroad Company is not the real lessee, and that the guarantee executed by it is not the real lease. The misnomer of papers and the use of a nominal entity as nominal lessee does not change the substance of the transaction with which this court deals. The situation here may be summed up in the words of Vice Chancellor Kindersley in *Attorney General vs. The Great Northern Railway Co.*, 1 Drew. & S. 157, 6 Jur. (N. S.) 1006, 29 L. J. 794, 'a more flimsy device, when the particulars are once known, it is impossible to imagine. It may succeed for a time in baffling persons who may have an interest in preventing its being done and has succeeded, but it was

a mere crafty contrivance to evade the requisition of the law on the subject of joint stock companies.'

"It must not be thought that courts are powerless to strip off disguises that are designed to thwart the purposes of the law. The mere suggestion of such a condition is an insult to the intelligence of the judiciary. Whenever such disguises are made apparent they can readily be disrobed. The difficulty is in showing the disguises, not in penetrating them when they appear. *Attorney General vs. The Great Northern Railway Co., supra; Pennsylvania R. R. Co. vs. Commonwealth, 7 Atl. Rep. 268; People vs. Chicago Gas Trust Co., 130 Ill. 268; People vs. North River Sugar Refining Co., 121 N. Y. 582; State of Ohio, ex rel., Attorney General vs. Standard Oil Co., 30 N. E. Rep., 279.*"

In the case at bar the evidence upon the trial was that the partnership of Loeb Brothers was heavily indebted to the complainant, as well as to the State Bank. That the State Bank was more or less secured. That the Loeb Brothers caused the Ellbee Company to be formed by incorporators who were all close family connections, namely, two sisters-in-law and a cousin. That practically the entire business of the partnership was continued by the corporation as the successor of the partnership, all or practically all of the good will of the partnership being transferred to the corporation. It further appears that the three Loeb Brothers were the only persons in any way active in the conduct and management of the corporation. That they were its officers. That the business of the corporation was conducted in the same identical location with the partnership. It appears not only that the good will of the partnership was transferred to the corporation, but at least circumstantially that other assets that the partnership had which were not pledged to the

State Bank were transferred to the corporation. It appears therefore that the transformation from partnership to corporation was a change of form and not of substance. Such transfer, either of assets or business, made by one indebted at the time the transfer is made, is presumptively fraudulent as against existing creditors.

Moran vs. Denton, 88 N. J. Eq., 135; 102 Atl. 266;

Bushby vs. Berkely, 85 Misc. (N. Y.) 178;

Smith vs. Reid, 134 N. Y., 568;

Kerker vs. Levy, 206 N. Y., 109;

GaNun vs. Palmer, 216 N. Y., 603, 611.

The examination of the witness Leech and of two of the Loeb brothers as adverse parties shows *both directly and inferentially that the Ellbee Company succeeded to the partnership and took over its business, except as to a few minor matters*, as to which it was later on thought better to allow the business to be continued in the name of the partnership. We say it appears both directly and inferentially because this is a case typical of cases of fraudulent transfers in which inference is one of the strongest forms of proof.

“Since proof by fraud is seldom if ever possible by direct evidence, recourse to circumstantial evidence is a necessity, and there is no kind of action wherein it can be held with greater reason that the fact in issue may be inferred from other facts proved than in cases of this character” (27 C. J. (Fraudulent Conveyances) 822, S. 771, citing scores of cases.

We have here all the usual badges of fraud. We have the use of near relatives as incorporators and nominal stockholders. We have the customary claim that these relatives advanced money. We

have upon the examination the total disappearance of the books of the partnership and corporation. We have upon the trial of the present case the failure of any of the Loeb brothers, their sisters-in-law and their cousin to take the stand to explain away the inferences normally to be drawn from the facts proved. If they were not in the jurisdiction their depositions could have been taken by the defendant Bank. The brothers Loeb filed an answer by their New Jersey solicitors, Schwartz & Schwartz. According to the version given by the brothers Loeb (in their examination in New York), when they formed the Ellbee Company, they were "stripped"; but we find them in the guise of the Ellbee Company not so long afterwards engaged in an extensive importation business having \$40,000 net worth and obtaining bank credits in considerable amounts, conducting business just as the partnership of Loeb Brothers had done in its palmy days before the debt to the complainant was incurred and the corporation was formed. All these circumstances justify the inference that the Ellbee Company enjoyed the use of very considerable capital which the Loeb brothers were holding out from their creditors and devoting to the uses of the corporation. Under such circumstances as these it has been held time and time again by the Courts that a creditor is not bound by the exact version of the facts given by the debtor, and that it may be inferred that there were concealed assets.

In bankruptcy it has been repeatedly held that the mere denial of the bankrupt that he has concealed or transferred property is not necessarily conclusive and that on proof of circumstances indicating that he has property in his possession or under his control which he is withholding from the trustee, even a summary order for its surrender,

punishable by contempt process in case of disobedience, may be made.

In re Oriel, 23 Fed., 2nd, 409, 412 (C. C. A. 2), *affid. sub nom. Oriel v. Russell*, 278 U. S. 358;

U. S. ex rel. Paleais v. Moore (C. C. A. 2), 294 Fed. 852, 857;

In re Gerstel, 123 Fed. 166;

In re Goodman, 196 Fed. 566.

Even where imprisonment may result from disobedience of the turn-over order, proof beyond a reasonable doubt is not requisite.

Oriel v. Russell, 278 U. S. at p. 364.

See *Fraudulent Conveyances*, 27 C. J., 835, where it is said:

“Although the party making the conveyance or transfer denies the fraudulent intent in making it, a fraudulent intent may of course be inferred notwithstanding such denial from the acts done and the surrounding circumstances, which must be taken into consideration.”

See

National Security Bank vs. Blumberg, 96 N. J. Eq., 270; 125 Atl., 330.

In the leading case of *Becker vs. Koch*, 104 N. Y., 394, 401, a case involving fraudulent transfer, Peckham, J., said:

“With regard to such witnesses it is well settled that all the rules applicable to the examination of other witnesses do not in their strictness apply. An adverse witness may be cross examined, and leading questions may be put to him by the party calling him, for the very sensible and sufficient reason that he is adverse and that the danger arising from such

a mode of examination by the party calling a friendly or unbiased witness does not exist.

“What favorable facts the party calling him obtained from such a witness may be justly regarded as wrung from a reluctant and unwilling man, while those which are unfavorable may be treated by the jury with just that degree of belief which they may think is deserved, considering their nature and the other circumstances of the case.”

In *Bleiler vs. Moore*, 99 Wisc., 486, 488; 75 N. W., 953, it was said:

“While such testimony (of the judgment debtor) is competent, it is not conclusive, and may be outweighed by collateral facts and circumstances which tend to throw light on the intent.”

In *Re Larkin*, 168 Fed., 100, 101 (N. Dist. of N. Y.), Ray, D. J., said:

“The evidence is sufficient to sustain the finding, even though based to quite an extent upon the testimony of the alleged bankrupt himself, who vehemently denied that he conveyed and transferred the property referred to with intent to hinder, delay, or defraud, while conceding that he made the transfer and conveyance claimed.”

Even if the most important asset transferred to the corporation was the going business of the Loeb Brothers partnership, together with its good will, the complainant, as we shall show, may recover. There being a continuity of the business and an intent to defraud creditors, it is really immaterial how large the value of the assets transferred may have been.

On such states of facts creditors' bills have frequently been availing to reach the corporate assets. In bankruptcy even summary process,

without plenary suit, has very often been allowed to enable a receiver or trustee to seize the corporate assets as being actually part of the assets of the bankrupt individual.

See exhaustive notes to be found in 1 A. L. R., 610; 15 A. L. R., 1127, *et seq.*, and Wormser on Disregard of Corp. Fiction, pp. 47-85, and cases reviewed.

The following is a partial list of authorities:

- 27 Corpus Juris* (Fraudulent Conveyances), page 460;
Terhune vs. The Hackensack Savings Bank, 45 N. J. Eq., 344;
Stockton vs. Central R. R., 50 N. J. Eq., 52;
Mulford vs. Doremus (N. J. Ch.), 45 Atl., 688;
Van Campen vs. Ingram (N. J. Ch.), 12 Atl., 537;
In re Berkowitz, 173 Fed., 1013 (Dist. of N. J.);
Edward Finch vs. Robie, 12 Fed. (2nd), 360 (C. C. A. 8th Cir.);
Wilkinson vs. Walker, 294 Fed., 939, 947 (N. Dist. of Texas);
In re Eiler's Music House, 270 Fed., 915 (C. C. A. 8th Cir.);
In re Liller, 253 Fed., 845 (Dist. of W. Va.);
W. A. Liller Building Co. vs. Reynolds, 247 Fed., 90 (C. C. A. 4th Circ.);
York Mfg. Co. vs. Brewster, 174 Fed., 566 (C. C. A. 5th Circ.);
In re Rieger, et al., 157 Fed., 609 (Dist. of Ohio);
Booth vs. Bunce, 33 N. Y. 139;
Williams vs. Colby, 6 N. Y. S., 459;

Linn & Lane Timber Co. vs. U. S., 236
U. S., 574; 59 L. Ed., 725; 35 Sup. Ct.,
440;
Sullivan vs. International Baking Co., 60
B. J. Eq., 80.

In *Terhune vs. The Hackensack Savings Bank, supra*, Vice-Chancellor Pitney held that a transfer by an insolvent debtor to a corporation which he caused to be formed for the purpose of saving the remainder of his assets for the benefit of his wife and mother was fraudulent and void, and in a creditor's action he directed that the assets vested in the corporation be appropriated to the payment of the creditor's claim. That suit contained many features similar to those of the case at bar. There was a similar resort to relatives of the insolvent debtor to be incorporators of the corporation, and there was a similar pretense that such third parties financed the corporation and were the holders of its shares of stock. There was another similarity in that there, as here, the insolvent debtor continued in exclusive control and active management of the corporation.

See also

Sullivan vs. International Baking Co., 60
N. J. Eq. 80.

In re Berkowitz, supra (decided by United States District Judge Lanning of the New Jersey District, sitting in equity), at a time when Berkowitz was insolvent he conveyed all his assets to a corporation which he caused to be formed. The similarity of the facts to the case at bar will be apparent from the following quotation from Judge Lanning's opinion:

“The incorporators were the bankrupt and three of his brothers-in-law. These brothers-

in-law seem to have paid into the corporation, for its capital stock, the sum of \$2,000, and the bankrupt \$25. . . . If they did in fact pay \$2,000 into the treasury of the corporation, it is clear that their purpose was not to invest that sum in the business on their own account, but to aid the bankrupt in business that was to be treated by him as his own, and not as a business in which they had any interest whatever. The corporation was intended to operate as a cloak to shield the property from seizure by the bankrupt's creditors. Obviously it was a fraud upon the creditors of the bankrupt. The referee's orders of September 26 and 27, 1907, directing the receiver to seize the property in possession of the company, were amply sustained by the proofs and will be confirmed."

In *W. A. Liller Building Co. vs. Reynolds, supra*, the Circuit Court of Appeals affirmed on opinion below of District Judge Dayton. There had been a summary order seizing all property of a corporation to which the bankrupt Liller had executed a formal transfer of his property and business. Judge Dayton said, at page 91 (247 Fed.):

"The cases of *York Mfg. Co. vs. Brewster*, 174 Fed. 566, 98 C. C. A. 348, *in re Rieger, et al.* (D. C.), 157 Fed. 609, *in re Berkowitz* (D. C.), 173 Fed. 1013, and *in re Holbrook Shoe & Leather Co.* (D. C.), 165 Fed. 973, seem to well establish the doctrine that, where an individual is insolvent and undertakes to form a corporation, with near relatives as incorporators, to which he conveys his property with a view to withdraw such property from the reach of creditors, such corporation should not be held to be an adverse claimant, its holding to the contrary is only colorable and should be held to be that of the insolvent himself. It seems to me the logic of such conclusion is clear. A corporation is only a creature of law, and the law never creates means to defraud."

Of the cases cited above, the one which goes the greatest length (much further in fact than it is necessary to go in this case), is *Edward Finch vs. Robie*, 12 Fed. (2nd) 360. Judge Kenyon writing for a unanimous court (Circuit Court of Appeals, 8th Circuit), held that regardless of whether the facts established technically a transfer in fraud of the rights of creditors, property of the corporations should be treated as the property of the individual bankrupt because they were but his creatures or instrumentalities for the purpose of keeping his assets away from his creditors. It was therefore decided that these corporations were not entitled to assert claims against the bankrupt estate based on his notes held by them. The Court said (p. 362):

“Courts do not hesitate to look through the shell of corporate identity to get at the real purpose of the association of individuals. The illuminating light of facts here clearly shows that the real purpose of the bankrupt was to organize and use the corporations as his agencies or instrumentalities to carry on his business and hold his properties as a protection to him in the future if his speculations or business went wrong. There was no intention to serve the stockholders. The transfers of property were not intended to be out and out transfers with change of ownership, but were part of the arrangements for his control thereof through the instrumentality of the corporations.”

Also on page 363:

“Our holding is based on the general proposition that the corporations were not good-faith corporations, but were in fact, agencies or instrumentalities of the bankrupt; that they should be treated as mere creatures of his, and their assets as his assets.”

The case contains an exhaustive citation of authorities on the general proposition of "piercing the corporate entity." Several cases in the United States Supreme Court are cited which are valuable on the general proposition but which we have omitted to cite because they were not cases of transfers in fraud of creditors, and authorities on all fours are so ample.

In view of the well settled condition of the law it is not deemed necessary to spend any time distinguishing *Jackson v. Hooper*, *Einstein v. Rosenfeld*, *Aiello v. Crampton*, and other cases cited in appellant's brief. In none of them was the corporation formed or a transfer of property made to it *with intent to defraud creditors*. They merely go to show that the corporate entity must be duly observed in cases where its formation has not been for the purpose of defrauding anyone.

We wish to lay special stress upon the proposition that under the above authorities it is not necessary to trace particular items of assets from the individual insolvent to the corporation. In the above cited bankruptcy cases particularly the invariable ruling was that all of the assets of the corporation be seized as being actually the property of the bankrupt. It was not necessary to trace each dollar of the bankrupt or each piece of the bankrupt's goods into the corporate treasury or stock of merchandise. Once it was found that the bankrupt's business had been transferred to the corporation by him for the purpose of defrauding his creditors, the law treated the property, profits, accounts receivable, good will and all other assets of the corporation as being actually the property of the bankrupt. The fundamental basis of the ruling in each case was that the corporation was but an instrumentality of the bankrupt for the purpose of defrauding his creditors.

It is not necessary in this case to go so far as to hold that if an individual who had become heavily embarrassed, in good faith procured a corporation to be formed and financed by a third party, the assets of the corporation could be reached by his creditors. As the learned Vice-Chancellor very properly found, the facts proved on the trial in this case show the relatives of the Loeb Brothers who acted as incorporators were mere dummies and that the real owners of the Ellbee Company were the Loeb brothers. To say the least all the proved circumstances, such as the continuation of the business in the same place and the domination of the business by the Loeb brothers as officers, the stock being held in the name of close relatives, also the disappearance of all books of account, were sufficient to cast the burden of explanation on the defendants. No satisfactory explanation was forthcoming.

Bleakley vs. Nelson, 56 N. J. Eq., 674;
Runyon vs. Groshon, 12 N. J. Eq., 86.

Fraudulent Conveyances, 27 *C. J.*, 494:

“(S. 148) 11. Failure to Produce Evidence. Where the circumstances under which a transfer of property by a debtor is made are suspicious, the failure of the parties to testify or to produce available explanatory or rebutting evidence is a badge of fraud. The presumption is that if they could have truthfully testified to facts showing the *bona fides* of the conveyance they would have done so. It is wholly immaterial that their failure or refusal to do so is based on the advice of counsel.”

Fraudulent Conveyances, 27 *C. J.*, 803:

“(S. 733) o. Presumption from Failure to Testify or Produce Evidence. The rule that the failure of a party to testify as to facts

material to his case, and as to which he has full knowledge, creates an inference that he refrains from testifying because the truth would not aid his contention, applies with particular force to actions to set aside fraudulent conveyances, and it is held that the failure of the parties to the transaction to explain suspicious matters relating thereto, or to produce documentary evidence in their possession, affords strong evidence of fraud, and may even authorize rendition of a judgment against him. An unfavorable inference is created from the failure to call a disinterested person, available as a witness, to show the good faith in the transaction."

Another valid reason for the affirmance of the decree below is that it is not really necessary to disregard the corporate entity, for under persuasive authority the corporation must be held to have assumed in equity the debts of the copartnership and subjected its assets to being charged therewith.

