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# New Jersey Court of Errors and Appeals

IRONBOUND TRUST COMPANY,
*Plaintiff-Appellant,*

vs.

NEWARK TRUST COMPANY,
*Defendant-Respondent.*

*Action at Law.*

*Points on Appeal for Plaintiff-Appellant.*

## PRELIMINARY STATEMENT.

The case below was submitted on a stipulated state of facts, for a declaration by Dungan, J., sitting as a court without a jury. The Court below gave judgment against the plaintiff and in favor of the defendant. The present proceeding is an appeal from such judgment.

## STATEMENT OF FACTS.

It appears that the Ninth Ward Building & Loan Asssociation received a subscription for 25 shares of stock in the 17th series, in the name of Adelaide R. March, the sister-in-law of its secretary, George Brown, Jr.; that this stock was not actually subscribed for by Miss March, but was taken out by Brown in his sister-in-law's name, without her consent. It is perhaps a fair inference that the stock was actually taken out by Brown for the purposes of defrauding the association, since when only three payments had been made upon it he applied for a loan of $500, in the name of Miss March, and as the officer charged with the keeping of the record of the payment of dues by the shareholders, reported that Miss March was entitled to a loan of that amount. Pursuant to the application, a loan of $500 upon the security of the stock was granted to Adelaide R. March,

and a check to her order duly drawn. This check, it will be noted, was not only a check, but a warrant as well, the by-laws of the association requiring the drawing of a warrant by the secretary, signed by him and countersigned by him and the president. In the practice of the association, the warrant was combined with the check and became a check when duly signed by the treasurer of the association. The procedure in this case was that after the granting of the loan, the Secretary of the association drew the warrant to the order of A. R. March, presented it to the president, who signed the warrant, who, in turn, presented it to the secretary, who likewise signed it and converted the warrant into a check. It is admitted that both the president and the treasurer of the association, the only officers who, under the statute, are authorized to draw the funds of the association, both knew of the existence of Adelaide R. March, and knew her as the sister-in-law of the Secretary. The check was never given to Miss March, but her name was forged on the back of it and the check endorsed again by the Frederic Lau Company, of which Mr. Brown was an officer, and deposited in that company's account in the defendant's bank, who credited the Lau Company with the amount of the check, presented it under its endorsement to the plaintiff bank for payment, and the plaintiff bank paid it to the defendant in due course. Complaint was afterwards made by the Ninth Ward Building & Loan Association to plaintiff, that the check should not have been charged against the association's account in the plaintiff bank, on account of the forged endorsement, and the plaintiff thereupon, having convinced itself of the facts as set forth above, recognized the validity of the association's claim, and proceeded to indemnify itself by action against the defendant.

## SPECIFICATION OF ERROR.

The Court below erred in giving judgment against the plaintiff and in favor of the defendant.

## POINTS.

**I. The words "A. R. March" appearing on the back of the check in question constituted a forgery.**

**II. Defendant warranted the genuineness of all prior endorsements.**

**III. Plaintiff was not entitled to charge the association's account with the amount of the payment on the check.**

**IV. The act of the plaintiff bank in recrediting the Ninth Ward Building and Loan Association with the $500 payment made on the check in question, was not a voluntary payment barring an action against the defendant in the present case.**

**V. Adelaide R. March was a real and not a fictitious person, and the act of Brown in writing her name on the back of the check in question was a forgery, upon which defendant bank was not authorized to pay.**

**VI. The defendant bank does not, in relation to the check in question, occupy the position of a holder in due course or a purchaser for value without notice.**

## ARGUMENT.

### I.

### The words "A. R. March" appearing on the back of the check in question constituted a forgery.

It would seem perfectly obvious that the action of Brown in writing the words "A. R. March" on the back of the check in question was a forgery.

See 19 Cyc, p. 1370, note 1, for the definition of "forgery," as follows:

> The fraudulent making or alteration of a written instrument to the prejudice of the rights of another.

*Commonwealth* vs. *Chandler,* Thach Cr. Cas. (Mass.) 187, and other cases therein cited.

Also, see *Lanier* vs. *Clarke* (Tex.), 133 S. W. Rep. 1093-1094.

> "That any material alteration in an instrument evidencing a pecuniary liability is a forgery which the maker is not bound to anticipate and guard against by making such alteration difficult or impossible."

It would seem that the above quotations declare the very elemental principle applicable to the question of forgery in the case at bar, and that there can be no question but that Brown's act constituted a forgery.

### II.

### Defendant warranted the genuineness of all prior endorsements.

It is elementary law that an endorser of negotiable instruments, warrants the validity of the instrument, the capacity of the parties thereto to contract, and his own title to it. Such has been the law merchant for many years as laid down with great uniformity in numberless decisions,

which it is unnecessary here to recite since the negotiable instruments law adopted in this State definitely states this principle. Section 66 of that act, *Compiled Statutes, 3743,* reads as follows:

Warranties of General Endorsers. Every endorser who endorses without qualification warrants to all subsequent holders in due course.

1. The matters and things mentioned in subdivisions 1, 2 and 3 of the next proceeding section. (These sub-divisions are as follows:)

I. "That the instrument is genuine and in all respects what it purports to be";

II. "That he has a good title to it";

III. "That all prior parties had capacity to contract"; and

IV. "That the instrument is at the time of his endorsement valid and subsisting."

That no title could be obtained by Brown or by the Lau Company through the forging of Miss March's signature is clear after a consideration of the principles above set forth, and is also well stated by the Court in the case of

*Buckley* vs. *The Second National Bank of Jersey City,* 35 N. J. L. 400,

where it appears that a check drawn on the Assistant Treasurer of the United States to the order of the plaintiff, was received by one Crossman, who had been acting for the plaintiff in a certain bounty claim against the government, and who, on the receipt of the check, forged plaintiff's name and collected the amount of the check from the Assistant Treasurer of the United States by endorsing it to the defendant bank. The Court states that from this state of the facts it results:—

> "*First,* that the loser of a note with a forged endorsement, may recover it from any hand; and, secondly, that a maker, acceptor or other

promissor, who has already paid such a bill, is liable again for the amount to its proper owner."

Continuing, the Court says:—

"It is clear then that nothing passed to the defendants by virtue of the forged endorsement. The plaintiff's right to the check remained precisely as it was before his name was forged. The check, therefore, when the defendants obtained the money on it, was the property of the plaintiff, and in that case he may, as we have seen, recover the amount in this action, as money received by the defendants to his use."

From these authorities it is clear that the Newark Trust Company acquired no title to the check under the forged endorsement.

## III.

## Plaintiff was not entitled to charge the association's account with the amount of the payment on the check.

A bank which pays a check on a forged endorsement acquires no rights against the drawer and cannot charge to his account the amount so paid out. The law is thus stated in

*5 Cyc. 548,*

where a large number of cases are cited in support of the proposition of the text. One of these cases is

*Belknap* vs. *The National Bank of N. America,* 100 Mass. 376,

in which it appears that a clerk of the plaintiff having knowledge of the drawing of a check for a substantial amount, to the order of one Boyden, and having been entrusted with a letter containing the check for the purpose of mailing it, removed the check from the letter, struck out the words "or

order" on the check and inserted the words "or bearer" and thereafter presented the check to the bank for payment. *It was held in that case that no negligence could be imputed to the maker of the check, since the obtaining of money on it by the clerk involved the commission of a crime by him.* The Court, therefore, held that the bank which had paid the money under such circumstances was not entitled to charge it against the account of the drawer of the check.

A case remarkably in point is that of *Hatton* vs. *Holmes,* 31 Pac. (Cal.) 1131, where it appears that on the representation of one J. that he was the agent of K. plaintiff took a mortgage on land belonging to K., purporting to have been signed and acknowledged by K. and gave to J. a check for $1,000 to the order of K. The mortgage was false, and J. afterwards forged K.'s name to the check and collected it at the bank. The Court held that no title was acquired by J., by reason of his fraudulent act in obtaining the check or through the forgery, and that the bank paying it was not entitled to charge the amount of the check against plaintiff's account. This is the exact situation in the case at bar.

See also the following cases:

*Corn Exchange National Bank* vs. *The Nassau Bank,* 91 N. Y. 81;

*German Savings Bank* vs. *Citizens' National Bank,* 70 N. E. (Iowa) 769;

*First National Bank* vs. *The State Bank,* 26 N. W. (Neb.) 289,

where the Court says:

> "The second bank, therefore" (the plaintiff in this case) "having received the check from a reputable bank, may assume that it has taken the necesssary precautions to ascertain the genuineness of the signature and the person's

identity presenting the check. After a careful examination of the authorities, we have no doubt that a party who pays a forged check does so at his own peril, and if by means of his endorsement and use of the same he thereby obtains money from another, he is liable for the amount thus received."

See further—

*Muller* vs. *The National Bank of Cortland,* 96 Appl. Div. 73;

*New York Produce Exchange Bank* vs. *Twelfth Ward Bank,* 135 Appl. Div. 53;

*Leather Manufacturers' Bank* vs. *Merchants' National Bank,* 128 U. S. 38.

## IV.

**The act of the plaintiff in re-crediting the Ninth Ward Building and Loan Association with the $500 payment, made on the check in question, was not a voluntary payment barring an action against the defendant in the present case.**

The defendant made a point in the Court below that the act of the plaintiff bank in re-crediting the amount of the check in question to its depositor, the Ninth Ward Building & Loan Association, was a voluntary payment, citing and quoting from several cases in support of this contention.

The following was quoted from *Camden* vs. *Green,* 54 N. J. L. 589:

> "In such a transaction there is nothing to take the case out of the general principle that where a party, without a mistake of fact or fraud, duress or extortion, voluntarily pays money on a demand which is not enforceable against him, he cannot recover it back."

As we have shown in Point III of this brief, the plaintiff was not entitled to charge the associa-

tion's account with the amount of the payment on the check. Therefore, if plaintiff had not re-credited this amount to its depositor, such depositor could have enforced the re-payment or re-crediting of said amount to it. Therefore, the above case is no authority for defendant's contention.

The following is also quoted from *Harter* vs. *Mechanics' National Bank*, 63 N. J. L. 578:

> "The principle on which negligence may preclude a depositor from recovering of his bank the money paid by the bank on a forged check, is thus stated by Chief Justice Cockburn in *Swan* vs. *N. B. Australasian Co.*, 2 Hurlet & C. 175, 190: 'The customer would be entitled to recover from the banker the amount paid on such a check, the banker having no voucher to justify the payment; the banker, on the other hand, would be entitled to recover against the customer for the loss sustained through the negligence of the latter. Possibly, to prevent circuity of action, the right of the banker to immunity from loss so brought about would afford to him a defence to an action by the customer to recover the amount.' This view received the approval of the Court of Exchequer in *Halifax Union* vs. *Wheelwright*, L. R., 10 Exch. 183, 192, and of Chief Justice Gray in *Greenfield Savings Bank* vs. *Stowell*, 123 Mass. 196, 201."

Also the following from Banks and Banking, 1329 (w) (Ohio 1891):

> "Where a bank is released from liability for cashing a forged check by the negligence of its depositor, and then voluntarily makes good the depositor's loss, such bank cannot thereafter recover the amount of the check from another bank from which the check had been received in settlement of balances. *Van Wert Nat. Bank* vs. *First Nat. Bank*, 6 Ohio Cir. Ct. R. 130."

As we feel that we have shown in both previous and subsequent parts of this brief that there has been no such negligence on behalf of the Ninth Ward Building & Loan Association (this plaintiff's depositor) as to release this plaintiff from liability to re-pay or re-credit to said depositor the amount paid on the check in question, it is submitted that the payment in question was not a voluntary payment and that plaintiff is not precluded from recovering the same from the defendant on that ground.

## V.

## Adelaide R. March was a real and not a fictitious person and the act of Brown in writing her name on the back of the check in question was a forgery, upon which defendant bank was not authorized to pay.

It is contended by the defendant that A. R. March, the payee in the check in question and whose name was also written on the back of the said check, was a fictitious person and that by reason of the provisions of sub-division 3 of the 9th section of the Negotiable Instruments Act of this State this check was payable to bearer and that, therefore, the defendant bank was justified in paying said check when the same was presented to it. This is also, in substance, the view of the situation taken by Judge Dungan in the court below.

Judge Dungan has indicated in the first part of his decision (page 23, State of the Case) what he considers the scope of the issue in the present case, in the following words:

> "The principal and perhaps the sole question presented by the agreed facts and the briefs by which the case was argued is whether or not the endorsement of A. R. March, the payee of the check, is a forgery; or, whether in its appli-

cation to the check in suit the said A. R. March is to be regarded as a fictitious person."

Continuing in his decision (page 24, State of the Case), Judge Dungan says:

> "There is no doubt but that there was in existence such a person as A. R. March. Adelaide R. March was the sister-in-law of George Brown, Jr., the Secretary of the Ninth Ward Building and Loan Asssociation, the maker of the check, but that it was intended by our negotiable instruments act to differentiate between fictitious and non-existing persons is clear from sub-division 3 of the ninth section, which declares that 'The instrument is payable to bearer (3) when it is payable to the order of a fictitious or non-existing person.' " (This sub-division also contains the following words: "And such fact was known to the person making it so payable.")

As was said in *Snyder* vs. *Corn Exchange National Bank,* 70 Atl. (Pa.) 876:

> "A fictitious person within the contemplation of the act of 1901 is not merely a non-existing one: for, if so, the word 'non-existing' would have been sufficient without more. It is clear, then, that when the legislature declared that a check payable to 'A fictitious or non-existing person' is to be regarded as payable to bearer, it meant a fictitious person to be one who, though named as payee in a check, has no right to it, or the proceeds of it, because the drawer of it so intended, and it therefore matters not whether the name of the payee used by him be that of one living or dead, or of one who never existed."

*Snyder* vs. *Corn Exchange National Bank* is not in any way inconsistent with the contention of the plaintiff.

This was a case in which the person who actually drew and signed the check *affirmatively* in-

tended that the person named in the check as payee was never to receive the check or the money represented thereby, or have any interest in the same.

The person who drew the check in the Snyder case had a power of attorney, authorizing him to sign the name of the plaintiff to checks, which is exactly what he did in that case. In the case at bar, as we have stated above, Brown had no power or authority to draw a check on the funds of the association, and he did not even attempt to do this in the present case. His only authority, and the only authority which he attempted to exercise in connection with the drawing of the check was in signing the warrant *which, before it became a check, had to be signed by both the president and treasurer of the asssociation.* His duties, as stated above, were merely clerical.

As we have previously stated, both the president and treasurer of the association, who were the drawers or makers of this check, knew that there was an A. R. March in existence and that she was the sister-in-law of Brown.

The Court, in the course of its decision (pages 24, 25 and 26 of State of the Case) refers to certain statements in the stipulated State of Facts, as indicating that the president and secretary were careless in the manner in which they conducted the businesss of making loans for the association and finally states (page 26, State of the Case) that "No one else (except Brown) appears to have exerted himself sufficiently to have formed an intent."

There is nothing in the stipulated State of Facts, nor any part of the case, to justify the presumption that the minds of the president and treasurer of the association were a blank, when they signed this check, and, of course, no such pre-

sumption can be indulged in. Unless their minds were a blank when they signed the check, there must have been an intention present that somebody was to receive the check and the funds represented thereby. It is not alleged by the defendant that these officers of the association had any fraudulent or secret intentions whatever. Therefore, the only possible person whom they could have intended to receive the check and the money represented thereby was the person named as the payee in the check whom they knew to be an existing woman, namely A. R. March, the sister-in-law of Brown.

A person, in law, is deemed to intend the legal effect of his acts. The only legal effect of the acts of the president and treasurer in drawing this check was that the same could only be paid to A. R. March or some one designated by her, either of which acts would have to be authorized by her endorsement.

That A. R. March was fictitious in fact is obviously untrue under the stipulation in the case. She is a flesh and blood woman and the sister-in-law of Brown, but it will be argued that where a check is drawn to the order of a person, whether that person be an actual individual or not, if the intent of the drawer is to make a check, the proceeds of which are not intended to inure to the benefit of the person whose name appears as payee on the check, for the purposes of that check, the payee therein named is fictitious and the check is, therefore, payable to bearer. It is true that it has been held in certain cases that under certain conditions the mentioning of a real and existent person as payee in a negotiable instrument, does not prevent the payee from being a fictitious one and the check from being payable to bearer, but certain condi-

tions must exist to bring this state about. Probably the leading case on this subject is that of

*Phillips* vs. *Mercantile National Bank,* 35 N. E. (N. Y.) 982,

in which the facts were that the cashier of a bank for the purpose of obtaining moneys illegitimately, drew a check to the order of one of the depositors in the bank, and thereupon forged the depositor's endorsement, sending the check thus endorsed, to New York City, where it was duly honored, the proceeds eventually finding their way into the cashier's pocket. The Court of Appeals of New York held that the payee, although an actual person, and a depositor in the bank, was a fictitious person, for the reason:—

> "That the bank through its authorized officer, had put in circulation, a paper with knowledge, chargeable to it, that the names of the payees did not represent real persons, and with the intention to endorse thereon the names of the payees who, for all intents and purposes, were fictitious payees, and whose names were adopted and resorted to as a device to avoid suspicion."

Again the court states the law as follows:

> "As the payee had no interest, and it was not intended that he should ever become a party to the transaction, he may be regarded, in relation to this matter, as a nonentity; and it is fully settled that, when a man draws and puts into circulation a bill which is payable to a fictitious person, the holder may declare and recover upon it as a bill payable to bearer."

We believe that this statement of the law is accurate and correct, but the court later clearly shows the exact limitations of the doctrine when it says:

> "The fictitiousness of the maker's direction to pay does not depend upon the identification

> of the name of the payee with some existent person, but upon the intention underlying the act of the maker in inserting the name."

