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BILL OF COMPLAINT.

Filed December 7, 1936.

In Chancery of New Jersey

To the Honorable Luther A. Campbell,
Chancellor of the State of New Jersey:

The complainant, Ellis Slatoff, of the Village of South Orange, in the County of Essex and State of New Jersey, complaining of the defendant, Edward E. Theurich, surviving Executor of the Estate of Edward Theurich, deceased, says:

1. On or about September 1, 1925, complainant was President of Newark Cleaning and Dye Works (sometimes called Newark Cleaning & Dye Works, Inc.), a corporation organized and existing under the laws of the State of New Jersey, and having its principal place of business at 20 Broome street, in the City of Newark, New Jersey.

2. That at or about said date, Newark Cleaning and Dye Works, a corporation, acquired by deed of conveyance, a parcel of property located on the easterly side of Broome street in said City of Newark, from Augusta M. Theurich, widow, as Executrix and Edward E. Theurich as Executor of the Estate of Edward Theurich, deceased.

3. That $15,000.00 of the purchase price for the foregoing conveyance was paid to the said Estate of Edward Theurich, deceased by delivering to the said Augusta M. Theurich and Edward E. Theurich, Executrix and Executor as aforesaid, a purchase money mortgage dated Septem-

ber 1, 1925 and becoming due and payable September 1, 1931, executed solely by said Newark Cleaning and Dye Works, a corporation.

4. That the bond accompanying said mortgage was executed jointly by Newark Cleaning and Dye Works and its officers the complainant Ellis Slatoff, Morris Colton and Samuel Greene. A copy of the bond is hereto annexed as "Exhibit I" and hereby expressly referred to as if herein set out fully and at length. A certified copy of the mortgage, which is likewise referred to, will be produced at the hearing of this cause.

5. That no consideration moved directly to complainant, Ellis Slatoff, or Morris Colton or Samuel Greene, notwithstanding upon said bond all of the obligors purport to be principal debtors, since between the parties to said bond, Newark Cleaning and Dye Works, a corporation, was the sole purchaser of said property, and was in fact the principal obligor, and the complainant Ellis Slatoff, Morris Colton and Samuel Greene were in fact, sureties thereon.

6. That thereafter and prior to April 28, 1936, the mortgage, securing and accompanying the aforesaid bond, was foreclosed, resulting in an alleged deficiency of upward of $16,259.19, and the defendant herein has since claimed and now claims that complainant is indebted to him in said sum less a credit of $2,000.00 hereafter referred to.

7. That thereafter and on or about April 28, 1936, Edward E. Theurich, surviving executor of the Estate of Edward Theurich, deceased, the defendant herein, in accordance with the terms of an act entitled "An Act to authorize

the compromise and discharge of claims against one or more of several joint debtors or co-partners" (3 C. S. 3780), by an instrument in writing in consideration of the sum of $2,000.00 discharged Newark Cleaning and Dye Works, a corporation, the principal debtor upon said bond, and Morris Colton and Samuel Greene, two of the sureties thereon from all and every liability to the said Estate of Edward Theurich, deceased, arising out of the execution and delivery of the aforesaid bond by them,—all of which was without the knowledge or consent of complainant. A copy of said discharge is hereto annexed as "Exhibit II", made part hereof and is expressly referred to as if herein set out fully and at length.

8. That on or about May 1, 1936 and pursuant to the claim mentioned in paragraph 6 hereof, defendant instituted a suit in the New Jersey Supreme Court by attachment against complainant, then a non-resident, demanding damages of complainant in the sum of $14,259.19.

9. That in the aforesaid attachment suit the defendant herein made affidavit wherein he falsely, fraudulently and unconscionably demanded of the complainant the sum of $14,259.19. Subsequently and on or about the tenth day of September, 1936, the defendant herein falsely, fraudulently and unconscionably testified before the auditor appointed in said attachment suit that the amount then due to the defendant herein (the plaintiff in said attachment suit), as of that date, was $14,554.45, and itemized the said amount as more fully appears from the testimony given before the said auditor; and as a result of said testimony and the concealment and misrepresentation of the true and material facts, the

auditor was thereby imposed upon and induced to report that complainant was indebted to defendant in the sum of $14,554.45.

10. That the said defendant knew as a fact that the amount claimed to be due in accordance with said testimony, was false and improper and that a claim invalid in law, was being made by him for a large sum of money which was not due from this complainant in that, pursuant to the Statute, hereinbefore referred to relating to joint obligations, the maximum for which the complainant herein would be liable to this defendant, if the relationship of principal and surety had not existed, was but one-fourth of said sum of $16,259.19, or approximately $4,064.79.

11. That in the progress of said suit at law and subsequent to September 12, 1936, complainant appeared specially in the New Jersey Supreme Court suit to attack the jurisdiction of the said Court and thereupon learned for the first time that Newark Cleaning and Dye Works, a corporation, the principal debtor upon said bond as aforesaid, and Morris Colton and Samuel Greene complainant's co-securities, had been discharged as alleged in Paragraph No. 7 hereof, of all liability by reason of the execution and delivery of the aforesaid bond. Decision retaining jurisdiction was rendered November 30, 1936, but complainant is not advised whether the order thereon has as yet been actually entered.

12. That no judgment has as yet been entered in said attachment suit and complainant herein has not appeared generally therein, since the true relationship and character in which the parties executed and delivered the foregoing bond

cannot be pleaded or proved in any suit at law, and particularly in said attachment proceeding now pending in the New Jersey Supreme Court, and unless this Court intervenes and adjudicates and decrees the legal relationship existing between the parties, complainant's property may be sold by virtue of said attachment suit to satisfy a judgment therein, which in equity and good conscience should not be permitted.

13. That the said defendant herein, further seeking to collect an unjust and unlawful demand, has instituted a suit in the Supreme Court in the State of New York, County of New York, wherein personal service of this complainant was effected, and which is upon the same bond, and judgment therein is demanded for like unconscionable and inequitable sums, to wit: the sum of $14,259.19.

14. That in said New York suit the defendant herein has unlawfully, illegally, fraudulently, unconscionably and inequitably demanded a sum greatly in excess of the sum which would be due from this defendant if the relationship of principal and surety had not existed as hereinabove set forth.

15. That complainant is advised and verily believes that the aforesaid discharge, referred to in Paragraph No. 7, of Newark Cleaning and Dye Works, a corporation, the principal debtor as aforesaid, by the defendant herein discharges complainant as surety upon said bond.

16. That unless this Court enjoins defendant from the further prosecution of said attachment suit in the New Jersey Supreme Court and the

suit in the New York Supreme Court, defendant will continue as he has threatened to do, both of said unconscionable and inequitable proceedings and complainant will suffer irreparable damage if either or both of said proceedings are permitted to be continued,—contrary to equity and good conscience.

17. That complainant is without adequate remedy in the courts of law and therefore prays:

1. That defendant, Edward E. Theurich, surviving executor of the estate of Edward Theurich, deceased, may answer this bill of complaint and every statement herein contained, but without oath.

2. That this Court adjudicate and decree that Newark Cleaning and Dye Works, a corporation, was the principal obligor under the foregoing bond, and that complainant and Morris Colton and Samuel Green were sureties thereon.

3. That this Court adjudge and decree that complainant be discharged and relieved from any and all responsibility whatever by reason of the execution and delivery of the aforesaid bond.

4. That this Court, pending the final hearing in this cause, enjoin and restrain defendant from the further prosecution of the aforesaid attachment suit now pending in the New Jersey Supreme Court and the suit now pending in the Supreme Court of the State of New York, and from further proceeding to enforce in any manner whatsoever, any alleged liability upon said bond or any deficiency thereunder.

5. That this Court permanently enjoin and restrain defendant from the further prosecution

of the foregoing attachment suit now pending in the New Jersey Supreme Court and the suit now pending in the Supreme Court of the State of New York, and from enforcing in any manner whatsoever, any alleged liability of complainant upon the foregoing bond.

6. That a subpoena may issue commanding defendant aforesaid, to answer this bill of complaint and to abide by such decree as this Court may make in the premises.

7. That complainant may have such other and further relief as the nature of the case may require, and as shall be agreeable to equity and good conscience.

Dated: December 5, 1936.

SAUL J. ZUCKER,
Solicitor for and of Counsel
with Complainant.

Exhibit I.

KNOW ALL MEN BY THESE PRESENTS

THAT we, NEWARK CLEANING AND DYE WORKS, INC., a corporation having its principal place of business in the City of Newark, County of Essex and State of New Jersey, and SAMUEL GREENE, ELLIS SLATOFF and MORRIS COLTON, of the City of Newark in the County of Essex and State of New Jersey are held and firmly bound unto AUGUSTA M. THEURICH, widow, as Executrix, and EDWARD E. THEURICH, as Executor of the Estate of EDWARD THEURICH, deceased, of the City of Newark in the County of Essex and State

Exhibit I.

of New Jersey, in the penal sum of THIRTY THOUSAND DOLLARS ($30,000.00) lawful money of the United States of America, to be paid to the said AUGUSTA M. THEURICH, widow, and EDWARD E. THEURICH, their heirs, executors, administrators or assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors or assigns, firmly by these presents. Sealed with the Obligors' seals and dated the first day of September One Thousand Nine Hundred and Twenty-five.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, that if the above bounden NEWARK CLEANING AND DYE WORKS, INC., SAMUEL GREENE, ELLIS SLATOFF and MORRIS COLTON, their heirs, executors, administrators, successors or assigns, shall well and truly pay or cause to be paid unto the above named AUGUSTA M. THEURICH, and EDWARD E. THEURICH, their heirs, executors, administrators or assigns, the just and full sum of FIFTEEN THOUSAND DOLLARS ($15,000.00), as follows: $1000.00 within one year from the date hereof; $1,000.00 within two years from the date hereof; $1000.00 within three years from the date hereof; $1000.00 within four years from the date hereof; $1000.00 within five years from the date hereof; and the balance on the first day of September which will be in the year One Thousand Nine Hundred and thirty-one, and the interest thereon, to be computed from September 1st, 1925 at and after the rate of six per cent. per annum, and to be paid semi-annually without any fraud or other delay, then the above obligation to be void, otherwise to remain in full force and virtue.

Exhibit I.

And it is hereby expressly agreed that should any default be made in the performance of any of the terms, covenants and conditions contained in the Mortgage accompanying this Bond (the said terms, covenants and conditions, and all matters and things contained in said Mortgage being hereby made a part hereof as though particularly incorporated herein), or should any of the events or contingencies occur by reason of which the time for the payment of the said Mortgage matures as set forth therein, or should any default be made in the payment of the said interest or any part thereof, on any day whereon the same is made payable as above expressed, or should any tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in the Mortgage accompanying this Bond, and become due and payable, and should the said interest, or installment remain unpaid and in arrear for the space of thirty days, or said tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien, or any or either of them remain unpaid and in arrear for the space of sixty days, then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods, as the case may be, the aforesaid principal sum of money, or so much thereof as may remain unpaid, with all arrearages of interest thereon, shall, at the option of the said obligee , or the legal representatives of the said obligee , become and be due and payable immediately thereafter, although the period first above limited for the payment thereof may not then have expired, anything herein-

before contained to the contrary thereof in anywise notwithstanding.

The principal secured by this Bond, or any part thereof, not less than Five Hundred Dollars, may be paid at any time before maturity, on any interest day herein reserved, upon thirty days' written notice to the holder of the Mortgage accompanying this Bond.

AND IT IS FURTHER EXPRESSLY AGREED that the said obligors shall not be entitled to and will not claim any credit on the interest payable on the Mortgage securing this Bond for taxes which may be levied upon the mortgaged premises, or for any part of said taxes.

NEWARK CLEANING &
DYE WORKS, INC.
ELLIS SLATOFF,
Pres.

Attest
MORRIS COLTON,
Secy.

ELLIS SLATOFF L.S.
MORRIS COLTON L.S.
SAM'L GREENE L.S.

Signed sealed and delivered
in the presence of
I. H. COLTON.

Exhibit II.

In consideration of the sum of Two Thousand Dollars ($2,000.00), receipt whereof is hereby acknowledged, I, Edward E. Theurich, surviving executor of the Estate of Edward Theurich, deceased, by Sholem Lipis, duly authorized agent, do hereby compose and compromise with the Newark Cleaning and Dye Works, Inc., a corporation of New Jersey, Samuel Greene and Morris Colton, their joint debt due me in connection with a deficiency arising out of a certain bond made on September 1st, 1925, by Newark Cleaning and Dye Works, Inc., Samuel Greene, Morris Colton and Ellis Slatoff, which bond was secured by a mortgage of even date and which mortgage was foreclosed in proceedings in the Court of Chancery of New Jersey resulting in a deficiency due me.

It is agreed that said Newark Cleaning and Dye Works, Inc., Samuel Greene and Morris Colton, their heirs, executors, successors and assigns, shall have the full benefit of "An act to authorize the compromise and discharge of claims against one or more of several joint debtors or co-partners," being Public Laws of 1884, page 298, and 3 Compiled Statutes, pages 3780 and 3781.

In Witness Whereof, I have hereunto set my hand and seal this 28th day of April, 1936.

SHOLEM LIPIS,
Duly authorized agent for Edward E. Theurich, surviving executor of the Estate of Edward . Theurich, deceased.

Exhibit II.

Signed, sealed and delivered
in the presence of

I. H. COLTON.

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

BE IT REMEMBERED, That on this 28th day of April, in the year of our Lord One Thousand Nine Hundred and Thirty-six, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared Sholem Lipis, duly authorized agent for Edward E. Theurich, surviving executor of the Estate of Edward Theurich, deceased, who, I am satisfied, is the person mentioned in the within Instrument to whom I first made known the contents thereof, and thereupon he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

ISADORE H. COLTON,
A Master in Chancery of New Jersey.

Affidavit of Ellis Slatoff.

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

ELLIS SLATOFF, being duly sworn on his oath according to law, deposes and says:

1. That he is the complainant herein; that he has read the foregoing Bill of Complaint; that the facts therein alleged are true and the matters mentioned therein on information and belief are true to the best of his knowledge, information and belief.

2. That on or about September 1, 1925, complainant herein was President of Newark Cleaning and Dye Works (sometimes called Newark Cleaning & Dye Works, Inc.), a New Jersey corporation, having its principal place of business at 20 Broome street, Newark, New Jersey.

3. That at or about said date, Newark Cleaning and Dye Works, a corporation, acquired by deed of conveyance, a parcel of property located on the easterly side of Broome street in said City of Newark, from Augusta M. Theurich, widow, as Executrix and Edward E. Theurich as Executor of the Estate of Edward Theurich, deceased.

4. That $15,000.00 of the purchase price for the foregoing conveyance was paid to the said Estate of Edward Theurich, deceased, by delivering to the said Augusta M. Theurich and Edward E. Theurich, Executrix and Executor as aforesaid, a purchase money mortgage dated September 1, 1925 and becoming due and payable September 1, 1931, executed solely by said Newark Cleaning and Dye Works, a corporation.

Affidavit of Ellis Slatoff.

5. That the bond accompanying said mortgage was executed jointly by Newark Cleaning and Dye Works and its officers the complainant Ellis Slatoff, Morris Colton and Samuel Greene.

6. That no consideration moved directly to complainant, Ellis Slatoff, or Morris Colton or Samuel Greene, notwithstanding upon said bond all of the obligors purport to be principal debtors, since between the parties to said bond, Newark Cleaning and Dye Works, a corporation, was the sole purchaser of said property, and was in fact the principal obligor, and the complainant, Ellis Slatoff, Morris Colton and Samuel Greene were in fact, sureties thereon.

7. That thereafter and prior to April 28, 1936, the mortgage, securing and accompanying the aforesaid bond, was foreclosed, resulting in an alleged deficiency of upward of $16,259.19, and the defendant herein has since claimed and now claims that complainant is indebted to him in said sum less a credit of $2,000.00 hereafter referred to.

8. That thereafter and on or about April 28, 1936, Edward E. Theurich, surviving executor of the Estate of Edward Theurich, deceased, the defendant herein, in accordance with the terms of an act entitled "An Act to authorize the compromise and discharge of claims against one or more of several joint debtors or co-partners" (3 C. S. 3780), by an instrument in writing in consideration of the sum of $2,000.00 discharged Newark Cleaning and Dye Works, a corporation, the principal debtor upon said bond, and Morris Colton and Samuel Greene, two of the sureties thereon from all and every liability to the said Estate of Edward Theurich, deceased,

arising out of the execution and delivery of the aforesaid bond by them,—all of which was without the knowledge or consent of complainant.

9. That on or about May 1, 1936 and pursuant to the claim mentioned in paragraph No. 6 of the bill of complaint, defendant instituted a suit in the New Jersey Supreme Court by attachment against complainant, then a non-resident, demanding damages of complainant in the sum of $14,259.19.

10. That in the aforesaid attachment suit the defendant herein made affidavit wherein he falsely, fraudulently and unconscionably demanded of the complainant the sum of $14,259.19. Subsequently and on or about the tenth day of September, 1936 the defendant herein falsely, fraudulently and unconscionably testified before the auditor appointed in said attachment suit that the amount then due to the defendant herein (the plaintiff in said attachment suit), as of that date, was $14,554.45, and itemized the said amount as more fully appears from the testimony given before the said auditor; and as a result of said testimony and the concealment and misrepresentation of the true and material facts, the auditor was thereby imposed upon and induced to report that complainant was indebted to defendant in the sum of $14,554.45.

11. That the said defendant knew as a fact that the amount claimed to be due in accordance with said testimony, was false and improper and that a claim invalid in law, was being made by him for a large sum of money which was not due from this complainant in that, pursuant to the Statute, hereinbefore referred to relating to joint

obligations, the maximum for which the complainant herein would be liable to this defendant, if the relationship of principal and surety had not existed, was but one-fourth of said sum of $16,259.19, or approximately $4,064.79.

12. That in the progress of said suit at law and subsequent to September 12, 1936, complainant appeared specially in the New Jersey Supreme Court suit to attack the jurisdiction of the said Court and thereupon learned for the first time that Newark Cleaning and Dye Works, a corporation, the principal debtor upon said bond as aforesaid, and Morris Colton and Samuel Greene complainant's co-sureties, had been discharged as alleged in Paragraph No. 7 of the bill of complaint herein, of all liability by reason of the execution and delivery of the aforesaid bond. Decision retaining jurisdiction was rendered November 30, 1936, but complainant is not advised whether the order thereon has as yet been actually entered.

13. That no judgment has as yet been entered in said attachment suit and complainant herein has not appeared generally therein, since the true relationship and character in which the parties executed and delivered the foregoing bond cannot be pleaded or proved in any suit at law, and particularly in said attachment proceeding now pending in the New Jersey Supreme Court, and unless this Court intervenes and adjudicates and decrees the legal relationship existing between the parties, complainant's property may be sold by virtue of said attachment suit to satisfy a judgment therein, which in equity and good conscience should not be permitted.

Affidavit of Ellis Slatoff.

14. That the said defendant herein, further seeking to collect an unjust and unlawful demand, has instituted a suit in the Supreme Court in the State of New York, County of New York, wherein personal service of this complainant was effect, and which is upon the same bond, and judgment therein is demanded for like unconscionable and inequitable sums, to wit: the sum of $14,259.19.

15. That in said New York suit the defendant herein has unlawfully, illegally, fraudulently, unconscionably and inequitably demanded a sum greatly in excess of the sum which would be due from this defendant if the relationship of principal and surety had not existed as hereinabove set forth.

16. That deponent is advised and verily believes that the aforesaid discharge, referred to in Paragraph No. 7 of the bill of complaint herein, of Newark Cleaning and Dye Works, a corporation, the principal debtor as aforesaid, by the defendant herein, discharges complainant as surety upon said bond.