If the corporation had become bankrupt there can be no doubt that the complainant could have proved his claim against its assets. During its solvency he was entitled, with the aid of equity, to impress a lien on its assets.

Such rule is established by the following cases, among many others:

- Du Vivier & Co. vs. Gallice* (C. C. A. 2),
149 Fed. 118;
- In re W. J. Marshall Co.*, 3 Fed. (2nd)
192 (citing many authorities);
- In re Johnson-Hart Co.*, 34 Fed. (2nd)
183 (citing many authorities);
- Boyd vs. Northern Pac. Ry. Co.*, 228
U. S., 482;
- Louisville Trust Co. vs. Louisville Ry.
Co.*, 174 U. S., 674;

Kansas City So. Ry. Co. vs. Guardian Trust Co., 240 U. S., 166;
Pierce vs. U. S., 255 U. S. 398;
Hurd vs. New York & C. Steam Laundry Co., 167 N. Y. 89, 60 N. E. 327.

The ruling principle may be broadly stated as follows:

Where those who stand towards a creditor in the relation of either stockholders of a debtor corporation or (*a fortiori*) primary debtors, transfer the property of the corporation, or their own property, to a new corporation, retaining for themselves the rights of ownership in such new corporation, without making proper provision for payment of the creditor, the new corporation remains chargeable with the debt, at least to the extent of the value of the property transferred. This result follows regardless of good faith in making the transfer. And if the transfer is made in bad faith, and the transferee is a mere successor or continuation of the transferrer, which is merged into the transferee, then, at least, the transferee corporation should be liable without limitation.

In *Du Vivier vs. Gallice* (*supra*), it was held:

“The only express assumption of the debts of the DuVivier copartnership by the corporation were those shown upon the books of the copartnership, yet, as this corporation was organized, as the agreed statement of facts shows, by the same persons who composed the partnership, for the purpose of carrying on the same business at the same place, with the same employees, using some of the same books of account and issuing all of its stock to the members of the copartnership or their nominees, it must, under the authorities, be held liable for the debts of the copartnership, even though they were not ex-

pressly assumed by the writings transferring the assets to the corporation. . . . I think it must be held that the corporation Du Vivier is liable for all of the debts of the partnership, Du Vivier, whether expressly assumed or not."

This early decision forecasts the rule later laid down by the Supreme Court in the noted case of *Northern Pac. Ry. Co. vs. Boyd* (*supra*).

The same doctrine has been applied by the same Circuit Court of Appeals, very recently in

In re Alamac Operating Corp. (C. C. A. 2), 42 Fed. (2nd) 120.

In re W. J. Marshall Co. (*supra*), the Court said:

"It is a rule of the common law that a corporation which succeeds to the business of a copartnership or a corporation, organized for the purpose of continuing the business, and takes over the assets thereof, by so doing assumes the debts and liabilities of the partnership or corporation which it succeeds to the extent of the property so received."

Citing

Cook, Stock & Stockholders (3rd Ed.),
Sec. 671;

Beach, Private Corporations, 360;

Ean's Adm. vs. Exchange Bank, 79 Mo.
182;

2 *Cook on Corporations* (4th Ed.), 673;

Austin vs. Bank, 49 Neb. 412; 68 N. W.
628; 35 L. R. A. 444;

Reed Bros. vs. Bank, 46 Neb. 175; 64 N.
W. 701;

Baker Furniture Co. vs. Hall, 76 Neb.
88; 107 N. W. 117, 118; 111 N. W. 129;
113 N. W. 267;

Sanger vs. Upton, 91 U. S. 56;
Chicago & C. Ry. Co. vs. Chicago Bank,
 134 U. S. 276;
Grenell vs. Detroit Gas Co., 112 Mich., 70;
 70 N. W. 413, 414.

(The last above quotation, perhaps, states the rule too broadly, in omitting to specify the retention of rights in the property by the same subordinate interests.)

In re Johnson-Hart Co., 34 Fed. (2nd) 183, the Court said, after discussing the rule of assumption of liabilities governing corporate reorganizations:

“More difficulty is encountered with the question of assumption of liabilities when a corporation has succeeded to the business and assets of a copartnership or an individual, but it seems safe to say that the same rule prevails when copartners incorporate themselves simply for the purpose of taking over their own assets and continuing their own business.”

Citing, in addition to cases cited above, others, some of which, while recognizing the rule, distinguish it:

In re Stone-Moore-West Co., 292 Fed. 1004;
In re C. W. Aschenbach Co., 174 Fed. 396;
In re A. G. Crosby Co., 199 Fed. 344;
Andres vs. Morgan, 62 Ohio St., 236; 56 N. E. 875;
Ziemer vs. Bretting, 147 Wis., 252; 133 N. W. 139,

and cases cited in note in A. L. R. to *Skirvin Operating Co. vs. Southwestern Electric Co.*, 71 Okla. 25; 15 A. L. R. 1104.

In re Alamac Operating Corp., 42 Fed. (2nd), at page 122, the Court said:

“Without the payment of any consideration therefor, the new corporation took the chattels of the old, leaving it completely denuded of assets; and the new corporation was composed of stockholders and assenting creditors of the old. . . . Under such circumstances, the new corporation became liable to non-assenting creditors of the old, at least to the extent of the value of the assets received from the latter.”

Citing

DuVivier & Co. vs. Gallice (*supra*);
Northern Pac. Ry. vs. Boyd (*supra*);
Skirvin Operating Co. vs. Southwestern Electric Co. (*supra*);
Hurd vs. New York & C. Steam Laundry Co. (*supra*); also *Yone Suzuki vs. Central Argentine Ry.*, 27 Fed. (2nd) 795;
Okmulgee Window Glass Co. vs. Frink, 260 Fed. 159, Cert. denied, 251 U. S. 563;
Sanborn-Cutting Co. vs. Paine, 244 Fed. 672;
American Ry. Express Co. vs. Kentucky, 190 Ky. 636; 228 S. W. 433; 30 A. L. R. 543.

As has been pointed out in the opinions quoted from, there is no difference in the rule between cases where a partnership is incorporated and cases where a corporation succeeds a corporation. The difficulty (if there has been any) in reaching the same result probably has sprung from the trust fund doctrine. When corporate assets are declared to be a trust fund for the payment of its debts it is quite simple to say that a successor corporation must take such assets burdened with

the trust. When it is individual or partnership assets that are transferred the argument is less facile. Yet the same result is reached. As was said in the *Alamac* case (*supra*), "We need not stop to discuss the precise theory upon which this result may best be supported."

Even though the transaction be consummated openly and in good faith and supported by a consent decree of Court, such assumption of liabilities follows, at least to the extent of the value of the property transferred.

In re Alamac Operating Corp. (*supra*);
In re W. J. Marshall Co. (*supra*);
Okmulgee Window Glass Co. vs. Frink
 (*supra*).

The case last cited (260 Fed. at pp. 166, 169) attempts a distinction between cases where there is merely a transfer of assets to a stranger corporation and cases where the transferee corporation is in effect a successor or continuation of the transferor, holding that in the former case the transferee will be liable only to the amount of the value of the property transferred and no lien will be imposed on its assets.

Cf. Guaranty Trust Co. vs. N. Y. & Q. C. Ry. Co., 253 N. Y., 190, 200;
Mississippi Valley Trust Co. vs. Southern Trust Co., 261 Fed., 765.

With any such qualification of the rule as to the extent of liability, we may profitably compare the expression of the Supreme Court in *Northern Pac. Ry. vs. Boyd*, 228 U. S. at pp. 506-507, where it was in effect held that the transferee corporation was a successor:

"As between the parties and the public generally, the sale was valid. As against

creditors, it was a mere form. Though the Northern Pacific Railroad was divested of the legal title, the old stockholders were still owners of the same railroad, encumbered by the same debts. . . .

“The invalidity of the sale flowed from the character of the reorganization agreement *regardless of the value of the property*, for in cases like this, the question must be decided according to a fixed principle, *not leaving the rights of the creditors to depend upon the balancing of evidence whether on the day of sale the property was insufficient to pay prior encumbrances.*”

The Court assumed that the transfer was made “in good faith and in ignorance of Boyd’s claim” (228 U. S. at p. 504), and yet reached the same result.

It would seem especially forceful that when the organization of the corporation is for the very purpose of taking over a business entire and hindering and defrauding creditors by interposing the bar of a corporate entity, with dummy stockholders, the assumption of liability should not be limited to the value of the assets at the date of the transfer, less preferred or secured claims.

In any event, if the corporation, the creature of Loeb Brothers, has mingled assets derived from the partnership with others which may have been created by the activities of the corporation, the whole mass will be subject to the complainant’s claim; at least unless the defendants point out how to make a separation, which they have failed to do.

27 C. J., 667;

Cf. *Northern Pac. Ry. Co. vs. Boyd*, 228

U. S. at pp. 500-501;

Babirecki vs. Virgil, 97 N. J. Eq., 315.

And if the transferred property be sold by the fraudulent grantee the proceeds in its hands may be reached by equitable process:

Holland vs. Grote, 193 N. Y., 262, 269;
Lawrence vs. Bank, 35 N. Y., 320.

It might even be argued that there is ample evidence to support a finding that the corporation actually agreed to assume the partnership debts.

“Where it appears that a corporation has been organized by the members of a firm to continue the same business, and where it is shown that the assets of the firm have been transferred to the corporation, such facts afford very strong presumptive evidence that the corporation assumed the debts of the firm.”

4 *Thompson on Corp.*, 2438, citing
Bremen Sav. Bank vs. Branch-Crookes Saw Co., 104 Mo., 425; 16 S. W., 209;
Fort Worth Pub. Co. vs. Hitson, 80 Tex., 216; 14 S. W., 843; 16 S. W., 551;
Reed Bros. Co. vs. First Nat. Bank, 46 Nebr., 168; 64 N. W., 701;
Hall vs. Herter, 90 Hun (N. Y.), 280, aff'd. on op. below, 157 N. Y., 694.

“An agreement to assume, like any other fact, may be established by circumstantial evidence.”

In re Johnson-Hart Co., 34 Fed. (2d), 183.

Perhaps we need go no farther than to say that if the corporation was organized for honest purposes, a proper inference may be drawn that it assumed the partnership debts. If it was dishonestly formed, then it was a fraud on this complainant and the law will impose on the corpora-

tion an obligation to pay the partnership debts and will subject the corporate assets to be charged therewith in an equitable suit in aid of an attachment.

POINT II.

The appellant made no attempt to, and had no right to, set off the amount of the demand notes of Ellbee Fur Trading Company against the deposit.

Mr. Wortendyke testified that the demand notes were taken from the Ellbee Company by the Bank when the Letters of Credit were severally requested, for the purpose of evidencing the obligation of the Ellbee Company *on the letters of credit* to reimburse the Bank the amount of the ninety days drafts that might be drawn against the several letters of credit when paid at maturity (p. 103, ll. 10 to 20; p. 104, l. 32 *et seq.*). Ellbee's obligations on the letters of credit had not matured at the time of the attachment. The Bank had no other writing evidencing the obligation of the Ellbee Company to reimburse the Bank.

The Bank did not enter any one of these demand notes on any of its books.

Not one of the demand notes was in any way entered at any time on the account of the Ellbee Company.

Not one of the demand notes had the revenue stamps required by the Revenue Act of October 3, 1917, Chapter 63, Section 807-40 Statutes at Large, 321-324 Schedule A, sub-division 6, in force at the time these so-called demand notes were given. Promissory notes were taxable at the rate of two cents per one hundred dollars. Section 802 of the Act provided that

“Whoever makes, signs, issues or accepts any instrument without the full amount of tax thereon being duly paid is guilty of a misdemeanor.”

While the failure to place the stamps on the notes did not invalidate them or make them inadmissible as evidence (*Ockenfels vs. Boyd*, 297 Fed. 614-616; *Cole vs. Ralph*, 252 U. S. 286, 293), the inference to be drawn from the omission to pay the tax on these notes, as Mr. Wortendyke testified, is that they were not regarded as independent obligations presently enforceable, but rather as mere memoranda of indebtedness (Wortendyke, p. 105). If the Bank had regarded them as actual present obligations, it must be presumed that it would have caused the tax to be paid, since it was the practice of the Bank as soon as it took a promissory note which was effective, or any note that was effective, “as soon as it became effective” to put on a stamp (Record, p. 105, l. 10). Every presumption must be taken against the commission of a crime by the Bank or by Loeb Brothers.

Had the demand notes been considered as an asset of the Bank it would have been its duty to list them among its demand notes without collateral.

Since the liability of the appellant Bank to the American Exchange National Bank on the Letters of Credit was until maturity purely a contingent liability, of unascertained amount, and since the appellant Bank had nothing whatsoever in writing, excepting these demand notes, to evidence the liability of Ellbee Fur Trading Company to indemnify the appellant Bank in case it had to make good to the American Exchange National Bank, it is easily understood why the demand notes were taken in an arbitrary amount in excess of the Letter of Credit. The notes were the only

writings held by the appellant evidencing any liability whatsoever to it by the Ellbee Fur Trading Company (p. 106, l. 9).

Mr. Wortendyke testified definitely and positively that the Bank did not charge up any of these demand notes at any time (p. 105, ll. 1-2). Mr. Wortendyke also testified that the amount of each note was a purely arbitrary amount fixed by the Bank with the intention of exceeding the amount of any call that might be made upon the Bank for the payment of a draft drawn against the Letter of Credit. For example, if a Letter of Credit was for £1,000 sterling, under which drafts might be drawn for any amount from nothing up to £1,000, the Bank would take a demand note for \$5,000 or \$6,000 (p. 104, ll. 30-40).

We submit that the manner in which the appellant took the demand notes, held them and never demanded payment of them, is a conclusive answer to the argument contained in Point II of Appellant's Brief.

If any further answer is needed, it is supplied by the indemnity agreement between the appellant Bank and the Ellbee Fur Trading Company which was taken by the Bank on October 13, 1922 (Exhibit C-5, p. 126).

The effect of this agreement is more fully discussed in Point III hereof.

It is respectfully submitted, therefore, that the facts in this case show that the appellant did not have the right to, nor did it claim or attempt to make any set-off until long after complainant's attachment was levied and until after the indemnity agreement was taken by the appellant from the Ellbee Fur Trading Company without surety or security.

POINT III.

The indemnity agreement (Exhibit C-5), taken by the appellant October 13, 1922, shows conclusively that the Bank never before that date attempted to exercise any right of set-off and that the demand notes were held for the purpose of evidence only.

Exhibit C-5 (p. 126) was prepared by the attorneys for the Bank (p. 108) and was executed by the Ellbee Fur Trading Company for the purpose of determining the rights of the parties to the agreement in view of the attachment that had been levied by the complainant six weeks prior.

The following recitals were made in the agreement:

“WHEREAS, the party of the first part (Ellbee) is a depositor in and a creditor of the party of the second part (First National Bank), the amount of said deposit and credit being approximately \$22,000. as will appear by the books of account of the party of the second part” (the Bank).

This recital recognizes the fact that at the time the Bank considered itself indebted to the Ellbee Fur Trading Company to the extent of \$22,000, the amount of the deposit, except as that relationship of debtor and creditor was affected by the attachment. Moreover, it establishes the fact that up to the time of the execution of this agreement in October there had been no charge against the account by the Bank, else the relationship of debtor and creditor expressed in the agreement would not have existed to the extent of \$22,000.

As emphasizing the fact that the Bank owed Ellbee Fur Trading Company \$22,000 when the

attachment was levied, the following recital is conclusive:

“AND WHEREAS this relationship and this deposit and credit existed on August 28, 1922, at the time of the service upon the party of the second part hereto of a notice by the sheriff of the County of Hudson levying upon all the right, title and interest of David Loeb, Philip Loeb and Jacob Loeb, copartners then or formerly doing business under the firm name of Loeb Brothers, in said credit and account of the party of the first part.”

How could it be made more plain and certain that at the time of the levying of this attachment and in the period between August 28 and October 13 when the agreement was made, there had been no assertion by the Bank of any lien or right of set-off against the moneys in this account that had been attached, although approximately \$10,500 of the drafts drawn against prior letters of credit had been paid by the American Exchange National Bank and had been charged against the account of the First National Bank early in October? The fact of the maturity and payment of these drafts is also mentioned in the indemnity agreement.