And again:

> "The distinction between such a case and the many other cases which the plaintiff's counsel cites from is in the fact that it was within the scope of this cashier's powers to bind the bank by his checks."

It is precisely in these latter distinctions that the present case is clearly distinguishable from the Phillips case. Brown, the secretary of the association, had no power to draw checks, whatever his intent may have been, as to the ultimate disposition of the check. His duties in relation to the transaction were purely clerical. It was the president and the treasurer of the association who, under the statute alone, were entitled to dispose of the association's funds, and who actually did dispose of them in the present transaction, and under the stipulation it is admitted that both the president and the treasurer knew of Miss March as an existent person and believed that the check was intended for her. It is immaterial whether they were negligent or not in the drawing of the check. The check was drawn to the order of a real person. It was intended by the officers who disbursed the moneys that it should be placed in the hands of a real person, the payee therein mentioned, and that such payee should receive the money represented by such check, and the fact that such check never reached such payee, but was taken by Brown and by him disposed of under a forged endorsement, cannot operate to change a real into a fictitious payee. As appears clearly from the stipulation, Brown did not draw a check. He merely drew a warrant which did not obtain the value of a check until it was signed by the president. It was the president's act, in signing the warrant, that made

it possible for the treasurer to draw upon the funds of the association. It is, therefore, clear that there was no intention to draw a check to a fictitious payee on the part of those who had authority to draw such check, and who actually drew such check, and, as is stated in the Phillips case, the fictitiousness does not depend upon the identification of the payee with some existent person, but on the intention of the act underlying the act of the maker. It is clear again, following the Phillips case, that Brown did not in this case have the power to bind, by his checks, the association, as did the cashier in the Phillips case.

There are two other cases which are well in point with the case at bar, and as both of these cases contain much valuable material on the matters in issue we will quote from the same quite fully:

The first of these cases is

*Seaboard National Bank* vs. *Bank of America,* 193 New York 26, 85 N. E. Rep. 829.

The facts in this case were, in brief, as follows:

A draft was drawn by a bank, payable to an existing partnership, on the fraudulent request of the depositor's bookkeeper, who, thereafter, endorsed the partnership's signature and deposited the draft in his own account. It was held that the draft was not payable to a fictitious or non-existing person so as to pass by delivery within the Negotiable Instruments Law of Pennsylvania. As the Court held that it is only where a person making an instrument knows that he is making it payable to a fictitious or non-existing person that it can be treated as payable to bearer.

The Court, in its opinion, says:

> "The Federal National Bank was a depositor with the plaintiff. The relation existing between a bank and a depositor being that of debtor and creditor, the bank can justify a

payment on the depositor's account only upon the actual direction of the depositor. *Critten* vs. *Chemical National Bank,* 171 N. Y. 219, 63 N. E. 969, 57 L. R. A. 529. It is provided by the Negotiable Instruments Law that: 'Where a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from settling up the forgery or want of authority.' Laws 1897, p. 727, c. 612, sec. 42. If it was necessary for Carroll Bros. to endorse the draft before it could be paid by the plaintiff to the account of the Federal National Bank, then it was never so endorsed, because Pennock's (the bookkeeper mentioned above) act was a forgery and wholly inoperative. The defendant cannot retain the money paid to it by the plaintiff upon such unendorsed draft, for the very excellent reason that it had no title to the instrument upon which the money was paid. It is further provided by the Negotiable Instruments Law (section 28) as follows: 'The instrument is payable to bearer: (1) when it is expressed to be so payable; or (2) when it is payable to a person named therein or bearer; or (3) when it is payable to the order of a fictitious or non existing person, and such fact was known to the person making it so payable; or (4) when the name of the payee does not purport to be the name of any person; or (5) when the only or last endorsement is an endorsement in blank.'

It is claimed by the defendant that the draft was payable to a fictitious or non-existing person, and consequently writing the signature of Carroll Bros. on the back of the draft was not

in legal effect a forgery, and not necessary to protect the plaintiff in its payment. The defendant also claims that the Federal National Bank was negligent in not discovering that the check of E. V. Babcock & Co. presented to it by Pennock was forged, and that such negligence should prevent the plaintiff from recovering against the defendant in this action. The draft was obtained from the Federal National Bank by fraud. It was a fraud perpetrated by the same person, who, within a short time after perpetrating it, fraudulently obtained the money upon the draft from the Mellon National Bank, but the fraudulent acts, so far as they concerned persons other than Pennock, were wholly unrelated. The Federal National Bank was the only one concerned in the consideration accepted by it in issuing the draft. The question in this action, therefore, is not dependent in any way upon the facts relating to the consideration for the draft, or as to whether the consideration for the draft was real or fictitious, but whether, upon all the facts disclosed, the draft was legally collected from the plaintiff by one other than its payee, or as ordered by it. The transaction between the plaintiff and the defendant had no legal connection with the fraud by which Pennock obtained the draft from the Federal National Bank. We are of the opinion that the alleged negligence on the part of the Federal National Bank is immaterial in this action, because no act of the Mellon National Bank or of the defendant was induced by the acts, representations or admissions of the Federal National Bank. We also think that the defendant is wrong in its contention that the draft was payable to bearer as defined in the Negotiable Instruments Law. *It is only when a person making an instrument knows that he is making it payable to a fictitious or*

*non-existing person that it can be treated as payable to bearer.*

* * * * * * *

It (the draft above mentioned) was payable to a real partnership. The conceded transaction, so far as it was expressed in acts or words, including the delivery of the check, charging the amount thereof to E. V. Babcock & Co., and the receipt of the draft in return for the check, was not with Pennock individually, and he did not become the owner of the draft with any rights therein as owner. The secret intention of a criminal, contrary to his express intention, and the avowed purpose for which he obtains possession of a draft, does not give the criminal ownership of the draft, or a legal right to change a draft, payable to a real payee, to one payable to bearer. There is no such presumption arising from the facts proven that the name 'Carroll Bros.' was intended as a fictitious or non-existing payee. Such intention, to be effective, must necessarily arise from knowledge, *and exist as an affirmative fact in the mind of the drawer of a draft at the time of its delivery.* There is nothing in this case to estop the plaintiff from controverting the genuineness of the endorsement of the draft in controversy, as in *Coggill* vs. *American Exchange Bank*, 1 N. Y. 113, 49 Am. Dec. 310, where one of the members of a partnership, the makers of a draft, put it into circulation, with the forged endorsement of the payee upon it, or, as in *Phillips* vs. *Mercantile National Bank*, 140 N. Y. 556, 35 N. E. 982, 23 L. R. A. 584, 37 Am. St. Rep. 596, where the person who forged the name of the payee was the cashier of the defendant, empowered to bind the bank by his checks. The legal effect of making a note or bill payable to a fictitious person was stated in Rev. St. pt. 2, c. 4, tit, 2, sec. 5, as follows: 'Such notes made payable to the order of the maker thereof, or to the

order of a fictitious person shall, if negotiated by the maker, have the same effect, and be of the same validity as against the maker and all persons having knowledge of the facts, as if payable to bearer.'

Prior to the enactment of the Negotiable Instruments Law, the language of which makes it clear that, if an instrument is to be deemed payable to bearer, although in form payable to a named person, the intention to make the instrument payable to a fictitious or non-existing person must exist with the maker thereof, this court, in *Shipman* vs. *Bank of the State of New York*, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821, referring to the rule stated in the Revised Statutes, said: 'We are of the opinion, upon examination of the authorities cited by counsel on both sides, that this rule applies only to paper put into circulation by the maker with the knowledge that the name of the payee does not represent a real person. The maker's intention is the controlling consideration which determines the character of such paper. It cannot be treated as payable to bearer unless the maker knows the payee to be fictitious, and actually intends to make the paper payable to a fictitious person.' The court further says: 'Bedell (the employe who signed the names of the payees) of course knew that the payees were fictitious, but he was not acting within the scope of his employment, but in carrying out a scheme of fraud upon the plaintiffs, and under such circumstances his knowledge cannot be imputed to his principals.'

Selover in his work on Negotiable Instruments Law (page 70) says: 'The doctrine that a check or bill made payable to a fictitious person is payable to bearer, and negotiable without endorsement if the fictitious character of the payee was known to the parties, originated in England, and in each of the cases holding

the doctrine the decision was based on the fact that the acceptor knew, at the time of his acceptance, that the instrument was payable to a fictitious person. If the drawer or maker of an instrument did not know that the payee was a fictitious or non-existent person, and did not intend to make the paper payable to such person, paper payable to the order of such person cannot be treated as payable to bearer, for the intention of the maker or drawer is the test.'

Bunker on Negotiable Instruments, in his note to a section of the Negotiable Instruments Law of Michigan (section 11), corresponding to and and the same as section 28 of the Negotiable Instruments Law in this State, compares the bills of exchange act of England (section 7) with the statute of Michigan, and says: 'The difference between the two statutes is important. The element of knowledge is the distinguishing feature. Under the English statute the paper is payable to bearer if the payee be a fictitious or non-existing person. Under the American statute paper payable to a fictitious or non-existing person is not payable to bearer unless the maker or drawer knew that the payee was a fictitious or non-existing person. Under the English statute the fact governs; under the American statute the fact coupled with knowledge governs. Thus there has been carried into the two statutes the differences heretofore existing in the authorities.'

In Crawford's Annotated Negotiable Instruments Law it is said in a note to section 28, referring to the case of *Shipman* vs. *Bank of the State of New York*, supra, and quoting from the opinion: 'Hence if the maker or drawer supposes the payee to be an actually existing person (as, for instance, where he is induced by fraud to draw the instrument to the order of a fictitious person whom he supposes to exist), the instrument will not be pay-

able to bearer, and no person can acquire the title thereto by delivery. And where the instrument is drawn payable at a bank, the bank cannot charge the same to the account of its customer, since the instrument is not in such case payable to bearer, and the endorsement is a forgery.'

In Eaton and Gilbert on Commercial Paper it is said: 'Under the common law a bill payable to a fictitious person or his order was neither in effect payable to the order of the drawer nor to the bearer, unless it was shown that the circumstances of the payee being a fictitious person was known to the acceptor. To show that the acceptor was aware that the payee was a fictitious person, evidence is admissible of the circumstances under which he accepted other bills payable to fictitious persons. The fictitiousness of the maker's direction to pay does not depend upon identification of the name of the payee, with some existing person, but upon the intention underlying the act of the maker in inserting the name. The rule as to an instrument payable to the order of a fictitious or non-existing person applies only to paper put in circulation by the maker with knowledge that the name of the payee does not represent a real person. The maker's intention is the controlling consideration. It cannot be treated as payable to bearer unless the maker knows the payee to be fictitious, and *actually intends* to make the paper payable to the fictitious person.' "

The Court held that the judgment of the court below for the plaintiff should be affirmed with costs.

Another case remarkably well in point with the case at bar is *Jordan Marsh Company* vs. *National Shawmut Bank,* 87 N. E. Rep. (Mass.) 740, etc.

The facts in this case are stated by the court as follows:

> "These are seven suits, brought against seven corporations doing a banking business in the city of Boston. In each of these banks or banking companies the plaintiff was a depositor. The suits are all of the same character, and the opinion in the first of them will be equally applicable to all the others. The declaration contains two counts, one for money had and received, to recover the balance of the plaintiff's deposit after a demand, and the other setting forth the contract between the plaintiff and the defendant, and that the plaintiff made sundry checks, payable in part to the order of fictitious or non-existing persons, which fact as to these persons was not known to the plaintiff, and in part to the order of one A. L. Sefton, and that the defendant paid these checks upon forged endorsements of the names of the payees. The cases were submitted to the superior court upon the report of an auditor who found for the defendants. The judge found *pro forma* for the defendants, and reported the cases to this court."

As this is a well thought out and well argued case, we will, at the risk of making our brief rather long, quote from the same at length. The court in the course of its opinion, at page 741, says:

> "The implied contract between the banker and his depositor in regard to the depositor's checks is that the banker will pay them from his deposit to the persons to whom he orders payment to be made. When a definite order is made in the check, the duty of the banker is absolute, as a general rule, to pay only in accordance with the order. If payment is to be made to the order of a person named in the check, and if he orders the payment to be made to another person, it is the duty of the banker to see that the signature of the payee

is genuine. *Murphy* vs. *Metropolitan National Bank,* 191 Mass. 159-164, 77 N. E. 693, 114 Am. St. Rep. 595; *Greenfield Savings Bank* vs. *Stowell,* 123 Mass. 196, 25 Am. Rep. 67; *Dedham National Bank* vs. *Everett National Bank,* 177 Mass. 392-395, 59 N. E. 62, 83 Am. St. Rep. 286; *Critten* vs. *Chemical National Bank,* 171 N. Y. 219-228, 63 N. E. 969, 57 L. R. A. 529; *Hardy* vs. *Chesapeake Bank,* 51 Md. 562, 34 Am. Rep. 325; *Harter* vs. *Mechanics' National Bank,* 63 N. J. Law, 578-580, 44 Atl. 715, 76 Am. St. Rep. 224."

And further along in the opinion, on page 742, says:

"The facts reported by the auditor show an entire neglect of legal duty on the part of the defendant. If there was or could be any attempt to perform this duty on its behalf by any prior holder of a check, under such circumstances, that the defendant, upon the facts of this case, can take advantage of the effort, there is nothing in the report to show it. We have a naked case of payment of the plaintiff's checks in reliance upon a responsible guarantor of the endorsement, and without doing anything to perform the duty which the defendant owed the plaintiff in reference to his order for the payment. If the case stopped here the defendant's liability for the payment would be unquestionable.

The auditor has found that the plaintiff, in the method of doing its businesss, and in the conduct of its officers and employes, was negligent in not discovering and preventing the fraud by which it was induced to draw checks payable to fictitious persons, and to another person who was not entitled to payments. The auditor has also found that this negligence induced the defendant to pay these checks. The facts are pretty fully stated in the report, and the question arises whether there was any ques-

tion of negligence, which was a direct and proximate cause of the payment of these checks upon forged endorsements, or whether the negligence only produced conditions which were followed by criminal acts of forgery by a third person, which acts were not discovered by the defendant through its failure to make investigation as to the pretended endorsements by the payees. Assuming that, under some circumstances, negligence of a depositor inducing an unauthorized payment of a check by a banker may be availed of in defense of a claim by the depositor for the money paid, it seems plain that only negligence which is a direct and proximate cause of the payment can be effectual in making such a defense. Some of these checks were made payable to A. L. Sefton, a woman, and were endorsed by her. We think it plain that these were not payable to a fictitious person and that the payments were rightly made. Other checks were in the same form and were not endorsed by her. Assuming for the moment that these were not payable to a fictitious person, they were paid on forged endorsements. If one is fraudulently induced to deliver to a person who is not entitled to it a check made payable to another person who is not entitled to payment of it, can his negligence in suffering the fraud to be practiced upon him be found to be a direct and proximate cause of a payment made by the banker on whom the check is drawn, upon a forged endorsement of the name of the payee, without any investigation by the banker, as to the genuineness of the endorsement? We think not. The check is like any other check payable to a real person which happens to be in the possession of another person. It is possible to forge an endorsement upon it, as it is to forge an endorsement upon any other check. Perhaps the circumstances make a speedy detection of such a forgery less prob-

able than in ordinary cases. But the whole duty of seeing whether there is a forgery of such an endorsement upon any check rests primarily upon the banker. The drawer of the check has nothing to do with that. Ordinarily he makes no representation that has any relation to it.

In the case just supposed he made no representation in regard to it. The checks payable to the order of A. L. Sefton, which he did not endorse, were wrongly paid, and the defendant's liability for payment is like that for the payment of any other check bearing such a forged endorsement. The plaintiff had nothing to do with the payment, or with the defendant's performance or non-performance of its duty to see that payment was made to the right person.

There are many cases that illustrate the rule that negligence of the maker is immaterial unless it is of a kind that *directly and proximately* affects the conduct of the banker in the performance of his duties. *Belknap* vs. *National Bank of North America*, 100 Mass. 376, 97 Am. Dec. 105; *Shepard & Morse Lumber Co.* vs. *Eldridge*, 171 Mass., 516, 51 N. E. 9, 41 L. R. A. 617, 68 Am. St. Rep. 446; *Arnold* vs. *Cheque Bank*, L. R. 1 C. P. D. 578-587; *Bank of Ireland* vs. *Trustees of Evans Charities*, 5 H. of L. Cas. 389; *Colonial Bank of Australia* vs. *Marshall*, A. C. (1906) 559; *Schoefield* vs. *Earl of Londersborough*, A. C. (1896) 514; *Macbeth* vs. *North & South Wales Bank*, 1 K. B. (1908) 13; *Roberts* vs. *Tucker*, 16 Q. B. 560; *Shipman* vs. *Bank of New York*, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821; *Bank* vs. *Nolting*, 94 Va. 263, 26 S. E. 826; *Welsh* vs. *German-American Bank*, 73 N. Y. 424, 29 Am. Rep. 175; *Armstrong* vs. *National Bank*, 46 Ohio, St. 512, 22 N. E. 866, 6 L. R. A. 625, 15 Am. St. Rep. 655; *Harter* vs. *Mechanics' National Bank*, 63 N. J.

Law, 578-580, 44 Atl. 715, 76 Am. St. Rep. 224; *German Savings Bank* vs. *National Bank,* 101 Iowa, 530, 70 N. W. 769, 63 Am. St. Rep. 399; *Janin* vs. *London, etc., National Bank,* 92 Cal. 14, 27 Pac. 1100, 14 L. R. A. 320, 27 Am. St. Rep. 82.