17. That unless this Court enjoins defendant from the further prosecution of said attachment suit in the New Jersey Supreme Court and the suit in the New York Supreme Court, defendant will continue as he has threatened to do, both of said unconscionable and inequitable proceedings and complainant will suffer irreparable damage if either or both of said proceedings are permitted to be continued,—contrary to equity and good conscience.

ELLIS SLATOFF.

Subscribed and sworn to before me,
this 7th day of December, 1936.

MILDRED D. FLIEDNER,
A Notary Public of New Jersey.

ORDER TO SHOW CAUSE.

Filed December 7, 1936.

Upon reading and filing the bill of complaint, and affidavit annexed thereto, by Saul J. Zucker, Esq., solicitor for and of counsel with complainant, it is, on this seventh day of December, 1936,

ORDERED, that EDWARD E. THEURICH, surviving Executor of the Estate of Edward Theurich, deceased, defendant herein, show cause before the Chancellor of the State of New Jersey, on the fifteenth day of December, 1936, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, at the Chancery Chambers, 1060 Broad street, Newark, New Jersey, why said defendant should not be enjoined and restrained, pending the final hearing in this cause, from the further prosecution of the attachment suit now pending in the New Jersey Supreme Court, and a suit now pending in the Supreme Court of the State of New York, in both of which suits the defendant herein is plaintiff, and the complainant herein is defendant, and from further proceeding to enforce in any manner whatsoever any alleged liability upon the bond referred to in the bill of complaint, and which is the basis of the foregoing pending suits herein referred to; and it is further

ORDERED, that pending the argument of this order to show cause, and the entry of an order thereon, the defendant be and he is hereby enjoined and restrained from the further prosecution of the attachment suit now pending in the New Jersey Supreme Court, and a suit now pending in the Supreme Court of the State of

Order to Show Cause.

New York, in both of which suits the defendant herein is plaintiff, and the complainant herein is defendant, and from further proceeding to enforce in any manner whatsoever any alleged liability upon the bond referred to in the bill of complaint, and which is the basis of the foregoing pending suits herein referred to; and it is further

ORDERED, that any affidavits to be relied upon by the defendant, upon the return of this order to show cause, be served upon complainant or his solicitor, at least one day before the return day mentioned herein, with leave to complainant to file reply affidavits upon the argument; and it is further

ORDERED, that a copy of this order, and the bill of complaint, and affidavit annexed thereto, upon which it is based, certified as true copies by the solicitor for the complainant, be served upon defendant, or his attorney in the New Jersey Supreme Court attachment suit, Sholem Lipis, within two days from the date hereof.

LUTHER A. CAMPBELL,

C.

Respectfully advised,

J. O. BIGELOW,

V.-C.

ORDER RESTRAINING AND ENJOINING DEFENDANT PENDENTE LITE.

Filed December 15, 1936.

This matter being opened to the Court by Saul J. Zucker, Esq., solicitor for and of counsel with complainant, upon the return day of an order herein, dated December 7, 1936, requiring defendant to show cause why he should not be enjoined and restrained pending the final hearing of this cause, from the further prosecution of the attachment suit now pending in the New Jersey Supreme Court, and a suit now pending in the Supreme Court of the State of New York, in both of which suits the defendant herein is plaintiff, and the complainant herein is defendant, and from further proceeding to enforce in any manner whatsoever any alleged liability upon the bond referred to in the bill of complaint, and which is the basis of the foregoing pending suits herein referred to, and the defendant having appeared herein by Sholem Lipis, Esq., his solicitor, and the Court having heard argument in the presence of Isadore H. Colton, Esq., of counsel with defendant, and the solicitor for defendant consenting in open court and having duly considered of the pleadings and affidavits submitted, and being of the opinion that the relief prayed for should be granted, it is, on this 15th day of December, 1936,

Ordered, that pending the final hearing in this cause, and the entry of a final decree herein, defendant be and he is hereby enjoined and restrained from the further prosecution of the attachment suit now pending in the New Jersey Supreme Court, instituted on or about May 1, 1936, and a suit now pending in the Supreme

Order Allowing Amendment to Bill of Complaint.

Court of the State of New York, instituted on or about May 22, 1936, in both of which suits the defendant herein is plaintiff, and the complainant herein is defendant, and from further proceeding to enforce in any manner whatsoever any alleged liability upon the bond referred to in the bill of complaint, and which is the basis of the foregoing pending suits herein referred to.

LUTHER A. CAMPBELL,
C.

Respectfully advised,
ALFRED A. STEIN,
V.-C.

ORDER ALLOWING AMENDMENT TO BILL OF COMPLAINT.

Filed February 2, 1937.

Application having been made to the Court by complainant, upon due notice to the defendant for an order striking the Answer filed by the defendant, for the reasons set forth in the notice of motion dated January 8, 1937, and the said application having come on for argument before the undersigned, and the Court having examined the pleadings, affidavits, and memoranda submitted by the respective parties, and having duly considered the same, and having concluded that the Bill of Complaint was deficient in failing to allege that defendant had knowledge of the suretyship alleged in the Bill of Complaint, and being of the opinion that the Bill of Complaint was amendable, and the complainant signifying

his intention of amending the Bill of Complaint, in the respects set out in the proposed amendment hereto annexed, it is, on this 2nd day of February, 1937,

ORDERED, that complainant have leave within five days from the date hereof, to file the Amendment to the Bill of Complaint, a copy of which is hereto annexed, and that a copy thereof be served upon the defendant, within five days from the date hereof; and it is further

ORDERED, that within 10 days of service upon the defendant, of a copy of the proposed Amendment to the Bill of Complaint, defendant answer the Amended Bill of Complaint, or for failing so to do, his present Answer be deemed to stand as an Answer to the Amended Bill of Complaint subject to the present motion to strike; and it is further

ORDERED, that the pending motion of complainant to strike the Answer of defendant be continued until the sixteenth day of February, 1937, unless sooner brought on for hearing by either party, or by the order of the Court. Complainant shall pay costs on the motion to strike answer.

LUTHER A. CAMPBELL,
C.

Respectfully advised,
J. O. BIGELOW,
V.-C.

Service of copy of within order acknowledged February 2, 1937.

SHOLEM LIPIS,
Solicitor of Defendant.

AMENDMENT TO BILL OF COMPLAINT.

Filed February 2, 1937.

The complainant hereby amends the Bill of Complaint filed herein, by inserting the following paragraphs: 4 (a), 4 (b), 4 (c), 4 (d), and 4 (e), between paragraphs 4 and 5 of the original Bill of Complaint.

4 (a). That the deed of conveyance referred to in paragraph 2 of the Bill of Complaint, is recorded in the Essex County Register's Office, in Deed Book C73, on page 535, is referred to as if herein set forth fully and at length, and contains the following provisions:

"WITNESSETH, that the party of the first part (Augusta M. Theurich, widow, as executrix, and Edward T. Theurich, as executor of the Estate of Edward Theurich, deceased), for and in consideration of $20,000.00, lawful money of the United States of America, to them in hand well and truly paid by the said party of the second part (Newark Cleaning and Dye Works) * * * the receipt whereof is hereby acknowledged" * * *

"* * * and that the said parties of the first part (Augusta M. Theurich, widow, and as executrix, and Edward E. Theurich, as executor of the Estate of Edward Theurich, deceased), do for themselves, their heirs, administrators, covenant and grant to and with the said party of the second part (Newark Cleaning and Dye Works), its successors and assigns."

Amendment to Bill of Complaint.

4 (b). That the mortgage referred to in paragraph 3 of the Bill of Complaint, was recorded in the Essex County Register's Office, in Mortgage Book U-55, on page 91, is hereby referred to as if herein set forth fully and at length, and contains the following provisions:

"WITNESSETH, that the said mortgagor (Newark Cleaning and Dye Works), for and in consideration of the sum of $15,000.00; lawful money of the United States of America, to it in hand well and truly paid by the mortgagee (Augusta M. Theurich, widow, and as executrix, and Edward E. Theurich, as executor of the Estate of Edward Theurich, deceased)." * * *

"Provided always * * * that if the said mortgagor (Newark Cleaning and Dye Works), its successors and assigns, does and shall well and truly pay or cause to be paid to the said mortgagee (Augusta M. Theurich, widow, and as executrix, and Edward E. Theurich, as executor of the Estate of Edward Theurich, deceased), the sum of $15,000.00, as follows: * * * according to the conditions of a certain bond bearing even date herewith, in the penal sum of $30,000.00, made by the party of the first part (Newark Cleaning and Dye Works)."

4 (c). That by the delivery of the deed referred to in paragraph 2 of the Bill of Complaint, and the acceptance of the mortgage referred to in paragraph 3 of the Bill of Complaint, defendant had actual knowledge that Newark Cleaning and Dye Works, a corporation, was the principal obligor, and complainant, Ellis

Slatoff, Morris Colton and Samuel Greene were sureties, and only secondarily liable upon the bond referred to in paragraph 4 of the Bill of Complaint.

4 (d). That by the delivery of the deed referred to in paragraph 2 of the Bill of Complaint, and the acceptance of the mortgage referred to in paragraph 3 of the Bill of Complaint, defendant was and is chargeable in law, with constructive knowledge that Newark Cleaning and Dye Works, a corporation, was the principal obligor, and complainant, Ellis Slatoff, Morris Colton and Samuel Greene, were sureties, and only secondarily liable upon the bond referred to in paragraph 4 of the Bill of Complaint.

4 (e). That by the delivery of the deed referred to in paragraph 2 of the Bill of Complaint, and the acceptance of the bond and mortgage referred to in paragraphs 3 and 4 of the Bill of Complaint, defendant acknowledged that Newark Cleaning and Dye Works, a corporation, was the principal obligor, and complainant, Ellis Slatoff, Morris Colton and Samuel Greene were sureties, and only secondarily liable upon the bond referred to in paragraph 4 of the Bill of Complaint.

SAUL J. ZUCKER,
Solicitor for Complainant.

Dated: January 27, 1937.

Service of copy of within amendment acknowledged February 2, 1937.

SHOLEM LIPIS,
Solicitor of Defendant.

ANSWER TO AMENDED BILL OF COMPLAINT.

Filed February 9, 1937.

The defendant, Edward E. Theurich, surviving Executor of the Estate of Edward Theurich, deceased, of the State of Pennsylvania, says that:

1. The allegations of paragraph 1 of the complaint are hereby admitted.

2. The allegations contained in paragraph 2 of the complaint are hereby admitted.

3. He denies the allegations of paragraph 3 of the complaint, but states that one, Samuel Greene, agreed to purchase the property referred to for the sum of Twenty Thousand Dollars ($20,000.00), by an agreement, a copy of which is hereunto annexed and made part hereof; that by the terms of said agreement, Greene was to pay Ten Thousand Dollars ($10,000.00) in cash and Ten Thousand Dollars ($10,000.00) by a bond secured by a mortgage on said property; that Greene was unable to raise sufficient cash to make the cash payment required; that after numerous conferences, the complainant, Samuel Greene, Morris Colton and Newark Cleaning & Dye Works, Inc. offered the defendant their joint bond in the penal sum of Thirty Thousand Dollars ($30,000.00), conditioned for the payment of Fifteen Thousand Dollars ($15,000.00), and that as further security they offered the defendant a mortgage on the premises, which mortgage was to be executed by Newark Cleaning & Dye Works, Inc., to whom they requested title to be conveyed. This offer was accepted by the defendant.

Answer to Amended Bill of Complaint.

4. The allegations in paragraph 4 of the complaint are admitted, except that the defendant states that the bond referred to was given for the debt and that the mortgage was given as security for the bond.

4 (a). The allegations contained in paragraph 4 (a) of the amended bill of complaint are hereby admitted.

4 (b). The allegations contained in paragraph 4 (b) of the amended bill are hereby admitted.

4 (c). The allegations contained in paragraph 4 (c) of the amended bill of complaint are hereby denied.

4 (d). The allegations contained in paragraph 4 (d) of the amended bill of complaint are hereby denied.

4 (e). The allegations contained in paragraph 4 (e) of the amended bill of complaint are hereby denied.

5. Defendant denies each and every one of the allegations of paragraph 5 of the complaint and states that the transaction was closed under the circumstances and in the manner alleged in paragraph 3 of this answer, and that the complainant, Newark Cleaning & Dye Works, Inc., Samuel Greene and Morris Colton received a legal consideration for the execution and delivery of said bond.

6. Defendant admits the allegations contained in paragraph 6 of the complaint, except as to the following: "and the defendant herein has since claimed and now claims that complainant is indebted to him in said sum less a credit of

$2,000.00 hereafter referred to." As to this allegation, defendant states that the amount claimed to be due by the defendant from the complainant is the sum of approximately $4,100.00 besides interest and costs.

7. The defendant admits the allegations of paragraph 7 of the complaint, except that he denies that the Newark Cleaning & Dye Works, Inc. was the principal obligor on the bond and that Morris Colton and Samuel Greene were sureties thereon. Defendant further states that the writing referred to in paragraph 7 of the complaint was delivered by this defendant and received by the Newark Cleaning & Dye Works, Inc., Samuel Greene and Morris Colton by virtue of and in accordance with the terms of the statute referred to in paragraph 7 of the complaint, and that by the terms of said statute, the said writing marked as "Exhibit 2" to the bill of complaint and attached thereto, cannot be construed as to discharge this complainant, and that said statute, by its express terms, reserved the right to this defendant to proceed at law or in equity against this complainant. Defendant further states that at the time the writing hereinbefore referred to was executed and delivered, it was agreed between this defendant and the Newark Cleaning & Dye Works, Inc., Samuel Greene and Morris Colton that this defendant was reserving all his rights against this complainant and that the writing was not to be deemed, considered or construed to discharge the complainant from his liability on said bond.

8. Defendant admits the allegations contained in paragraph 8 of the complaint.

9. Defendant denies each and every one of the allegations contained in paragraph 9 of the complaint, except that the auditor appointed in the Supreme Court attachment action filed a report in favor of this defendant in the attachment suit for the sum set forth in said paragraph 9.

10. Defendant denies the allegations contained in paragraph 10 of the complaint but states that he innocently erred in computing the amount due from complainant because of a misconstruction of the statute referred to, and now admits that the complainant is indebted to this defendant in the sum of approximately $4,064.79 besides interest and costs.

11. Defendant denies the allegations contained in paragraph 11 of the complaint, but admits that the complainant obtained a rule to show cause with a restraint directed against this defendant to show cause why the writ of attachment should not be quashed because of the fact that this complainant and the other obligors on the bond were joint debtors, that this complainant was a non resident; that the other joint debtors were residents of New Jersey and that therefore a writ of attachment could not be issued against him. That upon a hearing before a Supreme Court Commissioner at which depositions were taken, the complainant first learned of the writing referred to in paragraph 7 of the complaint. Defendant further states that notwithstanding complainant's knowledge of this writing which came to his attention at the hearing before the Supreme Court Commissioner, the complainant nevertheless, subsequent thereto, appeared in the New Jersey Supreme Court and

argued the rule to show cause not only on the specific question of jurisdiction raised by said rule, but on the question of the validity of the writ of attachment on the additional ground that the affidavit on which it was based, claimed an excessive amount of indebtedness. The writ of attachment was sustained and an order entered discharging the rule to show cause.

12. Defendant admits that no judgment has been entered in the attachment suit, but denies that the complainant had appeared specially therein and states that while a special appearance was reserved by the complainant in his application for a rule to show cause, the defendant did argue orally and in his memorandum of law filed with the Justice of the Supreme Court, the question of the validity of the writ by reason of the alleged excessive demand contained in the affidavit on which the writ was based. Defendant states that the argument in the New Jersey Supreme Court on this latter point constituted a general appearance. As to the remaining allegations of paragraph 12 of the complaint, defendant is advised that he need not answer same as they raise legal questions to be determined by this Court.

13. Defendant denies each and every one of the allegations contained in paragraph 13 of the complaint, but admits that a suit was instituted in the New York Supreme Court by this defendant in order to obtain a personal judgment against the complainant who at the time of the institution of said suit was a resident of New York.

14. Defendant denies the allegations contained in paragraph 14 of the complaint, except that

he admits that the amount claimed therein is erroneous.

15. Defendant denies each and every one of the allegations contained in paragraph 15 of the complaint.

16. Defendant denies each and every one of the allegations contained in paragraph 16 of the complaint.

FIRST SEPARATE DEFENSE.

1. On the 28th day of April, 1936, this defendant, under and by virtue of an act entitled "An act to authorize the compromise and discharge of claims against one or more of several joint debtors or copartners," being Public Laws of 1884, page 298, and 3 Compiled Statutes, pages 3780 and 3781, executed and delivered to the Newark Cleaning & Dye Works, Inc., Samuel Greene and Morris Colton, a written agreement, a true copy of which is annexed to the bill of complaint as "Exhibit 2."

2. That at the time of the delivery of said written agreement, it was understood and agreed between the defendant and the Newark Cleaning & Dye Works, Inc., Samuel Greene and Morris Colton that this defendant reserved all of his rights against this complainant, and said agreement was delivered and received in pursuance to said parol agreement, and that at no time did this defendant intend by said agreement to release this complainant from his obligation to this defendant, nor did the Newark Cleaning & Dye Works, Inc., Samuel Greene and Morris Colton intend, in receiving said agreement, that Slatoff should be released of his obligation to

this defendant, but on the contrary this defendant and Newark Cleaning & Dye Works, Inc., Samuel Greene and Morris Colton intended Slatoff to remain liable to this defendant.

3. That by reason of the foregoing, the complainant is not released or discharged in any manner from his liability to the complainant on the bond in question.

SECOND SEPARATE DEFENSE.

1. That the writing, "Exhibit 2," of the complaint, is not such a release as can or does discharge complainant from his obligation to this defendant.

THIRD SEPARATE DEFENSE.

1. Paragraph 1 of the First Separate Defense is hereby repeated and made paragraph 1 of this defense.

2. Newark Cleaning & Dye Works, Inc., Samuel Greene and Morris Colton accepted said agreement subject to the terms of the aforesaid statute.

3. That by the express terms of said statute the writing referred to in paragraph 1 hereof cannot be construed as to discharge this complainant, and further, by the terms of said statute, the defendant reserved the right to proceed against this complainant in law or in equity for the collection of the complainant's ratable share of the indebtedness, and that by the terms of said statute only those debtors named in the writing were discharged and none other.

4. That by reason of the foregoing, complainant is not released or discharged from his indebtedness to this defendant.

FOURTH SEPARATE DEFENSE.

1. That on or about the first day of May, 1936, this defendant commenced a suit by attachment against the complainant for a deficiency arising out of the bond and mortgage referred to in the complaint.

2. That on or about September 12th, 1936, complainant obtained a rule to show cause from Mr. Justice Parker of the New Jersey Supreme Court, directing this defendant to show cause why the writ of attachment should not be quashed on the ground that this complainant and the other obligors on the bond were joint debtors, and this complainant being the only non resident among the four joint debtors on the bond, the writ of attachment could not issue.

3. That in pursuance to the rule to show cause depositions were taken and there was introduced in evidence by this defendant the writing marked "Exhibit 2" and attached to the bill of complaint.

4. That, in order to decide the question raised by the rule to show cause, the New Jersey Supreme Court was obliged to construe the aforesaid writing and its legal effect upon this complainant.

5. That said court did construe said writing and its legal effect in connection with the operation of an act of the State of New Jersey, entitled "An act to authorize the compromise and discharge of claims against one or more of sev-

eral joint debtors or copartners,'' being Public Laws of 1884, page 298, and 3 Compiled Statutes, pages 3780 and 3781.