Our contention that the First National Bank had no right to enforce payment by the Ellbee Company of the demand notes until after the respective drafts had been paid by the American Exchange Bank is expressly admitted in the third paragraph of Exhibit “C-5” as follows:

“WHEREAS on August 28, 1922 and prior thereto the party of the second part had guaranteed drafts or letters of credit for the use and benefit of the party of the first part and was subject to a liability thereupon exceeding \$50,000, and since which time the letters of credit of the Ellbee Fur Trading Co., Inc.

so guaranteed by the party of the second part have been presented for payment, and have been paid by the party of the second part, pursuant to its guarantee, approximating \$10,500., which the party of the second part in the ordinary course of its business is entitled to set off and charge against the said deposit or account above referred to of the party of the first part. NOW, THEREFORE, THIS AGREEMENT WITNESSETH: That if the party of the second part shall set off and charge against the account of the party of the first part above specified the said amount *so paid by it* on the guaranteed letters of credit above referred to, and shall in the future set off and charge against said account any subsequent *maturing* guaranteed letters of credit of the party of the first part which it, the party of the second part may be called upon *to pay* under its guarantee, and it should be adjudicated that any right which the party of the second part had to offset the indebtedness due to it by reason of said payment of the guaranteed letters of credit was subject and subsequent to the attachment and the levy thereunder as above set forth in an action brought in the Hudson County Circuit Court by John Elihu Body, trading as J. E. Body & Co. That the said Ellbee Fur Trading Co., Inc. will hold harmless the said First National Bank of Jersey City from any loss which it might or could sustain, and the said party of the first part agrees that if any suit or suits is brought against it by the party of the second part for or on account of its payment under said guarantee or **for the collection of any demand notes which may be given as evidence of the liability of the Ellbee Fur Trading Co., Inc. on said letters of credit**, that it, the party of the first part will not plead or set up as a defense in any action at law that it, the party of the second part has been paid by reason of its exercise of the right to set off moneys due to the party of the second part against the said account of the party of the first part so levied upon as aforesaid."

The latter portion of this agreement indicates:

1. That the Bank had a serious doubt at the time as to its right to off-set and would take no chances in attempting to exercise its right without first obtaining the written consent of the Ellbee Company so to do.

2. It also proves conclusively that up to October 13, 1922, when the agreement was signed, no attempt had been made to off-set anything, not even the \$10,500 of drafts that had matured a few days before the agreement, Exhibit "C-5" was executed, or the demand note or notes which the Bank held evidencing that specific item.

3. The indemnity agreement also conclusively shows that the demand notes were, as testified to by Mr. Wortendyke and as well expressed in the indemnity agreement, "*given as evidence of the liability of the Ellbee Fur Trading Co., Inc., on said letters of credit*".

4. The agreement also conclusively shows the solvency of the Ellbee Fur Trading Company to the satisfaction of the Bank for the reason that the Bank at the time of the taking of this agreement did not require any surety or any security other than the agreement itself, and thus accepted the credit of the Ellbee Company as sufficient.

It is contended by appellant that the obligations of the Ellbee Company to the Bank were at the date of the attachment matured obligations and not unmatured obligations because the Bank held the Ellbee Company's aforementioned demand notes. The following are conclusive answers thereto:

A. As shown above, the notes were not considered ordinary commercial paper or even present obligations. They were taken solely to evi-

dence the obligation of the Ellbee Company to reimburse the First National Bank,—an obligation which could not become matured and enforceable until the maturity of the drafts drawn against the letters of credit. If they had been considered real demand obligations they would have had to be entered in the books of the Bank assets so as to be subject to the audit of national bank examiners. Furthermore, they would have borne revenue stamps.

B. If the demand notes had been actual independent, enforceable obligations prior to maturity of the drafts they would have had to be for some liquidated amount owed by the customer. Representing, as they do, merely approximate amounts considerably in excess of the maker's contingent debt, determinable only by the actual amount of the drafts, which might be less than the maximum amount authorized in the letters of credit, depending upon market conditions, and by the rate of exchange upon payment at the date of the maturity of the drafts, the Ellbee Company would have had a good defense if sued on them before the ninety day drafts had matured. In fact all the surrounding circumstances clearly show an undertaking on the part of the Bank not to make demands for payment until the actual amount of the indebtedness had become liquidated at the maturity of the drafts.

“The general rule with regard to commercial paper, payable on demand, is that it becomes due immediately * * *. ‘This rule may not apply where there is something on the paper, or in the circumstances under which it is given, showing that it was not the intention that it should become due immediately.’ 7 Cyc. 848, 849.”

Sullivan v. Ellis, 219 Fed. 696, 8 *Corpus Juris* 407.

C. Furthermore, the terms of the indemnity agreement and the evidence in the case indicate that the Bank waived and abandoned any right it might conceivably have had to treat any obligations of the Ellbee Company as matured at the time of the levying of the attachment. Until October 13, 1922, the Bank did nothing except write the word "attached" across the face of the Ellbee Company account and then it took an indemnity agreement and thereafter attempted to set-off, at the respective dates stated above on page , the several outstanding drafts. From and after October 13 the Bank relied entirely on the indemnity agreement and made no attempt whatever to base any right of set-off on the demand notes.

POINT IV.

The record is devoid of any special equities warranting an application of the doctrine of equitable set-off in favor of the Bank as against the complainant, an attaching creditor.

The account of the Ellbee Company in the First National Bank was a general checking account, and not in any sense a special account.

There is no evidence that any of the \$22,000 in the account when the attachment was levied was advanced to the depositor by the Bank, and it was apparently all money of the customer's that was deposited in the regular course of trade (Record, pp. 39-41, inc.). There is no evidence that any of said moneys were the proceeds of the sale of any merchandise that was purchased on the faith of the letters of credit mentioned in this case.

Furthermore, there is no evidence that the Ellbee Company was insolvent until the end of 1923

(Record, pp. 140-141) and the fact that the Bank took the indemnity agreement of this company without surety or security on October 13, 1922 (Exhibit "C-5") negatives any idea of insolvency.

It therefore appears that there are no matters of equitable consideration present in this case, such as were found by this Court in *Camden National Bank vs. Green*, 45 N. J. Eq. 546, aff., 46 N. J. Eq. 607.

See also, the admirable opinion of Vice Chancellor Howell in *McManus-Kelly Co. v. Pope Mfg. Co.*, 70 Atl. Rep. 297. Vice Chancellor Howell's actual decision was wrong in that case (which should have been controlled by statute), but the law of equitable set-off that he pronounced was correct, as mentioned by Vice-Chancellor Stevens in *Shields vs. John Shields Constr. Co.*, 83 N. J. Eq. 21.

The attachment, of course, became a lien against the attached deposit from the moment it was levied.

Section 7 of the Attachment Act provides, among other things:

"The writ shall bind the attached rights and credits, money and effects, goods and chattels of the defendant from the time of executing the same."

Comp. Stat. Vol. 1, p. 137.

This is no more than declaratory of the common law, as is shown by the following excellent statement from 6 *C. J.* 286 *et seq.*:

"Sec. 547. G. *Priorities*—1. *Between Attachments and Other Liens or Claims*—a. *General Rule.* The rights of an attaching creditor with respect to the property attached must be determined by the state of the title at the time when the attachment was made. He is not in the position of a bona fide purchaser for value, but obtains only the rights which

the debtor had in the property at that time, and is postponed to liens or claims of other persons upon or to the property, which became effective before the attachment, except in so far as he may avail himself of fraud in a transaction affecting the property, or as his position may be bettered by an omission on the part of others to comply with statutory requirements in respect to a transfer or encumbrance of the property. An attaching creditor does, however, succeed to all the incidental rights to which the debtor was entitled by reason of his ownership of the property, and all rights acquired in the attached property, from or against the attachment debtor, subsequent to the attachment, are subordinate thereto, so that a title obtained under an attachment relates back to the time of the commencement of the lien, and the purchaser of the same acquires such title as the debtor had at that time, unaffected by any intermediate alienation or encumbrance."

The attachment was levied upon the deposit August 28, 1922, so that under the above statement of the law the only question under this issue is whether the Bank had any lien upon the attached deposit prior to the 28th of August, 1922. Unless it then had such a lien, it could not subsequently set off the account against the drafts maturing thereafter, and thus defeat the prior lien of the attachment. The rights of the Bank, certainly so long as the obligations of the Ellbee Fur Trading Company to it were unmatured, were merely *in personam*, whereas the rights of the plaintiff under the attachment lien were *in rem* against the specific property.

We assert with confidence that the Ellbee Company had the legal right to present a check on August 28, 1922, before the Sheriff levied the attachment, and draw the entire balance that was on deposit.

The bank would have had no right to refuse payment of a check so presented.

Inasmuch as the Ellbee Company had the legal right to withdraw the moneys before the attachment, the complainant by virtue of the attachment seized the Ellbee Company's property in the deposit free from any right of set-off now asserted by the Bank.

Thus it is said in 7 C. J. 671:

“Sec. 379. R. *Attachment of Deposit*. 1. *In General*. As a deposit is a debt due from the bank to the depositor, it may be attached by the depositor's creditors like any other property belonging to him, and when it is so attached, it becomes the bank's duty to retain the deposit until the court has made a proper order concerning its disposition. After a deposit has been attached, the bank cannot apply it on an unmatured debt due to itself. An attaching creditor, however, gains no greater rights over the depositors money than the latter himself had.”

Not a single one of the drafts which the Bank later attempted to set off against the account had matured at the time the attachment was levied.

A bank has no general lien on its customers' deposits. The rule is well stated in 7 C. J. 653:

“Sec. 351. P. *Application of Deposit to Debts of Depositor*. 1. *Debts due to Bank*. a. *General Rule*. As a general rule a bank may look to deposits in its hands for the repayment of any indebtedness to it on the part of the depositor and may apply the debtor's deposits on his debts to the bank as they become due. While the universal recognition of this rule has led the courts, on a few occasions, to make a general statement to the effect that a bank has a lien on deposits, the more accurate view appears to be that this right of a bank is not really in the nature of a lien but is rather a right of set-off or appli-

cation of payments. The exercise of the right is optional with the bank.”

Appleton v. National Park Bank (fully discussed *infra*).

It is not disputed that the Ellbee Company was liable to the Bank with respect to the letters of credit, but this liability had not matured, its amount was unliquidated, and there was no lien on any deposit prior to maturity. The demand notes can be disregarded entirely. For Mr. Wortendyke admitted and the terms of the indemnity agreement show that no demand ever was made for payment of the demand notes (p. 47, ll. 1-14; p. 105, l. 2) and that they merely evidenced *liability upon the letters of credit* (pp. 104-105, 126).

Furthermore, the nature of the transaction was such that no such demand could legally have been made by the Bank against the Ellbee Company until the maturity and payment of the drafts. All that the demand notes, held by the Bank, evidenced was the obligation to reimburse the Bank whatever it paid upon the maturity of the 90 days' drafts. This purpose of the demand notes is accurately disclosed in the indemnity agreement (Exhibit "C-5", p. 126), where they are described as "given as evidence of the liability of the Ellbee Fur Trading Co., Inc., on said letters of credit." The Bank never attempted to use the demand notes as the basis of a set-off—either at the time of the attachment or up to the trial (p. 105, l. 2).

There has been a great deal of discussion in the cases with respect to the right of set-off of unmatured obligations of an *insolvent* debtor. There is a line of cases of respectable authority holding that such right of set-off exists and there are numerous equally respectable authorities holding the contrary. None of these authorities has any

direct application to the case at bar, because here there is no evidence of the insolvency of the Ellbee Company, prior to the end of 1923 (p. 141), and, on the contrary, all the evidence indicates that the Ellbee Company was solvent and was so regarded by the Bank.

In the absence of any proof of insolvency some other equity would have to be found to justify a set-off in this case. How inequitable it would be to allow a set-off of unmatured obligations where the debtor is solvent may be illustrated by a hypothetical case. Suppose that A, a resident of New Jersey, ascertains that B, a resident of Australia, who is solvent, has a bank account with the C Bank of New Jersey. Suppose that the C bank has discounted B's notes not yet due. If A attaches B's bank account with the C bank on a matured obligation of B to A prior to the maturity of B's notes held by the C bank, how easy it would be for B and the C bank by collusion to put A in a position where he would have to go to Australia to recover his claim against B, if a right of set-off were allowed in such a case.

Probably the leading case allowing a set-off because of insolvency is *Schuler v. Israel*, 120 U. S. 506. In this case the Supreme Court held that a garnishee has a right to set up any defense against an attachment process which it could have asserted against the debtor in the principal action; and if the debtor be insolvent and owes the garnishee on a note not yet due, for which he has no sufficient security, he is not bound to risk the loss of his debt in answer to the garnishee process. It will be noted that the right of set-off was rested entirely on the fact that the debtor was insolvent. If the debtor is solvent, then the reason of the decision is gone, for the garnishee does not risk the loss of his debt by surrendering the fund under the attachment process. Later, Federal deci-

sions have limited the effect and authority of *Schuler v. Israel* (see cases cited below).

We call particular attention to the discussion of the so-called banker's lien in *Fifth National Bank of the City of New York v. Lyttle*, 250 Fed. 361, at pp. 365, 366. The passage is too long to quote, but the pith of the decision will be perceived from the following excerpts:

“It is undoubtedly true that a bank has a general lien on all moneys of a depositor which are in its possession for the balance of a general account, provided it is then due and payable, but not otherwise” (p. 365).

“There being no lien in favor of the bank on September 20th, no reason existed to prevent the Wills & Marvin Co. from withdrawing on that day the whole of its deposit. The right of withdrawal existed, for on that day the bank could not have exercised a right of set-off any more than it could have asserted a lien” (p. 366).

After referring to certain U. S. Supreme Court decisions, the Court said further:

“These cases differ from the case at bar, and it is now argued that the right of set-off existed at a date when the notes which the bank held had not matured and prior to the adjudication of bankruptcy. We are not aware that any such application of the doctrine is supported by any Supreme Court decision. We think it is not the law. The bank had no right to set off the unmatured notes until after the bankruptcy proceedings were commenced” (p. 366).

It is to be noted that a petition for writ of certiorari in the above entitled case was denied by the U. S. Supreme Court (247 U. S. 506), so that it may now safely be said that it represents the law of the Federal jurisdiction.

The decisions in this state hold that even in the case of insolvency a set-off will not be allowed merely by reason of insolvency. There must be other equities. As we have already pointed out, the authorities were fully reviewed by Vice-Chancellor Howell in *McManus-Kelly Co. vs. Pope Mfg. Co.*, 70 Atl. Rep. 297. He cites and relies on *Camden National Bank vs. Green*, 45 N. J. Eq. 546, affirmed 46 N. J. Eq. 607; *Harrison v. Williams*, 34 N. J. Eq. 225; *Jackson v. Bell*, 31 N. J. Eq. 554. He also cites the decision of the New York Court of Appeals in *Richards v. La Tourette*, 119 N. Y. 54, as an authority regarding equitable set-off.

In New York the rule is well established by numerous decisions that even in the case of insolvency an unmatured obligation of the insolvent cannot be set-off, although the obligation of the solvent party making the set-off need not be matured; the reason for the rule being that a solvent party has a right to waive the non-maturity of his obligation because such acceleration is in the interest of his creditor, the insolvent party, but that where insolvency has occurred, the equities of other creditors have intervened which render it inequitable to allow a set-off of the insolvent's unmatured obligation.

See

Gerseta Corporation v. Equitable Trust Company, 241 N. Y. 418, 150 N. E. 501.

The same rule has been applied in New York in favor of an attaching creditor and it has been held that the attachment of an insolvent depositor's account should be upheld as against the claim of the Bank against the insolvent on notes not matured, the debtor being insolvent at the time of the

attachment although no receiver had then been appointed.

Appleton v. National Park Bank, 122 Misc. 248; 211 App. Div. 708; 208 N. Y. Supp. 228; affirmed without opinion 241 N. Y. 561; 150 N. E. 555.

See to the same effect:

Birmingham National Bank v. Meyer, 104 Ala. 634;
Manufacturers National Bank v. Jones, 2 Pennyp. (Penn. Supreme Court) 377;
Iler v. Rieger & Co., 69 Mo. App. 64;
Bower v. The Foreign & Colonial Gas Co., 22 Wkly. Rep. 740 (Eng.).

Other cases where even after insolvency of the debtor it was held that there could be no set-off of an unmatured obligation of the insolvent debtor are:

Corn Exchange National Bank v. Locher, 151 Fed. 764 (U. S. C. C. A., 3rd Cir.);
Fifth National Bank of City of New York v. Lyttle, 250 Fed. 361 (U. S. C. C. A., 2nd Cir.); petition for writ of certiorari denied, 247 U. S. 506;
Wright v. Seaboard Steel & Manganese Corp., 272 Fed. 807 (U. S. C. C. A., 2nd Cir.).