The question arises whether the making of a check payable to a fictitious or non-existing person, through negligent failure to discover the fraud by which the check is obtained, stands differently from making a check to an actual person, in reference to its effect upon payment of the defendant. We are of the opinion that there is no difference in law. In either case it is the duty of the bank to see that there is a genuine endorsement. In some respects it would be more difficult to deceive a bank in this particular, as against vigilant investigation, if the payee was fictitious than if he were real. In some respects it might be less difficult. We know of no decision that has recognized a difference in law between the two cases. It has been held that there is no difference. *Armstrong* vs. *National Bank,* 46 Ohio St. 512, 22 N. E. 866, 6 L. R. A. 625, 15 Am. St. Rep. 655."

The concluding part of the court's opinion reads as follows:

"The case of *Shipman* vs. *Bank of New York,* 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821, is almost identical in its leading features with the case before us, and the decision of it fully covers the conclusion which we have reached.

There is a dispute between the parties as to whether the checks payable to A. L. Sefton, on which her signature was forged, were payable to a fictitious or non-existing person, within the meaning of the statute. Perhaps this question is not very important; for in either view the payments were obtained on forged indorsements, and it is immaterial to

> the rights of the parties whether the forgeries were of the name of a real person or of a fictitious person. *Armstrong* vs. *National Bank,* 46 Ohio St. 512, 22 N. E. 866, 6 L. R. A. 625, 15 Am. St. Rep. 655."

The court in its opinion goes on to state that the duty of the depositor does not extend to an examination of the signatures of the payees of checks, for the reason that he is not expected to know them and that the banker is expected to see that the payments are properly made, and cites the following cases: *Murphy* vs. *Metropolitan Nat. Bank,* 191 Mass. 159, 77 N. E. 693, 114 Am. St. Rep. 595, and cases cited; *Shipman* vs. *Bank of New York,* 126 N. Y. 318, 27 N. E. 371, L. R. A. 791, 22 Am. St. Rep. 821; *Welsh* vs. *German-American Bank,* 73 N. Y. 424, 29 Am. Rep. 175; *Harter* vs. *Mechanics' National Bank,* 63 N. J. Law 578, 44 Atl. 715, 76 Am. St. Rep. 224; *German Savings Bank* vs. *Citizens' National Bank,* 101 Iowa, 530, 70 N. W. 769; 63 Am. St. Rep. 399; *United Security Life Ins. & Trust Co.* vs. *Bank,* 185 Pa. 586, 40 Atl. 97. A new trial was ordered in this case.

Judge Dungan, in his opinion (p. 27, State of the Case) quotes two cases in support of the proposition that the officers of the Ninth Ward Building & Loan Association are chargeable with knowledge that A. R. March had not paid on the shares standing in her name the amount of the loan represented by the check in question.

The first case which he cites is that of *Campbell* vs. *Manufacturers' National Bank,* 67 N. J. Law 301, at p. 308, and also *Martin* vs. *Webb,* 110 U. S., p. 7, at page 15.

In the Campbell case *(supra)* the portion referred to by Judge Dungan is only the loosest sort of dicta on the general subject of imputed knowledge, and is not at all in point with the case at bar. As a matter of fact, in the Campbell case

the plaintiff was allowed to recover, as it was held that no knowledge could be imputed to the officers of the bank, the plaintiff in that particular case.

In the case of *Martin* vs. *Webb (supra)* it was held that

> "That which directors ought, by proper diligence, to have known as to the general course of the bank's business, they may be presumed to have known in any contest between the corporation (the bank) and those who are justified by the circumstances in dealing with it upon the basis of that course of business."

Surely the well-reasoned and well-considered opinion in *Seaboard National Bank* vs. *Bank of America (supra)* which, as well as being authority on the general doctrine of fictitious payees, also is directly in point on the question of negligence as affecting a defendant bank's liability for money paid on a forged endorsement of a check, is of more weight than the loose general dicta in *Campbell* vs. *Manufacturers' National Bank (supra).*

The court will recall from the Statement of Facts of this case in a previous portion of this brief, that it involved a draft drawn by a bank, payable to an existing partnership on the fraudulent request of the depositor's bookkeeper, who, thereafter, endorsed the partnership's signature and deposited the draft in his own account, and that the court, in its opinion, on pages 830 and 831 said:

> "We are of the opinion that the alleged negligence on the part of the Federal National Bank is immaterial in this action, because no act of the Mellon National Bank or of the defendant was induced by the acts, representations or admissions of the Federal National Bank."

In the case of *Marsh vs. National Shawmut Bank (supra)* the court, in its opinion on pages 742 and 743 (all of which is quoted in a previous portion

of this brief), states that the question arose whether there was any evidence of negligence which was a direct and proximate cause of the payment of the checks in question, upon forged endorsements, or whether the negligence only produced conditions which were followed by criminal acts of forgery by a third person.

The court in the course of its opinion saying:

> "If one is fraudulently induced to deliver to a person who is not entitled to it a check made payable to another person who is not entitled to payment of it, can his negligence in suffering the fraud to be practiced upon him be found to be a direct and proximate cause of a payment made by the banker on whom the check is drawn, upon a forged instrument of the name of the payee, without any investigation by the banker as to the genuineness of the endorsement? We think not."

The court goes on to state that the check is like any other check, and that it is posssible to forge an endorsement upon it as on any other check, and that while the circumstances make a speedy detection of such a forgery less probable than in ordinary cases, the whole duty of seeing whether there is such a forgery of such an endorsement rests primarily upon the banker, and that the drawer of the check has nothing to do with it, and that "The plaintiff had nothing to do with the payment or with the defendant's performance or non-performance of its duty to see that payment was made to the right person."

The court further states:

> "There are many cases that illustrate the rule that negligence of the maker is immaterial unless it is of a kind that *directly and proximately* affects the conduct of the banker in the performance of his duties."

(There are a great number of these cases which are cited in the quotation from *Marsh* vs. *National Shawmut Bank* in a previous portion of this brief.)

The court will see at a glance that the case above quoted from is well in point with the case at bar, and, while, of course, not binding authority upon the courts of New Jersey, well sets forth the law regarding the imputation of negligence in the present case, even should negligence of any sort upon the part of the Building & Loan Association be held to exist.

In addition to the persuasive authority of *Marsh* vs. *National Shawmut Bank (supra),* we would point out in relation to *Martin* vs. *Webb* (supra), cited by Judge Dungan in his opinion, that in that case it was held that the directors might be presumed to have known that which they ought, by proper diligence, to have known as to the general course of the bank's business, *in any contest between the corporation and those who are justified by the circumstances in dealing with it upon the basis of that course of business.* As is pointed out in *Marsh* vs. *National Shawmut Bank (supra)*, the defendant bank cannot be deemed to have relied upon any course of dealing of the plaintiff or of the Building and Loan Asssociation, as their absolute and sole duty in this matter was to see that the endorsement upon the check in question was genuine before paying the same.

By reason of the facts and authorities set forth under this point, the plaintiff respectfully urges that the check in the case at bar was not made payable to a fictitious person or to bearer, inasmuch as the makers of the check did not know that the same or the money represented thereby was not to go to the person named therein as payee, and that such knowledge cannot be imputed to them, but that, on the contrary, it clearly appears that

they knew of the existence of the certain defendant, the person named as payee in the check, and that their intention was that such person was to receive the check and the money represented by such check.

## VI.

## The defendant bank does not, in relation to the check in question, occupy the position of a holder in due course or a purchaser for value without notice.

The defendant in its brief in the court below urged that it occupied the position of a purchaser for value without notice in relation to the check in question.

This position, to say the least, is a novel one, as we think it will be difficult to find any case in this or any other jurisdiction holding that a bank is a purchaser of a note or check which is deposited in such bank for collection for a depositor. It seems to us that it is ridiculous to contend that the bank was the purchaser of or had any ownership in the check in question and that it had occupied any position other than a mere agency for the collection of this check for the depositor.

Even if, by any stretch of the doctrine relating to purchasers for value without notice, the defendant bank could be deemed to be such a purchaser (which, as indicated above, we think is inconceivable), they still could not occupy this position, as the law casts upon the defendant bank the burden of determining the genuineness of the endorsement on the check, and they, therefore, cannot by any possibility be deemed to have taken said check without notice, actual or constructive, of the forged character of the endorsement.

## CONCLUSION.

To summarize, therefore, it is elementary law that the genuineness of prior endorsements was warranted by the defendant upon the presentation of the check for payment to the bank; that, in the second place, no title could be obtained by virtue of the forgery of the endorsement; and, in the third place, since the check was not drawn by Brown, to whom alone any fraudulent intent could be ascribed, but by the president and treasurer of the association, both of whom knew the payee as an existing woman, the sister-in-law of Brown, and a shareholder in the association, and intended that the check should be cashed by her and, inasmuch as the plaintiff may not, under the decisions, charge the association's account with the amount of the check paid by it to the defendant, and further, that if plaintiff did so charge such amount the association could recover the same from the plaintiff, the plaintiff is entitled to recover from the defendant by virtue of the defendant's false warranty by its endorsement.

Respectfully submitted,

RIKER & RIKER,
*Attorneys of Plaintiff.*

# New Jersey Court of Errors and Appeals.

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| IRONBOUND TRUST COMPANY, a corporation of the State of New Jersey, *Plaintiff-Appellant,* *vs.* NEWARK TRUST COMPANY, a corporation of the State of New Jersey, *Defendant-Respondent.* | *Action at Law.* *Brief of Defendant-Respondent.* |

As a concise statement of the facts in the case is set forth both in the Stipulation (State of the Case, pages 15-22, inclusive) and in the Opinion of Dungan, J., in the Essex County Circuit Court (State of the Case, pages 23-28, inclusive), they will not be restated here.

The Notice of Appeal (State of the Case, pages 29-30, inclusive) shows the six grounds upon which the plaintiff relies in its appeal; and these grounds will be considered separately in the present brief. Before, however, answering in detail the points raised, we desire to point out certain general objections to the appeal as taken, which the respondent insists are sufficient to insure an affirmance of the judgment of the Essex County Circuit Court.

## POINT I.

**No requests for findings of law or fact, or law and fact, having been made by the plaintiff on submission of the case, there is no record before this court on which it can reverse the judgment of the Circuit Court.**

This case having arisen on stipulation, presents, of course, a different situation from one tried before a jury, in that objections to the admission of evidence, and similar motions and requests, cannot be made. But parties are not thereby excused from making such requests to the Court for findings of law or fact, or law and fact, and making and filing exceptions or objections to such findings when made, as will constitute a record on which the court of appeal can reconsider the case. In *French, Receiver,* v. *Higgins,* 66 N. J. Law 128, the cause had been originally tried, like the present case, by a Circuit Court without a jury on an agreed state of facts. The court said (at page 129):

> "Upon the justice reporting his findings, either of two courses is open for the review thereof—*first,* apply, within six days, for a rule to show cause why a new trial should not be granted, which, if allowed, will be heard by the Supreme Court, as in the case of a verdict; or, *second,* take a writ of error to the Court of Errors to review the errors of law *upon the exceptions taken at the trial or to the conclusions of law of the justice which have been allowed and sealed.*"

Rule 25 of the Practice Act of 1912 (Laws of 1912, Chapter 231) did, it is true, abolish the formal pleadings known as bills of exception and writs of error; but it did not abolish the necessity

of making requests for findings, and duly objecting or excepting to refusals to find, which form the basis of the appeal. The plaintiff-appellant in our case not having made any requests for findings of law or fact, or law and fact, on submisision of the briefs, there is no record before this court on which it can reverse the judgment of the Circuit Court. The rule on this point is laid down with unmistakable clearness by Chancellor Walker in the recent case of *Blanchard Bros.* v. *Beveridge,* 86 N. J. Law 561, at pages 562-563:

> "As the cause at bar was submitted to the court on an agreed state of facts, it may be that objections could not well have been made upon the trial—for want of a trial, so to speak—*but it was certainly incumbent upon counsel to request the court to make a finding or findings of law or fact, or law and fact, and to except or object to an adverse finding, when made, in order to lay the foundation for a review on appeal. This not having been done, there was no record before the Supreme Court upon which it could reverse the judgment of the District Court;* and, therefore, the Supreme Court's judgment must be reversed, to the end that the District Court's judgment shall be allowed to stand."

See also:

*Edwards Co.* vs. *Excelsior Drum Works,* 95 Atl., 976, 977.

*Sulzberger & Sons Co. of America* vs. *Miller,* 94 Atl., 400, 401.

*Webster* vs. *Freeholders of Hudson,* 86 N. J. Law, 256, 258.

## POINT II.

**In so far as the findings of the Circuit Court are findings of fact, or of blended law and fact, they are not reviewable by this court unless clearly unsupported by the evidence as adduced in the stipulation.**

It is submitted that, of the six findings of the Circuit Court which are stated as the plaintiff's grounds for appeal, at least five are findings of fact, or of blended law and fact.

The first ground stated in the Notice of Appeal is as follows:

"I. Because the court below found that the check in suit was payable to a fictitious person."

This was in effect a finding that, *as a matter of fact,* the name "A. R. March" inserted as the payee in the check did not refer to Adaline R. March, the sister-in-law of George Brown, Jr., or any other existing person. The only question, then, is whether there are any facts in the Stipulation upon which this finding can be based. It is admitted that "A. R. March, the sister-in-law of George Brown, Jr., never applied for a loan from said Associations, nor authorized anyone to apply for her," (*State of the Case,* page 19), that "neither A. R. March, the sister-in-law of George Brown, Jr., nor any other person have made any claim to the proceeds of the check, or to the fund represented thereby" (*State of the Case,* page 19), and that "the endorsement of A. R. March on check No. 518 was not made by her or by anyone having authority from her." (*State of the Case,* page 21.) It is evident from other facts stated in the Stipulation that George Brown, Jr., displayed no intention to

allow the proceeds of the check to go to A. R. March, but used the name simply as a blind; that the other two officers signing the check made no inquiries, but passively appended their signatures. The respondent insists that these admitted facts constituted abundant evidence for the court below to base its finding on; and that that finding, that the intention of the makers of the check was not to pay an actual A. R. March, but a fictitious payee, or bearer, was fully justified.

The second ground stated is this:

"2. Because the Court below found that the fact that the check in suit was payable to a fictitious person was known to the persons making it."

This on its face is a finding of fact. As will be seen by the reference to the last paragraph of Dungan, J.'s, opinion (*State of the Case*, page 28, line 19), his conclusion is not that the persons making the check were "legally chargeable" with knowledge of the fictitiousness of "A. R. March," payee; but that "such fact *was known* to the persons making it."

The fourth ground stated is:

"4. Because the Court below found that the defendant had no notice of the fraud of Brown in drawing the check to a fictitious person (or in the name of A. R. March) and endorsing that name upon it."

This is a finding of fact and seems, indeed, little more than a repetition of one of the facts admitted in the stipulation (*State of the Case*, page 20, line 28): "The Newark Trust Company had no knowledge of any alleged infirmity of the instrument and paid full value therefor."

The fifth and sixth grounds stated are:

"5. Because the Court below found that the intent of Brown was the intent of the officers of the Association in regard to the drawing of the check."

"6. Because the Court below found that the president and treasurer of the Association had knowledge or were chargeable with knowledge that A. R. March was a fictitious person."

The fifth and sixth grounds, it is submitted, are findings of blended law and fact, if they are findings at all; but it would seem that they were not really anything more than points made by the Court in its reasoning in reaching its final conclusion, as they are not mentioned in the last paragraph, in which the findings are definitely stated. The law applicable to this matter is laid down in State, *Ruckman* vs. *Demarest*, 32 N. J. Law, 528. We quote from the syllabus:

> "To assign error in matters not on the record, but in the written opinion of the court, alleging various imperfections and defects in the reasoning, by which the court reached its conclusion, is wholly unwarranted, and the court upon its own motion will order such assignment stricken out."

But, assuming that the fifth and sixth grounds as well as the others were actually findings of the court, the respondent contends that, as findings of fact, or of blended law and fact, they are not reviewable by this court unless it is conclusively established that they cannot reasonably be supported by the evidence contained in the stipulation. The law on this question is settled by a long line of authorities, of which these are a few:

"Where a cause is tried by the court, without a jury, its findings, on questions of fact, are not reviewable by writ of error. All that can be reviewed is the sufficiency of the facts found to support the judgment." *City of Elizabeth* vs. *Hill*, 39 N. J. Law, 555, 557.

"When a case is tried by the court, a jury being waived, its finding upon the blended law and facts cannot be reviewed upon error." *N. J. Rubber Co.* vs. *Commercial Union Assurance Co.*, 64 N. J. Law, 51 (syllabus).

See also:

*Mills* vs. *Mott*, 59 N. J. Law, 15.

*Dilks* vs. *Kelsey*, 59 Atl., 897.

*McLaughlin* vs. *Beck*, 71 N. J. Law, 380.

*Dilks* vs. *Stathem*, 43 Atl., 663.

*Ruppert* vs. *Zang*, 73 N. J. Law, 216.

*Stout* vs. *Leonard*, 37 N. J. Law, 492.

*Aschenberg* vs. *Mundy*, 76 N. J. Law, 352.

*Schorb* vs. *Haurand*, 76 N. J. Law, 768.

*Marten* vs. *Brown*, 80 N. J. Law, 143; judgment affirmed, 81 N. J. Law, 599.

In the syllabus to *Schorb* vs. *Haurand* (supra) it is said:

"In case of trial of a cause by the court without a jury, errors cannot be assigned upon the opinion of the court, nor upon matters of blended law and fact."

Accordingly, the respondent insists that the decision of the Circuit Court is not reviewable by this court on the grounds numbered 1, 2, 4, 5 and 6 in the Notice of Appeal.