6. That said court construed said writing under said statute and held that said statute reserved to this defendant the right to proceed against this complainant for complainant's ratable share of the debt.

7. That there is an identity of the parties and of the issues raised in the present suit as was in existence in the action in the New Jersey Supreme Court.

8. That by reason thereof the decision of the New Jersey Supreme Court is *res adjudicata* and absolutely binding upon this complainant.

FIFTH SEPARATE DEFENSE.

1. On or about the 21st day of May, 1935, this defendant instituted a suit in the Court of Chancery of New Jersey for the foreclosure of the mortgage referred to in the bill of complaint.

2. That in said proceedings this complainant was properly served as a party defendant.

3. That in said proceedings this defendant stated that the reason this complainant was joined was because of his potential liability to this defendant in case of a deficiency.

4. That the complainant failed to file any answer or other pleadings in connection with said foreclosure suit and a decree pro confesso and final decree were entered against him.

5. That thereafter this defendant sued out a writ of attachment in the New Jersey Supreme

Court against this complainant and levied on certain shares of stock in which this complainant claimed an interest, and that this complainant had immediate actual notice of said attachment proceedings, and further, had such constructive notice as would result from the publication of the notice of attachment.

6. That complainant had actual notice of the writing referred to as "Exhibit 2" in the bill of complaint at the time of the taking of the depositions in the attachment suit.

7. That on or about the 4th day of September, 1936, this complainant filed an affidavit in the New Jersey Supreme Court in connection with his petition for the rule to show cause, in which he stated that he was one of the joint debtors on the bond in question, that he was a non-resident, that the other joint debtors were residents, and that for that reason the writ could not legally issue.

8. That in the proceedings on the rule to show cause in the New Jersey Supreme Court, this complainant argued not only the question of the legality of the writ based on the question of joint debtors, but also the question of the validity of the writ based on the question of excessive demand in the affidavit on which the writ was issued.

9. That it was only after the Supreme Court had decided adversely to this complainant, that he filed the bill in this cause.

10. That by reason of the failure of the complainant to notify this defendant of his alleged suretyship and by reason of the fact that com-

plainant asserted in the New Jersey Supreme Court action aforesaid, that he was a joint debtor and thus entitled to have the writ dismissed and by reason of the fact that complainant argued on the question of the validity of the affidavit, that this complainant is estopped from now asserting that he was a surety on the bond to our knowledge, because of the loss and injury which this defendant would suffer by complainant's conduct.

SIXTH SEPARATE DEFENSE.

1. Paragraph 1 of the Fifth Separate Defense is hereby repeated and made paragraph 1 of this defense.

2. Paragraph 2 of the Fifth Separate Defense is hereby repeated and made paragraph 2 of this defense.

3. Paragraph 3 of the Fifth Separate Defense is hereby repeated and made paragraph 3 of this defense.

4. Paragraph 4 of the Fifth Separate Defense is hereby repeated and made paragraph 4 of this defense.

5. Paragraph 5 of the Fifth Separate Defense is hereby repeated and made paragraph 5 of this defense.

6. Paragraph 6 of the Fifth Separate Defense is hereby repeated and made paragraph 6 of this defense.

7. Paragraph 7 of the Fifth Separate Defense is hereby repeated and made paragraph 7 of this defense.

8. Paragraph 8 of the Fifth Separate Defense is hereby repeated and made paragraph 8 of this defense.

9. Paragraph 9 of the Fifth Separate Defense is hereby repeated and made paragraph 9 of this defense.

10. That by reason of the foregoing, complainant waived his right to assert his equitable defense of suretyship.

SEVENTH SEPARATE DEFENSE.

1. Paragraph 1 of the Fifth Separate Defense is hereby repeated and made paragraph 1 of this defense.

2. Paragraph 2 of the Fifth Separate Defense is hereby repeated and made paragraph 2 of this defense.

3. Paragraph 3 of the Fifth Separate Defense is hereby repeated and made paragraph 3 of this defense.

4. Paragraph 4 of the Fifth Separate Defense is hereby repeated and made paragraph 4 of this defense.

5. Paragraph 5 of the Fifth Separate Defense is hereby repeated and made paragraph 5 of this defense.

6. Paragraph 6 of the Fifth Separate Defense is hereby repeated and made paragraph 6 of this defense.

7. Paragraph 7 of the Fifth Separate Defense is hereby repeated and made paragraph 7 of this defense.

8. Paragraph 8 of the Fifth Separate Defense is hereby repeated and made paragraph 8 of this defense.

9. Paragraph 9 of the Fifth Separate Defense is hereby repeated and made paragraph 9 of this defense.

10. That by reason of complainant's failure to notify this defendant by letter or in person, or by institution of proceedings, and by reason of the fact that complainant waited until an adverse decision was rendered against him in the New Jersey Supreme Court, this complainant is guilty of laches and should not now be permitted to assert his alleged suretyship.

SHOLEM LIPIS,
Solicitor for Defendant.

ISADORE H. COLTON,
Of Counsel with Defendant.

REPLICATION.

Filed April 1, 1937.

The complainant joins issue with the Answer filed by the defendant.

SAUL J. ZUCKER,
Solicitor for Complainant.

Dated: March 30, 1937.

STIPULATION OF FACTS.

Filed May 10, 1937.

The parties hereto, by their respective solicitors, do hereby stipulate and agree to the following facts to be submitted with such other evidence as the respective parties may desire, for determination to the Court of Chancery of New Jersey; both parties hereto, however, reserving the right to object to any of the following facts on the ground that the same are immaterial and irrelevant, or not binding upon the party so objecting, and to review the decree to be rendered herein by appeal or other appropriate remedy.

1. On September 1, 1925 complainant was President of Newark Cleaning and Dye Works, (sometimes called Newark Cleaning & Dye Works, Inc.), a corporation organized and existing under the laws of the State of New Jersey, and having its principal place of business at 20 Broome Street, in the City of Newark, New Jersey.

2. On said date, Newark Cleaning and Dye Works acquired by Executor's Deed of conveyance (received in evidence as Exhibit "C. 1"), a parcel of property located on the easterly side of Broome Street in the City of Newark, New Jersey, from Augustus M. Theurich, widow, as Executrix and Edward E. Theurich, Executor of the Estate of Edward Theurich, deceased.

3. The purchase price for the conveyance mentioned in the foregoing paragraph was Twenty Thousand Dollars ($20,000.00), and

when the deed (Ex. C. I) was delivered it was paid as follows:

$ 5,000.00—Cash.

15,000—By the execution and delivery of a bond secured by a purchase money mortgage in that amount, becoming due and payable September 1, 1931.

4. The foregoing bond was executed jointly by Newark Cleaning and Dye Works, the complainant Ellis Slatoff, Morris Colton and Samuel Greene. The bond is offered in evidence as Exhibit "C. II" and the mortgage as Exhibit "C. III."

5. Thereafter and prior to April 28, 1936 the foregoing purchase money mortgage (Exhibit "C. III"), securing the foregoing bond (Exhibit "C. II"), was foreclosed and brought in by defendant at Sheriff's sale for $100.00, resulting in a deficiency of $16,259.19.

6. Newark Cleaning and Dye Works, Morris Colton and Samuel Greene and Ellis Slatoff were joined as parties defendants and duly served as such in the foregoing foreclosure in Chancery and none of said defendants filed any answer or plea.

7. On April 28, 1936 the defendant herein by his agent, Sholem Lipis, executed and delivered an agreement to Newark Cleaning and Dye Works, Samuel Greene and Morris Colton, which is received in evidence as Exhibit "C. IV."

8. On May 1, 1936 the defendant instituted a suit in the New Jersey Supreme Court in attachment against complainant, who was then a

non-resident, demanding damages in the sum of $14,259.19, being the amount of the deficiency resulting from the foreclosure sale referred to in paragraph 5 herein, less the $2,000.00 paid to defendant upon the execution of the agreement received in evidence as Exhibit "C. IV," and referred to in paragraph 7 herein.

9. In the progress of said attachment suit at law and subsequent to September 12, 1936, complainant appeared specially in the New Jersey Supreme Court action to attack the jurisdiction of said court on the ground that the debt sued upon was a joint debt and since some of the joint obligors were residents of New Jersey, attachment would not lie against the joint obligor who was a non-resident, and during the taking of depositions under said special appearance, complainant learned of the execution and delivery of Exhibit "C. IV," for the first time.

10. Hon. Charles W. Parker, Justice of the New Jersey Supreme Court, who heard argument upon the special appearance, filed an opinion which defendant offers in evidence as Exhibit "D. 1."

11. The decision of Justice Parker was filed in the New Jersey Supreme Court on December 1, 1936, the bill of complaint was filed herein on December 7, 1936.

12. Defendant instituted a suit in the New York Supreme Court against complainant for the deficiency resulting from the aforesaid foreclosure proceedings and claims that there is due in said suit, the sum of $14,259.19—the same cause of action which is the basis of the attachment suit in the New Jersey Supreme Court.

13. That no final judgment has been entered in the attachment suit at law in the New Jersey Supreme Court, or the suit instituted in the New York Supreme Court, proceedings in both suits having been stayed pending final hearing, by an order entered herein.

Dated: May 9, 1937.

SAUL J. ZUCKER,
Solicitor for Complainant.

SHOLEM LIPIS,
Solicitor for Defendant.

TESTIMONY.

IN CHANCERY OF NEW JERSEY.

May 10, 1937.

Between
ELLIS SLATOFF,
Complainant,
and
EDWARD E. THEURICH, surviving executor, etc.,
Defendant.

Transcript of shorthand notes of testimony taken in the above entitled cause before his Honor, Alfred A. Stein, Vice-Chancellor, at the Chancery Chambers, Newark, New Jersey, in the presence of Saul J. Zucker, Esq. for complainant; Sholem Lipis (by Isidore Colton, Esq.), for defendant.

The Court: How long will this case take?

Mr. Zucker: I do not think our case will take very long, because the facts, the essential facts of complainant's case are stipulated, and I can almost say that after opening if we confine it, your Honor, to the stipulation of facts, I may be able to rest.

Mr. Lipis: Yes, if the complainant will rest under those circumstances I will have only one witness, which will take about two minutes, your Honor.

Mr. Zucker: Your Honor, this is a suit to set aside an attachment suit at law and to fix the liability of the parties to a certain bond secured by a mortgage, which has been foreclosed and which is now in suit to recover the deficiency.

You may recall that this matter was before you upon the argument for injunction *pendente lite.* When you signed the order, I think it was back in November, in which Mr. Colton at that time said, at first, that he would approve the injunction *pendente lite,* and then withdrew his consent, but that is beside the point.

I think if I relate the facts chronologically it will clearly set forth exactly what is here.

In September 1925 there was a corporation in existence known as the Newark Cleaning and Dye Works. This corporation had as its officers my client, a man named Slatoff; a man named Greene and a man named Colton. The corporation for certain purposes acquired some additional property from the estate of Theurich, and on September 1, 1925 a deed was executed by the estate of Theurich to Newark Cleaning and Dye Works. It was an executor's deed and set up that the consideration was $20,000.

It is stipulated that the consideration, at that time was paid as follows: $5,000 in cash and $20,000—$15,000 represented by a purchase money mortgage. The deed went solely to the Newark Cleaning and Dye Works. Naturally, the purchase money mortgage back was executed only by the Newark Cleaning and Dye Works. The bond in question, however, was signed not only by the Newark Cleaning and Dye Works but by the individual officers of the corporation, of which my client, Mr. Slatoff, was one.

Things went along in that condition for about five years. Now I will come to the stipulation of facts. What I have just said is somewhat immaterial. Mr. Slatoff some time later became

disassociated with the company and in 1930 or thereabouts, or 1933, the mortgage was foreclosed. All the individuals that signed the bond were made parties to the foreclosure, and at the foreclosure sale the property was bought for $100, leaving an alleged deficiency at that time of approximately $16,000.

On April 28 of last year, 1936, the estate of Theurich executed a discharge to all of the parties on the bond, except Slatoff. That discharge, which is Exhibit C. 4 in evidence, was executed under the statute relating to the settlement or compromise of obligations of joint debtors, and provides, generally, that where a creditor holds the obligation of two or more joint debtors he may discharge or compromise any number of them, without releasing his right to sue the undischarged debtors for his ratable proportion of the debt. Roughly speaking, if an obligation is jointly signed in the sum of $9,000 by three people, the creditor has the right to discharge one of the debtors for a sum of money, but thereafter he may only hold the other two joint debtors for $6,000.

Now, if that were all there were in the case, perhaps the defendant in this suit, the mortgagee, would have the right to still sue Slatoff for his proportionate interest or obligation of that bond, but as I intimated, when I started, none of the consideration having gone to Slatoff in the first instance, but the deed having gone to the corporation and the corporation executing the mortgage, he and the other officers were sureties on this bond.

In equity they are sureties. Their obligation was a secondary obligation.

While I do not wish to argue all the points in my brief now, I just want to stress that this is the principal feature of our case, that Slatoff is a surety and not a principal.

The Court: Notwithstanding, on the bond. So you further ask a debtor to release some of the sureties without notice to him who is off.

Mr. Zucker: There are only two points in this case: First, when he signed the bond, was it as principal or surety, and, if he was a surety, is he released by the execution of a discharge which released the principal debtor, the Newark Cleaning and Dyeing?

I won't go into detail as to what appears in the exhibits. The deed specifically sets forth that a consideration is paid by the Newark Cleaning and Dye Company, and the mortgage, the purchase money mortgage, has the recital, also referred to in the memorandum. The instrument of discharge—May I have that?

The Court: I suppose, the other side takes the position of a guarantor.

Mr. Colton: We take the position personally that we had no knowledge of the suretyship, if he were, in fact, a surety.

The Court: You have to have knowledge of whatever the law was.

Mr. Colton: That is correct. We take a legal position.

The Court: If he was a guarantor, it might be different, that is, if he were a surety.

Mr. Zucker: That is the position, your Honor, and that is why I shan't put on any witnesses, because we say that the exhibits spell out a case.

The Court: This suit now is for the purpose of enforcing against him as—

Mr. Zucker: They started an attachment suit at law for $16,000. We are asking for a stay of that and for a decree releasing my man from any future responsibility upon the bond.

The Court: And asking for an injunction against the action at law?

Mr. Zucker: That is right. Two suits instituted, one in New York and one in New Jersey, and we are asking for an injunction against both, and a decree fixing the liability.

The Court: We cannot do that in the New York suit, can we?

Mr. Zucker: Insofar as we have personal jurisdiction over the defendant.

The Court: Oh, yes.

Mr. Zucker: Only that.

The Court: Personal jurisdiction.

Mr. Zucker: Yes. The instrument of discharge is a short one, and I, perhaps, would just like to read the first paragraph of it.

It is as follows:

"In consideration of the sum of $2,000, receipt whereof is hereby acknowledged, I, Edward E. Theurich, surviving executor of the Estate of Edward Theurich, deceased, by Sholem Lipis, duly authorized agent, do hereby compose and compromise with the Newark Cleaning and Dye Works, Inc., a corporation of New Jersey, Samuel Greene and Morris Colton their joint debt due me in connection with a deficiency arising out of a certain bond made on September 1, 1925, by Newark Cleaning and Dye Works, Inc. Samuel Greene, Morris Colton and Ellis Slatoff, which bond was secured by a mortgage of even date and which mortgage was fore-

closed in proceedings in the Court of Chancery, resulting in deficiency due me.

"It is agreed that said Newark Cleaning and Dye Works, Inc., Samuel Greene and Morris Colton, their heirs, executors, successors and assigns shall have the full benefit of 'an act to authorize the compromise and discharge of claims against one or more of several joint debtors or co-partners.'" That is all it says.

Now, lest there be any doubt as to just what that instrument means, reference can be had to the statute itself, which in so many words says that after a debtor has compromised his obligation with his creditor, he shall thereafter be completely discharged. So that this seems to me to be the highest form of a release which that particular debtor could have obtained, and that we as sureties have a right to plead that, as long as the person, who in equity is the principal debtor, has been discharged, we as sureties are likewise discharged.

I think, with that statement, your Honor, and with the exhibits which consist of the deed, the bond and the mortgage and the discharge, my case may be rested.

Mr. Colton: My situation is this—

The Court: Just a moment. We will have this marked in evidence.

Mr. Colton: I wanted to—

The Court: Any objection to any of them?

Mr. Colton: To one. I want to reserve an objection to one of the instruments.

The Court: Well, you may make the objection now.

Mr. Colton: Well, as he offers them individually, your Honor.

Mr. Zucker: The first one will be the deed.

Mr. Colton: Your Honor, I object to the deed on the ground it is irrelevant, immaterial and incompetent. I will ask your Honor to reserve a ruling on it, as I intend tieing up my argument in the case.

The Court: Tieing what up in the case?

Mr. Colton: Argument on the admission of it.

The Court: Can't you make it now?

Mr. Colton: Yes, sir, I can make it now, but we have got to go right into the heart of the case to do that.

The Court: Make it now.

Mr. Colton: Then I would have to open, really, to explain our defense.

May I open, then?

The Court: Yes.

Mr. Colton: The amended bill—There is an amended bill filed in that case, and by that amended bill the first complainant failed to charge us with knowledge of Mr. Slatoff's suretyship. On motion, Vice-Chancellor Bigelow struck the bill and permitted the complainant to amend by alleging we had notice of the fact he was a surety.

The Court: How do I understand that? You accepted the mortgage?

Mr. Colton: That is correct. If I may make my general opening, I think I can clear the situation up.

The Court: Well, just at that point, so I may not be confused; you had notice of whatever the law might have been, or was, when you signed that bond?

Mr. Colton: That is correct, your Honor.

The Court: Chargeable with it.

Mr. Colton: That is not—

The Court: Whether you knew it or not, chargeable with it.

Mr. Colton: That is a question of law. And I want to argue the fact we are not chargeable with anything that is contained in the deed or mortgage, but we are limited to the fact that it is contained in the only instrument of indebtedness, namely, the bond.

It is our legal position on that bond that the bond is the only evidence of indebtedness in this case and we say we can only be chargeable with the contents of the bond; that the deed and the mortgage cannot be referred to by this Court.

We have authority, as we believe, on that.

The Court: Let me hear your authority.

Mr. Colton: All right.

The Court: This is all one transaction, isn't it? You sold this property and took back the mortgage?

Mr. Colton: That is correct; put back a bond.

The Court: It is your deed—

Mr. Colton: That is correct.

The Court: —that is objected to.

Mr. Colton: That is correct.

The Court: And as part of the consideration for making the bond and the mortgage—

Mr. Colton: That is correct.

The Court: —with the bond accompanying the mortgage.

Mr. Colton: The mortgage accompanies the bond.

The Court: Well—

Mr. Colton: And that is quite the distinction that is raised in the cases.

The Court: The bond, however, is the debt.

Mr. Colton: Sir?

The Court: The bond is the indebtedness.

Mr. Colton: That is right. The mortgage is security for it.

The Court: And the mortgage is the security for it.

Mr. Colton: Now, the principle involved on a question of notice constitutes an equitable defense of the suretyship, and the leading case is *Kaighn* v. *Fuller,* in 14 Eq. 419.

In that case the complainant in Chancery and another had executed a joint bond for the payment of a debt. After the creditor had given one of the joint obligors an extension of time, the remaining joint obligor filed a bill in Chancery to have himself adjudged a surety and be relieved of the liability as against the creditor, because of his having been given that extension. In the bill of complaint, complainant charged the creditor with having had knowledge of the fact that he was a surety prior to the granting of the extension of time.