The *Wright* case last above cited contains the fullest discussion of the matter we have found in any opinion. Rogers, C. J., said (p. 810):

“It is claimed that no right of offset existed in the bank until the note matured. This court in *Fifth National Bank of City of New York v. Lyttle*, 250 Fed. 361, 162 C. C. A. 431, held that a bank has no lien on the general deposit of a customer for an unmatured

indebtedness to it. The doctrine therein announced is clearly supported by the authorities. There can be no doubt that as a general rule a bank has no right to apply a deposit to a debt of the depositor until such debt matures. *Birmingham First National Bank v. Minge*, 186 Ala. 405, 64 South. 957; *Richards v. La Tourette*, 119 N. Y. 54, 23 N. E. 531; *Oatman v. Batavian Bank*, 77 Wis. 501, 46 N. W. 881; 20 Am. St. Rept. 136; *Commercial National Bank v. Proctor*, 98 Ill. 558; *Hodgin v. People's National Bank*, 124 N. C. 540, 32 S. E. 887; *Ellis v. Woonsocket First National Bank*, 22 R. I. 565, 48 Atl. 936."

In *Shields v. John Shields Construction Co.*, 83 N. J. Eq. 21, Vice-Chancellor Stevens was careful to point out that the unmatured obligation which was allowed to be set-off by the Court of Errors and Appeals in the case of *Receivers v. Paterson Gaslight Co.*, 3 Zab. 294, was the obligation of the solvent debtor and not the obligation of the insolvent debtor and that, therefore, there was no conflict between that decision and the New York rule, as laid down in *Fera v. Wickham*, 135 N. Y. 223, a decision in which the same rule was laid down as in *Gerseta v. The Equitable Trust Co.*, *supra*. Furthermore, Vice-Chancellor Stevens quoted and followed the decision of the New York Court of Appeals (Cullen, C. J.), in *Frank v. Mercantile National Bank*, 182 N. Y. 264, another New York decision standing in the same line of authority.

A fortiori, if a set-off cannot be allowed even in the case of insolvency as against an attaching creditor or as against an assignee for the benefit of creditors or a receiver in equity, certainly no set-off can be allowed as against an attaching creditor where the unmatured obligation is that of a solvent debtor.

In no event could there be a set-off at law in this case, as clearly appears from the reasoning of *Receivers v. Paterson Gaslight Co.*, *supra*. Nor could there be any right of set-off under any bankruptcy or insolvency statute, as none is involved in this case. If there were any right of set-off, it would have to be a purely equitable right.

Illustrations of the right of set-off under an insolvency statute are to be found in Vice-Chancellor Stevens' decision in *Shields v. John Shields Construction Co.*, *supra*, and in the opinion of Chief Judge Cullen in *Frank v. Mercantile National Bank*, *supra*. In both of these cases there is a luminous discussion of the difference between the bankruptcy rule and the equity rule.

The limitations on the right of set-off in equity are so clearly set forth in the opinions in *Camden National Bank v. Green*, *supra*, and *McManus-Kelly Co. v. Pope Mfg. Co.*, *supra*, that it is unnecessary to dwell upon the matter further.

We have thus demonstrated that the Bank had no right to set-off the obligations of its solvent debtor unmatured at the date of the attachment under any rule of law or equity.

POINT V.

Complainant had a statutory right to commence his suit by attachment even though a non-resident.

The argument in Point III of complainant's brief is so completely answered by the opinion of Vice-Chancellor Bigelow (see Record, p. 196) and by the provisions of the Attachment Act, P. L. 1901, p. 158, Sec. 1, that further argument on this point is unnecessary.

POINT VI.

The evidence of fraud was lawful evidence.

The argument in appellant's brief that the testimony of Jacob Loeb read in evidence was hearsay as to the Bank does not seem to be pressed. Unless the Bank has a right of set-off, it is a mere stakeholder, and the issue lies solely between the complainant and the Loeb Brothers and Ellbee Fur Trading Company, Inc. The burden was on the Bank to establish the right of set-off.

The testimony given by Mr. Leech of R. G. Dun & Co. (Record, p. 25 to p. 33) was direct testimony as to the identity of Loeb Brothers and Ellbee Fur Trading Company, Inc., and was admissible as statements made in the course of business by the persons composing the firm of Loeb Brothers and the officers of the Ellbee Fur Trading Company, Inc., made at a time when they were requested by a credit reporting agency for a statement as to the business and financial standing of the two concerns.

The testimony given by the Loeb brothers in supplementary proceedings against them and also the affidavit of Jacob Loeb were admissible under the doctrine of admissions against interest made by them in judicial proceedings between the same parties in which the complainant was attempting at law to collect his judgment. This is the customary and accepted way of proving complainant's case in a creditor's action in equity.

Neither the Loeb brothers nor any officer of the Elbee Fur Trading Company, Inc., appeared or contradicted a word of their earlier testimony, or disputed the affidavit.

The Elbee Fur Trading Company, Inc., refused to produce its books and records pursuant to com-

plainant's notice to produce (C-1, p. 120; demand made, Record, p. 33).

The appellant Bank is not in a position to complain that the evidence admitted by the Court against the defendants, Loeb Brothers and Ellbee Fur Trading Company, Inc., was not legal evidence.

CONCLUSION.

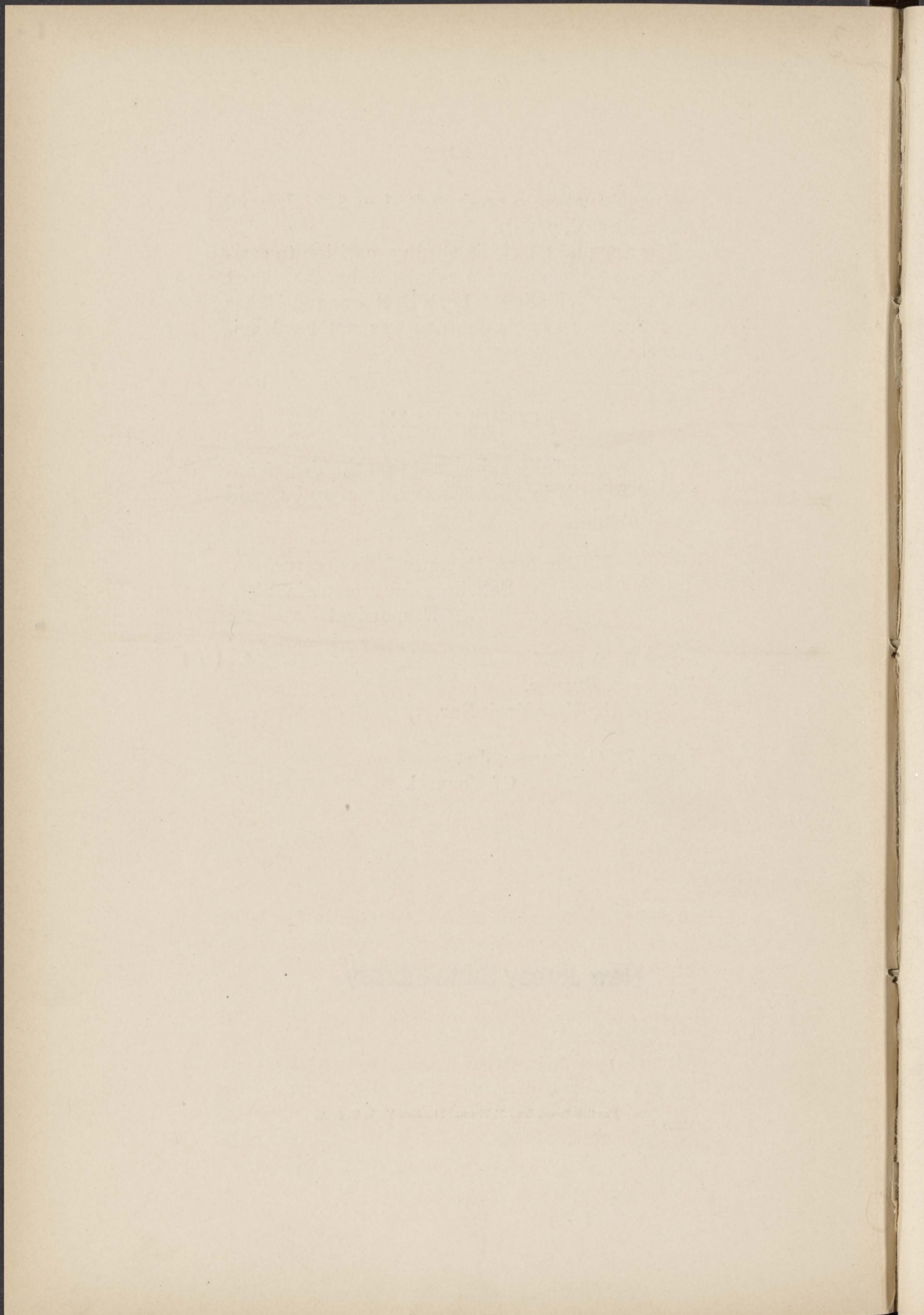
It is respectfully submitted that the decree appealed from is in all respects correct and should be affirmed.

McDERMOTT, ENRIGHT & CARPENTER,
Solicitors for Complainant-
Respondent.

JAMES J. FRANC,
ALFRED L. BECKER,
Of the New York Bar,

JAMES D. CARPENTER, JR.,
Of Counsel.

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New Jersey Court of Errors and Appeals

OCTOBER TERM, 1930.

No.

Between

JOHN ELIHU BODY, Trading as
J. E. BODY & Co.,
Complainant-Respondent,

and

THE FIRST NATIONAL BANK OF
JERSEY CITY,
Defendant-Appellant.

On Appeal from a
Decree, Advised
by Vice-Chan-
cellor Bigelow,
After a Hearing
by Vice-Chan-
cellor Bentley.

BRIEF FOR THE DEFENDANT-APPELLANT, FIRST NATIONAL BANK OF JERSEY CITY.

Statement.

During April, May, June, July and August, 1922, the appellant, The First National Bank of Jersey City, a correspondent of the American Exchange National Bank of New York City, procured from the latter several letters of credit for upwards of \$50,000.00, for the account of the defendant, Ellbee Fur Trading Company, a New York corporation. Exhibit DX-8 (p. 165) on which is endorsed the Customer's Agreement (pp. 167-172) and Exhibit DX-9 (p. 173), the agreement of The First National Bank of Jersey City, are typical initial papers. When notified by the American Exchange National

Bank that it had issued the letter of credit, The First National Bank of Jersey City would accept a demand note of the defendant, Ellbee Fur Trading Company, of which Exhibit DX-10 (p. 173), is typical. It would be taken (Wortendyke's testimony, p. 57) when The First National Bank of Jersey City was notified a draft had been issued, by American Exchange National Bank. The latter would charge the amount of the draft against its account with The First National Bank of Jersey City, when the draft was returned to (and paid by) the American Exchange National Bank.

On August 28th, 1922, The First National Bank of Jersey City held on deposit to the credit of the defendant twenty-two thousand six hundred forty dollars and three cents (\$22,640.03); it was liable to the American Exchange National Bank, upon its guarantees for over fifty thousand dollars (\$50,000.00) (testimony of Wortendyke, p. 41), and held the demand notes of Ellbee Fur Trading Company, Inc., also approximating that sum. The details are stated (*infra*, p. 10). The latter company had paid nothing to either bank.

On that day the complainant, a resident and citizen of Cooma, in Australia, in an attachment suit, brought under the Attachment Act of 1901, by him as plaintiff, against David Loeb, Philip Loeb and Jacob Loeb, partners trading as Loeb Brothers, as defendants, sought to attach "all moneys now on deposit in The First National Bank of Jersey City, 15 Exchange Place, Jersey City, and standing in the name of Ellbee Fur Trading Company. Appraised value unknown" (Case p. 21, ll. 30 to 40).

On the next day, August 29, 1922, the complainant filed his bill of complaint in the Court of Chancery (Case pp. 5, *et. seq.*) It sets forth that the writ of attachment issued on the 25th of August, 1922, against the Loeb, and an allegation

that the Sheriff "did attach the rights, credits * * * etc., of the said defendants * * * in one bank account under the name of Loeb Brothers and in a second bank account in the said The First National Bank of Jersey City, standing in the name of Ellbee Fur Trading Company, Inc.;" that the levy was made in the forenoon of August 28, 1922, when there was on deposit in the account of Ellbee Fur Trading Company, Inc., several thousand dollars, the amount of which is unknown to the complainant * * * ; that the writ issued for thirty-four thousand and five hundred thirty-one dollars and thirty-eight cents (\$34,531.38), the amount of a debt owing by the defendants (the Loeb) to complainant, who charges (p. 6) these moneys are, in truth and fact, the moneys of the defendants, David Loeb, Philip Loeb, and Jacob Loeb; and that the complainant's debt arose in 1920; that the Loeb on January 13, 1921, caused a corporation, Ellbee Fur Trading Company, Inc., to be formed in the State of New York, with a capital of fifteen thousand dollars (\$15,000.00) and caused substantially all of their assets (which are not described) to be transferred to Ellbee Fur Trading Company, Inc., receiving therefor stock only, that they are each an officer of that company of which all of the stock is held by them; that the name "Ellbee" is derived from the initials of Loeb Bros., and that the corporation has its office with them at No. 158 West 26th Street, New York City, and each has the same telephone number, Watkins 1809. The bill (p. 7) further charges that Loeb Brothers are insolvent, * * * that they have all or a substantial part of their assets concealed in the name of Ellbee Fur Trading Company, Inc., for the purpose of hindering and delaying their creditors, and particularly the complainant, and that the moneys in the account of the corporation

in The First National Bank of Jersey City are moneys of the said Loeb Brothers, placed in the account of the corporation, and outside of the State of New York, for the purpose of hindering, delaying and defrauding their creditors, and particularly the complainant. The complainant prays for (1) answers, but without oath; (2) an injunction against The First National Bank of Jersey City from paying out any of the moneys on deposit in the account of Ellbee Fur Trading Company, Inc., and in the account of Loeb Bros., on checks, drafts, or other instruments, and (3) an injunction against the Ellbee Fur Trading Company, Inc., and its agents (in effect) from disposing of the account of Ellbee Fur Trading Company, Inc., in The First National Bank of Jersey City, and restraint (p. 8) against the said Loeb Bros., to similar effect; (4) a decree that the moneys in the account of the Ellbee Fur Trading Company, Inc., are the moneys of the individual defendants David Loeb, Philip Loeb and Jacob Loeb, and are subject to complainant's attachment and may be ordered to be paid by the defendants to the complainant; (5) that it be decreed the Ellbee Fur Trading Company, Inc., is a mere corporate shell in which the Loeb Brothers have transferred and concealed all of their assets, etc., * * * and that all moneys in said account are the moneys of Loeb Brothers; (6) discovery by the Loeb Brothers as to their purpose in forming the Ellbee Fur Trading Company, Inc., after incurring the complainant's debt, and (7) that they be decreed to disclose what they did with their assets, goods, chattels, effects and moneys.

Upon the filing of this bill, the late Vice-Chancellor BENTLEY, advised a restraint *ad interim* against all the parties which was later (September 25, 1922) dissolved, as to The First National Bank of Jersey City, upon the advice of Vice-Chancellor FIELDER, after a *viva voce* hearing.

The amended and supplemental answer of the defendant, The First National Bank of Jersey City (Case pp. 16-18) sets up that at the time of the attachment, it had guaranteed drafts or letters of credit for the Ellbee Fur Trading Company, Inc., and was subject to a liability thereupon exceeding the amount so then owing by it to the Ellbee Fur Trading Company, Inc., and claims the right to set off against the account or credit of Ellbee Fur Trading Company, Inc., any indebtedness of the Ellbee Fur Trading Company, Inc., to this defendant for and by reason of this defendant's liability upon said guaranteed letters of credit above mentioned; that since August 26th, 1922, it has accordingly set off ten thousand five hundred dollars (\$10,500.00) and since the filing of its original answer (filed October 18, 1922) has set off additional amounts so that nothing remains due to the Ellbee Fur Trading Company, Inc.; this defendant also says it had no knowledge or information that the credit or account of Ellbee Fur Trading Company is the credit or account of Loeb Brothers, and it has at all times dealt with and extended credit to Ellbee Fur Trading Company, Inc., without knowledge or information that Loeb Brothers had any interest in Ellbee Fur Trading Company, Inc., other than that of stockholders, and that prior to August 26th, it had no knowledge that complainant set up any claim that the deposit or credit of the Ellbee Fur Trading Company was in fact the deposit or credit of Loeb Brothers, and defendant denies that attachment was made (par. 2 of answer, p. 17) as alleged in the bill of complaint (par. 2 of bill, p. 5).