## POINT III.

**The Ironbound Trust Co. stands in the same and no better position than the Ninth Ward Building and Loan Association with respect to the subject-matter of this suit; and all defenses available against the Ninth Ward Association are also available against the Ironbound Trust Company.**

On page 20 of the State of the Case, next to the last paragraph of the Stipulation reads:

"On March 1, 1914, the Ninth Ward Building and Loan Association demanded from the Ironbound Trust Co. the money paid by it on said check No. 518, on the gound that the signature of A. R. March was a forgery. *No suit was ever brought by the Ninth Ward Building and Loan Association against the Ironbound Trust Co.,* but the Ironbound Trust Co. voluntarily assumed the liability. The Ironbound Trust Co. has now brought suit against Newark Trust Co. for the amount of said check, as a guarantor of previous endorsements alleged to be forged."

It is clear from this statement of facts that the Ironbound Trust Company did not pay because it was forced to do so; but, voluntarily, *after hearing of the infirmity in the instrument,* consented to reimburse the Ninth Ward Building and Loan Association, the maker, and to rely on its remedy against the Newark Trust Co. as endorser. This, the respondent insists, deprives the appellant of any advantages which it might have had as a holder in due course, and makes it virtually an assignee of the claims which the Ninth Ward Building and Loan Association had, entitled to all the rights and subject to all the liabilities of that Association with regard to the check in suit.

Section 26 of the Negotiable Instruments Act (Comp. Stat. of N. J., p. 3738; P. L., 1902, p. 589) reads:

> "Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time."

In Crawford's Annotated Negotiable Instruments Law, New Jersey revised edition, page 63, the section is explained:

> "A holder in due course is a holder who has taken the instrument under the following conditions:
>
> "1. That it is complete and regular upon its face.
>
> "2. *That he became the holder of it before it was overdue*, and without notice that it had been previously dishonored, if such were the fact.
>
> "3. That he took it in good faith for value.
>
> "4. *That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.*"

It must be kept in mind that at the time the Ironbound Trust Co. acceded to the demand of the Ninth Ward Building and Loan Association for return of the money paid on that check, that the check had long been paid and returned to the drawer. See page 18 of the State of the Case:

> "The check was forwarded by the Newark Trust Co. to the Ironbound Trust Co. for col-

lection, having been paid by it from the funds on deposit to the credit of the Ninth Ward Building and Loan Association, was thereupon returned to the Ninth Ward Building and Loan Association on or about July 11th, 1913."

If it is to be maintained that the Ironbound Trust Co. is a holder for value, when did it become so? Clearly it was not such on July 11th, 1913, for at that time the check had passed entirely out of its possession, was paid, and returned as cancelled to the Association as drawer.

Not being a holder for value on July 11, 1913, did the Ironbound Trust Company subsequently become one? The only act which could conceivably be construed to confer that status was its accession to the demands of the Ninth Ward Building and Loan Association on March 1, 1914. By consenting to reimburse the Association, the Ironbound Trust Co. in effect purchased the right of action on the check which the Ninth Ward Building and Loan Association had against the Newark Trust Co. In so far as the check was a part of that right of action, it, too, passed to the Ironbound Trust Co.

But in no sense did the purchase or assignment of the right of action and check constitute the Ironbound Trust Co. a holder for value of the latter. The second and fourth elements in Crawford's summary, just quoted, that the holder in due course should become such holder before the instrument was overdue, and, "that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it" are absent. In fact, the assignment to the Ironbound Trust Co. was long after maturity, and the Association demanded payment on the very

ground that there was an infirmity in the instrument; so that the Ironbound Trust Co. had actual notice of one defect and was put on inquiry to discover if there were others.

The circumstance of the check in suit being overdue is of considerable importance in determining the status of the Ironbound Trust Co. In 7 Cyc, 820, it is said:

> "It is universally held that the effect of a transfer which is made after the maturity of the paper is to subject the indorsee to all defenses existing between the original parties to the paper at the time of such transfer, so far as such defenses are available against his indorser."

And in *Vinton* vs. *King*, 86 Mass., 562, at page 564, it is said:

> " * * * it being admitted law that he who takes a note after it is due is subject to all objections and equities to which it is liable in the hands of him from whom he takes it, and to the same defenses, in a suit against the maker, which the maker might set up in an action against him by the payee; that the circumstance that a note is overdue makes it incumbent on the party receiving it to satisfy himself that it is a good one, and that if he omit to do so he must stand in the situation of him who was holder at the time it was due."

See also *Cumberland Bank* vs. *Hann*, 18 N. J. Law, 222; *Little* vs. *Cooper*, 11 N. J. Equity, 224; *Northampton Nat. Bank* vs. *Kidder*, 106 N. Y., 221, 225.

The check in suit, as we have already shown, was long overdue when the Ironbound Trust Co. took it on March 1, 1914, having been returned to the maker as cancelled on July 11, 1913. The appellant, therefore, receiving the check as assignee of the Ninth Ward Building and Loan Association, takes it subject to all equities in the hands of its assignor, and is in no better position with respect to the subject matter of this suit than the Ninth Ward Building and Loan Association itself.

## POINT IV.

### The finding of the Circuit Court that the signing of A. R. March's name by Brown was not a forgery was justified in view of its findings of fact.

The Circuit Court having found as facts that the check was payable to a fictitious person, and that such fact was known to the person making it (see State of the Case, page 28, line 17; also Point II. of the present brief) could not consistently have reached any other conclusion than that the signing of the name of "A. R. March" by Brown was not a forgery.

The Negotiable Instruments Law says:

> "The instrument is payable to bearer—(3) when it is payable to the order of fictitious or non-existing person, and such fact was known to the person making it so payable."
> *Comp. Stat. of N. J.*, p. 3736, sec. 9, III.

It follows that, in our case, the check was payable to bearer, and hence it was wholly unnecessary to write the name of A. R. March on the back of it to negotiate it. This being so, the writing of that name on the check by Brown was as immaterial an

alteration of the instrument as if he had merely made a cross, or written "Thank you" on it. The writing did not alter the legal effect of the instrument one iota. In *19 Cyc, 1375,* it is said:

> "In order that an alteration may constitute forgery it is essential that it be material. Adding the name of a witness which is not required and which does not affect the validity of the instrument, the addition of a figure in the margin, the body remaining unchanged, or a change in a memorandum upon the back of an instrument, the legal effect of the instrument not being varied, is immaterial."

And in McClain on Criminal Law, sec. 765, it is said:

> "But the alteration, to constitute forgery, must be material; and a harmless alteration, or one which does not affect legal rights, will not constitute a forgery."

See also:

*Fry* vs. *P. Bannon Sewer Pipe Co.*, 101 N. E. (Ind.), 10.

*Barton Savings Bank* vs. *Stephenson*, 89 Atl. (Vt.), 639.

*Wicker* vs. *Jones*, 74 S. E. (N. C.), 801.

*Holthouse* vs. *State*, 97 N. E. (Ind.), 130.

*Blenkiron Bros.* vs. *Rogers*, 127 N. W. (Neb.), 1062.

*O. N. Bull Remedy Co.* vs. *Boyer*, 124 N. W., 20; 109 Minn., 396.

*Benton* vs. *Clemmons*, 47 So. (Ala.), 582.

*People* vs. *Burr,* 111 N. Y. S., 1136; 127 App. Div., 907.

*Warder, Bushnell & Glessner Co.* vs. *Stewart,* 36 Atl. (Del. Super.), 88.

*Shirley* vs. *Swafford,* 45 S. E. (Ga.), 722.

*Crowe* vs. *Beem,* 75 N. E., 302; 36 Ind. App., 207.

*Tranter* vs. *Hibberd,* 56 S. W. (Ky.), 169.

*Kelly* vs. *Thuey,* 45 S. W. (Mo.), 300.

*Prudden* vs. *Nester,* 61 N. W., 777; 103 Mich., 540.

In 2 Corpus Juris, 1190-1192, it is said under the subject "Alteration of Instruments":

> " * * * *any change* in words or form merely, even if made by an interested party, *which leaves the legal effect and identity of the instrument unimpaired and unaltered,* which in no manner affects the rights, duties or obligations of the parties, and which leaves the meaning of the instrument as it originally stood, *is not material and will not invalidate the instrument or discharge the parties from liability thereon,* in the absence of a statute declaring such to be the effect, notwithstanding the alteration is made by the payee or holder of the instrument himself. Where the words inserted, when taken with the original words, and as an addition to them, are wholly senseless and inoperative, or *where the addition is a mere nullity, it cannot affect the terms or identity of the contract.*"

The writing of A. R. March's name by Brown, then, was an immaterial alteration and could not

be forgery under the authorities; so the decision of the Circuit Court cannot be disturbed on this ground.

*But if this court shall determine that the six findings of the Court below, enumerated in the Notice of Appeal, were findings of law, and present legal questions to the Court, the respondent asks that each of the six propositions be affirmed, for the reasons that follow:*

## POINT V.

### The check in suit was payable to a fictitious person.

It is conceded that A. R. March, the sister-in-law of George Brown, Jr., had no knowledge of the issuance of the check in this suit or any connection with the Ninth Ward Building and Loan Association. She herself makes and has made no claim to the check or to the funds represented thereby. George Brown, Jr., used the name of A. R. March for a convenience. He might as well have drawn the check to the order of John Doe, but selected the name of A. R. March the better to disguise his intentions, and perpetrate a fraud on the Association. The transaction here involved is one of larceny and fraud rather than forgery, when we consider that A. R. March is in no way affected by the transaction, and the disguise merely enabled Brown to loot the Association. Therefore, the defendant insists that the situation comes under the class of cases dealing with checks payable to fictitious persons.

The rule of the Negotiable Instruments Law with reference to fictitious persons is that:

"The instrument is payable to bearer (3) when it is payable to the order of fictitious or non-existing person, and such fact was known to the person making it so payable." *Comp. Stat. of N. J.*, p. 3736, sec. 9, III.

This section of the statute has been construed in many cases in the State of New York and elsewhere, but does not appear to have been considered by the New Jersey courts. We quote from some of these opinions:

"One of two partners drew, in the name of his firm, a bill upon the plaintiff, payable to the order of B., and having forged the name of B. as endorser upon the bill, presented it to the Bank of Central New York, had it discounted in the regular course of business, and applied the proceeds to his private use. The cashier of the bank endorsed the bill and transmitted it to the defendants for collection, and the plaintiff accepted and paid it to the defendants. After discovering that the payee's endorsement was forged, he sued to recover back the money so paid. *Held*, that the action could not be maintained."

"Where the payee is a stranger to the transaction, and has no interest in the draft, his endorsement is unnecessary in order to transfer a good title to the party discounting the paper."

"If put in circulation by the drawer, with a forged endorsement of the payee, a bona fide holder may treat it as a bill payable to bearer." (Syllabus) *Coggill* vs. *Amer. Ex. Bank*, 1 N. Y., 113.

"As the payee had no interest, and it was not intended that he should ever become a party to the transaction, he may be regarded, in relation to this matter, as a nonenity; and it is fully settled that when a man draws and puts into circulation a bill which is made payable to a fictitious person, the holder may declare and recover upon it as a bill payable to bearer. In legal effect, though not in form, the bill is payable to bearer." *Coggill* vs. *American Ex. Bank*, supra.

In *Snyder* vs. *Corn Exchange Natl. Bank*, 70 Atl. (Pa.), 876, it is said, at p. 879:

"A fictitious person within the contemplation of the Act of 1901 is not merely a nonexisting one; for, if so, the word 'non-existing' would have been sufficient without more. It is clear, then, that when the Legislature declared that a check payable to 'a fictitious or nonexisting person' is to be regarded as payable to bearer, *it meant a fictitious person to be one who, though named as payee in a check, has no right to it, or the proceeds of it, because the drawer of it so intended, and it therefore matters not whether the name of the payee used by him be that of one living or dead, or of one who never existed.*"

See also:

*Bartlett* vs. *First Natl. Bank*, 93 N. E. (Ill.), 337.

*Boles* vs. *Harding*, 87 N. E. (Mass.), 481.

"In *Phillips* vs. *Mercantile Nat. Bank*, just decided, we held the bank represented by plain-

tiff responsible for the drafts drawn by its cashier, and duly paid by the defendant, although the cashier drew them for his own purpose and made them payable to the order of certain customers of the bank, whose names he forged, and who in truth were in no manner connected with the drafts and whose names were thus inserted by the cashier to give more semblance to the drafts as business paper. They were treated as fictitious payees, and the drafts were held good as against the bank because drawn by an officer who had apparent authority to sign them and in the usual course of business."

*Goshen Natl. Bank* vs. *State of New York*, 141 N. Y., 379.

See *Dundee Natl. Bank* vs. *Huntington*, 20 App. Div., 104.

"Under the Negotiable Instruments Law and the cases cited, I am of the opinion the checks in question, as between plaintiff and defendant, were payable to bearer. It does not appear who forged the maker's signature, but the subsequent history of the checks does not leave it open to doubt that the person who did so knew that the parties whose names were used as payees would never have any interest in the instruments. Just as in the Bank of England and the Phillips cases, in order to accomplish the fraud more easily, the names inserted as payees were those of persons to whom checks might naturally be made. Whether indorsing the names of the payees upon the checks was technically forgery or not, it is unnecessary to consider. It has been convenient

to thus describe them. Despite these forged instruments, then, the defendant acquired good title, since in legal effect the checks were payable to bearer. Plaintiff, having paid them to a holder in due course, cannot recover upon the ground that the payees' signatures were forged."

*Trust Co. of Amer.* vs. *Hamilton Bank of N. Y.*, 127 App. Div., 515; 112 N. Y. Supp., 84.

*Bank of England* vs. *Vagliano*, L. R., 1891, App. Cas., 107.

See also *North British Mercantile Ins. Co.* vs. *M. Natl. Bank*, 161 App. Div., 341.

"It was stated in the Shipman case that the maker's intention is the controlling consideration, which determines the character of the paper, and that the statutory rule, which gives to paper drawn payable to the order of a fictitious person, and negotiated by the maker, the same validity as paper payable to bearer, applies only when such paper is put into circulation by the maker with knowledge that the name of the payee does not represent a real person. The principle of that decision is quite applicable to the case at bar. Though Bartlett selected for the execution of his dishonest purposes the names of persons who were dealers with his bank, it was in legal effect, as though he had selected any names at random. The difference is that, by the methods resorted to, he averted suspicion on the part of the directors or other officers of his bank. The names he used were, for his purpose, fictitious, because he never intended that the paper should reach

the persons whose names were upon it. The transaction was one solely for the fraudulent purpose of appropriating his bank's moneys by a trick which his position enabled him to perform. Concededly, if the names of the payees were of fictitious persons, the Sumter bank would have had no claim upon the defendant. How, then, can the transaction be said to assume a different aspect because the names adopted were of known persons? That the intention was to treat them as being of fictitious persons is manifest."

*Phillips* vs. *Mercantile Natl. Bank*, 140 N. Y., 556, at 561.

"The fictitiousness of the maker's direction to pay does not depend upon the identification of the name of the payee with some existent person, but upon the intention underlying the act of the maker in inserting the name. Where, as in this case, the intent of the act was, by the use of the names of some known persons, to throw directors and officers off their guard, such a use of names was merely an instrumentality or a means which the cashier adopted in the execution of his purpose to defraud the bank, in an apparently legitimate exercise of his authority."

*Phillips* vs. *Mer. Natl. Bank*, 140 N. Y., 562.

"If a bill is payable to some person who had no interest in it, and not intended to become a party to it, whether such person is or is not known to exist, the payee may be deemed fictitious." *Rogers* vs. *Ware* (syllabus), 2 Neb., 29.

"If the bill or note be payable to some person who had no interest in it, and was not intended to become a party to it, whether such person is or is not known to exist, the payee may be deemed fictitious." *Daniel on Negotiable Instruments* (6th ed.), section 140.

## POINT VI.

**The fact that the check in suit was payable to a fictitious person was known to the persons making it.**

Having established that the check was drawn to a fictitious person it becomes necessary to establish the maker's knowledge and intention to make the check one payable to bearer. The maker of the check is the Ninth Ward Building and Loan Association. George Brown, Jr., its secretary, had obviously full knowledge. He prepared the check, signed it, and deposited it to the credit of a company controlled by him. Is the knowledge of Brown chargeable to the Association?

In *Cook on Corporations*, 7th Ed., Vol. 3, Sec. 727, it is said:

"It is well settled that a corporation is not chargeable with knowledge of facts merely because those facts were known to its incorporators or stockholders, or clerks, or promotors. *But the corporation has notice of facts which come to the notice of its officers or agents while engaged in the business of the corporation, provided those facts pertain to that branch of the corporate business over which the particular officer or agent has some control.*"

In *Armstrong* vs. *Ashley,* 204 U. S., 272, it was held that knowledge of the president of a local board of directors and of the local attorney of a building and loan association acquired while in the exercise of the powers committed to them was binding on the association. Mr. Justice Peckham, delivering the opinion of the court, said (at page 283):

> "The knowledge of the attorney and of the president of the board in regard to a matter coming within the sphere of their duty, and acquired while acting in regard to the same, and sending to the company in New Orleans their report which it was their duty to make, must be imputed to the company. *The fact that those agents committed a fraud cannot alter the legal effect of their acts or their knowledge with respect to the company in regard to third parties who had no connection whatever with them in relation to the perpetration of the fraud, and no knowledge that any such fraud had been perpetrated.*"

The same rule of agency has been developed in New Jersey in a line of cases beginning with *State* vs. *Sooy,* 41 N. J. Law, 394. It is stated as follows in *Geyer* vs. *Geyer,* 75 N. J. Eq., 124, at page 127:

> "The rule now is '*the knowledge of the agent is chargeable upon his principal whenever the principal, if acting for himself, would have received notice of the matter known to the agent.*'"

See also:

> *Vulcan Detinning Co.* vs. *Amer. Can. Co.,* 72 N. J. Eq., 387, 400, 401.