The Court held,

> "The bond is in the usual form. There is nothing upon its face to indicate the existence of the suretyship. It is incumbent therefore upon the surety in order to entitle himself to exemption from his liability as an obligor, to show that the fact of suretyship was communicated to the creditor; for, as the privilege of the surety is a mere equity, it can only be binding on those who have notice of its existence."

Now, based on this case and this doctrine of equitable law, the Vice-Chancellor, Bigelow

struck the original bill for having failed to allege knowledge.

In our case, we take the position now that this Court in trying to charge us with any knowledge must look solely to the bond and that is borne out by the fact that we all recognize that the primary obligation is the bond and the mortgage accompanies it as surety.

There are two cases in New Jersey: One, *Church* v. *Pingree Holding Co.*, 105 Eq. 97, where Vice-Chancellor Buchanan says as follows:

> "The real estate bond in this case contained a provision for acceleration of the maturity of the principal on non-payment of taxes for sixty days. The recorded mortgage which accompanied the bond contained no reference to an acceleration clause for non-payment of taxes, although the mortgage did recite other features of the bond. The original mortgagors conveyed the premises to a grantee who had no actual knowledge of the terms of the bond."

The Court: A different situation.

Mr. Colton: But what I am getting at—

The Court: This situation is not parallel; no third person is involved who can now be discharged of notice.

Mr. Colton: Yes, but what the Court said there I think has a bearing on our argument.

Vice-Chancellor Buchanan said:

> "The question then arises, as it does in this suit, when does the creditor obtain the right to foreclose and sell the mortgaged premises? One naturally looks to the con-

tract in that behalf. The bond being the written promise or obligation to pay, and the mortgage being given as security for such payment, one would naturally and logically look to the bond as the evidence of the contract to pay, for the terms and conditions of that contract; and one would naturally and logically expect the mortgage to provide that the interest conveyed to the mortgagee should cease and be determined if the debtor's contract to pay should be performed in accordance with the terms and conditions of the contract to pay, i. e., the bond."

The Court: There is no question about that.

Mr. Colton: But in the two cases I am going to recite the Court did refer to the mortgage to ascertain the terms of the contract only because of the fact that there were ambiguities in the bond and the mortgage, in the one case, and right on the face of the instrument between the two instruments there were clashes there inconsistent and different from the legal position that you cannot refer to the mortgage to ascertain the right of these parties, unless there be an inconsistency claimed, unless there be an ambiguity that requires further examination, but if the bond, as is said in the Kaighn-Fuller case, is full and complete on its face, the Court is limited to an examination of the bond to determine the rights of the parties.

We take the further position that, assuming that this Court had a right to look to the deed and mortgage, we say the clause in the deed, the consideration clause, they argue in their brief, in consideration of $20,000 paid by the Newark

Cleaning and Dye Works in itself, standing as it does, is insufficient to charge us with the fact that we knew Slatoff was a surety.

The Court: Well, that becomes a question of law.

Mr. Colton: That is correct.

The Court: That becomes a question of law after the entire case is in.

Mr. Colton: That is correct. And then we take the position that the mortgage—

The Court: Your argument was addressed to the reception of the deed in evidence.

Mr. Colton: And the reason for it is, I must suggest, if I am going to be sustained, by saying this Court cannot refer to the deed, but consider Slatoff in that he signed the bond.

The Court: I will allow the deed in evidence.

Mr. Colton: All right. Note my objection.

(Deed above referred to is received in evidence and marked Exhibit C. 1.)

Mr. Zucker: And then the bond, the subject of this suit, I offer as Exhibit C. 2.

(Bond above referred to is received in evidence and marked Exhibit C. 2.)

Mr. Zucker: And the mortgage.

Mr. Colton: I object on the ground it is incompetent, irrelevant and immaterial, on the same ground as the deed, your Honor.

The Court: I will allow it in evidence.

(Mortgage, indenture above referred to is received in evidence and marked Exhibit C. 3.)

Mr. Zucker: The instrument of discharge as—

Mr. Colton: No objection.

Mr. Zucker: —C. 4.

(Instrument of discharge above referred to is received in evidence and marked Exhibit C. 4.)

Mr. Zucker: There is a signed stipulation of facts.

Mr. Colton: Are you going to put in Justice Parker's opinion?

Mr. Zucker: That is the fact. And then the complainant rests.

Mr. Colton: I have one witness I would like to put on and then I— Mr. Green.

SAMUEL GREEN, called as a witness, being duly sworn according to law, on his oath testifies as follows:

Direct examination by Mr. Colton.

Mr. Colton: I would like to offer in evidence an opinion from Mr. Justice Parker in the New Jersey Supreme Court. This is part of our stipulation.

The Court: Why offer it in evidence?

Mr. Colton: Why, we stipulated that it is not a recorded opinion, your Honor.

The Court: Oh, it is not recorded?

Mr. Colton: Not recorded and not published and it is between the same parties.

The Court: Where is that to be found?

Mr. Colton: That appears on the third page of the stipulation, paragraph 10.

Mr. Zucker: That is over my objection. I reserved the right to object to it, incompetent, im-

material and irrelevant, of any admission. I could not deny the fact that such an opinion is filed.

The Court: Any admission? What do you mean by that?

Mr. Zucker: To the admission into evidence.

The Court: This is off the record.

(Discussion off the record.)

The Court: I don't know that it will have any bearing on the case whatever, but I will allow it.

Mr. Zucker: Just note my objection to the materiality.

The Court: Your objection is noted.

(Opinion of Justice Parker, part of the stipulation is received in evidence and marked Exhibit D. 1.)

Mr. Colton: I would like to offer in evidence at this time a petition and affidavit and rule to show cause allowed by Mr. Justice Parker in the attachment suit in the New Jersey Supreme Court. It has a bearing in that one of my defenses is that the complainant ratified our discharge of the other creditor by his argument refuting this contract, Exhibit C. 4 as an argument before Mr. Justice Parker for quashing his writ of attachment.

The Court: Consented to a discharge?

Mr. Colton: This discharge, Exhibit C. 4.

The Court: Yes, I know, but in what way did he consent?

Mr. Colton: By his appearance in the Supreme Court and arguing on the discharge, claiming that the writ should be quashed because the

amount claimed in that complaint was greater than we were legally entitled to by reason of the fact we had given a discharge under the statute and the amount that Slatoff was liable to us was reduced by the operation of that statute. Now, then, I take it—

The Court: That is all purely a legal defense you are making.

Mr. Zucker: Exactly.

Mr. Colton: Correct.

The Court: Relying upon the statute it reduces the obligation?

Mr. Colton: That is correct. It is our position and our contention—

The Court: That thereby be waived his right?

Mr. Colton: By going there and having knowledge of this contract; going there and using it as a basis for quashing the writ, filing a bill in this Court alleging that we fraudulently endeavored to obtain, meaning by the writ of attachment, namely, that $4,000, then we were entitled to a claim $4,000 trying to get the benefit of this contract and then trying to use this contract after getting the benefit as a source to destroy his liability as such, an estoppel situation, ratification of the transaction that this creditor has to estop him now.

The Court: Presently I do not see it.

Mr. Colton: I would like to offer it.

The Court: I will allow it in.

Mr. Zucker: I object. Note my objection.

(Petition, affidavit, rule to show cause are received in evidence and marked Exhibit D. 2.)

Mr. Colton: I further would like to offer in evidence two memoranda filed by Mr. Justice

Parker. The reason for that is that in the rule to show cause he did appear specially, but finally in the argument, the filing of the brief with Mr. Justice Parker, he went into the merits of the case as to the agreement Exhibit C. 4.

The Court: And thereby you think he waived his right to appear in Chancery?

Mr. Colton: Those three acts, by the appearance, by arguing the law, trying to get into this court, trying to get the benefits of this contract and escape the burden, having knowledge of our conduct, he ratified it by his conduct.

The Court: Ratified what?

Mr. Colton: The law is this, that even the release of a principal—

The Court: Now, do not become impatient.

Mr. Colton: I am not becoming impatient.

The Court: You know this case and I do not.

Mr. Colton: That is correct.

The Court: And the only way I can decide it intelligenly is to ask you questions.

Mr. Colton: I am about to answer—

The Court: Go on.

Mr. Colton: —about the release of a principal. There is an exception to that rule.

The Court: The purpose now of this, take one thing at a time.

Mr. Colton: There is an exception to the rule that where the surety consents to the discharge or release—

The Court: Why, of course.

Mr. Colton: —either prior or at the same time or ratifies the act subsequent thereto, he is estopped. I explain this as his act of ratification.

The Court: That is the point. In what way can it be said that there is a deterrent in the law action, after special appearance is denied and

it has been argued that the statute law governs, how can it be said that this is an estoppel?

Mr. Zucker: Let me interrupt and—

Mr. Colton: One moment. There was no general appearance there. We take the position he appeared generally when he went beyond his special limited appearance. My argument there is this: He discovered the form, for instance, of the contract.

The Court: Yes.

Mr. Colton: He comes into court, this court, gets his liability. He was still indebted to us.

The Court: Yes, under the statute, if there is any liability to get.

Mr. Colton: That is right. He comes in and says, "They have endeavored to get fourteen instead of four"—

The Court: Yes. Well, did you?

Mr. Colton: That is correct. That is true. And, now, then, he says this contract, if in an excessive amount is improper legally and the writ should be quashed.

The Court: Yes.

Mr. Colton: He follows it up with an argument of law on that.

Mr. Zucker: Upon—

Mr. Colton: Purely a legal argument, that is all.

The Court: Technically.

Mr. Colton: He comes into this court and uses this contract and paragraph 7 of his bill, alleging that this agreement was given pursuant to the statute and by the terms thereof his liability was reduced to $4,000, that we by fraud sought to get $14,000. Now, he took the benefit of this contract.

The Court: Yes.

Mr. Colton: He uses it to try to escape liability in that law action. He uses it in this very action. In his bill of complaint he alleges it, and seeks to take the benefit of it and then tries to use it to escape complete liability.

Now, I say such conduct is an estoppel.

The Court: I will allow it in.

Mr. Zucker: I object.

(Contract above referred to is received in evidence and marked Exhibit D. 3.)

The Court: What he did was to appear specially in the first instance to dismiss your writ, because, under the law, if you are correct about it, you were suing in your attachment for an amount greater than that which was due in law by reason of this statute. And that is all he did.

Mr. Colton: I would like to offer in evidence the record of the Chancery case involved in the foreclosure, the bond and mortgage.

Mr. Zucker: I do not think that is material.

The Court: What is the object of the offer? I mean, what is the complete object of the offer?

Mr. Colton: To prove that Slatoff and the others were parties to the foreclosure suit and filed no answer in the pleading.

Mr. Zucker: That is stipulated in the facts.

The Court: Even though that is so, that they filed no answer, it would not obtain to the question of his personal liability—

Mr. Colton: No, except as to notice, your Honor. We take the position Slatoff was notified in the foreclosure suit that he was joined as a party defendant.

The Court: And did nothing about it.

Mr. Colton: And did nothing about it. If he was surety, he should have notified us then.

The Court: Notified you of what?

Mr. Colton: "I am a surety on here, treat me accordingly." I still go back to the question of knowledge of the surety.

The Court: Well, Mr. Theurich, in what capacity was he sued by you?

Mr. Colton: As—in Chancery.

The Court: Why was he notified?

Mr. Colton: Because he had joined in the execution of the bond.

The Court: Exactly.

The Court: Now, whatever the equity was, that attached to his position. Whatever equity would decree later was his relationship was as well known to you as it was to him.

Mr. Colton: Yes, your Honor. If this Court imposes upon us knowledge as a result of the deed and mortgage—

The Court: This situation was created by your own instance, either by law or in equity.

Mr. Colton: Correct.

The Court: If that is so, you do not have to send special notice.

Mr. Colton: All right. Of course, we take the position that is not so.

The Court: I know you do.

Examined by Mr. Colton.

Q. Mr. Green, do you recall the date of April 28, 1936, the time this agreement C. 4, was entered into?

Mr. Colton: Have you C. 4?

Mr. Zucker: The Court has it.

The Court: Four? (Handing paper to counsel.)

A. I did—I do.

Q. Did Mr. Lipis have any conversation with you relative to Mr. Slatoff's liability? A. He did.

Q. What was that conversation?

Mr. Zucker: I object to that.

The Court: What was the question?

Q. (The pending question is read by the reporter as follows: "What was that conversation?")

The Court: How do you make that competent?

Mr. Colton: This is an action seeking to use a certain instrument as an excuse of the liability. We have a right to show the intention of the parties, in the delivery of that instrument. I am endeavoring to prove a verbal reservation of the right to sue Slatoff, made by the creditor at the time he delivered the instrument.

Now, I don't know what Mr. Zucker's objection is to this.

The Court: Well, I think I do. If it is anything at all, it is clearly an attempt to violate a written instrument.

Mr. Colton: As to the first point may I answer your Honor that this instrument, the parties to it are Theurich by his agent, Lipis, and the Newark Cleaning and Dye people and Colton sureties, your Honor. Now, the parole evidence rule—

The Court: This is with relation to the release?

Mr. Colton: Yes.

The Court: I am speaking of the bond.

Mr. Colton: I am not discussing the bond now, your Honor.

The Court: You were talking about this release.

Mr. Colton: I am, the validity of this agreement.

The Court: Just read the question, please.

(Three questions and answers are read by the reporter as follows:

"Question: Mr. Green, do you recall the date of April 28, 1936, the time this agreement C. 4, was entered into?

"Answer: I did—I do.

"Question: Did Mr. Lipis have any conversation with you relative to Mr. Slatoff's liability?

"Answer: He did.

"Question: What was that conversation?

"Mr. Zucker: I object to that.")

The Court: Objection sustained.

Mr. Colton: Sir?

The Court: Objection sustained.

Mr. Colton: May I suggest my reason for it?

The Court: No.

Mr. Colton: Mr. Slatoff is not a party to the contract.

The Court: No, I won't allow it.

Mr. Colton: May I state my reasons for the record, your Honor?

The Court: I thought you stated your reasons.

Mr. Colton: I had not.

The Court: I will allow you to state it on the record.

Mr. Colton: My reasons for the question.

The Court: For the question, the last question.

Mr. Colton: My reason for the question is that Exhibit P. 4 is an agreement wherein Theurich, the complainant, and the Newark Cleaning and Dye Works really are the only parties to it, Slatoff being a stranger, the parole rule evidence does not apply to the party to the contract and a stranger to it. Secondly, that in the Court of Chancery equity will allow parole evidence to show the purpose and intention of the people, of a written instrument; that the parole evidence rule has been substantially relaxed in equity in permitting the parties to show why they delivered an instrument in order to prevent the instrument from creating an injustice.

The Court: The instrument does not bear out the statement as to the purpose? Is that your only reason?

Mr. Colton: That is true, your Honor.

The Court: Go on.

Examined by Mr. Colton.

Q Mr. Green, I show you the contract. Is that your signature?

The Court: "I show you a contract."

Mr. Colton: This is an agreement for the sale of the property which precedes the deed which was offered in evidence.

The Court: Go on.

A. It is.

Mr. Colton: I offer in evidence the contract between Theurich and Samuel Green.

Mr. Zucker: I object to the offer in evidence of this agreement for a number of reasons: First, it is an agreement signed only by this witness and is not entered into—

The Court: Let me know the purpose of the offer.

Mr. Colton: If this Court will look to the deed to determine Mr. Slatoff's capacity, then we have a right to explain the transaction. If your Honor please, this property was originally bought by Mr. Green. It calls for a payment of $10,000 cash and $10,000 purchase money mortgage from Mr. Green. Mr. Green was unable to raise the funds and sought to offer $5,000 cash and $15,000 purchase money bond and mortgage. It was refused, and, after negotiation, they agreed to take $5,000 cash and $15,000 bond of the Newark Cleaning and Dye Works, Green, Colton and Slatoff.

The Court: The deed being a final contract between the parties?

Mr. Colton: Yes. This explains the transaction.

The Court: The final transaction was the deed? Right?

Mr. Colton: Yes.

The Court: Do you object?

Mr. Zucker: Yes.

The Court: Sustained.

Mr. Zucker: Now, that is the theory of the case.

The Court: Sustained.

Mr. Zucker: That is all.

The Court: Is that your case?

Mr. Colton: Now, then, shall I argue on—

The Court: You have given me your brief?

Mr. Colton: Yes, I have given you my brief.

The Court: And there is no need for an argument. I have your brief and I have Mr. Zucker's brief. I would like to hear whether you make a distinction between the guarantor and the surety.

Mr. Colton: I will be very frank with you, I am not prepared at this time to make it.

The Court: All right. Do you?

Mr. Zucker: I have proceeded on the theory all along that this is a case of principal and suretyship, and that is borne out by a recent case which was decided by Vice Chancellor Bigelow and affirmed by the Court of Errors last week, the case of *Burack v. Mayers,* where—

The Court: Well, now, here is what I have in mind, so that you might be prepared to answer: The absolute pronouncement with reference to suretyship is found mostly—in cases, I mean, with reference to surety on the bond is something more—is found mostly in those cases where the original mortgagor sells the property and the purchaser assumes the equity then imposes the relationship of principal and surety. The original obligor is no longer the principal. He is the surety.

Now, of course, there is a distinction in law between the guarantor and the surety. I am speaking now of an equity surety. Your contention here is that this man is a surety in equity.

Mr. Zucker: Yes, sir.

The Court: The fact being, however, that he was one of the original obligors. I am wondering whether you gentlemen have addressed yourselves to the real facts in the case—

Mr. Zucker: And—

The Court: —and the law as it applies to the fact.

Mr. Zucker: I followed this Burack case, and, if I can just relate those facts, I think you will see how close they are to the facts in our case.

In *Burack* v. *Mayers,* there were two Burack brothers, Ephraim and Harry, and Ephraim was the owner of a piece of property and held a

mortgage upon it from a man named Mayers. Mayers refused to advance the money unless he got his brother to sign the bond along with him, which is very similar, I say, to the situation where a corporation goes on the bond and the officers sign along with the corporation; and the check, the consideration, went only to Ephraim, and Vice Chancellor Bigelow held this—an answer to the contentions made by Mr. Colton— "A bond and mortgage given at the same time in a single transaction must be construed together in an endeavor to ascertain the actual contract; the terms of each are qualified by applicable provisions of the other. The bond and mortgage before me, taken together, point rather strongly to Ephraim as the principal debtor. Another circumstance with the same trend is that the loan was made by check of Mayers payable to Ephraim and deposited in the latter's bank account." And then, after going over those various facts, Vice Chancellor Bigelow said, "On the whole case I am satisfied that complainant was a surety."

Now, in our case, instead of a cash consideration going to the corporation the deed went to the corporation, so I have treated this case right along as a case in equity as principal and surety, rather than one in guaranty. And this case, I think, was affirmed last Thursday by the Court of Errors. That construction of that particular phase of the case seems to be consistent with the situation in our case. I have referred to that in my memorandum at length, and have it under quotations.

The Court: I would like you to supplement your briefs—

Mr. Colton: I think that is—

The Court: —without deciding the cause, if the equitable suretyship principal applies, that is one thing. But, if Slatoff was a guarantor, he was an original obligor, wasn't he?

Mr. Zucker: Yes. That might follow, if your Honor please.

The Court: And, if he was an original obligor, while he would come within the statute that you cite here, so far as the extent of his liabilities are concerned—

Mr. Zucker: Yes, sir.

The Court: —it is a question whether we can give him any relief here. If he is a surety—

Mr. Zucker: Of course, it is the suretyship on which the bill was filed.

The Court: The equity is quite clear as to that.

Mr. Colton: Suppose we file supplementary memorandums?

The Court: Please look into that.

Mr. Zucker: I am frank to say I had not considered it from that angle, but I would be glad to follow your Honor's suggestion.