Answers to similar effect were filed by Loeb Brothers and Ellbee Fur Trading Company, Inc.

The Testimony.

The cause was heard on April 13th and 14th, 1926, by the late Vice-Chancellor BENTLEY.

The testimony, summarized, is as follows:

O'Neill, deputy county clerk, produced the original papers in the attachment suit in the Hudson Circuit, in Body (complainant) against David, Philip and Jacob Loeb (pp. 20-23) resulting in judgment, about May 13, 1925, for thirty-six thousand nine hundred eighty dollars and five cents (\$36,980.05), before Judge Ackerson. Objection was made to the admission of this record, as against The First National Bank (pp. 24-25) because the Ellbee Fur Trading Company, Inc., was a distinct legal entity, against whose effects the attachment could not be levied, and further, because the bill of complaint contains absolutely no allegation concerning knowledge or fraud upon the part of the appellant; and that the only interest the complainant could have in the situation would be (p. 25, ll. 10-26) to the extent of the value of the Loeb's stock, after the payment of the debts of the corporation. Then, another witness, Leach, an agent of R. G. Dun & Co., testified he knew the individual defendants and made inquiries of them and the defendant Ellbee Fur Trading Company, Inc.; that their names appeared on the window at 158 West 26th Street, New York, in early August, 1922. Asked (p. 27, ll. 21 *et seq.*) what the conversation was, he was permitted to answer, against objection, that it was hearsay as to the bank. In overruling the objection, Vice-Chancellor BENTLEY said: "But if I predicate any decision against The First National Bank of Jersey City, on what one or more of these other defendants (the Loeb's) may have said, I would commit a very grievous error" (p. 28, ll. 1-10).

The objection was permitted by the Court to stand against all such testimony (p. 29, ll. 20-30) without reiteration. The Loeb brothers told the witnesses, in effect, that the Ellbee Fur Trading Company, Inc., had succeeded Loeb Brothers, and Loeb Brothers were practically inactive. The offices of both concerns were together (p. 30) and both concerns were in the same business of buying, selling and importing. They said in 1920, 1921 or 1922, in effect, (p. 32, ll. 20-40) that the market was dropping sharply and business had shrunk and was headed for a period of general adjustments. He consulted them about the number of accounts they sold and payments, etc., and they admitted they had lost money both on merchandise and receivables.

The next witness, Jacob R. Wortendyke, assistant cashier of the appellant, called by the complainant testified (pp. 34, *et seq.*): It was upon him the writ of attachment was served. He caused to be noted the attachment on the account of Loeb Brothers, in which was thirty-three dollars and eighty cents (\$33.80) and made a notation on the account of the Ellbee Fur Trading Company, Inc., in which was a balance of twenty-two thousand six hundred and forty dollars and three cents (\$22,640.03) (pp. 34-35). He produces the signature card of the Ellbee Fur Trading Company, Inc., and its resolution controlling the account, which had been lodged with the bank since January 27, 1921 (Exhibits C-2 and C-3, pp. 122-124). Loeb Brothers had an account with The First National Bank of Jersey City for a long time (pp. 38-39), opened on February 9, 1918, when Philip and David were authorized to draw. Their signature card is produced by him, and is Exhibit C-4 (p. 125). He is unable to trace the banks on which deposited checks might have been drawn (p. 40).

As soon as the Ellbee Fur Trading Company, Inc., account was opened on January 27, 1921, it became very active. No money was withdrawn from the account after August 28th, 1922 (when the attachment was served), until October 17, 1922. Then these debts were entered, for drafts met by the American Exchange National Bank, and charged by it against the funds of the appellant.

October 17, 1922	\$10,587.13
October 22, 1922	11,209.68
November 20, 1922	2.91

He further testified that the American Exchange National Bank had issued the letters of credit; and October 17th and October 22nd were the dates when these (outstanding) matured, and which the appellant had to pay. They were accompanied by bills of lading, invoice, consular invoice, and health certificate, insurance certificate; the documents were all delivered by the appellant to the Ellbee Fur Trading Company, Inc. The bills of lading were so endorsed that the appellant controlled them. The draft did not come to The First National Bank of Jersey City; it was charged (p. 42, ll. 10-20) against the Bank, by its New York correspondent, the American Exchange National Bank. The papers were held for delivery for twenty-four hours. Drafts against the letters of credit were presented to the American Exchange National Bank, which then charged the amount of them against The First National Bank of Jersey City which carried a daily balance there. The drafts were payable ninety days after sight and would be accepted by the American Exchange National Bank (pp. 44-45). Thus Mr. Wortendyke had the documentation in his hands several weeks before delivering it to Ellbee Fur Trading Company. He was then asked (pp. 45, ll. 20-30): "Did

you at any time give any notice to Mr. Body (the complainant) or his solicitors or attorneys, that these letters of credit and drafts against the letters of credit, had come in, and that you had merchandise evidencing them, and that nevertheless it was your intention to charge those drafts against this account?" To this question objection was made, but overruled (pp. 45-46). The witness had given no such notice. The letters of credit were issued by the American Exchange National Bank because The First National Bank of Jersey City does not issue them, but guarantees them. The First National Bank from its customer, The Ellbee Fur Trading Company, Inc., took demand notes which were not called until the amount of the letters of credit or draft against the letter of credit was actually charged against The First National Bank of Jersey City by its New York correspondent (pp. 46-47). Witness was then asked (p. 48, ll. 15-20): "Did you before delivering that merchandise or the documents evidencing it, to the Ellbee Fur Trading Company, Inc., demand a bond of indemnity from the Ellbee Fur Trading Company, Inc.?" Objection to the question was overruled, the Vice-Chancellor (BENTLEY) saying (p. 50, ll. 30-40): "I do not know what the law is; I hope to know more about it when the case is closed. I am going to let the question be answered, and deal with it, as I said before, when I come to decide the case." The witness answered that such an agreement had been taken. It was produced and marked Exhibit C-5 (p. 126). It is dated October 13, 1922. The demand notes carried no revenue stamps (p. 52) but were effective, according to the witness. It is his recollection (p. 53, ll. 20-28) that the documents (evidencing shipments, etc.), had been delivered by The First National Bank of Jersey City to the Ellbee Fur Trading Company, Inc.,

before August 28th (the date of the attachment); and later (pp. 99-100) he places the 16th of August as the day on which the documents were delivered to the Ellbee Fur Trading Company, Inc. The First National Bank of Jersey City, had also lent money to Ellbee Fur Trading Company, Inc., on promissory notes and had taken credit information from it (pp. 53-54, Exhibit C-6, p. 126). There is a transcript of the bill book of the Ellbee Fur Trading Company which is Exhibit C-7 (p. 205); it carries a list of notes discounted for the Ellbee Fur Trading Company, Inc., aggregating \$13,145.13, the proceeds of which had been placed into the account of the Ellbee Fur Trading Company, Inc., shortly before the attachment.

On cross examination he states (he was the complainant's witness, pp. 56-57) that the guarantees or requests of The First National Bank of Jersey City accompanied the applications for the letters of credit, and that The First National Bank of Jersey City, for security, took the demand notes (of the Ellbee Fur Trading Company, Inc.). These obligations are all in evidence:

DX-7 (p. 165) dated May 2, 1922 is for	\$6,800.00
DX-10 (p. 173) dated May 15, 1922 is for	9,000.00
DX-13 (p. 177) dated May 15, 1922 is for	3,600.00
DX-16 (p. 181) dated June 19, 1932 is for	15,000.00
DX-19 (p. 185) dated July 10, 1922 is for	14,000.00
DX-22 (p. 189) dated August 14, 1922 is for	3,690.00
Total of Demand Notes	\$52,090.00

The following is a list of the letters of credit:

DX-9 is for	1,700 pounds
DX-12 is for	2,000 pounds
DX-15 is for	800 pounds
DX-18 is for	3,000 pounds
DX-21 is for	2,800 pounds
DX-24 is for	665 pounds

Total number of pounds 10,965

These letters of credit, guaranteed by The First National Bank of Jersey City, were all issued by

the American Exchange National Bank, prior to the attachment suit of the plaintiff (pp. 58-59); and none of them had at that time been paid for by the Ellbee Fur Trading Company, Inc.

Daniel D. Loeb, counsellor-at-law, another witness for the complainant, testified to the incorporation of the Ellbee Fur Trading Company, Inc. He is a cousin of the Loeb. He produces no records of the company, and does not know where they are, nor does he know where his cousins are. He had incorporated Ellbee Fur Trading Company after conversations with Mr. Kellman (who is not a party to this suit) and David and Jacob Loeb. The offices were on 28th Street in New York City, at the same office that the Loeb Brothers had. He left all the books there (p. 61). He has no record as to how he was paid. A copy of the certificate of incorporation is put into evidence by the complainant (p. 62) and is marked Exhibit C-8 (p. 131). The books of the corporation were before Vice-Chancellor FIELDER on the motion to dissolve the injunction in the present case (p. 62).

James J. Franc, a counsellor-at-law of New York, was another witness for the complainant. He testified that after the judgment in the attachment suit in the Hudson Circuit, he reduced to judgment in New York the judgment obtained against the Loeb in New Jersey. His firm made efforts there to get the books of the Ellbee Fur Trading Company and of Loeb Brothers. He produces original orders made in the Supreme Court, in New York, in the matter of supplementary proceedings in attachment of John E. Body, judgment creditor against David Loeb, Philip Loeb and Jacob Loeb, and original subpoena dated August 25, 1925, for the production of the various books, papers and records of the Ellbee Fur Trading Company, Inc., and Loeb Brothers. He also produces the steno-

graphic record of the examination of David Loeb and Jacob Loeb, pursuant to the orders, in the suit against them in New York, to which suit, of course, The First National Bank of Jersey City was not a party (pp. 66-67). He testifies to contumacious conduct of Jacob Loeb, which is still under investigation in New York (p. 67); and produces a copy of affidavit of Jacob Loeb, made in the New York suit of Body against him and his brothers, which Vice-Chancellor admits as a statement against interest (p. 69, ll. 30) and as material (p. 69, ll. 1-10) as between Loeb Brothers and Ellbee Fur Trading Company, Inc. The affidavit is admitted (p. 69) and is Exhibit C-9 (p. 134). It is a long *ex parte* recital in a matter in which the present appellant, The First National Bank of Jersey City, was in no wise concerned. The "relevant facts" from the point of the affiant, Loeb, as to which the present appellant is in no wise bound, as it was not a party (nor could it have been) in the suit in which the affidavit was made, are set forth (pp. 138-146). So far as the affidavit deals with any transfer of property by Loeb Brothers to Ellbee Fur Trading Company, Inc., it is silent, unless the following excerpts may be said to show a transfer of assets: (p. 140, ll. 20-24) "The firm (Loeb Brothers) continued a nominal existence buying merchandise in its own name, but really for the account of the Ellbee Fur Trading Company"; (p. 140, ll. 25-30) "During that year (1922) the firm of Loeb Brothers continued its existence in the manner hereinbefore stated, engaging in business sporadically by buying occasionally as an aid to the Ellbee Fur Trading Company." As to the interest of any of the Loeb Brothers in the Ellbee Fur Trading Company, Inc., the affiant swears (p. 139, l. 33 to p. 140, l. 15): "In the early part of 1921, however, the firm (Loeb Brothers) was in difficulties and it was

decided the firm should go out of business and that a corporation should be organized to engage in the same line of business with my two brothers and myself as active men and some outstanding furnishing capital. The Ellbee Fur Trading Company, Inc., was thereupon organized, the persons interested therein being besides my two brothers and myself, a man by the name of D. Kellman, a Miss Mollie Flynn and a Miss Lena Yahre, a sister-in-law of my brother David. I had a few shares in the said corporation, and the rest of the stock was owned by the outsiders. To the best of my knowledge, neither my brother David, nor my brother Philip, held any shares in the stock of the corporation." * * * He then (pp. 140-141) adverts to the difficulties of Ellbee Fur Trading Company, Inc., which was wiped out at the end of 1923 (more than a year after the instant suit was begun) by the failure of the firm of N. Witkin. He gives the details of the formation of another new corporation, in which he has invested Two thousand five hundred dollars (\$2,500.00). He points out (p. 142) that the complainant's claim for recovery in the attachment suit (the basis of the present suit) was the failure of Loeb Brothers to accept merchandise from the complainant and that both Loeb Brothers and Ellbee Fur Trading Company, Inc., paid all their merchandise creditors, except the present complainant, but that the State Bank (a New York bank) claims a deficiency upon a certain loan to Loeb Brothers secured by a deposit of certain furs. This affidavit, in the supplementary proceedings against the Loeb Brothers, was made in New York on September 26, 1925, more than three years after the present action was begun. The witness, Mr. Franc, the New York attorney of complainant, was then (p. 73) withdrawn, and his stenographer, Miss Wollock, was

called by the complainant to verify the testimony given in the discovery proceedings brought in New York against the Loeb Brothers (p. 74). She reads the testimony of David Loeb (pp. 76 *et. seq.*) which, of course, is again all hearsay, so far as The First National Bank of Jersey City is concerned, and of no apparent competence. The purport of the testimony is (p. 77) that the Loeb Brothers had been sued by the State Bank in New York, that the Loeb Brothers (p. 77, ll. 20-25) had no money and that "the State Bank took everything away from us and they simply threw us out." * * * "They took everything away from us" (p. 77, ll. 35-40) and "They knew we had no money." Then others, relatives, organized the Ellbee Fur Trading Company, Inc., (pp. 77-78) so "that we should remain in business to take care of the business, but the money was given by these three people." Further testimony (in the same discovery proceedings) as to the capital stock of the Ellbee Fur Trading Company, Inc., are also read into the record (pp. 80-85); and then Miss Wollock reads the further testimony, taken in the same supplementary proceedings, to the effect that the Ellbee Fur Trading Company, Inc., commenced business with a new set of books (p. 86) that there was no claim pending against Loeb Brothers (p. 87) when the Ellbee Fur Trading Company, Inc., was organized, except that of the State Bank, with which the individual Loeb's apparently settled in full (p. 87, ll. 25-35) (see also Exhibit C-10, p. 150), by an agreement dated May 23rd, 1921, as to which, however, there was later an apparent breach by the Loeb's (see complaint in a New York suit, p. 147, brought by the State Bank against them).

On her cross examination by the appellant, Miss Wollock was confronted with still further testimony of Jacob Loeb (pp. 88-90) given in the same

supplementary proceedings. Of course, it is not competent, in the present suit against the appellant, who, however, was entitled to bring it out, in view of the fact that the complainant had put in only that part of the hearsay testimony he thought necessary. It develops (pp. 88-91 and Exhibit C-10, p. 150) that after the agreement with the State Bank, the Loeb's had no assets, they "were cleaned out and had no merchandise left."

Mr. Wortendyke, cashier of the appellant, was then recalled by the complainant and explains (p. 91, *et seq.*, particularly 98-99) that a balance of approximately twelve thousand dollars (\$12,000.00) was collected by The First National Bank of Jersey City upon notes (pp. 97-98) that had been received in payment of various bills of lading, which notes were made or endorsed to the Ellbee Fur Trading Company, Inc., and then deposited with The First National Bank of Jersey City. These notes and their maturities appear in Exhibit C-11 (p. 206). No cash was taken for these notes (p. 98, ll. 20 to 30), the bank took them in payment of the letters of credit, and the money was used (p. 98, l. 30) for those (letters of credit), which had already been guaranteed. When the attachment was levied, the bank had no shipping documents, such as bills of lading, in its hands. The various items (notes listed in Exhibit C-11) did not go through the Ellbee Fur Trading Company, Inc., account. They were accepted in payment of bills of lading or drafts (pp. 100-101). Mr. Wortendyke's examination is continued at pages 101-102. He says (p. 103) his bank (the appellant) in evidence of the customer's obligation always took the customer's demand note, by reason of the appellant becoming obligated to the American Exchange Bank. He is examined and gives the details of the "transaction," to use the words of Vice-Chancellor BENTLEY (p. 106, ll. 3 to 7), "whereby the bank had placed

its credit on behalf of this depositor (Ellbee Fur Trading Company, Inc.), and was taking its security (the demand notes). They might have taken, if fortunate enough, a mortgage merely as a pledge." The bank had nothing else but the demand notes (p. 106, ll. 15 to 21). No money came into the account of the Ellbee Fur Trading Company, Inc., after the attachment (p. 110, ll. 12 to 14), for the bank to protect itself, put into its Cashier's Account all notes of the customers of Ellbee Fur Trading Company, Inc., which thereafter came into its hands (Exhibit C-11), so that the gross amount of the letters of credit issued by the American Exchange National Bank, which were something in excess of \$52,000.00, were finally met and paid by Ellbee Fur Trading Company, Inc.