*Boice* vs. *Conover*, 71 N. J. Eq., 269, 270.

*Clement* vs. *Young McShea Amusement Co.*, 70 N. J. Eq., 677, 684.

*Lanning* vs. *Johnson*, 75 N. J. Law, 259, 261.

If the Association had been acting for itself, in the proper way, through its directors, it would certainly have received notice of the fact that A. R. March had not signed a note, pledged securities, or paid to the Association sufficient money to entitle her to a loan. And, in fact, that A. R. March was a fictitious person.

It will probably be objected that where the agent has knowledge of a fraud he is about to commit upon his principal, notice of such fraud is not chargeable to the principal. The two cases in New York of *Shipman* vs. *Bank of State of New York*, 126 N. Y., 318, and *Phillips* vs. *Mercantile Bank*, 140 N. Y., 556, illustrate well the point of distinction between where the knowledge of the agent is chargeable to the principal in cases of this character, and where it is not. In the Shipman case, Bedell was an attorney connected with the real estate department of the plaintiff. A man named Dodge acted as cashier, filled out checks, and kept the accounts. Bedell prepared statements showing the amount due to pay liens and charges. Dodge would prepare checks and have them signed by a member of the firm, and the checks were delivered to Bedell for distribution to the payees. Bedell thereupon forged the payee's name and used the proceeds. It was held in that case as follows:

> "It is claimed by the defendant that the sixteen checks made payable to the order of persons having no existence were, in legal

effect, payable to bearer. It is provided by statute that paper made payable to the order of a fictitious person and negotiated by the maker has the same validity 'as against the maker and all persons having knowledge of the facts, as if payable to bearer.' " *1 R. S.*, 768, sec. 5.

"We are of the opinion, upon examination of the authorities cited by counsel on both sides, that this rule applies only to paper put into circulation by the maker with knowledge that the name of the payee does not represent a real person. The maker's intention is the controlling consideration which determines the character of such paper. It cannot be treated as payable to bearer unless the maker knows the payee to be fictitious and actually intends to make the paper payable to a fictitious person."

"Bedell, of course, knew that the payees were fictitious, but he was not acting within the scope of his employment, but in carrying out a scheme of fraud upon the plaintiffs, and under such circumstances, his knowledge cannot be imputed to his principals."

In the Phillips case we find this case distinguished:

"The case of *Shipman* vs. *Bank of the State*, 126 N. Y., 318, 12 L. R. A., 791, 22 Am. St. Rep., 821, which was recently before us, did not decide any question inconsistently with what the courts below have decided. There it had been found that the checks were signed by the firm, in the belief that the names of the

payees represented real persons, entitled to receive the amounts of the checks, and with the intention that they should be delivered to real payees and should not go into circulation otherwise than through a delivery to and an indorsement by the payees named. Bedell was their clerk, whose employment did not comprehend the drawing or indorsing of checks or drafts; and in indorsing upon the checks the names of the payees he committed the crime of forgery, because he was without authority in that respect and did so with the intention to deceive his employers, the makers, and to put their checks in circulation for his account. That was a case wholly other than was made out here." *Phillips* vs. *Mercantile Bank*, 140 N. Y., at 561.

"The cashier, through his office, and the powers confided to him for exercise, was enabled to perpetrate a fraud upon his bank, which a greater vigilance of its officers might have earlier discovered, if it might not have prevented. If his position and the confidence reposed in him were such as to enable him to escape detection for the while, then the consequence of his fraudulent acts should fall upon the bank, whose directors by their misplaced confidence and gift of powers, made them possible, and not upon others, who, themselves acting innocently and in good faith, were warranted in believing the transaction to have been one coming within the cashier's powers.

"It may be quite true that the cashier was not the agent of the bank to commit a forgery, or any other fraud of such a nature; but he was

authorized to draw or check upon the bank's funds. If he abused his authority and robbed his bank, it must suffer the loss. The distinction between such a case and the many other cases which the plaintiff's counsel cites from, is in the fact that it was within the scope of this cashier's powers to bind the bank by his checks. In transmitting them, made out and endorsed as they were, the bank was so far concluded by his acts as to be estopped from now denying their validity." *Phillips vs. Mercantile Bank,* supra.

The case at bar is similar to the Phillips case. Brown was a responsible officer of the Association, drew and signed checks of the Association, and without his signature no checks of the Association would have been paid by the bank. It is true that the checks required other signatures, but he was a co-maker and co-signer. Therefore, the intention of one of the joint signers, and the only one who had any actual knowledge of the transaction or any intelligent intention as to whom the payee is to be, should be held the intention of all the signers, including those who merely mechanically affixed their signatures when told to do so. Brown, by permission of the Board of Directors, has been taken out of the class of ordinary administrative officers; he has been practically authorized to make stock loans and draw checks which bind the Association, the signature of the president and treasurer amounting to a formality. Following the reasoning of the Phillips case, the consequence of his abuse of power should fall upon the maker who permitted it.

We have assumed for the purposes of the above discussion that the officers other than Brown had

no knowledge of the fictitiousness of the transaction. However, it is insisted that the officers and directors of the Association had constructive knowledge.

"That which is discernible by inspection, upon the face of a draft or record, and which needs no investigation to show it to be out of the ordinary, and therefore speaks for itself, will, no doubt, raise an implied or constructive ratification, if seen by officers or directors. And failure to exercise ordinary care in checking off vouchers or inspecting records by bank officers will, no doubt, also raise such a ratification, if it appears that, if they had so examined the same, a simple inspection thereof would have shown the facts. They are undoubtedly chargeable with the things they know, or would have known by the exercise of ordinary care, and are estopped from denying their responsibility thereon unless repudiated within a reasonable time after such knowledge or imputed knowledge." *Campbell* vs. *Mfrs. Natl. Bank*, 67 N. J. L., 301, 308.

"Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than, from time to time, to elect the officers of the bank, and to make declarations of dividends. That which they ought, by proper diligence, to have known, as to the general course of business in the bank, they may have presumed to have known in any

contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business." *Martin* vs. *Webb*, 110 U. S., 7, 15.

The check on its face recited that it was drawn as a stock loan. The slightest investigation would have revealed the fact that no stock had been issued in the name of A. R. March which could have been the basis of a loan of $500. Seventy-five dollars had been paid by Brown, and under the statute only some $65 could have been loaned. Ordinary care would have shown no note in existence signed by A. R. March; and no stock deposited as collateral. The officers were chargeable with knowledge of these facts, and consequently cannot deny the result which knowledge thereof would have brought them, namely, knowledge of the fictitiousness of A. R. March, payee.

## POINT VII.

**The signing of the name "A. R. March" by George Brown, Jr., was not a forgery, but an immaterial alteration.**

If the two preceding points (V. and VI. of the present brief) are established, viz., that the check in suit was payable to a fictitious person, and that such fact was known to the persons making it, this Court must find as a matter of law that the signing of A. R. March's name by George Brown, Jr., was not a forgery. For a complete exposition of this point see Point IV. of the present brief.

## POINT VIII.

**The Newark Trust Company had no notice of the fraud of Brown in drawing the check to a fictitious person (or in the name of A. R. March) and indorsing that name upon it.**

That the Newark Trust Company had no actual notice of Brown's fraud is admitted in the Stipulation (*State of the Case*, page 20, line 28), where it is said:

"The Newark Trust Company had no knowledge of any alleged infirmity in the instrument and paid full value therefor."

Nor is there anything in the Stipulation indicating that the Newark Trust Company acted otherwise than in perfect good faith in accepting the check in suit on deposit, or in forwarding the same to the Ironbound Trust Company. There is not the slightest indication that the Newark Trust Company knew or suspected that Brown was practising a fraud in drawing the check to A. R. March, or knew or suspected that there was anything unusual in the indorsement. The contention of the appellant, therefore, must be that the respondent, though without actual knowledge of Brown's fraud, had constructive notice thereof.

The elements of constructive notice, as distinguished from actual notice, are well expressed in *Ogden* vs. *Delaware River and Atlantic R. R. Co.*, 80 N. J. Eq., 191, in the Court of Errors and Appeals, at page 197:

> "And whatever puts a party on inquiry amounts in judgment of law to notice, provided the injury becomes a duty, and would lead to a knowledge of the facts by the exercise of ordinary intelligence and understanding."

And the opinion in a Michigan case expresses the idea wth equal succinctness:

"Whatever fairly puts a party on inquiry is sufficient notice, where the means of knowledge are at hand, and, if a party omits to inquire, he is then chargeable with all the facts which by proper inquiry he might have ascertained." *Moore* vs. *Kenockee Tp.*, 42 N. W., 944, 947.

See also:

*Gale* vs. *Morris*, 30 N. J. Eq., 285.

*Boyd* vs. *Buffalo Steam Roller Company*, 149 N. Y. S., 1050; order affirmed, 152 N. Y. S., 1099.

*Bowles* vs. *Belt*, 159 S. W. (Tex. Civ. App.), 885.

*Tuocarora Club of Millbrook* vs. *Brown*, 154 App. Div. (N. Y.), 366.

*Hudson Structural Steel Co.* vs. *Smith & Rumery Co.*, 85 Atl. (Me.), 384.

*Gamble* vs. *Black Warrior Coal Co.*, 55 So. (Ala.), 190.

*United States Trust Co.* vs. *David*, 36 App. D. C., 549.

*Skov* vs. *Coffin*, 137 S. W. (Tex. Civ. App.), 450.

*Bergstrom* vs. *Johnson*, 126 N. W. (Minn.), 899.

*Cleveland, C., C. and St. L. Ry. Co.* vs. *Moore*, 82 N. E., 52; rehearing denied, 84 N. E., 540.

The syllabus of the last named case indicates the limited application which the courts will make of the doctrine of constructive notice:

> "Though notice to put a person on inquiry is not always the equivalent of full knowledge, *yet the doctrine of notice is not to be invoked wherever a person sought to be charged with knowledge has not been careful, but only where the result of his omission to inquire is such that it would be unconscionable to permit him to assert that he had no knowledge.*"

In the light of the authorities cited, was the Newark Trust Company chargeable with constructive notice of Brown's fraud? Was it, in short, put on inquiry as to the irregularities of the transaction, such inquiry having become a duty?

The only thing in the entire check, and the circumstances surrounding its presentation for deposit at the Newark Trust Company, which could conceivably have excited suspicion, was the signature of A. R. March. The check itself was signed by the genuine signatures of the three duly accredited officers of the Association; it was on its face made payable to A. R. March, which was not the name of any of the officers of the Association, so as to make the issuance of the check even apparently fraudulent; and it was endorsed on presentation by George Brown, Jr., in the name of the Fred'k J. Lau Co., which he had full power to represent. The first endorsement, that of A. R. March, was not, to be sure, that of a party by that name. But there is no evidence that the Newark Trust Company or any of its officers was familiar with the handwriting of the A. R. March who was Brown's sister-in-law, or any other party by that name.

The rule of the Negotiable Instruments Law, that an indorser of a check guarantees the genuineness

of all prior endorsements, which the appellant is seeking to invoke here, is applied irrespective of notice.

> "A person's indorsement of a check is a warranty of the genuineness of a prior endorsement, and on discovery of the forgery thereof he is liable to make good the amount he has received on the check." *Oriental Bank* vs. *Gallo,* 112 App. Div., 360; affirmed, 188 N. Y., 610.

But, as we have shown, the signing of A. R. March's name by George Brown, Jr., was an immaterial alteration and not a forgery. (See Points IV. and VII. of the present brief.) Hence there was no duty on the Newark Trust Company to know of the fact that Brown wrote the name and not a person named March; and under the authorities it was therefore not put upon inquiry with regard to that matter.

## POINT IX.

### The intent of Brown was the intent of the officers of the Association in regard to the drawing of the check.

This proposition, as we have already indicated, is merely one of the steps by which the conclusion is reached that the fact that the check in suit was payable to a fictitious person was known to the persons making it. For a full discussion of the question, and reasons why this finding of the Court below should be affirmed, see Point VI. of the present brief.

## POINT X.

**The president and treasurer of the Association had knowledge or were chargeable with knowledge that A. R. March was a fictitious person.**

For a full discussion of this question, and the reasons for affirmance of this finding of the Court below, see Point VI. of the present brief.

It is therefore respectfully insisted that the judgment of the Circuit Court should be affirmed with costs to the defendant.

RAYMOND, MOUNTAIN, VAN BLARCOM & MARSH,

*Attorneys of Defendant.*

# INDEX.

## Summons.

Filed August 7th, 1914.

THE STATE OF NEW JERSEY TO NEWARK TRUST COMPANY, a corporation.

You are summoned to answer the annexed complaint of Iron Bound Trust Company, a corporation, in an action at law in the ESSEX COUNTY CIRCUIT COURT.

[L. S.]

And take notice that unless you file your answer to said complaint with the Clerk of the said Essex County Circuit Court, at Newark, New Jersey, within *twenty days,* after the service upon you of this writ, and the annexed complaint, the plaintiff may proceed in the suit, and judgment may be entered against you. (And see Notice endorsed hereon).

WITNESS FREDERIC ADAMS, Esquire, Judge of the said Court, at Newark, this Seventh day of August, Nineteen Hundred and Fourteen.

RIKER & RIKER,
*Attorneys.*

JOSEPH MCDONOUGH,
*Clerk.*

**Complaint.**

# Essex County Circuit Court.

| | | |
|---|---|---|
| IRONBOUND TRUST COMPANY, *Plaintiff,* | | *Action-at-Law.* |
| *vs.* | | |
| NEWARK TRUST COMPANY, *Defendant.* | | *Complaint.* |

Plaintiff, Ironbound Trust Company, a corporation existing under and by virtue of the laws of the State of New Jersey, and having its principal place of business at No. 2 Ferry Street, in the City of Newark, Essex County, New Jersey, says:

1. Defendant is a corporation of the State of New Jersey, organized under the acts relating to trust companies of said state, and having its principal place of business in the Kinney Building, corner of Broad and Market Streets, in said City of Newark.

2. That on June 9, 1913, Ninth Ward Building and Loan Association drew its check to the order of A. R. March, in the sum of $500, payable at Ironbound Trust Company of the City of Newark (a true copy of which check is hereto attached, and designated as "Schedule A").

3. That thereafter "A. R. March" was written on the back of said check, without the authority of said A. R. March, and on on about the 10th day of June, 1913, said check was deposited with said defendant to the account of Frederick J. Lau

Company, and the said sum of $500 was credited by said defendant to the account of said Frederick J. Lau Company upon its books, without the consent or authorization of said A. R. March.

4. That said check was endorsed by said defendant and by it presented to plaintiff for payment, and that plaintiff paid to defendant upon said check the sum of $500.

5. That said payment was made in reliance upon the endorsement of said defendant and upon the guarantee therein contained of the validity of the purported endorsement of said A. R. March. That plaintiff had no notice of invalidity of said purported endorsement of said A. R. March.

6. That said Ninth Ward Building and Loan Association has repudiated the action of this plaintiff in charging against its account the said sum of $500 paid upon said check, and are holding this plaintiff liable for the sum so paid as having been paid on a forged endorsement and contrary to the directions contained in said check.

7. That by reason of the payment by plaintiff to said defendant, plaintiff has suffered the loss of the sum of $500, with interest upon said account from June 10, 1913.

8. That plaintiff has demanded the repayment of said sum from said defendant, and defendant has refused to pay the same.

Plaintiff demands of defendant the sum of $500, together with interest thereon from June 10, 1913.

RIKER & RIKER,
*Attorneys of Plaintiff.*

*Complaint.*

**Schedule A.**

No. 518. Newark, N. J., June 9, 1913.

Treasurer of Ninth Ward Building and Loan Association of the City of Newark,
Pay to the order of A. R. March $500 00/100
Five hundred.....00/100 Dollars.

Account of Stock Loan.

Payable at the Ironbound Trust Company.

S. B. BEIDLEMAN,
*Treasurer.*

ISAAC F. ROE,
*President.*

GEORGE BROWN, JR.,
*Secretary.*

ENDORSEMENTS:

A. R. March,
Fredk. J. Lau Co.
Credit Account.
Newark Trust Co.
June 10, 1913.
F. H. Kilpatrick, Treas.
Indistinctly Stamped:

Newark Trust Co.
June 10, 1913.
F. H. Kilpatrick, Treas.

NOTICE TO THE WITHIN NAMED DEFENDANT:

In case the within summons and complaint are served upon you personally then take notice that if you intend to make a defense to this action you must file an affidavit of merits within ten days from

the date of service hereof upon you, and must file your answer within twenty days from the date of such service, and in default of the filing of such affidavit and answer judgment will be entered against you. (Lawful service upon a corporation is deemed personal service for the purpose of this notice, P. L. 1912, page 394, Rule 56.)

RIKER & RIKER,
*Attorneys of Plaintiff.*

**Affidavit of Merits.**

Filed August 15th, 1916.

ESSEX COUNTY CIRCUIT COURT.

| | |
|---|---|
| IRONBOUND TRUST COMPANY, *Plaintiff,* | *Action-at-Law.* |
| *vs.* | |
| NEWARK TRUST CO., *Defendant.* | *Affidavit of Merits.* |

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

GORDON B. PHILLIPS, of full age, being duly sworn according to law on his oath says, that he is the Vice-President and Secretary of the Newark Trust Company, defendant in the above entitled action; said Newark Trust Company being a corporation organized and existing under the laws of the State of New Jersey; that Waters B. Day, president of the said company, is absent on account of sickness, and that the management is now in deponent's hands as Vice-President, and that deponent now has full authority to make this affidavit for the said Newark Trust Company.