The Court: I wish you would, because, if you do not, I will have to look it up, and it is your case.

Mr. Zucker: I will look it up. Does your Honor wish to set any time?

The Court: You need not go in great detail. It is simply a question of just dropping me a line and cite whatever authorities you have. You need not write any additional brief on that question. Let me have it within the next week.

Mr. Zucker: Yes, your Honor.

The Court: Exchange what you write to one another.

Mr. Colton: Yes, sir.

OPINION OF VICE-CHANCELLOR.

(Decided September 16th, 1937.)

A composition agreement made pursuant to "An Act to authorize the compromise and discharge of claims against one or more of several joint debtors or co-partners" (3 Comp. Stat. p. 3780), whereby the creditor discharges one or more co-obligors upon a bond, although one of them is the principal debtor and the others sureties, does not discharge the liability of the remaining obligors, but limits the liability of each to his proportionate part of the whole debt.

On bill.

Mr. Saul J. Zucker, for the complainant.

Mr. Sholem Lipis (Mr. Isadore H. Colton, of counsel), for the defendant.

STEIN, *V. C.*

On September 1st, 1925, Newark Cleaning and Dye Works, a corporation, acquired title to lands and premises situate on Broome street, in the City of Newark, New Jersey, from the defendant herein, for the consideration of $20,000, of which $5,000 was paid in cash and the balance of $15,000 by a purchase-money mortgage for that sum. The bond accompanying the mortgage was executed by the Newark Cleaning and Dye Works and by Ellis Slatoff, Samuel Greene and Morris Colton, officers of the corporation.

Upon the subsequent foreclosure of this mortgage a deficiency of $16,259.19 arose. This amount with interest less $2,000 hereinafter referred to, is claimed to be due and payable from the complainant in suits at law which have been brought by the defendant herein, one by attachment in the New Jersey Supreme Court and one by summons in the New York Supreme Court. The present bill is filed to enjoin the defendant from prosecuting these actions at law.

Pursuant to "An act to authorize the compromise and discharge of claims against one or more of several joint debtors or co-partners" (3 Comp. Stat. pp. 3780, 3781), the defendant, prior to the institution of the actions at law and in consideration of $2,000, executed a written compromise and discharge of the liability of Newark Cleaning and Dye Works, Samuel Greene and Morris Colton, being all of the joint obligors except the complainant.

The statute provides (section 3) that after such release of one or more of the joint debtors the creditor may proceed against the remaining joint debtors for the balance due "after the ratable portion or portions of said debtor or debtors so released shall have been deducted therefrom," which in this case would be for the remaining one-quarter of the whole debt, and not for the whole debt less the $2,000 above mentioned. This the defendant concedes, but inasmuch as this defense is available at law it need not concern us here. The equitable ground upon which this court is urged to enjoin the prosecution of the actions at law is that the transaction was one by which Newark Cleaning and Dye Works was the principal debtor and the individual obligors on the bond merely sureties for the payment of the debt; that the defendant so understood the arrangement and is estopped to claim that the four obligors on the bond are liable in equal degree as joint debtors, and that the statute was not intended to contravene the established rule that the discharge of the principal discharges the surety.

Assuming that complainant is right in his contention that he and the other individual signers

of the bond were, to defendant's knowledge, merely sureties for the payment of the debt, it does not follow that the defendant's discharge of the principal debtor discharged the complainant from liability for his proportionate part of the debt.

The agreement of discharge was executed pursuant to the authority of the statute above referred to, and the statute expressly provides that such a compromise or composition with one or more of several joint debtors shall not be construed to discharge the others from their obligation to pay a proportionate amount of the debt, and that the creditor's right to proceed at law or in equity against those joint debtors who have not been so released shall not be impaired. The compromise agreement, in view of the statutory provisions inherent in it, amounts merely to a covenant not to sue those joint debtors who have been discharged. It is immaterial that one of the joint debtors may be the principal debtor and the other sureties. *Bowne v. Mount Holly National Bank,* 45 N. J. Law 360. And it is well settled that the release of one joint debtor does not release the others where there is a reservation. *2 Williston on Contracts* (Rev. Ed. 1936) 1002; *Roseville Trust Co. v. Mott,* 85 N. J. Eq. 297. The reservation is contained in the express provisions of the statute, which are to be read into the compromise agreement.

The complainant was in nowise injured by defendant's discharge of his co-obligors. He still has the right to sue the principal debtor to recoup any losses he may sustain because of his suretyship. Indeed, he has derived a distinct

benefit because of the resulting limitation of his liability to his proportionate part of the debt.

The bill of complaint will be dismissed.

FINAL DECREE.

Filed September 21, 1937.

This cause coming on to be heard in the presence of Saul J. Zucker, solicitor of complainant, and Sholem Lipis, solicitor for the defendant, and Isadore H. Colton, of counsel with defendant; and the Court having examined the pleadings and taken proofs orally and in open court, and having heard and considered the arguments of counsel thereon;

It is on this 21st day of September, 1937, ORDERED, ADJUDGED and DECREED that the bill of complaint in this cause be and the same is hereby dismissed;

And it is further ORDERED, ADJUDGED and DECREED that the order dated December 15th, 1936, enjoining and restraining the defendant and his attorneys from the prosecution of the attachment suit now pending in the New Jersey Supreme Court and the suit at law now pending in the Supreme Court of the State of New York be and the same is hereby vacated;

And it is further ORDERED, ADJUDGED and DECREED that the complainant pay to the defendant or his solicitor, Sholem Lipis, or Isadore H. Colton, of counsel with defendant, the costs of this suit to be taxed, including a counsel fee of One Hundred Fifty ($150) Dollars which is hereby allowed to the defendant, within 10 days after the service upon him, or his solicitor, of true

but uncertified copies of this decree and of said taxed costs; and that, in default of such payment, execution issue therefor, according to the practice of this court, against the goods and chattels, lands, tenements and hereditaments of said Ellis Slatoff.

LUTHER A. CAMPBELL,

C.

Respectfully advised,

ALFRED A. STEIN,

V.-C.

Approved as to form only.

SAUL J. ZUCKER,

Solicitor for and of Counsel with Complainant.

NOTICE OF APPEAL.

Filed September 24, 1937.

To: Sholem Lipis, Esq.,
Solicitor of Defendant,
1172 Raymond Boulevard,
Newark, N. J.

Sir:

Please Take Notice, that Ellis Slatoff, complainant herein, appeals to the New Jersey Court of Errors and Appeals, the Court of last resort in all causes, from a Final Decree entered in the Court of Chancery herein, on September 21, 1937, upon the advice of Hon. Alfred A. Stein, Vice-Chancellor, and from every part thereof.

Dated: September 21, 1937.

Yours, etc.,

SAUL J. ZUCKER,
Solicitor for and of Counsel
with Complainant.

I conceive that there is good grounds for the above appeal.

SAUL J. ZUCKER,
Of Counsel.

PETITION ON APPEAL.

Filed October 15, 1937.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between ELLIS SLATOFF, *Complainant-Appellant,* *and* EDWARD E. THEURICH, surviving executor of the Estate of Edward Theurich, deceased, *Defendant-Respondent.*	*On Appeal, etc.* *Petition on Appeal.*

To the Honorable Court of Errors and Appeals in the last resort of all causes:

The petition on appeal of Ellis Slatoff, appellant herein, respectfully shows:

1. That appellant finds himself aggrieved by the entry of the Final Decree entered in the Court of Chancery on September 21, 1937, in the following respects, to-wit:

(a) The Chancery Court, after determining that Newark Cleaning & Dye Works was the principal debtor upon the bond in suit, and that appellant and others were sureties thereon, erred in dismissing the Bill of Complaint, and in adjudging that the discharge from liability of such principal debtor upon the said bond, did not discharge appellant, since such

discharge of the principal debtor discharged the surety as a matter of law.

(b) The Chancery Court, after determining that to the knowledge of respondent, Newark Cleaning & Dye Works was the principal debtor on the bond in suit, and that appellant and others were sureties thereon, erred in recognizing respondent's claim against appellant upon said bond, notwithstanding respondent had discharged the principal debtor, pursuant to "An Act to Authorize the compromise and discharge of claims against one or more of several joint debtors or co-partners" (3 C. S. 3780-81), since such discharge of the principal debtor discharged appellant as a matter of law.

(c) The Chancery Court erred in refusing to enter a final decree discharging appellant from liability upon the said bond, and enjoining the further prosecution of the suits at law, since the discharge of Newark Cleaning & Dye Works, the principal debtor upon the bond in suit, by act and operation of law, discharged appellant, one of the sureties thereon, thereby terminating his liability.

(d) The Chancery Court erred in applying the terms and provisions of "An Act to Authorize the compromise and discharge of claims against one or more of several joint debtors or co-partners" (3 C. S., 3780-81), to the bond in suit executed by Newark Cleaning & Dye Works, as the principal debtor, and appellant as the surety, since said Statute refers, and is applicable only, to obligors who are legally and equitably liable on the instrument in the same degree.

Your petitioner therefore prays, that the said Final Decree of the Court of Chancery may be in all respects reversed and set aside to the end that a decree may be entered in accordance with the prayer of the Bill of Complaint, and that appellant may have such other and further relief in the premises as to this Honorable Court may seem just and proper.

Dated: October 12, 1937.

SAUL J. ZUCKER,
Solicitor for and of Counsel
with Appellant.

Opinion of New Jersey Court of Errors and Appeals.

No. 211 February Term, 1938.

ELLIS SLATOFF,
Complainant-Appellant,

and

EDWARD E. THEURICH, surviving executor of the Estate of EDWARD THEURICH, deceased,
Defendant-Respondent.

Argued February, 1938. Decided May 11, 1938.

ON APPEAL FROM COURT OF CHANCERY

For complainant-appellant, Saul J. Zucker
For defendant-respondent, Sholem Lipis

The opinion of the court was delivered by BODINE, J.

The complainant appeals from a decree entered in the court of Chancery dismissing his bill of complaint. The Newark Cleaning and Dye Works, Inc., in 1925 purchased premises in the city of Newark from the Theurich estate paying therefor $5,000 in cash and the balance by the making of a purchase money mortgage in the sum of $15,000. The complainant, and two other officers of the corporation, also executed the bond. The mortgage was subsequently foreclosed and a deficiency of $16,259.19 resulted. Thereafter, the Theurich estate composed and compromised with the Newark Cleaning and Dye Works, Inc., Samuel Greene, and Morris Colton for the sum of $2,000, and commenced an action at law against the complainant Slatoff, which he quite properly sought to have restrained, if, in fact, in equity he was a surety and not a principal joint debtor.

Opinion of New Jersey Court of Errors and Appeals.

The legislature in R. S. sec. 42:5-4 has provided that a compromise or composition with one partner does not discharge the other co-partners or impair the right of the creditor to proceed at law or in equity against the others for the ratable portion of the debt. Section 2:70-10 confers the same privileges upon joint debtors.

We think the present proceeding was controlled by the rule stated in Westervelt v. Freck, 33 N. J. E. 451. In that case W made a note for the accommodation of another. The holder thereof knew that the note was given for accommodation. He then recovered a judgment at law against both maker and endorser, but without the knowledge or consent of W took from the endorser a new note and extended the time for him to pay. Held, that the complainant was entitled to a permanent injunction restraining the holder of the note from enforcing the judgment, since his liability as surety was discharged by giving time to the principal debtor.

In Bowne v. Mount Holly National Bank, 45 N. J. L. 360, and in Roosevelt v. Mott, 85 N. J. E. 297, the question of principal and surety was not the issue.

Professor Williston in his work on Contracts, Vol. 2, sec. 340, p. 1106, states the applicable doctrine with great clarity: "But a joint debtor who is merely a surety and known by the creditor to be a surety is discharged by such contract (extending time) with the principal. Though in ear-

ly cases the parol evidence rule was thought to prevent the proof of such a relation between the parties unless stated in the instrument creating the obligation, at first in equity and now generally at law, if the creditor at the time when he received the obligation knew that one of the joint debtors was as between himself and his co-obligors primarily liable for the whole debt, the creditor will lose his rights against all the other joint obligors if he makes any agreement or commits any action with reference to the debtor primarily liable which would impair the rights or increase the risk of those who were sureties."

Mr. Justice Dixon in Shute v. Taylor, 61 N. J. L. 256, 258, stated the rule as follows: "Finally, in Anthony v. Fritts, 16 Vroom 1, the subject was fully considered in the Supreme Court and, after discussing the cases, Chief Justice Beasley announced as the decision, 'that in a suit at law against two makers of a promissory note, one of them cannot set up as a defence that he was known to the payee to be an accommodation maker, and that the payee bound himself by legal contract to the other maker to give him time for payment', and that 'in such cases, a mere equity arises, and the remedy is in chancery.' " See also Grier v. Flitcraft, 57 N. J. E. 556.

The deed of conveyance and the bond and mortgage tend to indicate that the complainant executed the bond as surety for the corporate obligor. If in fact he was such and this circumstance was known to the Theurich estate, clearly the discharge of the principal, or an extension of time

for the payment of the principal debt, would discharge the surety.

It is urged, however, that the complainant was not entitled to any remedy because there was a reservation in the composition agreement of the right against the surety. However sound this argument may be as a matter of law if the reservation of the right appeared upon the face of the document need not be considered, because as a matter of fact it does not. The document is nothing more than a compromise of the estate's claim against the Newark Cleaning and Dye Works, Inc., and the two others. Because the agreement provides that those released shall have the benefit of the legislative enactments with respect to the compromise and discharge of claims against one or more joint debtors (R. S. secs. 42:5-4 and 2:70-10) does not deprive the complainant of his equitable right to an injunction if in fact he was in equity a mere surety, and the debt of his principal has been composed. Clearly, such composition impaired his rights or increased his risks.

The decree is reversed.

REMITTITUR ON APPEAL FROM CHANCERY.

#211, February Term, 1938.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

ELLIS SLATOFF,

Complainant-Appellant,

and

EDWARD E. THEURICH, surviving Executor of the Estate of Edward Theurich, deceased,

Defendant-Respondent.

This cause having been brought to a hearing on appeal from the Court of Chancery at the February, 1938 Term of this Court and the Court having heard SAUL J. ZUCKER, ESQ., of counsel with appellant and ISADORE H. COLTON, ESQ., of counsel with respondent, and having duly considered the questions brought up by this appeal, it is on this eleventh day of May, Nineteen Hundred and Thirty-eight, on motion of SAUL J. ZUCKER, ESQ., of counsel with appellant,

ORDERED, ADJUDGED and DECREED, that the final decree of the Court of Chancery made on the twenty-first day of September, Nineteen Hundred and Thirty-seven, dismissing the bill of complaint filed in this cause in said Court, from which appellant appealed, be and the same is hereby reversed, set aside and for nothing holden; and it is further

ORDERED, ADJUDGED and DECREED, that the award of costs and counsel fees to respondent in the

Remittitur on Appeal from Chancery.

Court below be and the same is hereby reversed, set aside and for nothing holden, and it is further

ORDERED, ADJUDGED and DECREED, that the record in this cause be remitted to the Court of Chancery for further proceedings thereon in accordance with the opinion of this Court and the law and practices of the Court of Chancery.

Entered
ON MOTION OF:
SAUL J. ZUCKER,
of Counsel with Appellant.

A True Copy.

Thomas A. Mathis,
Clerk.

ORDER ON REVERSAL OF THE DECREE DISMISSING BILL OF COMPLAINT, AND FINAL DECREE.

Filed Sept. 20, 1938.

IN CHANCERY OF NEW JERSEY #117/325.

Between ELLIS SLATOFF, *Complainant,* and EDWARD E. THEURICH, surviving Executor of the Estate of Edward Theurich, deceased, *Defendant.*	*On Bill, Etc.*

This cause coming on to be heard this day, and being opened to the Court by SAUL J. ZUCKER, Solicitor for and of counsel with the complainant, in the presence of SHOLEM LIPIS, by ISADORE H. COLTON, Solicitor for the defendant, and it appearing that complainant filed an appeal to the New Jersey Court of Errors and Appeals from the Decree herein entered on September 21, 1937, dismissing the bill of complaint, and that said appeal has been determined by the said Court of Errors and Appeals and that the proceedings in accordance with the view expressed in said Remittitur of the Court of Errors and Appeals and according to law, and on reading the Remittitur from the said Court of Errors and Appeals whereby it appears that it was ordered and decreed by the said Court that the aforesaid decree of dismissal of the Chancellor be reversed and it consequently appearing that complainant is entitled to the relief hereinafter granted, and that upon the bond dated September 1, 1925, referred to and

annexed as "Exhibit I" in the bill of complaint herein, NEWARK CLEANING AND DYE WORKS, a corportion was the principal obligator and complainant and MORRIS COLTON and SAMUEL GREENE were sureties thereon, and that the discharge by defendant of the NEWARK CLEANING AND DYE WORKS, the principal obligor, of liability and responsibility upon said bond by virtue of the written instrument dated April 28, 1926, annexed as "Exhibit II" to the bill of complaint, discharged complainant, a surety from further responsibility or liability thereon,

NOW THEREFORE, it is on this 19th day of September, Nineteen Hundred and Thirty-eight,

ORDERED, ADJUDGED AND DECREED,

1. That the decree of the Court of Errors and Appeals be and the same is hereby made the decree of this Court with costs to be taxed in favor of complainant and against defendant in this Court and in the Court of Errors and Appeals;

2. That upon the bond dated September 1, 1925, copy of which is annexed to the bill of complaint herein as "Exhibit I," NEWARK CLEANING AND DYE WORKS, a corporation, was the principal obligor and complainant and MORRIS COLTON and SAMUEL GREENE were sureties;

3. That complainant be discharged and relieved from any and all responsibility whatever by reason of the execution and delivery of the bond, copy of which is annexed to the bill of complaint herein as "Exhibit I";

Order on Reversal of the Decree Dismissing Bill of Complaint and Final Decree.

4. That defendant, EDWARD E. THEURICH, surviving Executor of the Estate of Edward Theurich, deceased, be permanently enjoined and restrained from the further prosecution of an attachment suit pending in the New Jersey Supreme Court wherein the within defendant is plaintiff and the within complainant is defendant, instituted on or about May 1, 1936 based upon the bond, copy of which is annexed to the bill of complaint herein as "Exhibit I."

5. That the defendant, EDWARD E. THEURICH, surviving executors, etc., be permanently enjoined and restrained from the further prosecution of a suit instituted in the Supreme Court of the State of New York, County of New York, wherein personal service effected upon the complainant, and in which the within defendant was plaintiff and the within complainant was defendant, based upon the bond a copy of which is annexed to the bill of complaint herein as "Exhibit I."

6. That defendant, EDWARD E. THEURICH, surviving executor, etc., be permanently enjoined and restrained from enforcing in any manner whatsoever, and alleged liability of complainant upon the bond, a copy of which is annexed to the bill of complaint herein as "Exhibit I."

7. That defendant, EDWARD E. THEURICH, surviving executors, etc., forthwith, and within 15 days of the service upon him or his solicitor of a copy of the within Final Decree herein, certified to be a true copy by the solicitor for the complainant, and without cost to complainant, discontinue

the aforesaid proceedings pending in attachment in the New Jersey Supreme Court and in *personam* in the Supreme Court of the State of New York, based upon the bond, copy of which is annexed to the bill of complaint herein and marked "Exhibit I", and discharge any levy or levies made thereunder, and discontinue any proceedings, taken in aid, ancillary or supplemental to said suits.

8. That the defendant, EDWARD E. THEURICH, surviving executors, etc., pay to the complainant a counsel fee of $250.—for services in this Court and that said counsel fees be included in the taxed bill of costs and that execution issue out of this court for said costs and counsel fees according to the practice of this Court, without further notice or order.