Mr. Wortendyke's further testimony in this regard is that after the appellant bank applied what it needed towards paying itself, it gave a check back to the Ellbee Fur Trading Company, Inc., for less than \$1,000.00, about the 15th day of December, 1922, as the last draft matured in that month (Testimony of Wortendyke, p. 98, l. 36; p. 99, ll. 1 and 2, and p. 111, ll. 20 to 25).

The appellant produced no witnesses, but relied upon Mr. Wortendyke's testimony and the documentation.

The opinions of the late Vice-Chancellor BENTLEY and Vice-Chancellor BIGELOW are found on pages 193 and 195, respectively. That of the former is simply an "outline," and he indicates a full expression if an appeal is taken. On the facts, however, he had concluded that there was no proof to implicate the appellant. He states that the Ellbee Fur Trading Company is a distinct creation, but holds that its purpose was that of "taking title to the property of individual defendants, so as to conceal it from their creditors." He thinks the important consideration to determine is the priority

between the complainant's attachment lien and the so-called banker's lien of the appellant. Apparently he does not consider that the demand notes were due when made, for he says: "The claim of The First National Bank did not mature at the giving of the demand notes." He adds, "The property in the name of the Ellbee Co. was the property of the Loeb in the eyes of this court."

Vice-Chancellor BIGELOW (pp. 196-197) adopts Vice-Chancellor BENTLEY's decision without analysis or comment, and confines his own decision to a consideration of the appellant's contention that since the complainant is an alien creditor and Loeb Brothers and Ellbee Fur Trading Company are all non-residents, the public policy of New Jersey should permit the appellant, a domestic corporation, to appropriate to the payment of its own debt, the moneys sought to be attached.

The appellant makes the following points:

POINT I.

The sheriff of Hudson County was not authorized under the writ of attachment against Loeb Brothers to attach the moneys in the possession of the appellant in the account of the Ellbee Fur Trading Company, because those moneys were not the property of the Loeb Brothers.

POINT II.

The appellant may set off against the deposit, the amount of the demand notes of the Ellbee Fur Trading Company.

POINT III.

Respondent, a non-resident and alien, should not be permitted to seize property within this jurisdiction, to the detriment of a resident creditor.

POINT I.

The sheriff of Hudson County was not authorized under the writ of attachment against Loeb Brothers to attach the moneys in the possession of the appellant in the account of the Ellbee Fur Trading Company, because those moneys were not the property of the Loeb Brothers.

It will be noted that no testimony has been adduced in this case that evidences in the slightest degree that the moneys in the account of the Ellbee Fur Trading Company were transferred to it by any of the Loeb Brothers. It is repeatedly charged and assumed, but there is no proof. We have been at pains to epitomize the whole testimony, as submitted to Vice-Chancellor BENTLEY, and it is quite silent in this regard.

The only assets of Loeb Brothers mentioned in the course of the testimony, and then only by hearsay evidence so far as the present appellant is concerned, are mentioned in the assignment by Loeb Brothers to the State Bank (p. 150) made on May 23, 1921, whereby they surrendered their equities in merchandise and life insurance policies. No witness was called at the hearing to prove that after the incorporation of the Ellbee Fur Trading Company, on January 7, 1921, any of the Loeb Brothers transferred to it any money or other property, except that it may be inferred from the hearsay affidavit of Jacob Loeb (p. 140, ll. 10 to 20), that he purchased a few shares of stock in the Ellbee Fur Trading Company, and that in 1922 the firm of Loeb Brothers engaged in business sporadically by buying occasionally, merely as an aid to the Ellbee Fur Trading Company.

In the absence of proof of a fraudulent transfer of assets by Loeb Brothers to the Ellbee Fur Trading Company and an actual tracing of those assets into the account sought to be attached, we are unable to see any support for a finding that the moneys in this account were in fact the moneys of Loeb Brothers. This was the charge in the Bill of Complaint (p. 7, par. 7), but no proof was adduced that this money had its origin with the Loeb Brothers or any of them, or that they or any one of them at any time had had it in their possession. We had supposed it was always essential, in a suit of this nature, for a complainant to demonstrate that there is a property of the judgment debtor which has been fraudulently transferred or concealed, and not only that the property sought to be reached belongs to the judgment debtor, but that there is a secret trust or reservation for his benefit.

In both of the Vice-Chancellors' findings, these elements are not present, for Vice-Chancellor BENTLEY states clearly (p. 193) "there is no proof to implicate the defendant bank," and Vice-Chancellor BIGELOW carries this finding into a recital in the decree (p. 202, ll. 21-29) in these words: "The defendant, The First National Bank of Jersey City, was not guilty of any fraud or collusion with any other defendant in this cause, * * * and had no knowledge of any of the matters and things alleged in the Bill of Complaint prior to the levying of the attachment and the filing of the Bill herein."

From the present case, therefore, we here distinguish the case of *Terhune v. Hackensack Savings Bank*, decided by this Court, *per curiam*, without opinion at 45 Equity, page 344. In that case Vice-Chancellor (then Advisory Master) PITNEY wrote the opinion in the Court of Chancery, found at 45 Equity, page 565. In the *Terhune* case assets

in kind were involved and traced, a different situation from that presented in the present case.

We call attention, moreover, to the case of *Sullivan v. International Baking Co.*, 60 Equity, page 80. That, too, was a creditor's bill, and the Court, in imposing a trust on the assets transferred in kind to the corporation, paid attention to the rights of innocent third parties, for in the last paragraph of the opinion Vice-Chancellor PITNEY said:

"No new rights were acquired by any person by the transfer to the corporation, and so far as appeared at the hearing, by any of its business operations during its short life—two months. It collected some of the debts due to the corporation, bought its supplies in cash and incurred no new indebtedness."

He thus recognized clearly the possible rights of third parties who deal with corporations.

Since the assets of a corporation constitute a trust fund for the benefit of its creditors and stockholders, the appellant, an entirely innocent third party in the present situation could deal with the Ellbee Fur Trading Company, as a distinct entity. Having extended credit to the corporation, it relies upon the established rules of law that make the assets of corporation available for creditors.

We have been unable to find any cases in which any Court has held property to be that of a judgment debtor unless proofs were adduced to show that he was once the legal owner of such property. Since such proof is lacking in this case, the complainant is remitted to the theory that the Ellbee Fur Trading Company was really Loeb Brothers, the defendant in the attachment suit; that these Loeb Brothers, after having become heavily indebted to the complainant, conceived the scheme of defrauding him by creating the barrier of a technically separate entity, the Ellbee Fur Trading

Co., which was, in the words of the prayer of the Bill of Complaint (p. 8, par. 5), "a mere corporate shell in which the defendant, Loeb Brothers, have transferred and concealed all of their assets, etc."

This theory of the complainant naturally brings us to a consideration of the case of *Jackson v. Hooper*, decided by this Court in 1909, in 76 Eq. 592, in which the opinion was delivered by the late Judge DILL. There this Court unanimously reversed the decree of Vice-Chancellor HOWELL, reported in the same volume at page 185. In that case, the complainant sought to enjoin the defendant, and attempted to spell out a copartnership between himself and the defendant, regardless of the fact that their business had been incorporated in New York, Illinois and in England. This was upon the theory that the corporate entities constituted, between the parties, a joint adventure, which took upon itself the characteristics of a copartnership and should be regulated by the law of copartnership.

At page 598 Judge DILL said:

"It is claimed, however, that these owners of all the stock were really copartners, doing business in corporate form for their own convenience, and that a court of equity has the power to control the property and affairs of the companies even to the extent of eliminating the corporate functions and powers as mere incidents and wholly disregarding the substantive law governing the creation, supervision and dissolution of corporations. We cannot subscribe to any such doctrine."

And on page 599, Judge DILL, further said:

"It is fundamental that, no matter how the shares of stock are held, the corporation itself is an entity wholly separate and distinct from the individuals who compose and control it.

* * *

"The complainant and the defendant, though owning the entire capital stock of the two corporations, are not, as expressed by Chief Justice WAITE in the leading case of Pullman Palace Car Co. v. Missouri Pacific Railway Co., 115 U. W. 587, 'the corporation, in the sense of that term as applied to the management of the corporate business or the control of the corporate property.'

"The law never contemplated that persons engaged in business as partners may incorporate, with intent to obtain the advantages and immunities of a corporate form and then, Proteus-like, become at will a copartnership or a corporation, as the exigencies or purposes of their joint enterprises may from time to time require.

"The policy of the law is to the contrary. If the parties have the rights of partners they have the duties and liabilities imposed by law and are responsible *in solido* to all creditors.

"If they adopt the corporate form, with the corporate shield extended over them to protect them against personal liability, they cease to be partners and have only the rights, duties and obligations of stockholders. They cannot be partners *inter sese* and a corporation as to the rest of the world.

"Furthermore, upon grounds of public policy, the doctrine contended for cannot be tolerated as it renders nugatory and void the authority of the legislature—a co-ordinate branch of the government—established by the Constitution in respect to the creation, supervision and winding up of corporations.

"These views are amply sustained by abundant authority.

"'A corporation is a legal person just as much as an individual,' said the Court in Sheffield, etc. v. Building Society, 22 Q. B. D. 476; and in Society v. Abbott, 2 Beav. 567, Lord Langdale, master of rolls, held that, as in this case, great confusion arises by failure to distinguish the body corporate from the

individuals who constitute, 'not the corporations, but all the members of the corporation.' ”

Judge DILL said further (p. 600) :

“The doctrine repeatedly urged by the complainant and adopted by the Vice-Chancellor, viz., that ‘the English and Illinois corporations were, respectively, agencies by which they (Jackson and Hooper) accomplished their results,’ was expressly repudiated by the House of Lords in *Salomon v. Saloman, Limited*, 45 Week. Rep. 193; L. R. App. Cas. (1897) 22, where Lord Halsbury met this argument, saying: ‘I will, for the sake of argument, assume the proposition that the Court of Appeals lays down, that the formation of the company was a mere scheme to enable Salomon to carry on business in the name of the company. * * * Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Salomon. If it was not, there was no person and no thing to be an agent at all, and it is impossible to say at the same time that there is and there is not a company.’

“And Lord Macnaghten thus concurred:

“‘The company is at law a different person altogether from the subscribers to the memorandum, and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them.’ ”

We add to these excerpts from the decision of Judge DILL in *Jackson v. Hooper, ubi supra*, further excerpts from the decisions of the House of Lords in *Salomon v. Salomon* above. We print them at length, because the *Weekly Reporter* is not uniformly available. Thus, Lord HALSBURY (*XLV Weekly Reporter*, 194) said:

“* * * it seems to me impossible to dispute that once the company is legally incorporated, it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are. * * * Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Salomon. If it was not, there was no person and no thing to be an agent at all; and it is impossible to say at the same time that there is and there is not, a company.”

Lord HALSBURY said further (*ibid.*):

“The learned judges (in the lower Court) appear to me not to have been absolutely certain in their own minds whether to treat the company as a real thing or not. If it was a real thing, if it had a legal existence, and if, consequently the law attributed to it certain rights and liabilities in its constitution as a company, it appears to me to follow as a consequence, that it is impossible to deny the validity of the transactions into which it has entered.”

He said further (*ibid.*, p. 195):

“The truth is that the learned judges have never allowed in their own minds the proposition that the company has a real existence. They have been struck by what they have considered the inexpediency of permitting one man to be, in influence and authority, the whole company, and assuming that such a thing could not have been intended by the Legislature, they have sought various grounds upon which they might insert into the act (concerning corporations) some prohibition of such a result. I say, with the utmost deference to the learned judges, that we have nothing to do with the question, whether such a

result be right or wrong, politic or unpolitic, if this company has been duly constituted by law. Whatever may be the motives of those who constituted it, I must decline to insert into the Act of Parliament limitations which are not to be found there."

Lord WATSON said (*ibid.*, p. 196) :

"He, (the judge below) appears to have proceeded mainly upon the ground that the appellant was in truth the company, the other members being either his trustees or mere 'dummies,' and consequently that the appellant carried on what was truly his own business under cover of the name of the company, which was nothing more than an *alias* for Aron Salomon."

Lord WATSON said further (*ibid.*, p. 196), speaking of the rationale of the decisions in the lower courts:

"Lindley, L. J., after observing 'that the incorporation of the company cannot be disputed,' refers to the scheme for the formation of the company, and says (1895, 2 *Ch.* 337), 'the object of the whole arrangement is to do the very thing which the Legislature intended not to be done'; and he adds that 'Mr. Salomon's scheme is a device to defraud creditors.'"

And Lord WATSON also said (XLV Weekly Reporter, p. 196) :

"He" (Vaughan Williams, J.) "appears to have proceeded mainly upon the ground that the appellant was in truth the company, the other members being either his trustees or mere 'dummies,' and consequently that the appellant carried on what was truly his own business under cover of the name of the company, which was nothing more than an *alias* for Aron Salomon."

Then Lord WATSON said (XLV Weekly Reporter, p. 197) :

“I am unable to comprehend how a company, which has been formed contrary to the true intent and meaning of a statute, and (in the language of Lindley, L. J.) does the very thing which the Legislature intended not to be done, can yet be held to have been legally incorporated in terms of the statute. ‘Intention of the Legislature’ is a common, but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it. In a court of law or equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication. Accordingly, if the words ‘intent and meaning,’ as they occur in the finding of the Appeal Court, are used in their proper legal sense, it follows, in my opinion, that the company has not been well incorporated; that, there being no legal corporation, there can be no liquidation under the Companies Acts, and that the counter-claim preferred by its liquidator must fail.”

Commenting upon the statutory requirements regulating the English companies, Lord WATSON thus continued: (XLV Weekly Reporter, p. 197) :

“The first of these enactments does not require that the persons subscribing shall not be related to each other, and the second plainly imports that the holding of a single share affords a sufficient qualification for membership; and I can find no other rule laid down or even suggested in the Act. * * * At the date of registration all the requirements of the Act had been complied with; and, as matters then stood, there does not appear to have been any room for the pleas now advanced by the liquidator.” * * *

Lord HERSCHELL succinctly presented the whole matter (XLV Weekly Reporter, p. 198) :

“The learned judges in the Court of Appeal dissented from the view taken by Vaughan Williams, J., that the company was to be regarded as the agent of the appellant. They considered the relation between them to be that of trustee and *cestui que trust*, but this difference of view, of course, did not affect the conclusion that the right to the indemnity claimed had been established. It is to be observed that both courts treated the company as a legal entity distinct from Salomon and the then members who composed it, and therefore as a validly-constituted corporation. This is, indeed, necessarily involved in the judgment which declared that the company was entitled to certain rights as against Salomon. Under these circumstances I am at a loss to understand what is meant by saying that A. Salomon & Co. (Limited) is but an *alias* for A. Salomon. It is not another name for the same person; the company is *ex hypothesi* a distinct legal *persona*. As little am I able to adopt the view that the company was the agent of Salomon to carry on his business for him. In a popular sense a company may in every case be said to carry on business for and on behalf of its shareholders, but this certainly does not in point of law constitute the relation of principal and agent between them or render the shareholders liable to indemnify the company against the debts which it incurs. Here, it is true, Salomon owned all the shares except six, so that if the business were profitable he would be entitled, substantially, to the whole of the profits.