Deponent further says that he believes that the said Newark Trust Company, defendant in the above action as aforesaid, has a just and legal defense to said action on the merits of the case.

GORDON B. PHILLIPS.

Sworn and subscribed before me, this
15th day of August, A. D. 1914.

[SEAL] J. HANSBURY CALLAGHAN,
*A Master in Chancery of New Jersey.*

## Answer.

Filed August 27th, 1914.

ESSEX COUNTY CIRCUIT COURT.

| | |
|---|---|
| IRONBOUND TRUST COMPANY, *Plaintiff,* | *Action-at-Law.* |
| *vs.* | |
| NEWARK TRUST CO., *Defendant.* | *Answer.* |

Defendant, a corporation organized and existing under the laws of the State of New Jersey, and having its principal place of business in the Kinney Building, located at Broad and Market Streets, in the City of Newark, County of Essex and State of New Jersey, says that:

1. It admits the first paragraph of the complaint.

2. It admits the second paragraph of the complaint.

3. As to the matters alleged in the third paragraph of the complaint, the defendant admits "That on or about the tenth day of June, 1913, said check was deposited with said defendant to the account of Frederick J. Lau Company, and the said sum of $500 was credited by said defendant to the account of said Frederick J. Lau Company upon its books." Defendant denies the remainder of the third paragraph of the complaint.

4. It admits the fourth paragraph of the complaint.

*Answer.*

5. As to the matters alleged in the fifth paragraph of the complaint, defendant has not any knowledge or information thereof sufficient to form a belief, but the defendant denies that the endorsement of said A. R. March was invalid.

6. As to the matters alleged in the sixth paragraph of the complaint, the defendant has not knowledge or information thereof sufficient to form a belief.

7. It denies the seventh paragraph of complaint.

8. It admits the eighth paragraph of the complaint.

ROLAND D. CROCKER,
*Attorney of Defendant.*

*Amended Answer.*

## Amended Answer.

Filed April 20th, 1916.

ESSEX COUNTY CIRCUIT COURT.

| | |
|---|---|
| IRONBOUND TRUST COMPANY, *Plaintiff,* | *Action-at-Law.* |
| *vs.* | |
| NEWARK TRUST CO., *Defendant.* | *Amended Answer.* |

Defendant, a corporation organized and existing under the laws of the State of New Jersey, and having its principal place of business in the Kinney Building, located at Broad and Market Streets, in the City of Newark, County of Essex and State of New Jersey, says that:

1. It admits the first paragraph of the complaint.

2. It admits the second paragraph of the complaint.

3. As to the matters alleged in the third paragraph of the complaint, the defendant admits "That on or about the tenth day of June, 1913, said check was deposited with said defendant to the account of Frederick J. Lau Company, and the said sum of $500 was credited by said defendant to the account of said Frederick J. Lau Company upon its books." Defendant denies the remainder of the third paragraph of the complaint.

4. It admits the fourth paragraph of the complaint.

5. As to the matters alleged in the fifth paragraph of the complaint, defendant has not any knowledge or information thereof sufficient to form a belief, but the defendant denies that the endorsement of said A. R. March was invalid.

6. As to the matters alleged in the sixth paragraph of the complaint, the defendant has not knowledge or information thereof sufficient to form a belief.

7. It denies the seventh paragraph of the complaint.

8. It admits the eighth paragraph of the complaint.

FIRST DEFENSE.

And this defendant says by way of defense to the matters set out in the plaintiff's complaint that A. R. March is a fictitious person and that check No. 518 of the Ninth Ward Building and Loan Association is, therefore, drawn payable to bearer.

The defendant, having paid said check to bearer in accordance with its terms, does not owe the plaintiff any money.

SECOND DEFENSE.

And this defendant, by way of further defense to the matters set out in the plaintiff's complaint, says that A. R. March is a fictitious person and was known to be so by the maker of the check referred to in said complaint, and that said check is, therefore, payable to bearer.

This defendant, having paid said check to bearer, in accordance with its terms, does not owe the plaintiff any money.

*Amended Answer.*

THIRD DEFENSE.

And this defendant, by way of further defense to the matters set out in the plaintiff's complaint, says that the Ironbound Trust Company, having collected the amount due on said check from the maker, Ninth Ward Building and Loan Association, on or about June 12th, 1913, has suffered no injury, and, therefore, there is nothing due to the said plaintiff from the defendant.

FOURTH DEFENSE.

And this defendant, by way of further defense to the matters set out in the plaintiff's complaint, says that the Ironbound Trust Company collected the amount due on said check from the maker, Ninth Ward Building and Loan Association on or about June 12th, 1913, and that Ironbound Trust Company, not having been compelled to refund the money collected on said check, has no right of action thereon against the defendant.

FIFTH DEFENSE.

And this defendant, by way of further defense to the matters set out in plaintiff's complaint, says that the Ironbound Trust Company, having collected the amount due on said check from the maker, Ninth Ward Building and Loan Association, on or about June 12th, 1913, voluntarily assumed liability to refund the said amount to the Ninth Ward Building and Loan Association, and, that, therefore, there is no right of action thereon against the said defendant.

*Amended Answer.*

SIXTH DEFENSE.

And this defendant by way of further defense to the matters set out in the plaintiff's complaint, says that Ninth Ward Building and Loan Association negligently issued the check and that Ironbound Trust Company collected the amount due thereon from the Ninth Ward Building and Loan Association and that there was no obligation on the part of the plaintiff to assume liability for said check, and that because of such negligence on the part of the Ninth Ward Buildng and Loan Association in the issuance of said check and the voluntary assumption of liability on the part of the plaintiff there is no obligation on the part of the defendant to repay the amount due on said check to said plaintiff.

RAYMOND, MOUNTAIN, VAN BLARCOM & MARSH,

*Attorneys of Defendant.*

ENDORSED ON COVER.

We consent to the filing of the within amended answer.

RIKER & RIKER,
*Attorneys for Plaintiff.*

## Reply to Amended Answer.

Filed May 25, 1916.

ESSEX COUNTY CIRCUIT COURT.

| | |
|---|---|
| IRONBOUND TRUST CO., *Plaintiff,* | *Action-at-Law.* |
| *vs.* | *Reply to Amended Answer.* |
| NEWARK TRUST CO., *Defendant.* | |

Plaintiff, a corporation organized and existing under the laws of the State of New Jersey, and having its principal place of business at No. 2 Ferry street, in the City of Newark, Essex County, New Jersey, says:

1. It denies the matters contained in the "first defense" of the amended answer.

2. It denies the matters contained in the "second defense" of the amended answer.

3. It denies the matters contained in the "third defense" of the amended answer.

4. It denies the matters contained in the "fourth defense" of the amended answer.

5. It denies the matters contained in the "fifth defense" of the amended answer.

6. It denies the matters contained in the "sixth defense" of the amended answer, and particularly the negligent issuance of the check by the Ninth Ward Building and Loan Association and the voluntary assumption of liability therefor on the part of the plaintiff.

*Reply to Amended Answer.*

SEPARATE REPLY TO AMENDED ANSWER.

And this plaintiff, by way of further reply to the matters set out in the defendant's amended answer, says George Brown, Jr., had no power or authority to draw checks in behalf of the Ninth Ward Building and Loan Assocation. That the check mentioned in the complaint was drawn by said association to the order of a then existing person, namely, A. R. March; that, therefore, said check was not drawn payable to bearer; and that "A. R. March" was written on the back of said check by said George Brown, Jr., and this action of said Brown constituted a forged endorsement of said check.

RIKER & RIKER,
*Attorneys of Plaintiff.*

## Stipulation.

Filed April 20, 1916.

ESSEX COUNTY CIRCUIT COURT.

IRONBOUND TRUST CO., *Plaintiff,*
*vs.*
NEWARK TRUST CO., *Defendant.*
*Stipulation.*

It is hereby stipulated and agreed by and between Riker & Riker, Esquires, attorneys of plaintiff, and Raymond, Mountain, Van Blarcom & Marsh, Esquires, attorneys of defendant, that the following is an agreed statement of facts upon which the above entitled cause may be submitted for decision to the Court sitting without a jury.

The plaintiff and the defendant are both corporations and trust companies organized under the laws of the State of New Jersey, having their principal places of business in the City of Newark, County of Essex and State of New Jersey.

That the Ninth Ward Building and Loan Association of the City of Newark, a corporation of the State of New Jersey, was at the time of the matter in controversy and still is, doing business in the said City of Newark, in accordance with the statutes of New Jersey applicable to building and loan associations, copies of the pertinent sections of which are annexed. That the officers of said Association were, at the time of the matters herein controverted, Isaac Roe, president, Solomon B. Beidleman, treasurer, and George

*Stipulation.*

Brown, Jr., secretary. The by-laws and constitution of the Ninth Ward Building and Loan Association showing the duties of its officers are hereto annexed and made a part of this stipulation.

The Ninth Ward Building and Loan Association had its office at No. 31 Astor street, in the City of Newark; that such office was used alone by the Association, with the exception that on one night in the month a smaller association, known as the Milford Park Association, held meetings there and kept there its small individual safe. The Ninth Ward Building and Loan Association had a large safe on the premises, the combination of which was in the possession of both the secretary and the treasurer. In this safe were kept all the building and loan books, book of account, check books, stock certificate books, returned vouchers and securities of the Association, of every description. A part of the contents of the safe was, in accordance with the by-laws, under the control and in the custody of the secretary, and a part under the control and in the custody of the treasurer, but the safe was so arranged that both officers had full access to all of its contents.

In the drawing of money the by-laws of the Association required that the money should be drawn by check signed by the president and treasurer upon warrant drawn by the secretary and countersigned by the president. In practice these two instruments were combined in a single warrant-check. The practice was for the secretary to prepare the paper, filling in the name of the payee, the date and amount, and to sign the same. It was then presented to the president who likewise signed the same, thus constituting

the warrant. The warrant was then presented to the treasurer who in turn signed it, and by so doing transformed the warrant into a check. The Ironbound Trust Company, which was the Association's depository, was instructed to pay checks only when bearing the signatures of the three officers.

At the meetings of the Association there was an order of business known as "Correspondence and applications for loans." When this order was called for, the secretary at first read any letters received by him or by other officers of the Association, relating to Association business, which had been delivered to him, and when the reading of this correspondence and such action thereon as the directors might take, had been finished, he would proceed to read applications for loans. In the first place, he would read applications for loans on bond and mortgage on real estate, stating the location, the stated value in the application and the amount which the applicant desired. He would then usually make suggestions as to his ideas as to the value of the property and would then request the president to appoint a committee. After the real estate loans he would present to the board any applications for loans upon stock, to be read off, in substantially the following form: "Mr. X. wishes a stock loan of $100. upon his shares of stock. He is entitled to it." Action would then be taken by the board, granting the loan without other investigation. An examination of the minute book reveals that whereas all applications for loans on bond and mortgage are entered in the minutes, that from the beginning of the association it was not the practice of the secretary to enter in the

*Stipulation.*

minutes applications for stock loans or for withdrawals of shares.

On or about June 9th, 1913, the Ninth Ward Building and Loan Association drew its check known as No. 518 to the order of A. R. March, in the amount of five hundred dollars ($500.00), reciting it to be on account of a stock loan, a copy of which said check is annexed hereto and is the check upon which suit is brought in the above entitled cause. The check was drawn and prepared, and signed by George Brown, Jr., the secretary of said Association, and presented by him to Isaac Roe, the president, who signed the same, and then was signed by Solomon B. Beidleman, treasurer, in the manner above set forth.

The check having been endorsed on the back "A. R. March," "Frederick J. Lau Company," was deposited at the Newark Trust Company on June 10th, 1913, to the credit of Frederick J. Lau Company. The check was forwarded by the Newark Trust Company to the Ironbound Trust Company for collection, having been paid by it from the funds on deposit to the credit of the Ninth Ward Building and Loan Association, was thereupon returned to the Ninth Ward Building and Loan Association on or about July 11th, 1913.

George Brown, Jr., absconded February 22nd, 1914. George Brown, Jr., had a sister-in-law by the name of A. R. March. The said A. R. March never at any time applied for any stock in the Ninth Ward Building and Loan Association, nor did she ever make any payments for any such stock, and never authorized any one else to do it for her. The said George Brown, Jr., applied to the Association in the name of A. R. March for twenty-five shares of stock in the Associa-

tion, in the seventeenth series of the Association, which was opened at the April meeting of the board of directors in the year 1913, at which time Brown made a payment of twenty-five dollars, on account of the stock, and a certificate of stock for said twenty-five shares of the Association was issued in the name of A. R. March. Payments were made upon said stock for two months thereafter by the said George Brown, Jr., and then ceased.

A. R. March, the sister-in-law of George Brown, Jr., never applied for a loan from said Association, nor authorized any one to apply for her, but the said George Brown, Jr., stated to the Association that the said A. R. March desired a loan of $500. upon her stock, and that she was entitled to it.

The treasurer, Solomon B. Beidleman, was personally acquainted with the said A. R. March and knew her as the sister-in-law of the said George Brown, Jr. That the president, Isaac Roe, was not personally acquainted with the said A. R. March, but knew of the existence of such a woman as the sister-in-law of the said George Brown, Jr.

No other A. R. March ever applied for a loan from said Association, neither A. R. March, the sister-in-law of George Brown, Jr., nor any other person have made any claim to the proceeds of the check, or to the fund represented thereby.

No note was ever delivered to the Association.

No interest was ever paid by any one to the Association on account of such alleged loan.

No reference appears in the minute book of said Association concerning the issuance of the check No. 518 or of any circumstances connected

therewith. No stock or other security was ever deposited with said Association or any officer thereof, or assigned to it, as collateral for a loan of this amount by any one.

The said George Brown, Jr,. was an officer of Frederick J. Lau Company and had the general management and control of said corporation, and had authority to endorse checks of said corporation. The Frederick J. Lau Company's endorsement on the back of said check No. 518 is in the handwriting of George Brown, Jr.

On March 1st, 1914, the Ninth Ward Building and Loan Association demanded from the Ironbound Trust Company the money paid by it on said check No. 518, on the ground that the signature of A. R. March was a forgery. No suit was ever brought by the Ninth Ward Building and Loan Association against the Ironbound Trust Company, but the Ironbound Trust Company voluntarily assumed the liability. The Ironbound Trust Company has now brought suit against Newark Trust Company for the amount of said check, as a guarantor of previous endorsements alleged to be forged.

The Newark Trust Company had no knowledge of any alleged infirmity of the instrument and paid full value therefor.

RIKER & RIKER,
*Attorneys of Plaintiff.*

RAYMOND, MOUNTAIN, VAN BLARCOM & MARSH,
*Attorneys of Defendant.*

Dated, March 31st, 1916.

*Stipulation.*

It is Further Stipulated that the endorsement of A. R. March on check No. 518 was not made by her or by anyone having authority from her, but that the signature is in the handwriting of George Brown, Jr.

RIKER & RIKER.

RAYMOND, MOUNTAIN, VAN BLARCOM & MARSH.

No. 518. Newark, N. J., June 9, 1913.

Treasurer of Ninth Ward Building and Loan Association of the City of Newark,

Pay to the order of A. R. March, $500 00/100 Five Hundred .....xx/100 Dollars,

Account of Stock Loan.

Payable at the Ironbound Trust Company.
A. B. Beidleman, Treasurer,

Isaac F. Roe, President.
George Brown, Jr., Secretary.

Endorsements:

A. R. March,

Fredk. J. Lau Co.
Credit account
Newark Trust Company,
June 10, 1913,
F. H. Kilpatrick, Treas.

Indistinctly stamped:
Newark Trust Co.
June 10, 1913.
F. H. Kilpatrick, Treas.

* * * * * * * * * * *

*Stipulation.*

Building and Loan Act, Compiled Statutes of New Jersey, page 334.

Sec. 7. MANAGEMENT; BOARD OF DIRECTORS; ELECTION.—The business and affairs of every such association shall be managed and directed by a board of directors, of such number as the constitution may prescribe, not less than five, who shall be shareholders and shall be elected by the members by ballot at such time and for such term as the constitution may provide; the polls at every such election shall be opened for at least one hour between the hours of nine o'clock in the forenoon and nine o'clock in the afternoon at such time as the constitution may designate; at least one-third of the members of said board shall be elected each year. (P. L. 1903, p. 460.)

Sec. 10. TREASURER'S DUTIES.—The treasurer shall be the custodian of all funds and securities belonging to his association, except such as are given by him, which shall be held by the secretary; he shall promptly deposit in the name of the association in some bank or trust company in this state, to be designated by the board of directors, all money received by his association, and all checks or drafts against the same shall be signed by him and countersigned by the president, or, in his absence, by the vice-president. P. L. 1903, p. 461.)

Sec. 24, Subdiv. 4.—LOANS ON SHARES OF ASSOCIATION.—In loans upon the pledge or collateral security of the shares of such association, not to exceed ninety per centum of the withdrawal value of such shares;

## Decision.

Filed April 19, 1916.

ESSEX COUNTY CIRCUIT COURT.

IRONBOUND TRUST CO., *Plaintiff,*

*vs.*

NEWARK TRUST CO., *Defendant.*

*Decision.*

DUNGAN, *J.*

In this case a jury was waived, and a stipulation presented, setting forth the facts upon which it was agreed it should be submitted for decision by the Court.

These facts fully appear in the stipulation, in which they are so concisely stated that no good purpose can be served by an endeavor to restate them in more condensed form, or by repeating them in this decision.