9. That complainant have leave to apply for any other, further or supplemental relief necessary to properly and completely effectuate the full intent and purpose of this decree.

LUTHER A. CAMPBELL,

C.

Respectfully advised,

ALFRED A. STEIN,

V. C.

NOTICE OF APPEAL.

Filed October 18, 1938.

IN CHANCERY OF NEW JERSEY.

Between ELLIS SLATOFF, *Complainant,* and EDWARD E. THEURICH, surviving executor of the Estate of Edward Theurich, deceased, *Defendant.*	*On Bill, &c.,* To Saul J. Zucker, Esq. *Solicitor for complainant* 810 Broad Street Newark, N. J.

Sir:

PLEASE TAKE NOTICE, that Edward E. Theurich, surviving executor of the Estate of Edward Theurich, deceased, the defendant herein, appeals to the New Jersey Court of Errors and Appeals, the Court of last resort in all causes, from a final decree entered in the Court of Chancery herein on the 19th day of September, 1938, by the Chancellor of the State of New Jersey, upon the advice of Hon. Alfred A. Stein, Vice-Chancellor, and from every part thereof.

Dated: October 11th, 1938.

Yours truly,

SHOLEM LIPIS,
Solicitor for Defendant.
ISADORE H. COLTON,
Of counsel with Defendant.

I conceive that there is good grounds for the above appeal.

ISADORE H. COLTON,
Of counsel.

PETITION OF APPEAL.

Filed November 5, 1938 .

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between ELLIS SLATOFF, *Complainant-Respondent,* and EDWARD E. THEURICH, surviving executor of the Estate of Edward Theurich, deceased, *Defendant-Appellant,*	*On Appeal from the Court of Chancery.*

To the Honorable Court of Errors and Appeals in the Last Resort of All Causes:

The petition on appeal of Edward E. Theurich, surviving executor of the Estate of Edward Theurich, deceased, defendant-appellant, respectfully shows:

That appellant finds himself aggrieved by the entry of the final decree entered in the Court of Chancery on the 19th day of September, 1938, in the following respects, to wit:

1. That the Court of Chancery in said final decree decreed that Ellis Slatoff was a surety on the bond annexed to the bill of complaint.

2. That said Court of Chancery decreed that said Ellis Slatoff be discharged and relieved of any and all responsibility whatever by reason of the execution and delivery of the aforesaid bond.

3. That the Court of Chancery decreed that the defendant, Edward E. Theurich, surviving executor of the Estate of Edward Theurich, deceased, be permanently enjoined and restrained from the prosecution of the attachment suit in the New Jersey Supreme Court and of the suit on the bond in the New York Supreme Court.

4. The Court of Chancery erred in refusing to permit the witness, Samuel Greene, to answer the following question: "Q. What was that conversation?"

5. The Court of Chancery erred in refusing to accept into evidence a contract made between Theurich and Samuel Greene dated the 16th day of May, 1923, and marked Exhibit "D 3."

6. The Court of Chancery erred in entering the final decree aforesaid without having made any finding of fact as to whether or not the defendant-appellant had knowledge of complainant-respondent's suretyship.

7. No adequate proof was put in evidence on which the Court of Chancery could find that the appellant had knowledge of complainant's suretyship.

8. No adequate proof was put in evidence on which the Court could find that complainant was a surety on the bond in question.

9. The Court of Chancery erred in refusing to permit the appellant to introduce evidence of the transactions, conversations and negotiations between the Newark Cleaning and Dye Works,

Inc., Morris Colton, Samuel Greene, Ellis Slatoff and the executors of the Estate of Edward Theurich, deceased, all of which took place prior to the delivery of the deed by the Estate of Theurich to the Newark Cleaning and Dye Works, Inc., Exhibit "C 1."

Dated: November 4th, 1938.

SHOLEM LIPIS,
Solicitor for Defendant-Appellant.

Isadore H. Colton,
Of Counsel with Defendant-Appellant.

EXHIBIT C. 1.

(DEED)

AUGUSTA M. THEURICH IND. ET AL. &C. TO NEWARK CLEANING & DYE WORKS, INC.

THIS INDENTURE, made the first day of September in the year of our Lord One Thousand Nine Hundred and twenty-five BETWEEN Augusta M. Theurich, widow, individually and as Executrix of the Last Will and Testament of the Estate of Edward Theurich, deceased, and Edward E. Theurich, Executor of the said Estate, of the City of Newark, in the County of Essex and State of New Jersey, of the First Part; AND Newark Cleaning and Dye Works, Inc. a corporation having its principal place of business in the City of Newark in the County of Essex and State of New Jersey, of the Second Part, WITNESSETH, That the said party of the first part, for and in consideration of Twenty Thousand Dollars ($20,000.00) lawful money of the United States of America, to them in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part, therewith fully satisfied, contended and paid, have given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents do give, grant, bargain, sell, alien, release, enfeoff, convey and confirm to the said party of the second part, and to its successors and assigns forever, ALL that tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Newark in the County of Essex and State of New Jersey.

($20.00)

Exhibit C. 1.

BEGINNING on the easterly side of Broome Street at a point therein distant one hundred and forty-two feet six inches southerly from the southerly line of South Orange Avenue thence running along the easterly line of Broome Street south twenty-two degrees thirty minutes west eighty-five feet; thence south sixty-seven degrees thirty minutes east one hundred feet; thence north twenty-two degrees thirty minutes east eighty-five feet; thence north sixty-seven degrees thirty minutes west one hundred feet to the place of BEGINNING. Being the same premises conveyed to Edward Theurich, in his lifetime, by deed of Thomas J. Wilson and Mary—his wife, recorded in Book F 21 of Deeds for Essex County on pages 233 etc.; the said Edward Theurich having died seized of said premises on August 14, 1918, leaving a Last Will and Testament duly probated in the Surrogate's Office of the County of Essex, wherein the said party of the first part, and H. Edward Wolf were nominated and appointed as Executors of the said Estate, with full power of sale, the said H. Edward Wolf having been discharged as Executor of the said Estate, by order of the Court, on December 9, 1921. This conveyance is made subject to an agreement made with Benjamin Wulach and Eva—his wife, recorded in Book N 58 of Deeds for Essex County on pages 460, etc. This conveyance is further made subject to a purchase money mortgage of even date herewith, made by said parties of the second part to the said parties of the first part, in the sum of $15,000.00.

Exhibit C. 1.

TOGETHER with all and singular, the houses, buildings, trees, ways, waters, profits, privileges and advantages, with the appurtenances to the same belonging or in anywise appertaining; ALSO all the estate, right, title, interest, property, claim and demand whatsoever, of the said party of the first part, of, in and to the same, and of, in and to every part and parcel thereof. TO HAVE AND TO HOLD all and singular the above described land and premises, with the appurtenances, unto the said party of the second part, its successors and assigns, to the only proper use, benefit and behoof of the said party of the second part, its successors and assigns forever; AND they the said parties of the first part do for themselves, their heirs, executors and administrators covenant and grant to and with the said party of the second part, its successors and assigns, that they the said parties of the first part are the true, lawful and right owners of all and singular the above described land and premises, and of every part and parcel thereof, with the appurtenances thereunto belonging; and that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents, are not encumbered by any mortgage, judgment or limitation, or by any encumbrance whatsoever, by which the title of the said party of the second part, hereby made or intended to be made, for the above described land and premises, can or may be changed, charged, altered or defeated in any way whatsoever. AND ALSO, that the said party of the first part now have good right, full power and lawful authority, to grant, bargain, sell and convey the said land and premises in manner aforesaid. AND ALSO,

Exhibit C. 1.

that party of the first part will WARRANT, secure and forever defend the said land and premises unto the said party of the second part, its successors and assigns, forever, against the lawful claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all manner of encumbrance whatsoever.

In Witness Whereof, the said party of the first part have hereunto set their hands and seals the day and year first above written.

Signed, sealed and Delivered in the presence of
Moe M. Fast

Augusta M. Theurich Seal
Individually
Augusta M. Theurich Seal
Executrix
Edward E. Theurich Seal
Executor

State of New Jersey, ss. Be it Remembered,
County of Essex. That on this first day of September, in the year of our Lord One Thousand Nine Hundred and Twenty-five, before me, An Attorney at Law of New Jersey, personally appeared Augusta M. Theurich, widow, individually and as Executrix of the Last Will and Testament of the Estate of Edward Theurich, deceased, and Edward E. Theurich, Executor of the said Estate, who, I am satisfied, are the grantors mentioned in the within Indenture, and to whom I first made known the contents thereof, and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

Moe M. Fast, An Attorney at Law of New Jersey.

Received in the Office September 25th A. D. 1925 at 10:09 A. M. No. 28

EXHIBIT C. 2.

(BOND)

C. 2 is same as Exhibit I annexed to Bill of Complaint.

EXHIBIT C. 3.

(MORTGAGE)

THIS INDENTURE,

MADE the first day of September One Thousand, Nine Hundred and twenty-five.

BETWEEN

NEWARK CLEANING AND DYE WORKS, INC., a corporation having its principal place of business in the City of Newark in the County of Essex and State of New Jersey of the First Part, hereinafter known as the Mortgagor,

AND

AUGUSTA M. THEURICH, widow, as Executrix, and EDWARD E. THEURICH, as Executor, of the Estate of Edward Theurich, deceased, of the City of Newark in the County of Essex and State of New Jersey of the Second Part, hereinafter known as the Mortgagee,

WITNESSETH, that the said mortgagor, for and in consideration of the sum of FIFTEEN THOUSAND ($15,000) Dollars, lawful money of the United States of America, to it in hand well and truly paid by the mortgagee, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said mortgagor therewith fully satisfied, con-

tented and paid, has given, granted, bargained, sold, aliened, enfeoffed, conveyed and confirmed, and by these presents does give, grant, bargain, sell, alien, enfeoff, convey and confirm to the said mortgagee and to their heirs, executors, administrators and assigns, all that tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Newark in the County of Essex and State of New Jersey.

BEGINNING on the easterly side of Broome Street at a point therein distant one hundred and forty-two feet six inches southerly from the southerly line of South Orange Avenue; thence running along the easterly line of Broome Street south twenty-two degrees thirty minutes west eighty-five feet; thence south sixty-seven degrees thirty minutes east one hundred feet; thence north twenty-two degrees thirty minutes east eighty-five feet; thence north sixty-seven degrees thirty minutes west one hundred feet to the place of BEGINNING.

Being the same premises conveyed to the said parties of the first part by deed of said parties of the second part, of even date herewith, this mortgage being a purchase money mortgage and given to secure part of the purchase price of said deed of conveyance.

TOGETHER with all and singular the profits, privileges and advantages, with the appurtenances to the same belonging or in anywise appertaining. Also all the estate, right, title, interest, property, claim and demand whatsoever of the mortgagor of, in and to the same, and of, in and to every part and parcel thereof,

Exhibit C. 3.

To HAVE AND TO HOLD all and singular the above described tract or lot of land and premises with the appurtenances, unto the said mortgagee, their heirs, executors, administrators and assigns, to the only proper use, benefit and behoof of the said mortgagee, their heirs, executors, administrators and assigns forever. PROVIDED ALWAYS, and it is agreed by and between the parties to these presents that if the said mortgagor, its successors and assigns does and shall well and truly pay or cause to be paid, to the said mortgagee, the sum of FIFTEEN THOUSAND DOLLARS ($15,000) as follows: $1000.00 within one year from the date hereof; $1000.00 within two years from the date hereof; $1000.00 within three years from the date hereof; $1000.00 within four years from the date hereof; $1000.00 within five years from the date hereof; and the balance on September 1, 1931 with lawful interest for the same from the first day of September 1925, at the rate of six per cent. per annum, payable semi-annually, according to the conditions of a certain bond, bearing even date herewith, in the penal sum of THIRTY THOUSAND ($30,000.00) Dollars, made by said party of the first part without any deduction or defalcation for taxes, assessments or any other imposition whatsoever, thence and from thenceforth these presents and said obligation shall cease and be void, anything herein and therein contained to the contrary in anywise notwithstanding.

AND THE SAID MORTGAGOR, for itself, its successors and assigns does covenant and grant to and with the said mortgagee, their heirs, executors, administrators and assigns that it shall not nor

will claim or demand or be entitled to receive any credit or credits on the interest payable hereon, or on the moneys to secure payment of which this mortgage is made, for so much of the taxes assessed against said land as is equal to the tax rate applied to the amount due on this mortgage or any part thereof.

AND THE MORTGAGOR hereby warrants and defends the title to the said lands and premises.

The mortgagor shall and will keep the buildings erected and to be erected upon the lands above conveyed insured against loss or damage by fire by insurers, through such broker or brokers selected and in an amount approved by the mortgagee, their heirs, executors, administrators and assigns, and assign the policy or policies and certificate or certificates thereof to the mortgagee, their heirs, executors, administrators and assigns, as collateral security for the payment of the principal and interest aforesaid; and it is agreed that if the mortgagor, its successors and assigns, shall neglect to pay all or any tax, assessment or other municipal or governmental rate, charge, imposition, or any installment or installments of monthly Building Loan dues and interest, or any sums payable under any lien superior hereto, or any premium for insurance, as aforesaid, on any day whereon the same shall become due and payable, after the period of default aforesaid, then it shall be lawful for the mortgagee, their heirs, executors, administrators and assigns, to pay such charges, and the sum or sums so paid shall be a lien on the said mortgaged premises added to the amount secured hereby, with interest at six per cent. per annum, and, in the event of such payment, at the

option of the mortgagee, their heirs, executors, administrators or assigns, the principal sum secured hereunder shall become due and payable, and agrees that if default be made in the payment of any installment of principal or of the said interest or any part thereof, on any day whereon the same is made payable as hereinbefore expressed, and should the same remain unpaid and in arrears for the space of thirty days, or if default be made in the payment of any of said taxes, water rents or other municipal or governmental rate, charge, imposition or any money payable under the terms of any mortgage lien paramount hereto, on any day whereon the same shall become due and payable, and should the same remain unpaid and in arrears for the space of sixty days, or in the event that any building shall be demolished or removed from the mortgaged premises (or if the removal or demolition thereof is threatened) without the consent in writing of the mortgagee or holder of this mortgage, or in the event that the owner of the mortgaged premises shall fail, within ten days after written request therefor, to furnish a statement of the amount due and owing for principal and interest hereunder, or evidence of the payment of taxes, water rents, interest and principal of prior mortgages or any carrying charges, or in the event that default shall be made in any of the terms, covenants and conditions herein contained, or contained in any mortgage constituting a lien upon the mortgaged premises prior and superior to the lien hereof, or should any action be commenced to foreclose any such prior mortgage, or should the owner of the mortgaged premises fail, for a period of thirty

days, to begin compliance with any requirements, recommendation or recommendations of any of the Departments or authority of the State of New Jersey, or the municipality where such mortgaged premises are situate, such municipality or State Department or authority having jurisdiction over the mortgaged premises, or in the event of the adjudication in bankruptcy or insolvency of the mortgagor or the owner of the mortgaged premises, then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods, as the case may be, the aforesaid principal sum of money, with all arrearages of interest thereon, and any other charge paid by the holder of this mortgage shall, at the option of the mortgagee and assigns, become and be due and payable immediately thereafter, although the period first above limited for the payment thereof may not then have expired, anything hereinbefore contained to the contrary thereof in anywise notwithstanding.

And agrees that the said mortgagee, their heirs, executors, administrators or assigns shall and may, from time to time, and at all times after default shall be made in the performance of the proviso or condition herein contained, peaceably and quietly enter into, have, hold, use, occupy, possess and enjoy all and singular the above granted and bargained premises, with the appurtenances, without the let, suit, trouble, hindrance or denial of the said mortgagor, its successors or assigns, or of any other person or persons whatsoever.

And agrees that if default shall be made, as aforesaid, the mortgagee, their heirs, executors,

administrators and assigns, shall have the right forthwith, after any such default, to enter upon and take possession of the said mortgaged premises, and to let the said premises, and receive the rents, issues and profits thereof, and to apply the same, after payment of all necessary charges and expenses, on account of the amount hereby secured, and said rents and profits are, in the event of any such default, hereby assigned to the Mortgagee, their heirs, executors, administrators and assigns and the mortgagee, their heirs, executors, administrators and assigns shall also be at liberty immediately after any such default, upon proceedings being commenced for the foreclosure of this mortgage, to apply for the appointment of a receiver of the rents and profits of the said premises, and be entitled to the appointment of such receiver as a matter of right, as security for the amounts due the mortgagee, their heirs, executors, administrators and assigns without consideration of the value of the mortgaged premises or solvency of any person or persons liable for the payment of such amounts.

In Witness Whereof, the party of the first part has caused these presents to be signed by its President, attested by its Secretary and its corporate seal hereto affixed the day and year first above written.

NEWARK CLEANING & DYE WORKS, INC.,

Per Ellis Slatoff,

Pres. (SEAL)

Signed, Sealed and Delivered
in the Presence of

Attest:

Secy. Morris Colton.

Exhibit C. 3.

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

BE IT REMEMBERED that on this first day of September, in the year of our Lord One Thousand Nine Hundred and Twenty-five before me, the subscriber, AN ATTORNEY AT LAW OF NEW JERSEY personally appeared MORRIS COLTON known to me to be the Secretary of the NEWARK CLEANING AND DYE WORKS, INC., a Corporation, the Mortgagor within named, who, being by me duly sworn on his oath, said and made proof to my satisfaction that he is such Secretary, and that he well knows the Common Seal of said Corporation, and that the Seal affixed to the within Mortgage is such Common Seal and was thereto affixed by ELLIS SLATOFF the President of said Corporation, and that the said Mortgage was by the said President also signed and delivered as and for the voluntary act and deed of said Corporation in the presence of said Deponent, who thereupon subscribed his name thereto as attesting witness.

MORRIS COLTON.

Sworn and subscribed before
me at Newark
ISADORE COLTON
A. M. C. C. of N. J.

EXHIBIT C. 4.

(DISCHARGE)

C. 4 is same as Exhibit II annexed to Bill of Complaint.

EXHIBIT D. 1.

(SUPREME COURT OPINION)

Filed December 7, 1936.

NEW JERSEY SUPREME COURT.

EDWARD E. THEURICH, Surviving Executor &c., *v.* ELLIS SLATOFF.	*In Attachment. Not to be Published in any Report.*

Argued November 28, 1936; Decided December , 1936.

On rule to show cause why a writ of attachment should not be quashed.

Before Justice Parker, at Chambers.

For the plaintiff, Isadore H. Colton.
For the defendant, Saul J. Zucker.

MEMORANDUM OF DECISION.

This is a rule to show cause why a writ of attachment should not be quashed as improvidently issued. The proofs taken under the rule disclosed that the plaintiff's claim is for a deficiency on a bond secured by mortgage; that the bond was made jointly by defendant, a non-resident, and

three other obligors, all residents of this State. This fact is conceded, and if nothing more appeared, clearly attachment would not lie. Curtis *v.* Hollingshead, 14 N. J. Law 402; Corbit *v.* Corbit, 50 Id. 363. See Thayer *v.* Treat, 39 Id. 150, 156.

But it further appears without dispute, that two days before the affidavit in attachment was filed, namely, on April 28, 1936, the other three obligors compromised and settled their liability on the bond, pursuant to the statute entitled "An Act to authorize the compromise and discharge of claims against one or more of several joint debtors or copartners" (P. L. 1884, p. 298; C. S. of 1910, p. 3780). The title is a sufficient compendium of the text, so far as relates to authority conferred. The procedure as prescribed is that the debtor or debtors compromising shall take from the creditor a writing exonerating him or them, available in bar of an action, and if the debt be already in judgment, then in discharge of the judgment as to the released debtors, and in reduction of its amount, leaving the remaining debtors responsible for their "ratable portion" of the debt or judgment.