“The other shareholders, too, are said to have been ‘dummies,’ the nominees of Salomon. But when once it is conceded that they were individual members of the company distinct from Salomon, and sufficiently so to bring into existence in conjunction with him a validly-constituted corporation, I am unable

to see how the facts to which I have just referred can affect the legal position of the company, or give it rights as against its members which it would not otherwise possess. The Court of Appeal based their judgment on the proposition that the formation of the company, and all that followed it, was a mere scheme to enable the appellant to carry on business in the name of the company, with limited liability, contrary to the true intent and meaning of the Companies Act, 1862. The conclusion which they drew from this premiss was, that the company was a trustee and Salomon their *cestui que trust*. I cannot think that the conclusion follows even if the premiss be sound. It seems to me that the logical result would be that the company had not been validly constituted, and therefore had no legal existence. But, apart from this, it is necessary to examine the proposition on which the Court have rested their judgment, as its effect would be far reaching. Many industrial and banking concerns of the highest standing and credit have, in recent years, been, to use a common expression, converted into joint-stock companies, and often into what are called "private" companies, where the whole of the shares are held by the former partners. It appears to me that all these might be pronounced "schemes to enable" them "to carry on business in the name of the company, with limited liability," in the very sense in which those words are used in the judgment of the Court of Appeal. The profits of the concern carried on by the company will go to the persons whose business it was before the transfer, and in the same proportions as before, the only difference being that the liability of those who take the profits will no longer be unlimited. The very object of the creation of the company, and the transfer to it of the business, is that, whereas the liability of the partners for debts incurred was without limit, the liability of the members for the debts incurred by the company shall be limited. In no other

respect is it intended that there shall be any difference; the conduct of the business and the division of the profits are intended to be the same as before. If the judgment of the Court of Appeal be pushed to its logical conclusion all these companies must, I think, be held to be trustees for the partners who transferred the business to them, and those partners must be declared liable, without limit, to discharge the debts of the company. For this is the effect of the judgment as regards the respondent company. The position of the members of a company is just the same whether they are declared liable to pay the debts incurred by the company, or by way of indemnity to furnish the company with the means of paying them. I do not think the learned judges in the court below have contemplated the application of their judgment to such cases as I have been considering, but I can see no solid distinction between those cases and the present one. It is said that the respondent company is a "one-man" company, and that in this respect it differs from such companies as those to which I have alluded. But it has often happened that a business transferred to a joint stock company has been the property of three or four persons only, and that the other subscribers of the memorandum have been only clerks or other persons who possess little or no interest in the concern. I am unable to see how it can be lawful for three or four or six persons to form a company for the purpose of employing their capital in trading, with the benefit of limited liability, and not for one person to do so, provided, in each case, the requirements of the statute have been complied with, and the company has been validly constituted. How does it concern the creditor whether the capital of the company is owned by seven persons in equal shares, with the right to an equal share of the profits, or whether it is almost entirely owned by one person who practically takes the whole of the profits? The creditor has notice

that he is dealing with a company the liability of the members of which is limited, and the register of shareholders informs him how the shares are held, and that they are substantially in the hands of one person, if this be the fact. The creditors in the present case gave credit to and contracted with the limited company; but the effect of the decision is to give them the benefit, as regards one of the shareholders, of unlimited liability.

“I have said that the liability of persons carrying on business can only be limited provided the requirements of the statute be complied with, and this leads naturally to the inquiry, What are those requirements? The Court of Appeal has declared that the formation of the respondent company, and the agreement to take over the business of the appellant, was a scheme ‘contrary to the true intent and meaning of the Companies Act.’ I know of no means of ascertaining what is the intent and meaning of the Companies Act except by examining its provisions and finding what regulations it has imposed as a condition of trading with limited liability. The memorandum must state the amount of the capital of the company and the number of shares into which it is divided, and no subscriber is to take less than one share. The shares, may, however, be of as small a nominal value as those who form the company please; the statute prescribes no *minimum*, and though there must be seven shareholders, it is enough if each of them holds one share, however small its denomination. The Legislature therefore clearly sanctions a scheme by which all the shares, except six, are owned by a single individual, and these six are of a value little more than nominal. It was said that in the present case the six shareholders other than the appellant were mere dummies, his nominees, and held their shares in trust for him. I will assume that this was so. In my opinion it makes no difference. The statute forbids the entry in the register of any trust, and it

certainly contains no enactment that each of the seven persons subscribing the memorandum must be beneficially entitled to the share or shares for which he subscribes. The persons who subscribe the memorandum or who have agreed to become members of the company, and whose names are on the register, are alone regarded as, and in fact are, the shareholders. They are subject to all the liability which attaches to the holding of the share. They can be compelled to make any payment which the ownership of a share involves. Whether they are beneficial owners or bare trustees is a matter with which neither the company nor creditors have anything to do; it concerns only them and their *cestuis que trustent* if they have any. If, then, in the present case all the requirements of the statute were complied with, and a company was effectually constituted, and this is the hypothesis of the judgment appealed from, what warrant is there for saying that what was done was contrary to the true intent and meaning of the Companies Act?"

LORD MACNAGHTEN thus stated the matter (*XLV Weekly Reporter*, p. 200):

"The order of VAUGHAN WILLIAMS, J., appears to me to be founded on a misconception of the scope and effect of the Companies Act, 1862. In order to form a company limited by shares, the Act requires (section 6) that a memorandum of association should be signed by seven persons, who are each to take one share at least. If those conditions are complied with, what can it matter whether the signatories are relations or strangers? There is nothing in the Act requiring that the subscribers to the memorandum should be independent or unconnected, or that they should take a substantial interest in the undertaking, or that they should have a mind and will of their own, as one of the learned lords justices seems to think, or that there should be any-

thing like a balance of power in the constitution of the company. In almost every company that is formed the statutory number is eked out by clerks or friends, who sign their names at the request of the promoter or promoters without intending to take any further part or interest in the matter. When the memorandum is duly signed and registered, though there is only seven shares taken, the subscribers are a body corporate, 'capable forthwith,' to use the words of the enactment, 'of exercising all the functions of an incorporated company.' Those are strong words. The company attains maturity on its birth. There is no period of minority; no interval of incapacity. I cannot understand how a body corporate, thus made 'capable' by statute, can lose its individuality by issuing the bulk of its capital to one person, whether he be a subscriber to the memorandum or not. The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act. That is, I think, the declared intention of the enactment. If the view of the learned judge were sound, it would follow that no common law partnership could register as a company limited by shares without remaining subject to unlimited liability.

"Mr. Salomon appealed. But his appeal was dismissed with costs, though the appellate court did not entirely accept the view of the court below. The decision of the Court of Appeal proceeds on a declaration of opinion embodied in their Order.

"I must say I have great difficulty in understanding this declaration. If it only means that Mr. Salomon availed himself to the full of

the advantages offered by the Act of 1862, what is there wrong in that? Leave out the words 'contrary to the true intent and meaning of the Companies Act, 1862,' and bear in mind that 'the creditors of the company' are not the creditors of Mr. Salomon, and the declaration is perfectly innocent: it has no sting in it. In an early case, which, in some of its aspects, is not unlike the present, the owner of a colliery (to quote the language of GIFFORD, L. J., in the Court of Appeal) went on working the colliery, not very successfully, and then determined to form a limited company in order to avoid incurring further personal liability. 'It was,' adds the L. J., 'the policy of the Companies Acts to enable this to be done.' And so he reversed the decision of MALINS, V. C., who—after expressing an opinion that if the laws of the country sanctioned such a proceeding they were 'in a most lamentable state'—had fixed the former owners with liability for the amount of the fully paid-up shares they took in exchange for their property (Baglan Hall Colliery Co., 18 W. R. 499, L. R. 5 Ch. 346).

"Among the principal reasons which induce persons to form private companies, as is stated very clearly by Mr. Palmer in his treatise on the subject, are the desire to avoid the risk of bankruptcy, and the increased facility afforded for borrowing money. By means of a private company, as Mr. Palmer observes, a trade can be carried on with limited liability, and without exposing the persons interested in it, in the event of failure, to the harsh provisions of the bankruptcy law. A company, too, can raise money on debentures, which an ordinary trader cannot do; any member of a company acting in good faith is as much entitled to take and hold the company's debentures as any outside creditor. Every creditor is entitled to get and to hold the best security the law allows him to take.

* * * * *

"It has become the fashion to call companies of this class "one-man companies." That is a

taking of a nickname, but it does not help one much in the way of argument. If it is intended to convey the meaning that a company which is under the absolute control of one person is not a company legally incorporated, although the requirements of the Act of 1862 may have been complied with, it is inaccurate and misleading; if it merely means that there is a predominant partner possessing an overwhelming influence and entitled practically to the whole of the profits, there is nothing in that that I can see, contrary to the true intention of the Act of 1862, or against public policy, or detrimental to the interests of creditors. If the shares are fully paid up it cannot matter whether they are in the hands of one or many. If the shares are not fully paid it is as easy to gauge the solvency of an individual as to estimate the financial ability of a crowd."

Lord DAVEY's view of the matter (*XLV Weekly Reporter*, p. 201) is thus stated:

"It was not argued in this case that there was no association of seven persons to be registered, and the registration therefore effected nothing, or that the so-called company was a sham, and might be disregarded. And, indeed, it would have been difficult for the learned counsel for the respondents, appearing as they did, at your lordships' bar for the company who had been permitted to litigate in the courts below as actors (on their counter-claim), to contend that their clients were non-existent. I do not say that such an argument ought to or would prevail; I only observe that, having regard to the decisions, it is not certain that section 18, making the certificate of the register conclusive evidence that all the requirements of the Act in respect of registration had been complied with, would be an answer to it.

"We start, then, with the assumption that the respondents have a corporate existence with power to sue and be sued, to incur debts

and be wound up, and to act as agents or as trustees, and I suppose, therefore, to hold property. Both the courts below have, however, held that the appellant is liable to indemnify the company against all its debts and liabilities. VAUGHAN WILLIAMS, J., held that the company was an *alias* for the appellant, who carried on his business through the company as his agent; and that he was bound to indemnify his own agent, and he arrived at this conclusion on the ground that the other members of the company had no substantial interest in it, and the business in substance was the appellant's. The Court of Appeal thought the relation of the company to the appellant was that of trustee to *cestui que trust*. The ground on which the learned judges seemed to have chiefly relied was that it was an attempt by an individual to carry on his business with limited liability, which was forbidden by the Act and unlawful. I observe, in passing, that nothing turns upon there being only one person interested. The argument would have been just as good if there had been six members holding the bulk of the shares and one member with a very small interest, say one share. I am at a loss to see how in either view taken in the courts below the conclusion follows from the premises, or in what way the company became an agent or trustee for the appellant, except in the sense in which every company may loosely and inaccurately be said to be an agent for earning profits for its members or a trustee of its profits for the members amongst whom they are to be divided. There was certainly no express trust for the appellant, and an implied or constructive trust can only be raised by virtue of some equity. I took the liberty of asking counsel what the equity was, but got no answer. By an *alias* is usually understood a second name for one individual; but here, as one of your lordships has already observed, we have, *ex hypothesi*, a duly formed legal *persona*, with corporate attributes and capable of incurring legal liabilities.

Nor do I think it legitimate to inquire whether the interest of any member is substantial when the Act has declared that no member need hold more than one share, and has not prescribed any minimum amount of a share. If, as was said in the Court of Appeal, the company was formed for an unlawful purpose, or in order to achieve an object not permitted by the provisions of the Act, the appropriate remedy, if any, would seem to be to set aside the certificate of incorporation, or to treat the company as a nullity, or, if the appellant has committed a fraud or misdemeanour (which I do not think he has), he may be proceeded against civilly or criminally; but how either of those states of circumstances creates the relation of *cestui que* trust and trustee, or principal and agent, between the appellant and respondents, is not apparent to my understanding."

In the instant case, the complainant and both Vice-Chancellors, as well as the appellant bank, regarded the Ellbee Fur Trading Company as a legal entity duly incorporated, as the complainant proved (see the certificate of incorporation, p. 131), by the State of New York, whose records under the Federal Constitution are entitled to full faith and credit. The complainant may not ask the Courts of New Jersey in any proceedings that we may imagine, to hold that a corporation formed in the State of New York should be adjudged not to exist, and the Bill of Complaint (p. 6, paragraph 5) states that the Ellbee Fur Trading Company was formed under the laws of the State of New York. Once it be conceded there is such a legal entity, the case of the complainant is at an end, unless the complainant demonstrates that the attached account was in fact the property of the individual Loebes, and we repeat that the complainant has adduced no proof in this regard. Consequently, the

complainant gained nothing by attempting to levy on the moneys deposited in the bank, standing in the name of Ellbee Fur Trading Company (p. 21, ll. 30 to 40).

As side-lights upon this point, we call the attention of the Court to these facts: (1) the decisions under the Attachment Act of 1901 are to the effect that so far as personal property is concerned, a lien is effected only by actual levy (Attachment Act, Section 7, 1 Compiled Statutes, p. 137; cases there cited), and (2) as against the appellant the Loeb Brothers could not maintain that this money on deposit with the appellant was theirs, and not that of the Ellbee Fur Trading Company.

POINT II.

The appellant may set off against the deposit, the amount of the demand notes of the Ellbee Fur Trading Company.

The appellant was entitled to set-off, against the moneys on deposit, the amount of the demand notes of the Ellbee Fur Trading Company. As to this aspect of the case, Vice-Chancellor BENTLEY would have held for the appellant Bank, if it had the right of set-off when the attachment was made, and he thought the set-off might have been accelerated by the "supervening insolvency of the depositor." We are at a loss to comprehend the basis of his reasoning, and that of Vice-Chancellor BIGELOW, who advised the decree, for if these moneys on deposit were in fact the moneys of the Loeb Brothers, the appellant Bank would have no right to them as a creditor of the Ellbee Fur Trading Company, for if a debtor delivers to his creditors property that does not in fact belong to the debtor, but is the property of a stranger, the stranger, unless he is legally or equitably estopped, has the right to reclaim the property. In this case, the bank has no legal set-off against Loeb Brothers, who are the debtors of the complainant. ~~Evidently, both Vice Chancellors thought, however, in view of the fact that the appellant was without fault, it should have some chance for its white marble, but not much of a chance.~~ The appellant asserted against the Ellbee Fur Trading Company, a right of set-off, which, we contend, was created immediately upon the delivery to the appellant of the demand notes (Exhibits DX-7, p. 165; DX-10, p. 173; DX-13, p. 177; DX-16, p. 181; DX-19, p. 185, and DX-22, p. 189), for this Court has decided that the relation of bank and depositor is that of debtor

and creditor, and that a demand note is due immediately upon delivery.

DeRaimes v. DeRaimes, 70 N. J. L., page 15 (Sup. Ct.), affirmed 71 N. J. L., at page 680, by the Court of Errors and Appeals.

In that case suit was brought upon a promissory note, dated May 22, 1896, payable on demand. Action was taken June, 1902, more than six years after its date. Defendant pleaded the Statute of Limitations.

The Supreme Court (Justices GUMMERE, DIXON, HENDRICKSON and PITNEY) said (Chief-Justice GUMMERE, writing the opinion), (70 N. J. Law, page 81):

“We have not overlooked the contention of the plaintiff that as the note sued upon bore interest, it did not become due until actual demand made, but we considered it without merit. It was decided by this Court as early as 1831 in *Larason v. Lambert*, 7 Halst. 247 (12 N. J. L. 247) that in the case of a promissory note, payable on demand, the time when the Statute of Limitations began to run against the maker should be computed from the making of the note, and the correctness of that decision have never been questioned. In that case the note did not draw interest but the rule is the same whether the note draws interest or not. * * * Counsel refers us to *Merit v. Todd*, 23 N. Y. 28 in support of his contention, but that case merely decides that *as between holder and endorser* (italics are the Chief Justice’s), a demand note which bears interest does not become due until demand is actually made and has no application to the rights of the holder against the maker. It so declared in the later case of *Wheeler v. Warner*, 47 *Id.* 519 where it was expressly held that a promissory note payable on demand,

whether with or without interest, is due forthwith, and an action thereon is barred *against the maker* by the Statute of Limitations, if not brought within six years after its date."

This Court unanimously approved the doctrine of this opinion (70 N. J. L., p. 681).

We add what was said by Chief Justice EWING in 1831, in *Larason, et al. v. Hoppock*, 7 Halstead (12 Law) 249:

"As soon as the note is made and delivered, the holder of it may require payment. An antecedent demand *in pais* is not a necessary preliminary to the commencement of a suit. Hence as soon as the note is made and delivered, the payee has a full and complete cause of action, and may forthwith enforce his demand at law."

Of course, this case had the express approval of the Supreme Court, as already shown *supra*, in the *DeRaimes* case. Why in equity it should have been disregarded by both Vice-Chancellors, we cannot imagine. To all intents and purposes the Court of Chancery regarded these demand notes as so much waste paper.

The relation between a depositor and a bank is that of debtor and creditor. *Perth Amboy Gas Light Co. v. Middlesex Bank*, 16 N. J. Eq. 84; *Campbell v. Watson*, 62 N. J. Eq. 408. The title of the money deposited passes to the bank which becomes the debtor. 7 *Corpus Juris* 628. The relation being that of debtor and creditor, the bank may set off against a general deposit a debt due to it from the depositor. *Tufts v. Peoples Bank*, 54 N. J. Law, 380.

It was therefore, unnecessary that in the instant case there should have been any acceleration of the due date of the notes, since the notes aggregating \$52,090.00 (*supra*, p. 10) were due immediately.