The principal and perhaps the sole question presented by the agreed facts, and the briefs by which the case was argued is whether or not the endorsement of A. R. March, the payee of the check, is a forgery; or whether, in its application to the check in suit, the said A. R. March is to be regarded as a fictitious person. It being practically conceded by the respective attorneys that if the endorsement be a forgery the plaintiff is entitled to a verdict, while the defendant would be entitled to a verdict if A. R. March be a fictitious person.

There is no doubt but that there was in existence such a person as A. R. March. Adaline R. March was the sister-in-law of George Brown, Jr., the secretary of the Ninth Ward Building and Loan Association, the maker of the check, but that it was intended by our negotiable instruments act to differentiate between fictitious and non-existing persons is clear from sub-division 3 of the ninth section, which declares that "The instrument is payable to bearer (3) when it is payable to the order of a fictitious *or* non-existing person."

As was said in *Snyder v. Corn Exchange National Bank,* 70 Atl. (Pa.) 876:

"A fictitious person within the contemplation of the act of 1901 is not merely a non-existing one; for, if so, the word 'non-existing' would have been sufficient without more. It is clear, then, that when the Legislature declared, that a check payable to 'A fictitious or non-existing person' it is to be regarded as payable to bearer, it meant a fictitious person to be one who, though named as payee in a check, has no right to it, or the proceeds of it, because the drawer of it so intended, and it therefore matters not whether the name of the payee used by him be that of one living or dead, or of one who never existed."

The agreed facts state that A. R. March, the sister-in-law of George Brown, Jr., "never at any time applied for any stock in the Ninth Ward Building and Loan Association, nor did she ever make any payment for any stock and never authorized any one else to do it for her." She "never applied for a loan from said Association, nor authorized any one to apply for her," that "no other A. R. March ever applied for a

loan from said Association, neither A. R. March, the sister-in-law of George Brown, Jr., nor any other person has made any claim to the proceeds of the check or the fund represented thereby."

In *Phillips* v. *Mercantile National Bank,* 140 N. Y. 556, at p. 562, the Court said:

"The fictitiousness of the maker's direction to pay does not depend upon the identification of the name of the payee with some existent person, but upon the *intention* underlying the act of the maker in inserting the name. Where, as in this case, the intent of the act was, by the use of the names of some known persons, to throw directors and officers off their guard, such a use of names was merely an instrumentality or a means which the cashier adopted in the execution of his purpose to defraud the bank, in an apparently legitimate exercise of his authority."

The plaintiff insists that Brown, the secretary, had no power to draw checks of the Association, whatever his *intent* may have been as to the ultimate disposition of the check, that it was the president and treasurer who, under the by-laws, were entitled to dispose of the Association's funds; that since there was such a person as A. R. March, known to them, it was *their* intention that the check should be made payable to and placed in the hands of a real person, and that therefore the above quotation from *Phillips* v. *Mercantile National Bank* is authority for the contention that as to them the payee was not a fictitious person; but it is impossible to conclude from a reading of the agreed facts, that they took sufficient interest in the matter to have or exercise any intention whatever. The acts and intentions of Brown appear to have been absolutely controlling. The Association had adopted a form

of warrant and check which required Brown to be a party to it. It is agreed that when applications for stock loans were made, no entry thereof was made in the minutes, that when such applications were made Mr. Brown would merely read off "Mr. X wishes a stock loan of $100.00 upon his shares of stock. He is entitled to it"; and that action would then be taken by the board granting the loan *without other investigation.* The check would be drawn and prepared and signed by Brown as secretary, and presented by him to the president who signed it, and then it was signed by the treasurer, apparently without any investigation as to whether or not the applicant was the owner of stock, or had paid in upon stock a sufficient amount to be entitled to the loan, or whether the stock had been properly assigned; or, in fact any inquiry whatever. All upon the representations of Brown. By this negligent method Brown, for the purpose of that particular loan so far as the question of *intention* is concerned, was practically president, treasurer and board of directors. No one else appears to have exerted himself sufficiently to have formed an intent. Everything was left with Brown. As was said in reference to the bank in *Phillips* v. *Mercantile National Bank,* at p. 560. The intent of Brown was the intent of these officers of the Association. Should the results of such loose management, such negligent exercise of official functions be visited upon the Building Loan Association or upon a party which has dealt with the check of the Association in the usual and customary way?

Subdivision 3 of Section 9 of the Negotiable Instruments Act, however, in providing that an instrument is payable to bearer when it is made

payable to the order of a fictitious person, adds, "And such fact was known to the person making it so payable," and the plaintiff insists that there was no knowledge on the part of the president and treasurer, that A. R. March was a fictitious person.

However, what has been said on the subject of intention may be applied to the question of knowledge, to which may be added that these officers are undoubtedly chargeable not only with what they actually knew, but what they would have known by the exercise of ordinary care.

*Campbell* v. *Mfgrs. National Bank,* 67 L. 301, at p. 308.

These officers could not in justice to those having business transactions with the association, shut their eyes to conditions and be heard to say that they did not know.

That which they ought, by proper diligence to have known as to the general course of business of the Association they may be presumed to have known in any contest between the Association and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business.

*Martin* v. *Webb,* 110 P. S., p. 7, at p. 15.

As is suggested by the brief for the defendant:

The check on its face recited that it was drawn as a stock loan. The slightest investigation would have revealed the fact that no stock had been issued in the name of A. R. March which would have been the basis of a loan of $500. Seventy-five dollars had been paid by Brown, and under the statute only some $65. could have been loaned. Ordinary care would have shown no note in existence signed by A. R. March; and no stock de-

posited as collateral. The officers were chargeable with knowledge of these facts, and consequently can not deny the result which knowledge thereof would have brought them, namely, knowledge of the fictitiousness of A. R. March, payee.

It may be added that it appears from the agreed facts that the check was charged to the account of the Building Loan Association in the plaintiff bank, and that now, on the demand of the Association, the plaintiff voluntarily assumes the liability therefor; thus, for the purposes of this suit, placing itself in the position of the Building Loan Association.

I find, therefore, that the check in suit was payable to a fictitious person, and that such fact was known to the persons making it; that the signing of the name of A. R. March by George Brown, Jr., is not a forgery; that the defendant is a purchaser for value from Frederick J. Lau Company, the bearer, and having no notice of the fraud of Brown in drawing the check to a fictitious person and endorsing that name upon it, is not liable to repay the plaintiff the amount paid by it for the note, and judgment is therefore given against the plaintiff and in favor of the defendant.

NELSON Y. DUNGAN,
*Circuit Court Judge.*

**Rule for Judgment.**

Entered April 19th, 1916.

# Essex County Circuit Court.

| | |
|---|---|
| Ironbound Trust Co., *Plaintiff,* vs. Newark Trust Co., *Defendant.* | *Action-at-Law.* *By the Court Judgment entered April 19th, 1916.* *Costs, $42.18.* |

Raymond, Mountain, Van Blarcom & Marsh,
Attorneys for Defendant.

Judgment by the Court in the above entitled Action-at-Law was rendered on the nineteenth day of April, nineteen hundred and sixteen, in favor of the said defendant, Newark Trust Co., and against said plaintiff, Ironbound Trust Co., for the sum of forty-two dollars and eighteen cents, costs of suit.

Judgment entered and signed April 19th, 1916.

## Notice of Appeal.

Filed June 3, 1916.

ESSEX COUNTY CIRCUIT COURT.

| | |
|---|---|
| IRONBOUND TRUST CO., *Plaintiff-Appellant,* | *Action-at-Law.* |
| *vs.* | *Notice of Appeal.* |
| NEWARK TRUST CO., *Defendant-Respondent.* | |

To Raymond, Mountain, Van Blarcom & Marsh, Esqrs.,
*Attorneys of Defendant-Respondent.*

Gentlemen:—

TAKE NOTICE that the plaintiff appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds:

1. Because the Court below found that the check in suit was payable to a fictitious person.

2. Because the Court below found that the fact that the check in suit was payable to a fictitious person was known to the persons making it.

3. Because the Court below found that the signing of the name of "A. R. March" by George Brown, Jr., was not a forgery.

4. Because the Court below found that the defendant had no notice of the fraud of Brown in drawing the check to a fictitious person (or in the name of A. R. March) and endorsing that name upon it.

*Notice of Appeal.*

5. Because the Court below found that the intent of Brown was the intent of the officers of the Association in regard to the drawing of the check.

6. Because the Court below found that the president and treasurer of the Association had knowledge or were chargeable with knowledge that A. R. March was a fictitious person.

RIKER & RIKER,
*Attorneys of Plaintiff-Appellant.*

## Addenda to Stipulation.

CONSTITUTION
of the
NINTH WARD
BUILDING AND LOAN ASSOCIATION
of the
CITY OF NEWARK
Organized 1909

### CONSTITUTION.

### ARTICLE I.

NAME, LOCATION AND OBJECT.

Section 1. The name of the Association shall be "Ninth Ward Building and Loan Association, of the City of Newark." The principal office shall be at 31 Astor Street, in the city of Newark, Essex County, New Jersey.

Sec. 2. This association is formed for the purpose of assisting its members in acquiring real estate, making improvements thereon and removing incumbrances therefrom, by the payment of periodical installments; and for the further purpose of accumulating a fund to be returned to the members who do not obtain advances for the above purposes, when the funds of the Association shall have amounted to the par value of such shares, as designated on the face of the certificate of the same which is Two Hundred Dollars per share.

### ARTICLE II.

SHAREHOLDERS.

Section 1. The members of this Association shall be residents of the United States. Minors may hold stock in the Association by guardians. A parent

procuring stock for a minor child may, during the minority of such child, represent him or her in all the rights of membership, except that of holding office. When such child shall have attained the age of twenty-one years, he or she shall be dealt with as the absolute owner of the stock and be considered a member.

Sec. 2. A payment by any shareholder, trustee, guardian or representative for a minor, of one or more installments of one dollar on a share of stock, shall constitute such shareholder, trustee, guardian or representative for a minor, a member of the Association, and as such he or she shall be subject to all fines and penalties imposed by this constitution and entitled to all the privileges of membership.

Sec. 3. Each and every shareholder, trustee, guardian or representative for a minor, for each and every share of stock held by him or her in this Association, shall pay the sum of one dollar as installments on the second Monday of each and every month (unless said second Monday shall be a legal holiday, when the payments shall be made at the time hereafter mentioned); these payments shall be made to the Secretary or such other person or persons as shall from time to time, by the laws and regulations of this Association be authorized to receive the same, at such hours as provided for in this constitution and at 31 Astor street, or at such place as the shareholder shall provide; the said payments to continue until it shall be ascertained that the value of the whole stock of their respective series be sufficient to divide to each share of stock in such respective series the sum of two hundred dollars. The time for payments for each month shall terminate as soon as the Secretary shall have waited on all present, between eight and nine P. M., on the second Monday of each month. In the

event of the second Monday in any month being a legal holiday, the stockholders meeting above provided for shall be held and all dues and installments of premium and interest shall be due and payable on the next succeeding business day, at the time and place before stated.

Sec. 4. In case any shareholder, trustee, guardian or representative for a minor, shall neglect or refuse to pay his or her monthly dues, or premium on a loan, each and every person so neglecting or refusing, shall incur a monthly fine of ten per centum (on the amount payable each month), said fines to be non-accumulative, and to be collected in the same manner as dues and interests; and provided that any payment shall be first applied to the accruing dues and then to the payment of the dues, and fines in the inverse order in which they have accrued.

And providing further that in the event of a default in any periodical payment for more than three successive months, fines shall be charged for the fourth and successive months, at the rate of two per centum per month on the amount in arrears.

Table showing the manner fines are charged on one share of stock for six months, according to the foregoing constitution:

| | Shares. | Dues. | Fines. | Totals. |
|---|---|---|---|---|
| First Month ..... | 1 | $1.00 | 10c. | $1.10 |
| Second Month ..... | 1 | 2.00 | 10c. | 2.20 |
| Third Month ..... | 1 | 3.00 | 10c. | 3.30 |
| Fourth Month .... | | | | |
| Fifth Month ..... | 2 per cent. on the amount due | | | |
| Sixth Month ..... | | | | |

Sec. 5. In case any shareholder (not having taken a loan) shall neglect or refuse to pay his or her monthly installments of dues or fines for the space of six months, each and every shareholder so

neglecting or refusing shall be tendered by the Treasurer the withdrawal value of the shares held by him or her, first deducting all fines and forfeitures that may be charged against him or her, and from that time he or she shall cease to be a member of this Association. Provided that such action shall not be taken against a defaulting shareholder unless he or she shall have been notified by the Secretary in writing one month previously.

Sec. 6. Any non-borrowing shareholder wishing to withdraw from this Association may do so, giving thirty days' notice in writing to the Secretary of such intention to withdraw, etc.

Before one year has expired from date of issue of any stock, the withdrawing shareholder is entitled to receive the amount of installments paid in; after one year, the amount of installments paid in and 20 per centum of the net profits; at the expiration of the second year of any series, 30 per centum; at the end of the third year, 40 per centum; fourth year, 50 per centum; fifth year, 60 per centum; sixth year, 70 per centum; seventh year, 80 per centum; eighth year, 90 per centum. At any time thereafter the Board of Directors, may, at their discretion, pay to the withdrawing shareholders of such series their present value less all arrears, and a proportionate part of all losses sustained by the Association, provided the necessary funds are in the hands of the Treasurer at the time of the receipt of such notice. All arrears and a proportionate share of all losses sustained by the Association shall be deducted from withdrawing shares.

Sec. 7. Upon the death of a shareholder, who has not received a loan or loans, his or her legal representatives shall be entitled to receive from this Association the withdrawal value of the shares of such deceased shareholder, less any fines he or she

may owe, and his or her portion of the loss sustained, with interest added to the same at rates in accordance with Section 6 of this Article. Then his or her interest in this Association shall determine, unless the legal representatives of such deceased person shall continue the payments of installments on such stock.

Not more than one-half the amount received in any month as dues shall be applicable to the payment of withdrawing shares, unless the Board of Directors otherwise order, but no withdrawing shareholder shall be obliged to wait more than six months from date of notice of withdrawal.

If it shall become necessary to foreclose or sell any security given by any borrowing member, the Association will credit on the loan the withdrawal value of the shares of the member pledged to secure the loan.

Sec. 8. When each and every shareholder, trustees, guardian or representative for a minor shall have a loan of two hundred dollars for their several share or shares of stock; or when the whole of the funds of the Association (including the securities for the loans aforesaid) shall be sufficient to divide to each share of stock the sum of two hundred dollars, then this particular series shall terminate and close. At this period those who have borrowed from the Association, and are yet members, shall have their obligations cancelled and returned to them. The investment members, or those who have not borrowed, shall be paid the value of their shares in cash.

## ARTICLE III.

### MANAGEMENT, DIRECTORS, ETC.

Section 1. The management, direction and control of the affairs of this Association shall be vested

in a Board of Directors, which shall be elected by ballot by the qualified members at the annual meeting. Immediately after the first election the names of the twelve directors chosen shall be placed in a hat, and the President and the Treasurer elect of the Association shall draw alternately from the hat the names separately. The first four names drawn shall serve as Directors for three years, the next for two years and the last four for one year. At each succeeding election four directors shall be chosen, in place of those whose terms expire to serve three years.

Sec. 2. If a vacancy shall occur in the Board of Directors, or in any office, the Board may fill the vacancy by the election of a member of the Association to serve the unexpired term, and until his successor has been duly elected and qualified.

Sec. 3. The Board of Directors may appoint and employ such clerical and other assistants as may be necessary. It shall fix the remuneration of all officers and employees.

Sec. 4. It shall be the duty of the Board of Directors to judge of the sufficiency of all mortgages and other securities offered to the Association, and it may purchase at foreclosure any property mortgaged to the Association, for the benefit of the Association generally.

Sec. 5. The Board of Directors, from time to time, by resolution, adopted by a vote of at least two-thirds of all the members of the Board and duly recorded in the minutes, may borrow money on the note, or other evidence of indebtedness of the Association, upon such terms and conditions as they shall agree upon; provided such loan shall not be made for a longer period than one month and the money so borrowed shall be used for no other purpose than to pay, in whole or in part, a loan

already made to a member of the Association, or a maturing series of stock, and provided further that the total amount of money so borrowed shall at no time exceed thirty per centum of the amount then actually paid into the Association as subscriptions or dues on installment shares.

Sec. 6. The Directors shall receive no compensation for their services.

Sec. 7. A quorum shall consist of not less than five. The President, Vice-President or any Director being absent without sufficient excuse for three monthly meetings successively, his office as President, Vice-President or Director shall be declared vacant by the Board of Directors. Officers and employees appointed by the Board of Directors may be removed by them at their pleasure, and the Directors have the power of requiring bonds of any officer or employee for the faithful and honest performance of his duties.

## ARTICLE IV.

### OFFICERS.

Section 1. The officers of the Association shall consist of a President, Vice-President, Secretary, Treasurer and three Auditors, all of whom shall be members of the Association. The President, Vice-President, Secretary and Treasurer shall be elected by the Directors and shall hold their respective offices for one year and until their successors are duly elected and qualify, unless they be removed by the Board of Directors as above provided.

Sec. 2. The Auditors shall be elected by the shareholders at the annual meetings by a majority vote. The Board of Directors shall also appoint a Solicitor for the Association.

## ARTICLE V.

PRESIDENT.