The "writing" exonerating the other obligors, provided by Section 2 is before me. Hence, by Section 3, the creditor may proceed against the remaining obligor (the present defendant) for the balance remaining of the amount due on the bond "after the ratable portions of said debtor or debtors so released shall have been deducted therefrom," in the present case, for the remaining one quarter.

Exhibit D. 1.

Under the statute, as has just been said, the effect of the compromise is to release the compromising obligors from liability. In this case there is now only one debtor, namely, the defendant Slatoff. He remains solely liable on the bond. He is non-resident. It seems to follow that for his "ratable portion" an attachment will lie.

As the present application is based wholly on the theory of existing resident joint debtors, and there were none such when the affidavit was filed and the writ issued, it follows that the present rule must be discharged. However, it appears that the affidavit of the plaintiff's agent on which the writ issued is for the full amount due on the bond less what was paid in compromise. This is erroneous. As three of the four joint obligors were released, the defendant remains liable only for one quarter of the amount due before the compromise. The original affidavit says nothing about other debtors or a compromise, and in view of the facts developed on this rule, it calls for several times the proper amount.

But defendant Slatoff does not deny his non-residence or the general liability of his property to attachment. The amount sworn to in the writ is conclusive of nothing. The old Attachment act, Rev. Stat. of 1847, p. 48, Rev. of 1877, p. 42, required the affidavit to aver a "debt." Frisby *v.* Williamson, 16 N. J. Law, page 61. By the act of 1901, C. S. 132, it must "specify as nearly as practicable, the amount" of the debt. In this case if defendant should appear, the correct amount will be settled on the pleadings and proofs.

Exhibit D. 1.

If defendant does not appear, and an auditor is appointed, it will be the duty of plaintiff to disclose to such auditor the facts relating to the compromise with the other joint debtors discharged thereby. Plaintiff now undertakes to do this. I do not find any cases in this State holding that an attachment will be quashed for overstatement of the amount claimed to be due, where it appeared that there was a debt and that defendant was a non-resident. To the contrary see Robinson *v.* Mellon, 2 Misc., 1184, 1186.

The two essentials are, non-residence and the existence of a debt. The error in regard to the amount appears to have resulted from a misconception of the effect of the act of 1884. It is not intimated that there was any fraud in stating the amount. The rule to show cause will be discharged, but without costs.

Since writing the above, I have examined the file in the Clerk's office, and it appears therefrom that the auditor has reported the amount of the joint debt less the compromise payment, as due from the present defendant. The proper amount should be (as plaintiff's counsel has admitted) one-quarter of the joint debt as it stood just prior to the compromise, with interest thereon to date of the auditor's report.

EXHIBIT D. 2.

NEW JERSEY SUPREME COURT.

EDWARD E. THEURICH, surviving executor of the Estate of Edward Theurich, deceased, *Plaintiff*, *vs.* ELLIS SLATOFF, *Defendant*.	*In Attachment. Rule to Show Cause.*

Application having been made to the undersigned, by the defendant, appearing specially for the purpose of the present application only, for a rule to show cause why the writ of attachment issued herein, and all proceedings had thereunder should not be quashed, on the ground that the return was improvidently issued inasmuch as the obligation upon which the within proceedings are based, is a joint bond, executed jointly by Newark Cleaning and Dye Works, Morris Colton, Samuel Greene, and Ellis Slatoff, and the individual joint debtors other than Ellis Slatoff are residents of the State of New Jersey, and the corporate debtor was created under the laws of the State of New Jersey, and now has a registered agent and office in New Jersey, and good cause being shown, it is, on this twelfth day of September, 1936, on motion of SAUL J. ZUCKER, Esq., attorney for the defendant, appearing specially for the purpose of this motion,

ORDERED, that EDWARD E. THEURICH, surviving executor of the Estate of Edward Theurich, deceased, be and appear before this Court, on the tenth day of October 1936, at the County Court House in the City of Newark, at nine-thirty

Exhibit D. 2.

o'clock in the forenoon of that day (Daylight Saving time), then and there to show cause why the writ of attachment issued herein, and all proceedings had thereunder should not be quashed, set aside, and for nothing holden; and it is further

ORDERED, that pending the return of this rule to show cause, and the entry of an order thereon, the plaintiff, his agents, servants and attorneys, be and they each are hereby restrained and enjoined from taking any proceedings thereunder; and it is further

ORDERED, that the plaintiff, and the defendant herein, have leave to take depositions to be used upon the argument of the within Rule to Show Cause, upon five days' notice to the other party; and it is further

ORDERED, that upon five days' notice, the plaintiff serve upon the defendant, or his attorney, at the expense of the defendant, a photostatic copy of the bond referred to in the notice of Lis Pendens filed prior to the institution of this suit; and it is further

ORDERED, that service of this rule be made by serving a copy thereof, and copy of the affidavit upon which it is based (both of which may be certified by the attorney of the defendant) upon the plaintiff or his attorney, within ten days from the date hereof.

ENTER: C. W. Parker, Justice of the New Jersey Supreme Court.

On Motion of

SAUL J. ZUCKER,

Attorney for Defendant,

Appearing Specially.

Exhibit D. 2.

NEW JERSEY SUPREME COURT.

EDWARD E. THEURICH, surviving executor of the Estate of Edward Theurich, deceased, *Plaintiff*, *vs.* ELLIS SLATOFF, *Defendant.*	*In Attachment. Affidavit.*

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

ELLIS SLATOFF, being duly sworn, on his oath, according to law, deposes and says:

I am the defendant in the above entitled cause, and reside at 310 W. 79th Street, New York City.

The obligation which is the basis of the within attachment suit, as appears from the notice of Lis Pendens, filed in the Office of the Register of Essex County, on April 30, 1936, is a bond, dated September 1, 1925, in the penal sum of $30,000.00, executed by Newark Cleaning and Dye Works, (a corporation), Morris Colton, Samuel Greene, and myself, to Edward S. Theurich, and Augusta M. Theurich, executor and executrix of the Estate of Edward Theurich, deceased, to additionally secure the payment of which Newark Cleaning and Dye Works executed to the aforesaid obligees a mortgage of even date with said bond, which was recorded in the Essex County Register's Office, in Mortgage Book U-55, on page 91.

Exhibit D. 2.

The notice of Lis Pendens referred to above, provides as follows:

> "* * *, the general object of said suit is to recover the amount due on a certain bond bearing date September 1, 1925, executed by Newark Cleaning and Dye Works, Morris Colton, Samuel Greene, and Ellis Slatoff, to Edward E. Theurich, and Augusta M. Theurich, executor and executrix of the Estate of Edward Theurich, deceased, in the penal sum of $30,000.00, to secure the payment of which bond, said Newark Cleaning and Dye Works executed * * * a mortgage of even date with said bond, which bond was recorded in the Register's Office of Essex County, in Book U-55 of Mortgages for said County, on page 91."

Of all the persons executing the aforesaid bond, I alone am the only non-resident. Newark Cleaning and Dye Works is a corporation organized and existing under the laws of the State of New Jersey, and has as its registered agent, according to the records on file in the office of the Secretary of State, Samuel Gross, 20 Broome street, in the City of Newark, County of Essex, and State of New Jersey.

Samuel Greene, at the time of the institution of the within proceedings, and ever since, has been and is a resident of Montclair, New Jersey, and resides at 102 Cooper Avenue, in that municipality.

Morris Colton, at the time of the institution of the within proceedings, and ever since, has been and is a resident of Newark, New Jersey, and resides at 1167 Bergen Street, in that city.

Exhibit D. 3.

There are no applying creditors.

I, appearing specially, therefore pray that a rule issue, directing the plaintiff to show cause why the writ of attachment should not be quashed, since some of the joint obligors are residents, and further that I be permitted to take depositions to be used upon the return of the rule, and that the plaintiff be required to furnish defendant or his attorney with a photostatic copy of the bond, at the defendant's expense, prior to the return day.

ELLIS SLATOFF.

Subscribed and sworn to before me,
this 4th day of September, 1936.
WINFRED B. JAMES,
A Notary Public of Bronx County,
New York.

EXHIBIT D. 3.

ARTICLES OF AGREEMENT

made the sixteenth day of May in the year of Our Lord One Thousand Nine Hundred Twenty-Three

BETWEEN

AUGUSTA M. THEURICH, Widow

of the City of Newark in the County of Essex and State of New Jersey party of the first part;

AND

SAMUEL GREENE

of the City of Newark in the County of Essex and State of New Jersey, party of the second part;

WITNESSETH, That the said party of the first part, for and in consideration of the sum of

Exhibit D. 3.

TWENTY THOUSAND DOLLARS ($20000.00) to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that she, the said party of the first part, will well and sufficiently convey to the said party of the second part, his heirs and assigns, by Deed of Warranty, free and clear of all encumbrances, except as hereinafter stated AND subject to the Newark Zoning Ordinance. on the first day of July, 1924 hereof, all that lot , tract , or parcel , of land and premises, hereinafter particularly described situate, lying and being in the City of Newark in the County of Essex State of New Jersey

Being premises commonly known and designated as 14-16-18 Broome Street, Newark, New Jersey, it being intended hereby to convey all the premises of the party of the First Part in and about Broome Street south of South Orange Avenue.

This conveyance is to be made subject to the restrictions of record, if any.

It is understood and agreed that the scale is not to go with this sale and that the party of the First Part shall have the right and privilege of removing same at any time before the closing of title.

And the said Samuel Green for his heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, her heirs, executors, administrators and assigns, that he, the said party of the second part,

Exhibit D. 3.

will pay and satisfy, or cause to be paid and satisfied, unto the said party of the first part, the said sum of

TWENTY THOUSAND DOLLARS ($20000.00)

as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

On Execution of this agreement for which this is also a receipt.....$ 1000.00

On delivery of deed, cash.....$ 9000.00

On first Bond and Mortgage, same containing usual interest, tax, assessment, insurance and installment default clauses, and an agreement not to claim credit on the interest payable on bond and mortgage, by reason of any tax assessed, or to be assessed against the premises, with interest at 6% payable semi-annually for one year.....$10000.00

said bond and mortgage to be drawn up by the attorneys of the vendor at the expense of the vendee.

By assuming the mortgage at present a lien on the premises, and paying the same according to the terms thereof .....$

This Contract is entered into upon the knowledge of the parties as to the value of the land and whatever buildings are upon the same, and not on any representations made as to character or quality.

And it is further Agreed by the parties to these presents, that the said party of the sec-

Exhibit D. 3.

ond part, his heirs and assigns, may enter into and upon the said land and premises on the first day of July, 1924, and from thence take the rents, issues and profits to his and their use.

And it is further Agreed by the parties hereto, that the said deed of Warranty shall be delivered and received at office of Fast & Fast, 9-15 Clinton Street, Newark, N. J. between the hours of nine in the forenoon and five o'clock in the after on the said first day of July, 1924.

The rents of said premises, insurance premiums, water rents, taxes, and interest on Mortgage, if any, shall be adjusted, apportioned and allowed as of the day of delivery of said deed.

Gas and electric fixtures and chandeliers, carpets, linoleum, mats and matting in halls, ash cans and heating apparatus, if any, are included in this sale.

The risk of loss or damage to said premises by fire or otherwise until the delivery of said deed is assumed by the party of the first part.

In case the premises shall suffer injury beyond the ordinary wear and tear, the party of the first part, shall repair the damage before the date set for delivery of said deed or make an appropriate deduction from the purchase price herein stated.

It is understood and agreed that the buildings upon said premises are all within the boundary lines of the property as described in the deed therefore, and that there are no encroachments thereon.

Exhibit D. 3.

It is expressly understood and agreed that the title to the land and premises hereby agreed to be conveyed is not derived from any proceedings or any Act for the Sale of Land for non-payment of the municipal taxes or assessments.

And for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, executors and administrators; and they hereby agree to pay, upon failure to perform the same, the sum of which they hereby fix and settle as liquidated demages therefor.

In Witness Whereof, the said parties have hereunto interchangeably set their hands and seals the day and year first above mentioned.

SAMUEL GREENE

Signed, Sealed and Delivered }
In the Presence of }

As to Samuel Greene
Leser Oury

To be argued by
Mr. Isadore H. Colton.

New Jersey Court of Errors and Appeals

Between

Ellis Slatoff,
Complainant-Respondent,

and

Edward E. Theurich, surviving executor of the Estate of Edward Theurich, dec'd.,
Defendant-Appellant.

BRIEF ON BEHALF OF DEFENDANT-APPELLANT.

(Italics ours except as otherwise noted.)

Brief Summary of Facts.

This is an appeal from a final decree in chancery entered the 19th day of September, 1938, on advice of the Hon. Alfred A. Stein, Vice Chancellor (S. C., p. 84).

On May 16, 1923, one, Samuel Greene, entered into a contract for the purchase of property commonly known as Nos. 14-16-18 Broome Street, Newark, N. J., with Augusta M. Theurich, widow (Exhibit D-3, S. C., p. 112). By the terms of this contract Samuel Greene agreed to pay $20,000 for the property by the payment of $10,000 cash and $10,000 by the execution of a purchase money bond and mortgage. He was unable to fulfill the terms

of his contract and a new arrangement was entered into whereby the vendor conveyed the premises in question to the Newark Cleaning & Dye Works, Inc., a corporation of New Jersey, and took back a purchase money bond and mortgage for $15,000 instead of $10,000 as called for by the contract. The bond appears in the state of the case on page 7 and the mortgage on page 96. The bond was executed jointly by the Newark Cleaning & Dye Works, Inc., Samuel Greene, Ellis Slatoff and Morris Colton. The mortgage, of course, was executed by the Newark Cleaning & Dye Works, Inc. only.

A default arose in the payment of the money due under the bond and foreclosure proceedings were instituted, resulting in a deficiency. The Newark Cleaning & Dye Works, Inc., Samuel Greene and Morris Colton settled their liability for deficiency by entering into an agreement with the appellant herein, which agreement was marked Exhibit "C-4" and appears on page 11 of the state of the case.

The appellant, not having received full satisfaction of his claim for deficiency, instituted suit by attachment in the New Jersey Supreme Court against the respondent, Ellis Slatoff, who was a resident of the State of New York at that time, and in said proceedings attached certain shares of stock of a New Jersey corporation.

At the same time appellant instituted an action in the Supreme Court of the State of New York for the deficiency against said Ellis Slatoff.

The respondent endeavored to quash the writ of attachment in the New Jersey Supreme Court but failed (see opinion of Mr. Justice Parker, Exhibit D-1, S. C., p. 104).

Thereafter respondent filed a bill in the Court of Chancery in which he charged that he was in fact a surety on the bond, Exhibit C-2, and that by reason of the nature of the transaction, the

appellant was charged with the knowledge of a suretyship and that appellant's adjustment of his claim with the Newark Cleaning & Dye Works, Inc., Samuel Greene and Morris Colton, as evidenced by agreement, Exhibit C-4, in effect, discharged him as surety from any liability.

The cause went to final hearing and the Hon. Alfred A. Stein, Vice Chancellor, entered a decree dated September 21, 1937 (S. C., p. 72), in which he dismissed respondent's bill of complaint purely on legal grounds without determining the factual issues raised. In that opinion the Vice Chancellor assumed, but solely for the purpose of the opinion, that the allegations in the bill were true.

The respondent appealed from said final decree to this court and this court reversed the decree of the Court of Chancery of September 21, 1937 (see opinion of this court, S. C., p. 78) and remitted the cause to the Court of Chancery for the purpose of having that court determine, for the first time, the factual issues raised by the pleadings.

The Vice Chancellor, on receipt of the remittitur, without further hearing entered the final decree of September 19, 1938.

It is from this final decree that this appeal is taken.

Summary of Points to Be Argued.

It is fundamental that respondent's bill cannot be sustained unless he could establish to the satisfaction of the court two facts:

1. That respondent was in fact a surety on the bond notwithstanding that he appeared thereon as a co-obligor.

2. That appellant had knowledge of the fact that respondent was a surety.

It is therefore readily seen that in order for respondent to sustain his charge that he was a surety in fact, it would be necessary for him to go into the factual history of the entire transaction which resulted in his executing the bond in question and all evidential facts tending to show his connection with the transaction from the very beginning and right down through the culmination of the transaction were clearly admissible.

By the same logic and reasoning, if the respondent were permitted to show all the facts and surrounding circumstances from the beginning of the transaction down to its completion, appellant had the same right to introduce into evidence such facts and circumstances which existed at the time of the commencement of the transaction right down to the completion thereof in order to rebut respondent's proof. In other words, it became a simple question of fact, namely, was the respondent, Ellis Slatoff, a surety in this transaction, and every piece of evidence that either of the parties could have produced which might have shed light on this question of fact should have been admitted.

At the final hearing of this cause the Vice Chancellor did not permit appellant to introduce any evidence which preceded, in point of time, the delivery of the deed and purchase money bond and mortgage. It is this rejection of perfect evidence which constitutes one of the grounds of appeal.

Assuming that the respondent convinced the court that he was surety, it was still encumbent upon him to prove that we knew of his suretyship. As to charging us with this knowledge, the respondent introduced no evidence, except the fact, which was admitted by us, that Messrs. Greene, Slatoff and Colton were directors and officers of the Newark Cleaning & Dye Works, Inc.

at the time of the execution of the bond and mortgage in question. Respondent relied entirely on the deed, the bond and the mortgage as charging us with constructive, as distinguished from actual knowledge. As to this phase of the case, we will contend that the evidence adduced by complainant is insufficient to thus charge us constructively with knowledge of respondent's surety.

The third question to be determined by this court is whether or not appellant was entitled to introduce parol evidence of conversations had between the parties to the agreement, Exhibit "C-4", the purpose of which evidence was to show that at the time the appellant executed and delivered the agreement "C-4" he had verbally agreed with the Newark Cleaning & Dye Works, Inc. and Messrs. Greene and Colton that he reserved the right to institute suit against the respondent Ellis Slatoff for the balance of the deficiency due the appellant.

The Vice Chancellor refused to receive this evidence on the ground that it was an attempt to violate the parol evidence rule. We took and now take the position that as the respondent, Ellis Slatoff, was a stranger to that agreement, the parol evidence rule was not applicable.

Summarizing the issues to be argued, we have two instances of rejection of evidence offered by appellant, which rejections we contend were improper and harmful and a finding by the court below of constructive knowledge on our part of respondent's suretyship, which we contend the Vice Chancellor had no right to make and in connection with which we further contend that he made it on evidence entirely insufficient to justify such finding.

The matter will therefore be argued under the aforesaid three points.

POINT I.

The rejection of all evidence of the agreement, conversations and transactions between the appellant and Messrs. Greene, Slatoff and Colton, prior to September 1, 1925, the date of the deed, bond and mortgage was harmful error.

Under the adjudicated cases in this state one who signs an instrument as principal, even though he is in fact a surety, cannot urge his suretyship in the courts of law but is limited to asserting that equity only in a court of chancery.

Anthony v. *Fritts,* 45 N. J. L. 1, Supreme Court 1883;
Shute v. *Taylor,* 61 N. J. L. 256, Court of Errors and Appeals, 1897.

The surety is relegated to chancery for relief, on the theory that in that court one can always prove the true capacity in which he appears on any instrument. He therefore is permitted to testify to all facts and circumstances which preceded, in point of time, his signing of the instrument in question. In other words, in equity, the door is opened for him to prove the entire history of the transaction. Once this door is opened to the complainant, it remains open for the defendant, who, by the same token, is permitted to bring in all the evidence that he possesses which might shed light on the question of the fact of that person's suretyship.