It is necessary to add that even if Ellbee Fur Trading Company is Loeb Brothers, and the funds on deposit are those of Loeb Brothers, the appellant had no right of set-off at law, because Loeb Brothers are not its debtors, even though the Attachment Act of 1901 provides in its twenty-fourth section (1 Com. St., p. 144) that in an auditor's suit the defendant (appellant here) shall be entitled to set-off to the same extent as if the plaintiffs (Loeb Brothers, the defendants in attachment) were personally prosecuting the suit for their own use; for the present appellant, at law, could not have been sued as a debtor of Loeb Brothers. We suppose, therefore, that the Court of Chancery concluded it was but equitable for it to consider whether the appellant, to which no fraud or knowledge was imputed, had a defense by way of an equitable set-off. What we are unable still to perceive, however, is that the appellant has any right to the funds, if they are not in fact the property of the Ellbee Fur Trading Company, and we cannot understand the reasoning of Vice-Chancellor BENTLEY who, at one and the same time, apparently holds that the funds equitably belong to both Loeb Brothers and Ellbee Fur Trading Company.

As to equitable set-off: This Court and the courts of equity have always given a defendant, who has a meritorious claim, a fair opportunity to establish it against a complainant. The doctrine is thus stated, by Chief Justice FULLER, in *Scott, et al. v. Armstrong*, 14 U. S. 499; 13 S. C. R. 150, 36 L. ed. 1054:

“In equity, relief is usually accorded, says Mr. Justice STORY (Eq. Jur. 1435) ‘where, although there are mutual and independent debts, yet there is a mutual credit between the parties, founded at the time upon the existence of some debts due by the crediting party to the other. By “mutual credit,” in the sense

in which the terms are here used, we are to understand a knowledge on both sides of an existing debt due to one party, and a credit by the other party, founded on and trusting to such debt, as a means of discharging it.'

"This definition is hardly broad enough to cover all the cases where, as the learned commentator concedes, there being a 'connection between the demands, equity acts upon it, and allows a set-off under particular circumstances.' Section 1434. Courts of equity frequently deviate from the strict rule of mutuality when the justice of the particular case requires it, and ordinary rule is that, where the mutual obligations have grown out of the same transaction, insolvency on the one hand justifies the set-off of the debt due upon the other. *Blount v. Windley*, 95 U. S. 173, 177."

In this State the following cases uphold the doctrine of equitable set-off: *King v. King*, 9 Equity 47, where a debt due for board, etc., was permitted to be set up against an administrator who sued upon a bond and mortgage; *Jackson v. Bell*, 31 Eq. 556, where it was held that the mere existence of a cross-demand was sufficient, if there had been a mutual credit, given by each upon the footing of the debt of the other; *Trotter v. Hecksher*, 40 Eq., 657, where this Court stated that if special circumstances be shown creating an equity to have cross-demands balanced against each other, courts of equity will transcend the rules of law for the protection of such a right; *Loder v. Allen*, 50 Eq., 637, where Vice-Chancellor PITNEY, said that if two parties have independent money demands against each other, natural justice and equity demands that they should be set off against each other; *Norton v. Sinkhorn*, 63 Eq., 318, in which this Court, dealing with a defence by way of recoupment, said "the action of the Court of Chancery in striking out this part of the answer was erroneous * * * and

the fund should be retained in that Court, and the case allowed to stand over until the defendants shall have their damages arising from the breach of contract by the complainant set out in the answer assessed in a court of law, within such time and in such manner as the Court of Chancery may direct;" *Alpaugh v. Wood*, 45 Eq., 153, where this Court stayed a decree until the defendants should have had an opportunity of testing at law their counterclaim, which set up losses sustained by them through the negligence and want of skill of the complainants; and *McCracken v. Harned*, 59 Eq., 190, where, pursuant to *Alpaugh v. Woods*, it was held by Vice-Chancellor GREY that the enforcement of a decree would be suspended until the defendant, a lawyer, had an opportunity to establish his set-off, for professional services, at law.

Of course, in the instant case, the demand of the appellant is liquidated, being shown by the amounts paid by it to the American Exchange National Bank for Ellbee Fur Trading Company.

Finally upon this phase of the case, it is evident that Loeb Brothers and Ellbee Fur Trading Company are both insolvent, according to the bill of complaint and the hearsay evidence produced by the complainant.

In reference to Loeb Brothers individually, paragraph six of the complainant's bill of complaint states as follows (pp. 6 and 7):

"Complainant further shows and charges that the said Loeb Brothers are insolvent and are unable to pay their just debts and particularly the debt of the complainant aforesaid, and that they have all or a substantial part of their assets concealed in the name of Ellbee Fur Trading Company, Inc., for the purpose of hindering and delaying their creditors and particularly complainant."

This allegation of the insolvency of Loeb Brothers, contained in said paragraph, was not denied by the Ellbee Fur Trading Company nor by The First National Bank and therefore must be taken as admitted. It is further supported by the hearsay, affidavit of Jacob Loeb, produced by the complainant (p. 139, ll. 33-40) :

“In the early part of 1921 however, the firm (Loeb Brothers) was in difficulties and it was decided that the firm should go out of business and that a corporation should be organized to engage in the same line of business with my two brothers and myself as active men and some outsiders furnishing capital.”

See, also, on page 77 the hearsay testimony of David Loeb, taken in New York City, offered by the complainant, in which David Loeb says :

“Yes—you can see that we have remained without any money but with a lot of knowledge and a lot of experience. And then we didn't know what is going to happen on the contingencies. We had a lot of commercial papers given away to the State Bank with our signature endorsed to them and we didn't know, according to the conditions of the market, what is going to happen on the contingencies, that means on the signature that we have signed on those notes or other trade papers, what you call them, what were given away to the State Bank. We did not know where we were standing. Money we didn't have. The bank took everything away from us and they simply threw us out. First, they promised us when we gave them the merchandise away and the security or whatever they call it—the policies—they are going to repay us out as much as they can, but then they took everything away from us and we came back they asked me how much money we have. They knew that we had no money. I got ahold of my sister-in-law, Lena Yahre. She had a few

dollars. And Mr. Philip Loeb got his sister-in-law, Mollie Flyer, and also got a cousin of ours, Mr. David Kellman, and he having known us for so many years, yet from the old country, and he knew the character of us and he felt along with us, and they organized the Ellbee Fur Trading, whatever they call it, I don't know exactly."

Also on pages 88 and 89 of the hearsay testimony, in which this witness is reported as having said:

"Q. And some of it was represented by merchandise in your store and some by merchandise in the warehouse, and they cleaned you out completely; is that it? A. According to the paper; you can see.

"Q. I am asking you the question. A. We were cleaned out. After this we were cleaned out.

"Q. After this agreement was executed Loeb Brothers had no assets? A. After we have everything away to the bank we were cleaned out—no assets.

"Q. You had no merchandise? A. No.

"Q. You had no accounts receivable? A. Didn't amount to nothing.

"Q. How much? A. Didn't amount to anything, because if they would be any amount, a big amount, we would give it away to the bank.

"Q. You mean to the State Bank? A. Yes."

As to the insolvency of the Ellbee Fur Trading Company, we refer again to the hearsay affidavit of Jacob Loeb, offered in evidence by the complainant (pp. 140-141), which is as follows:

"We found a man by the name of Beckerman of Boston, who was willing to invest some money but declined to go into the old corporation, he having been advised by his attorney to organize a new corporation so as to make sure that there would be no old liabilities carried over into the new business. Thereupon,

the new corporation of Loeb Brothers Fur Corporation was organized by Mr. Beckerman and myself, the old corporation of Ellbee Fur Trading Corporation being continued until about the end of that year when its capital was entirely wiped out by the failure of the firm of N. Witkin which was indebted to that corporation in a large sum of money."

This hearsay testimony, submitted by complainant, shows conclusively that both the individuals and the Ellbee Fur Trading Company were insolvent.

We respectfully urge that this testimony was adduced by the complainant and that the complainant is bound by that testimony, although we still urge that the appellant bank is not bound by that testimony on the ground that it is all hearsay evidence, so far as the appellant is concerned, but if the Court determines that upon this testimony it has a right to find against the appellant, we then urge that the Court take into consideration the proofs, it has before it, and we urge that this proof clearly demonstrates that both defendants were insolvent and that Loeb Brothers individually did not transfer anything to the corporation, and that there is nothing in this testimony which can in any possible way lead this Court to assume a fraudulent transfer between these two defendants, Loeb Brothers and Ellbee Fur Trading Company.

It seems clear to us that even from Vice-Chancellor BENTLEY's point of view, that supervening insolvency accelerates and matures the claim, the bill of complaint should have been dismissed.

POINT III.

Complainant, a non-resident and alien, should not be allowed to seize property within this jurisdiction, to the detriment of a resident creditor.

Loeb Brothers are not the debtors of the appellant bank; its debtor is the Ellbee Fur Trading Company, Inc. It is respectfully suggested that no court anywhere could, upon the documentation in this case, hold the Loeb Brothers, individually, liable upon the demand notes, except, of course, that Jacob Loeb might be held as endorsee. We are unable to follow the involved theory adopted by the Court below, which is to the effect that the Loeb Brothers are the Ellbee Fur Trading Company, Inc., that Ellbee Fur Trading Company, Inc., is Loeb Brothers, and the obligations of either are the obligations of the other, because the corporation is only a device and a shell. The Court below in its consideration of the appellant's right of set-off impliedly must have regarded the Loeb Brothers as the makers of the demand notes, although in fact, the notes were made by the Ellbee Fur Trading Company, Inc. It need hardly be pointed out, that were this Court to subscribe to the implications of such a judgment the doctrine of limited liability of stockholders would be at an end, and every bank, by accepting the accounts of corporations, would incur risks that are beyond description.

Conceding for the purpose of the argument, however, that the demand notes of the Ellbee Fur Trading Company, Inc., held by the appellant may be considered those of Loeb Brothers, individually, we say that from this point of view, the complainant should be denied any relief, because the case

thus presented is the clear case of a non-resident alien attempting to seize to the detriment of a resident creditor, the property of a non-resident debtor. The Loeb Brothers are residents of the State of New York; the complainant is a citizen of Australia, and the appellant bank a resident corporation, organized under the Statutes of the United States.

This question, then arises: Should the Courts of New Jersey compel the present appellant, a resident corporation, to seek its debtors outside the State of New Jersey and permit the complainant, a resident and citizen of Australia, to depart this jurisdiction with the property of Loeb Brothers?

For the appellant we contend that as a matter of public policy the Court of New Jersey should adopt the Wisconsin Rule, which is approved by the Supreme Court of the United States. (See *Disconto Gesellschaft v. Terlinden*, 127 Wis. 651, 106 N. W. Rep. 821; 15 L. R. A. (N. S.) 1045; affirmed 208 U. S. 570; 28 S. C. R. 337; 52 L. Ed. 625.)

Justice DAY, there speaking for the Supreme Court of the United States, said:

“Alien citizens, by the policy and practice of the courts of this country, are ordinarily permitted to resort to the courts for the redress of wrongs and the protection of their rights. 4 Moore, International Law Dig., 7; Wharton, Confl. L., section 17.

“But what property may be removed from a state and subjected to the claims of creditors of other states is a matter of comity between nations and states, and not a matter of absolute right in favor of creditors of another sovereignty, when citizens of the local state or country are asserting rights against property within the local jurisdiction.

“‘Comity’ in the legal sense,’ says Mr. Justice GRAY, speaking for this court in *Hilton v. Guyot*, 159 N. S. 113, 163, 40 L. ed. 95, 108, 16

Sup. Ct. Rep. 139, 143, 'is neither a matter of absolute obligation on the one hand nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.'

"In the elaborate examination of the subject in that case many cases are cited and the writings of leading authors on the subject extensively quoted as to the nature, obligation, and extent of comity between nations and states. The result of the discussion shows that how far foreign creditors will be protected and their rights enforced depends upon the circumstances of each case, and that all civilized nations have recognized and enforced the doctrine that international comity does not require the enforcement of judgments in such wise as to prejudice the rights of local creditors and the superior claims of such creditors to assert and enforce demands against property within the local jurisdiction. Such recognition is not inconsistent with that moral duty to respect the rights of foreign citizens which inheres in the law of nations. Speaking of the doctrine of comity, Mr. Justice STORY says: 'Every nation must be the final judge for itself not only of the nature and extent of the duty, but of the occasions on which its exercise may be justly demanded.' Story, Confl. L., section 33.

"The doctrine of comity has been the subject of frequent discussion in the courts of this country when it has been sought to assert rights accruing under assignments for the benefit of creditors in other states as against the demands of local creditors, by attachment or otherwise in the state where the property is situated. The cases were reviewed by Mr. Justice Brown, delivering the opinion of the court in *Security Trust Co. v. Dodd*, 173 U. S.

624, 43 L. Ed. 835, 19 Sup. Ct. Rep. 545, and the conclusions reached that voluntary assignments for the benefit of creditors should be given force in other states as to property therein situate, except so far as they came in conflict with the rights of local creditors, or with the public policy of the state in which it is sought to be enforced; and, as was said by Mr. Justice McLEAN in *Oakey v. Bennett*, 11 How. 33, 44 13 L. ed. 593, 597, 'national comity does not require any government to give effect to such assignment (for the benefit of creditors) when it shall impair the remedies or lessen the securities of its own citizens.'

"There being, then, no provision of positive law requiring the recognition of the right of the plaintiff in error to appropriate property in the state of Wisconsin and subject it to distribution for the benefit of foreign creditors as against the demands of local creditors, how far the public policy of the state permitted such recognition was a matter for the state to determine for itself. In determining that the policy of Wisconsin would not permit the property to be thus appropriated to the benefit of alien creditors as against the demands of the citizens of the state, the supreme court of Wisconsin has done no more than has been frequently done by nations and states in refusing to exercise the doctrine of comity in such wise as to impair the right of local creditors to subject local property to their just claims. We fail to perceive how this application of a well known rule can be said to deprive the plaintiff in error of its property without due process of law."

A recent statement of the correct principle is found in 2 C. J., page 1070:

The right of an alien to sue is a matter of comity, as distinguished from a matter of right, and, while the courts will not ordinarily deny the right in the absence of positive legislation taking it away, they should not permit the privilege to be exercised so

as to work injury to the interests of citizens of the state.

Vice-Chancellor BIGELOW in his disposition of this point, so far as the Attachment Act is concerned, does not seem to discriminate between *alien* and *non-resident*, and apparently gives no effect to the law as indicated by the cited case or in the note to the cited case, as reported in 15 L. R. A., at page 1045, which note is in the following words:

“The novelty of the foregoing decision (*Terlinden* case) consists in its application to an individual alien creditor who was proceeding in his own name to reach assets of the debtor, of the principle upon which the courts have quite uniformly refused, as against domestic creditors, to recognize the right of one claiming under a foreign bankruptcy proceeding or assignment *in invitum* to impound local assets (see *Wharton, Conf. L.* 3d. Ed., Section 390, *et seq.*). This principle would, of course, have been strictly applicable if the proceedings to reach the local assets had been instituted by the trustee in the foreign bankruptcy proceedings; and in view of the plaintiff’s agreement with the trustee in those proceedings that anything realized in his action should go into the general estate, it would seem that the case came within the spirit, if not the strict letter, of the principle. The creditor in this case being a resident of a foreign country, and not merely of another state, and the treaty provisions being held inapplicable, the extent to which his rights should be recognized was wholly a matter of comity. A different question would, perhaps, have arisen if the plaintiff had been a citizen of another state, in view of the provision of the Federal Constitution that citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states.”

The opinion of the Supreme Court of Wisconsin in *Disconto, etc. v. Umbreit* (which is the case affirmed under the name of *Disconto, etc. v. Tenderden*, in 208 U. S. 570, etc., *ubi supra*) is reported in 127 Wisconsin 651, 106 North Western 821, 15 L. R. A., N. S., 1045. The two actions, an attachment and a creditor's bill, were consolidated for trial. What Justice WINSLOW said there may well be applied to the instant case:

"It is confidently believed that no court in such a case ever has allowed, or should allow, the foreigner to seize and carry away property within the jurisdiction when a resident creditor stands also at the bar with his judgment and his provisional lien (in the instant case with a right of set-off against funds actually in its possession) and thus force such resident creditor to go to a foreign country to collect his debt (in the instant case, to another jurisdiction against insolvent parties). If such action be not prejudicial to the rights and interests of our own citizens, it is difficult to see what action would be prejudicial. Nor does it make any difference that the home creditor's claim may have accrued after that of the foreign creditor; the question is not to be determined by priority in point of time any more than by priority of garnishment, but by the situation at the time when the court is called upon finally to decide which creditor shall receive its aid."

It is respectfully submitted that the decree in this case be reversed.

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