The President shall preside at all meetings of this Association and of the Board of Directors. He shall sign all orders on the Treasurer for the payment of money when ordered by the Board of Directors, and shall perform all other duties usually appertaining to the office of President. It shall be his duty, and he is hereby empowered to give releases and acquittance for all moneys which shall be paid to the Association upon any bond, note, mortgage or other security, and, if necessary, acknowledge satisfaction of the same on the records. The President shall be required to give bond in such sum as the Board of Directors shall determine for the faithful performance of his duties.

## ARTICLE VI.

VICE-PRESIDENT.

The Vice-President shall, in the absence of the President, preside at all meetings of the shareholders and of the Board of Directors, and discharge all duties appertaining to the office of President. It shall be his duty in the event of the death or resignation of the President to perform all the duties of that office until the next election by Directors, and he shall also be *ex-officio,* a member of the Board of Directors.

## ARTICLE VII.

TREASURER.

The Treasurer shall have custody of the funds of the Association received by him from the Secretary, and shall deposit the same, in the name of the Association, in a National Bank, or Trust Company, designated by the Board of Directors. He shall pay all orders drawn upon him by the President

and Secretary by check drawn on said bank, signed by the Treasurer and countersigned by the President of the Association, and shall receive and hold in trust for the Association all bonds, mortgages, and other securities on which money may be loaned by the Association; and it shall be his duty to see that all policies of insurance are regularly and promptly renewed. He shall, at each regular monthly meeting of the Board of Directors, report to the said Board the amount of money remaining in the Treasury unappropriated. He shall receive for his services such sum as the Board shall determine, and on the second Monday of April in each and every year, beginning in the year 1910, shall cause to be published, at the expense of the Association, a statement of the financial condition of the Association. He shall give bond with such securities and for such sum as the Board of Directors may direct, for the faithful performance of his duties. At the expiration of his office he shall deliver all books, papers, etc., belonging to the Association in his possession, to his successor in office.

## ARTICLE VIII.

### SECRETARY.

The Secretary shall keep accurate minutes of the proceedings of the Association and of the Board of Directors, and shall record the same in books to be kept for that purpose. He shall receive all moneys paid in to the Association and pay the same to the Treasurer, taking his receipt therefor. He shall keep accurate account with all of the shareholders, and shall attest all orders drawn on the Treasurer for the payment of money when so ordered by the Board of Directors. He shall notify the shareholders of the annual meetings, by public notice

conspicuously placed and by advertisement in a newspaper published in the neighborhood (at the expense of the Association). He shall be prepared at all times to inform the shareholders of the state of the financial concerns of the Association, and at yearly meetings shall furnish a detailed statement of the finances of the Association. He shall receive such compensation for his services as the Board of Directors may determine. He shall give bonds to the Association for the faithful and honest performance of his duties as approved by the Board of Directors. At the expiration of his term of office he shall deliver all books, papers and property belonging to the Association in his possession to his successor in office.

## ARTICLE IX.

### SOLICITOR.

The Board of Directors shall appoint a Solicitor for the Association, who shall examine all title deeds and make the necessary searches for ascertaining the title to all property offered to the Association as mortgage security, and shall give his opinion thereon in writing. He shall prepare all bonds, mortgages, agreements and other writings to be taken or given by this Association in the course of its business. He shall also transact all other law business of this Association whenever required, for which he shall receive a fair compensation, his charges for fees, disbursements, etc., in making searches, recording and proving papers, for preparing all mortgages and other written instruments and for examining papers, titles and other matters, shall be borne by the party applying for the loan. In all disputes as to the amount of the charges, the same shall be determined by the Board of Directors.

## ARTICLE X.

AUDITORS.

It shall be the duty of the Auditors to settle and adjust the accounts of the Association prior to the annual meetings, and report to the shareholders with a faithful and ample exhibit the financial affairs of the Association, the state of the Treasury and the value of the shares; which exhibit they shall have printed at the expense of the Association.

In the event of their neglect or refusal to furnish to the shareholders, at their annual meetings, a detailed exhibit of the finances, as hereinabove provided, they shall be fined in such an amount as the Board of Directors may determine.

They shall have the power at any time to inspect the accounts of the Treasurer and Secretary and upon five days' notice may call a meeting of the shareholders.

## ARTICLE XI.

LOANS.

Section 1. The money of the Association shall be loaned out in the open meeting at auction to the highest bidder; the premium bids for loans shall be at the rate of so much per month on each share (but no bid shall be received less than two cents a share), until the stock of the series bidding shall mature, or, in case the loan shall not be secured by a mortgage on real estate, then in that event the premium installments shall continue until the loan be repaid to the Association, and in both cases the premium shall be paid to the Secretary with the dues and interest each month. Provided, however, that should any loan secured by a mortgage on real estate be repaid to the Association before the full amount of the premium at which said loan was

made has been paid the Association, then the balance due on the same shall be paid before the Association surrender or cancel the mortgage or other evidence of indebtedness held by it.

Sec. 2. In addition to the premium bid for a loan, every stockholder shall be held as contracting to pay all taxes that may be assessed at any time upon said loan.

Sec. 3. Whenever a shareholder shall be declared to be entitled to a loan, and before receiving the same, he or she, shall secure the payment thereof to the Association, by a bond and mortgage for the full amount of the sum loaned, and for the payment of such fines as may be imposed for the failure to pay installments of premiums, dues and interest when due, and by the deposit of the policy of fire insurance; and for every loan of two hundred dollars made to a shareholder, one share of the stock shall be assigned as collateral security to said bond and mortgage.

Sec. 4. Shareholders taking loans from the Association shall be required to deliver to this Association within one month after the tax assessed against lands mortgaged to this Association to secure such loans, shall become a lien on said lands, receipted tax bills for the amount of taxes assessed against said premises; and it shall be the duty of the Secretary at the expiration of said thirty days after said tax shall have become a lien, to notify, by mail, all borrowing members who have failed so to deliver said receipted tax bills, and in case such taxes are not paid within three months after such notification, the mortgage on such property on which said taxes have not been paid shall be foreclosed.

Sec. 5. Shareholders taking loans from the Association shall pay interest monthly to the Secretary at the rate of one-half of one per centum per

month. Such borrower refusing or neglecting to pay the interest on their loans shall incur a monthly fine of five cents for each loan of two hundred dollars by him or her held. If the interest is suffered to remain for more than a period of three months, the Directors may compel payment on the principal and interest by ordering proceeding on the bond and mortgage according to law, and in no case shall the Directors suffer interest or premiums on a loan to remain unpaid for a period of longer than six months.

Sec. 6. The Association shall have the power of insuring all buildings on which loans may be made, the expense of insuring to be paid by the borrower.

Sec. 7. No real estate shall be purchased by the Association nor any loan made on bond and mortgage, except upon a report in writing of a committee of at least two members of the Board of Directors, signed by them, certifying to the value of the real estate in question to the best of their judgment; and approved by two-thirds of the Directors present at any meeting of the Board of Directors. Such report shall be filed and preserved among the records of the Association, and any member shall have access to such reports. Members of the Association not Directors may be associated on said committee with the members of the Board of Directors.

Sec. 8. When any mortgagor shall desire to redeem his or her premises from the mortgage upon it, he shall be allowed to do so by giving ten days' written notice to the Secretary and paying into the Treasury the full amount of the loans taken by him, together with the balance of the premium bid and any interest or fines that may be due; at which time the shares of stock assigned by him to the Association as security collateral to that of his

bond and mortgage shall be re-assigned to him on the transfer book of the Association by the President, by order of the Board of Directors.

Sec. 9. Should any stockholder who has executed a mortgage to the Association be desirous of selling the mortgaged property subject to the mortgage, he shall be at liberty to do so upon payment of all monthly dues and interest, and installments of premium and transfer of the shares secured by said mortgage to the purchaser; such purchaser thenceforth becoming liable for the payment of dues, premiums and interest payable in respect to such shares; provided that no expense shall be incurred by the Association, and the transfer shall be subject to the approval of the Board of Directors.

Sec. 10. If any building on property mortgaged to the Association and insured against fire for the benefit of the Association as its interest may appear, shall be destroyed or damaged by fire, the amount of such insurance shall be paid to the Association and be applied, as far as it will go, to the discharge of the debt due the Association. The balance, if any, shall be paid over to the member, or to his legal representatives. If the member should desire to rebuild, the insurance so collected may be, in the discretion of the Board of Directors, returned to him for that purpose, and his loan continued as before.

## ARTICLE XII.

### FUNDS—HOW INVESTED

Section 1. The funds of the Association shall be invested in the following and in no other ways:

In the purchase of lands or building lots and erecting buildings and improvements thereon, or in the purchase of lands already improved; which lands, buildings and improvements shall be already contracted to be sold to the members of this Asso-

ciation, payable in the shares of the Association or in periodical installments for a period such as agreed upon and designated in the Constitution; at the expiration of which term, all payments having been made, the lands, dwellings and improvements so sold and conveyed to the members of the Association shall become the property of the grantees, discharged from all further payment.

Sec. 2. In loans to members on bonds secured by mortgage, which shall be a first lien on real estate in this State, not to exceed eighty per centum of the cash value thereof, payable in shares of the Association or in periodical installments; provided where the Association holds a mortgage on real estate which is a first lien, the Association may increase its loan thereon and secure the same by a second or subsequent mortgage; provided further the total indebtedness to the Association, less the amount of dues paid on the shares pledged for such loan, shall not exceed eighty per centum of the cash value of the real estate loaned on and all the mortgages held by the Association shall be prior to any other encumbrance on said real estate.

Sec. 3. In the redemption of shares of the Association.

Sec. 4. In loans upon the pledge or collateral security of the shares of the Association not to exceed ninety per centum of the withdrawal value of such shares.

Sec. 5. In loans to persons not members, or to members without pledge of their stock as collateral security, on bonds secured by mortgage, which shall be a first lien on improved real estate in this State, not to exceed fifty per centum of the cash value thereof; a purchase money mortgage given to the Association upon real estate sold by it shall not be considered a loan within the meaning of this Section.

*Addenda to Stipulation.*

Sec. 6. In the purchase of any or all of the securities in which savings banks of this State are authorized by law to invest or as a loan upon any of such securities as collateral, not to exceed eighty per centum of their market value; provided, investments or loans authorized under Sections 5 and 6 of this Article only be made from moneys on hand not required for any of the purposes specified in Sections 1, 2, 3 and 4 hereof, or for the payment of withdrawals or matured shares, or for the purpose of creating a fund for the payment of maturing shares.

## ARTICLE XIII.

### MEETINGS AND QUORUMS.

Section 1. The first meeting of the incorporators shall constitute the first meeting of the members of the Association. Thereafter the annual meetings of the members shall be held on the second Monday in April each year, at 8 P. M., at the office of this Association, in the City of Newark, in the County of Essex and State of New Jersey. Notice of such meeting shall be given by the Secretary at least ten days previous thereto, by publication in a daily paper published in the City of Newark.

Sec. 2. Special meetings of the members may be convened by the President on the written request of a majority of the Directors. Ten days' notice in writing, stating the time, place and object of such meeting, shall be mailed to each member by the Secretary. No business shall be transacted at such meetings except that for which the meeting was called.

Sec. 3. At any special meeting fifteen members shall constitute a quorum, except for the election of directors, and no election of directors shall be held at any special meeting unless two-thirds of the shareholders shall be present.

Sec. 4. Each member in good standing shall have one vote at all annual and special meetings on the shares he holds, on which not less than one month's dues have been paid, provided that all shares so represented shall have been registered at least ten days prior to such meeting.

Sec. 5. Regular monthly meetings of the Board of Directors shall be held at the office of the Association on the second Monday of each month, or at such time and place as the Board of Directors may designate. Special meetings may be called by the President whenever the business of the Association may require, and must be called by him upon the request, in writing, of five of the Directors. Twenty-four hours' notice by mail must be given to each Director by the Secretary of all special meetings of the Board of Directors.

## ARTICLE XIV.

### FINES.

All officers failing to attend, without good and sufficient excuse, an annual meeting, shall be fined one dollar.

The Treasurer, for non-attendance at any monthly meeting, without any good and sufficient excuse, shall be fined one dollar.

The Secretary shall forfeit five dollars for failing, without good and sufficient excuse, to pay premiums on any insurance policy which is not paid by the owner.

The Secretary, for failing to attend any meeting of the Board of Directors, without good and sufficient excuse, or of the shareholders, shall be fined one dollar. All fines shall be charged by the Secretary with the monthly dues or deducted from the salary or compensation of such officers as receive any, at the time of receiving the same, and all fines

as above shall be levied at the discretion of the Board of Directors.

The President is empowered to impose a fine of one dollar on any member who disobeys.

## ARTICLE XV.

BY-LAWS.

The Board of Directors may enact By-Laws for their own government, not conflicting with this Constitution.

## ARTICLE XVI.

AMENDING THE CONSTITUTION.

This Constitution shall not be altered or amended except at an annual or special meeting, of which ten days' notice shall be given to each member, by postal card, and by a vote of two-thirds of the shareholders present.

## ARTICLE XVII.

SALARIES AND EXPENSES.

The salaries and fees of officers of this Association shall be fixed by the Board of Directors. All other expenses incurred for books, printing, etc., must be sanctioned by the Board of Directors.

## ARTICLE XVIII.

STOCK.

Section 1. A new series of stock may be commenced and certificates issued therefor on the second Monday of each month in every year; it being provided that the stockholders of any one series shall not share in the accumulation of profits of any preceding series, but shall pay their monthly dues and be entitled to their share in the profits of the Association only from the commencement of their particular series of stock.

*Addenda to Stipulation.*

Sec. 2. All shares of stock issued by the Association shall be of the same par or maturity value, and all shareholders shall occupy the same relative status as to debts and losses of the Association; but nothing herein shall forbid agreements with shareholders who pay the full par or maturity value of their shares in advance, whereby they may waive participation in the general profits of the Association in consideration of a fixed annual profit.

## ARTICLE XIX.

### WITHDRAWAL AND STOCK TRANSFERS.

After the first year of the Association, the Board of Directors shall have full power to enact rules to govern the admission and withdrawal of members and transfer of shares, not conflicting with any provisions of this Constitution or the laws of New Jersey.

## ARTICLE XX.

### VOTING.

Members may vote by proxy, which shall be in writing, signed by the party authorizing the same.

## ARTICLE XXI.

### GENERAL PROVISIONS.

Section 1. The provisions of an act of the Legislature of New Jersey entitled "An Act Concerning Building and Loan Associations," approved April 8, 1903, so far as not actually incorporated herein, are to be considered a part of the Constitution.

*Addenda to Stipulation.*

## PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE NINTH WARD BUILDING AND LOAN ASSOCIATION, TO BE VOTED ON BY THE SHAREHOLDERS AT THE ANNUAL MEETING IN APRIL, 1915.

### ARTICLE II.

SHAREHOLDERS.

Sec. 4. In case any shareholder, trustee, guardian or representative for a minor, shall neglect or refuse to pay his or her monthly dues or premiums on a loan, each and every person so neglecting or refusing, shall incur a monthly fine of ten per centum (on the amount payable each month), said fines to be non-accumulative, and to be collected in the same manner as dues and interest; and provided that any payment shall be applied to the payment of the dues and fines in the order in in which they have accrued.

And providing further that in the event of a default in any periodical payment for more than three successive months, fines shall be charged for the fourth and successive months, at the rate of two per centum per month, on the amount in arrears.

Table showing the manner fines are charged on one share of stock for six months, according to the foregoing constitution:

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| Third Month ..... | 1 | 3.00 | 10c. | 3.30 |
| Fourth Month .... | | | | |
| Fifth Month ..... | 2 per cent. on the amount due. | | | |
| Sixth Month ..... | | | | |

*Addenda to Stipulation.*

Sec. 6. Any non-borrowing shareholder wishing to withdraw from this Association may do so, giving thirty days' notice in writing to the Secretary of such intention to withdraw.

Before one year has expired from date of issue of any stock, the withdrawing shareholder is entitled to receive the amount of installments paid in; after one year, the amount of installments paid in and ten per centum of the net profits; at the expiration of the second year of any series, twenty per centum; at the end of the third year, thirty per centum; fourth, year, forty per centum; fifth year, fifty per centum; sixth year, sixty per centum; seventh year, seventy per centum; eighth year, eighty per centum. At any time thereafter the Board of Directors may, at their discretion, pay to the withdrawing shareholders of such series their present value, less all arrears, and a proportionate part of all losses sustained by the Association, provided the necessary funds are in the hands of the Treasurer at the time of the receipt of such notice. All arrears and a proportionate share of all losses sustained by the Association shall be deducted from withdrawing shares.

## ARTICLE XI.

### LOANS.

Sec. 5. Shareholders taking loans from the Association shall pay interest monthly to the Secretary at the rate of one-half of one per centum per month. Such borrowers refusing or neglecting to pay the interest on their loans shall incur a monthly fine of five cents for each loan of two hundred dollars by him or her held. If the interest, dues or premiums are suffered to remain unpaid for more than a period of three months, the Directors may compel payment of the principal and interest by

ordering proceedings on the bond and mortgage according to law, and in no case shall the directors suffer interest, dues or premiums on a loan to remain unpaid for a period of longer than six months.

Sec. 6. The Association shall have the power of insuring all buildings on which loans may be made, the expense of insuring to be paid by the borrower, or at its discretion, may permit such insurance to be effected by the borrower, and in the event of failure on the part of the borrower to pay any premium within thirty days of its being due, said board may direct foreclosure of the mortgage on said premises.

## PROPOSED AMENDMENTS.

Action on the following amendments to the Constitution, recommended by the Executive Committee:

Amend Article VII as follows: After the words "the Treasurer," insert "shall in the absence of the Secretary, receive moneys paid to the Association."

Amend Article VIII as follows: Leave out the word "all" in the sentence, "he shall receive *all* moneys, etc."