In the proceedings in the court below, the door was opened for the present respondent, but was closed in the face of this appellant. This "closing of the door" is found on page 65 of the state of the case, where the appellant sought to introduce

into evidence the contract, Exhibit "D-3" dated May 16th, 1923.

"*Examination by Mr. Colton*:

Q. Mr. Green, I show you the contract. Is that your signature?

The Court: 'I show you a contract.'

Mr. Colton: This is an agreement for the sale of the property which precedes the deed which was offered in evidence.

The Court: Go on.

A. It is.

Mr. Colton: I offer in evidence the contract between Theurich and Samuel Green.

Mr. Zucker: I object to the offer in evidence of this agreement for a number of reasons: First, it is an agreement signed only by this witness and is not entered into——

The Court: Let me know the purpose of the offer.

Mr. Colton: If this Court will look to the deed to determine Mr. Slatoff's capacity, then we have a right to explain the transaction. If your Honor please, this property was originally bought by Mr. Green. It calls for a payment of $10,000 cash and $10,000 purchase money mortgage from Mr. Green. Mr. Green was unable to raise the funds and sought to offer $5,000 cash and $15,000 purchase money bond and mortgage. It was refused, and, after negotiation, they agreed to take $5,000 cash and $15,000 bond of the Newark Cleaning and Dye Works, Green, Colton and Slatoff.

The Court: The deed being a final contract between the parties?

Mr. Colton: Yes. This explains the transaction.

The Court: The final transaction was the deed? Right?

Mr. Colton: Yes.

The Court: Do you object?

Mr. Zucker: Yes.

The Court: Sustained."

A reading of the court's ruling on that offer will conclusively disclose that the court barred the appellant from all evidence which preceded the deed in point of time. The court did this based on the theory of law enunciated by those law cases which hold that all prior dealings are merged in a deed given in consummation of a contract unless expressly reserved.

> *Latt* v. *Schwehm,* 162 Atl. 184 (not reported in any state report), Supreme Court;
> *Dieckman* v. *Walser,* 114 N. J. Eq. 382, 168 Atl. 582, Court of Errors and Appeals.

The court apparently overlooked the fact that the doctrine enunciated by the foregoing cases was not applicable in a suit of the nature of the present one.

The correct procedure which the court should have adopted in this case was that adopted by Vice Chancellor Bigelow in the case of

> *Reinfeld* v. *Fidelity Union Trust Company,* 123 N. J. Eq. 428, 198 Atl. 220.

Facts: This suit was originated by the complainants filing a bill in the court of chancery to enjoin the defendant from prosecuting an action at law for deficiency on a mortgage bond. The complainants asserted that they were sureties and that the term of the bond was extended without their consent or knowledge, and that they thereby were released from liability. It is interesting to note in this case Vice Chancellor Bigelow's statement in the second paragraph of this opinion which reads as follows:

> "The bond bears date March 18, 1926, but my statement of facts must begin three years

> earlier. In 1923 the complainants and two others decided to buy at foreclosure sale property known as #156 Market Street, Newark. * * *''

Vice Chancellor Bigelow thereafter proceeded to go into all the facts; not only those which preceded the execution and delivery of the bond in question, but even went into the facts which occurred after the bond was given.

Vice Chancellor Bigelow similarly explored prior facts in the case of

> *Burack* vs. *Meyers,* 187 Atl. 767, 121 N. J. Eq. 135 (Chancery).

It can therefore readily be seen that the trial court fell into error when he said (S. C., p. 65, fol. 19): ''The deed being a final contract between the parties?'' And when he next said: ''The final transaction was a deed?''

In view of the court's ruling that anything that preceded the deed was not admissible, notwithstanding that counsel sought to explain to the court the purpose of his offer (see S. C., p. 65, fols. 1-18), there was no use in our putting on other witnesses to testify to all the negotiations which intervened from the time the contract Exhibit ''D-3'' was entered into until the date of the consummation of the deal.

It is to be particularly noted that the transaction was not consummated in accordance with the contract as written, in the following respects:

a. The total cash called for by the contract, Exhibit ''D-3'', was $10,000. The actual cash paid was $5,000.

b. The total amount of the purchase money bond and mortgage was to be $10,000. The actual purchase money bond and mortgage was $15,000.

c. The purchaser was to be Samuel Greene. The deed was actually delivered to Newark Cleaning & Dye Works, Inc.

Now all the facts and circumstances which prompted the change in the terms of the contract were barred from evidence. We might have established that the consideration for the change in the terms of the contract was a statement made by Slatoff, the respondent, that he would bind himself as principal and not as surety. We might have established other facts and circumstances which would show that in fact Slatoff and Messrs. Greene and Colton were principals and that the corporation was surety. But all this evidence was barred and we respectfully submit, improperly so.

May we respectfully call the court's attention to an error on page 60, folio 13 of the state of the case, where there appears the following: "(contract above referred to is received and marked Exhibit 'D-3')." The only ruling of the court which preceded this comment referred to an offer which counsel made to put into evidence the two memoranda filed by Mr. Justice Parker in the Supreme Court proceedings. This offer appears on page 57 of the state of the case, folio 41.

The contract, marked in the state of the case Exhibit "D-3" was never allowed in evidence and respondent's objection to it was sustained, as appears in the state of the case, page 65, folio 28. What happened was that the contract marked Exhibit "D-3" really should have been marked for identification.

We therefore submit that this evidence was of such importance as to make the error harmful and to justify a reversal of the decree.

POINT II.

There was no evidence adduced by the respondent on which the court could properly find as a fact that appellant had either actual or constructive knowledge of respondent's surety.

As stated preliminarily, assuming that Slatoff, the respondent, was in fact a surety, he still would not be entitled to maintain his bill unless he proved that the appellant had knowledge of that fact. The burden of proof is upon the surety to show the knowledge of the creditor.

In *Young* v. *Bell,* Court of Chancery 1898, 41 Atl. 226 (not reported in any state report), the court said:

> "But, to raise an equity in favor of the surety in respect to third persons, it is essential that such persons should have had notice of the existence of the relation of suretyship. Whether the original relation of joint debtors is afterwards turned into that of principal and surety, there should be clear and *convincing* evidence that the creditor was *notified* of the change, before he is deprived of his original security by reason of his lenience."

And so in 50 C. J., page 22, paragraph 24:

> "In order that the surety may occupy that position and avail himself of the rights, defenses and remedies of a surety as against the creditor, the fact of suretyship must be known to the creditor; otherwise, the surety may be held liable as principal obligor. If the fact of suretyship appears upon the face of the contract it is sufficient notice to the creditor. But if it does not so appear, notice or the knowledge of it must be *clearly and satisfactorily* brought home to him by the surety, to enable the latter to avail himself

> of the protection which the law affords to sureties, the burden being on the surety to show the knowledge or notice of the relation to the creditor."
>
> *Kaighn* v. *Fuller,* 14 N. J. Eq. 419, Court of Chancery.

The bill in this case was filed by the surety upon the ground that the creditor, having given time to the principal debtor for payment of the deed without the knowledge or consent of the surety, has discharged the surety from liability. The court said:

> "The bond is in the usual form. There is nothing upon its face to indicate the existence of the suretyship. It is encumbent therefore upon the surety, in order to entitle himself to exemption from his liability as an obligor, to show that the fact of the suretyship was *communicated* to the creditor; for, as the privilege of the surety is a mere equity, it can only be binding on those who have notice of its existence."

The respondent throughout the handling of this cause seems to have disregarded this very important burden that was his. In the original bill filed (S. C., p. 1) he failed to allege our knowledge of his alleged suretyship and on our motion, the bill was dismissed with leave to amend (S. C., p. 21). He thereafter amended his bill (S. C., p. 23). But at the hearing he put in no evidence on this question other than that which was stipulated in the agreed state of facts (S. C., p. 39). All that was stipulated that could possibly have a bearing on this question of knowledge was that Messrs. Slatoff, Greene and Colton were directors and officers of the Newark Cleaning & Dye Works, Inc.

It is very interesting to note that the Court of Chancery in its final decree, from which this ap-

peal is being taken, fails to make any finding of fact on this all important question and said final decree (S. C., p. 84) is entirely devoid of any reference to our knowledge of the respondent's alleged suretyship.

As to this point, the respondent stakes his entire case on that part of his amended bill reading as follows:

> "That by the delivery of the deed referred to in paragraph 2 of the bill of complaint, and the acceptance of the *mortgage* referred to in paragraph 3 of the bill of complaint, defendant was and is chargeable in law, with constructive knowledge that Newark Cleaning & Dye Works, Inc., a corporation, was the principal obligor, and complainant, Ellis Slatoff, Morris Colton and Samuel Greene were sureties, and only secondarily liable upon the bond referred to in paragraph 4 of the bill of complaint."

The question, therefore, is what will constitute knowledge on the part of a creditor.

The court in the case of *Kaighn* v. *Fuller* (*supra*) says it must be "communicated" to the creditor. The court in the case of *Young* v. *Bell* (*supra*) says that there should be "clear and convincing evidence that the creditor was *notified* of the change." Corpus Juris (*supra*) says:

> "The fact of suretyship must be *made known* to the creditor. * * * If the fact of suretyship appears upon the face of the contract (which is not the fact in our case), it is sufficient notice to the creditor. But if it does not so appear, notice of knowledge of it must be clearly and satisfactorily *brought home* to him by the surety. * * *"

We respectfully contend that under the foregoing cases the debtor must prove actual knowledge and cannot rely on constructive knowledge, because the debtor's position is that of one pos-

sessed of a "naked equity" of which nobody need take notice unless it is brought home or communicated to him, or unless he is notified thereof.

Assuming, however, for the purpose of this argument, that constructive knowledge would be sufficient in this cause, we again submit that we could not be charged therewith.

It is fundamental that the basic instrument of indebtedness was the bond (Exhibit C-2, S. C., p. 7) and that we can only be charged with the facts appearing in this instrument of indebtedness. An examination of it discloses that it is in the usual form and that the liability of the four parties to the bond is joint. The "condition" clause of the bond reads as follows: "The condition of the above obligation is such, that if the above bounden Newark Cleaning & Dye Works, Inc., Samuel Greene, Ellis Slatoff and Morris Colton, their heirs, executors, administrators, successors or assigns, shall well and truly pay or cause to be paid * * *."

There is nothing on the face of the bond to suggest the suretyship of anyone. To the contrary, a reading of this last mentioned clause discloses a contrary legal situation because the obligation is if all the *four* parties to the bond should pay the monies, then the bond is to become void.

The mortgage is naturally security for the bond and unless there is an ambiguity on the face of bond, recourse to an examination of the mortgage cannot be had.

Church v. *Pingry,* 165 N. J. Eq. 97, 147 Atl. 162, opinion by V. C. Buchanan, who said:

> "The question that arises, as it does in this suit is when does the creditor obtain the right to foreclose and sell the mortgaged premises. One naturally looks to the contract in that behalf. The bond being the written promise or obligation to pay, and the mortgage being given as security for such pay-

> ment, one would naturally and logically look to the bond as the evidence of the contract to pay, for the terms and condition of that contract. * * *''

We desire to call the court's attention to the paragraph of the amended bill wherein the respondent seeks to charge us with constructive knowledge. In said paragraph he states that we should have such constructive knowledge because we delivered the deed and accepted the mortgage. Nothing is said in that paragraph of the amended bill about the bond. We think the word ''bond'' was designedly left out of that allegation because the bond on its face, as was said heretofore, couldn't impose any knowledge of respondent's alleged suretyship, but on the contrary would inform us of the opposite situation. We therefore contend that the respondent can gain nothing by this allegation because said allegation cannot by any construction impose ''constructive knowledge'' on our part of the respondent's alleged suretyship.

Judge Story speaking of constructive notice, says as follows:

> ''Constructive notice is in its nature no more than evidence of notice, the presumption of which is so *violent* that the court will not even allow of its being controverted.''

This definition was approved in the Court of Chancery in the case of *Van Doren* v. *Robinson,* 16 N. J. Eq. 256 at page 261:

> ''Constructive notice is knowledge imputed on presumption, too strong to be rebutted, that the knowledge must have been communicated.'' 1 Story's Eq. Jur., par. 399.

Can it therefore be said, in view of the foregoing definitions of constructive notice, that the ap-

pellant should have had such knowledge merely because they delivered a deed to the Newark Cleaning & Dye Works, Inc. and took back a joint bond of the corporation and the three individuals, which bond was conditioned upon the four paying the money evidenced by it?

We submit that the answer must be in the negative.

If respondent, in his bill of complaint, in charging us with constructive knowledge of a suretyship, intended to argue that we were put on reasonable inquiry as a result of the delivery of the deed and acceptance of the mortgage, we respectfully submit this argument must fail.

Respondent was named as a party defendant in the proceedings in the Court of Chancery involving the foreclosure of the mortgage and the sole reason for making him a defendant was that in said bill it was charged that he had joined in the execution of the bond and as such would be liable for any deficiency.

At that point of time he could have easily asserted his suretyship, by communicating with the appellant or his solicitor by letter or even verbally, stating that he was in fact a surety and that we should guide ourselves accordingly. Instead of doing this, he stood silently by until the New Jersey Supreme Court defeated him on his motion to quash our writ of attachment and then for the first time asserted his suretyship by filing the bill in chancery.

His great delay in failing to notify us of what he contends was his suretyship on the bond, placed us in a position where our legal rights are completely endangered.

Norfolk & N. B. Hosiery Co. v. *Arnold,*
Court of Chancery of New Jersey, 49
N. J. Eq. 390—23 Atl. 514, at page 516.

> "Equity can only help the diligent. The principle laid down by Lord Camden, more than a century ago, is still the guide of the court in cases where the party seeking its aid has been guilty of great delay. He said: 'A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands where the party has slept upon his rights or acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive, and does nothing; laches and neglect are always discountenanced.' "

Of course, we also recognize that this question of knowledge is tied up with the issue raised under point 1 of this brief, and it is undoubtedly true that had the court below permitted the introduction of our evidence of conversations and negotiations from the beginning of the original transaction to its consummation, those facts would also shed light on the question of knowledge. The barring of that evidence automatically barred evidence which would have an important bearing on the question of knowledge.

We further submit that when a mere "naked equity" is asserted, the ordinary rules of constructive knowledge are not applicable and what is required of the possessor of that equity is *clear and convincing evidence* to prove knowledge or even constructive knowledge. The present appellant is a Pennsylvania farmer; the executrix, Mrs. Augusta M. Theurich, has been dead many years prior to the date of the delivery of Exhibit "C-4". Can it be said that this layman acting as an executor of an estate should have had knowledge that a man who signed an obligation as principal might in equity be a surety? It is true that ignorance of the law is no excuse, but that maxim is not applicable on a question of notice of the

existence of a "naked equity". Where the burden is on one to assert and prove notice, it strikes us that even if the creditor were negligent in not ascertaining the facts as they truly existed, it would not be sufficient to bar him from his rights. It would have to amount to *wilful* ignorance, at least, to bar him from his rights.

As between the respondent withholding his knowledge of his own suretyship from the appellant in a manner suggesting "lying in wait" and appellant's innocent conduct in dealing with the parties as the legal instruments showed them to be and as his ordinary layman's knowledge told him they were, we respectfully submit that the Court of Chancery should not have aided the respondent at the expense of the innocent appellant.

As to this second point, we therefore respectfully submit:

1. That the burden of proof was on the respondent to prove that we had knowledge of his alleged suretyship.

2. That he has not sustained the burden of proof.

3. That the instrument of indebtedness does not on its face disclose respondent's suretyship, but on the contrary discloses him to be a principal.

4. That therefore actual knowledge must be proven.

5. That no actual knowledge was proven or attempted to be proven.

We respectfully submit by reason of the foregoing, the court below erred in entering its decree against the appellant.

POINT III.

The rejected evidence concerning Exhibit "C-4" should have been admitted in support of the first separate defense of our answer.

We attempted to introduce the aforesaid evidence to substantiate the First Separate Defense of our Answer (S. C., p. 31).

This First Separate Defense was based on the fundamental rule "that a discharge by a creditor will not discharge the known surety where the creditor reserves his rights against such surety."

Williston in his work on Contracts Vol. 2 page 2229, section 1230 says as follows:

> "It seems well settled that whether the creditor releases the principal debtor or merely gives an extension of time, he may by express reservation of rights against the surety preserve his claim against the latter. If the principal is in terms released, the agreement is construed in view of the reservation of rights as merely a covenant not to sue and the surety continues liable. If time is given, a reservation of rights against the surety is similarly effective.
>
> * * * * * *
>
> The common reasoning to support the rule is that the reservation is effectual upon this principle—first, that it rebuts the implication that the surety was meant to be discharged, which is one of the reasons why the surety is ordinarily exonerated by such a transaction; and, secondly, that it prevents the rights of the surety against the debtor being impaired, the injury to such rights being the other reason; for the debtor cannot complain if the instant afterwards the surety enforces those

> rights against him, and his consent that the creditor shall have recourse against the surety, is, impliedly, a consent that the surety shall have recourse against him."

In the 1936 Revision of Williston on Contracts, Volume 2, page 1002, the author, discussing the effect of covenants and qualified releases where a co-debtor is a surety, says as follows:

> "It has also been established that the surety cannot claim exemption if the agreement with the principal debtor reserves to the surety all rights of indemnification to which he is entitled, *and this is the legal effect of the agreement which reserves to the creditor a right against the surety,* as well as of an agreement which in terms reserves the surety's rights against the principal debtor."

50 Corpus Juris, page 116, section 196, dealing with the identical subject matters reads as follows:

> "A transaction between the principal and the creditor or obligee, which otherwise would operate to discharge a surety, will not, as a general rule, have that effect if the creditor or obligee reserves all rights against the surety, or reserves the right to sue the principal, at the request of the surety, the effect of such reservation being to make the agreement with the principal conditional upon the consent of the surety."

50 Corpus Juris, page 183, section 302, reads as follows:

> "The general rule is that the release of the principal debtor, without the consent of the surety, releases the surety, as where the release arises out of a composition agreement,

> or a covenant not to sue, or a substitution of another for the principal debtor. The surety, however, is not discharged if rights against him are reserved in the instrument of release, or it appears from the whole transaction that it was intended that the surety should remain bound."

This exception to the general rule is recognized in New Jersey.

Westervelt v. *Frech,* 33 N. J. Eq. 451.

FACTS: Complainant became the maker of a promissory note for the accommodation of the endorser, the payee of the note having knowledge of the accommodation. The payee sued on the note and obtained judgment against the maker and endorser. After obtaining judgment, the payee took notes from the endorser, some of which notes were paid and others renewed and not paid, and on those notes which were not paid, the payee of the original note, the creditor, recovered judgment. The maker of the note thereafter filed a bill in chancery to restrain the creditor from proceeding against him on the judgment, charging that he was a surety to the knowledge of the creditor, and the creditor having extended the time for payment of the judgment to the endorser who really was the principal obligor, thereby discharged him. The court held at page 456:

> "It is an established principle that where the creditor, knowing the surety to be such, without his assent, *and without reserving his rights as against him,* gives time to the principal, the surety is ipso facto discharged from his liability; and that, too, if the time be given after a judgment recovered against both upon the contract; and it is also established that

this doctrine applies where the contract is that of a maker of a negotiable promissory note made for the accommodation of the endorser. In the case in hand the firm of T. W. Frech & Co. lent to Cornelius C. Westervelt $2,500, less the discount on a promissory note of that amount, which they knew was made by the complainant without consideration and merely for the accommodation of the borrower. Having obtained judgment against both maker and endorser, the borrower, they gave the latter time without the assent or knowledge of the maker *and without reserving their right to proceed against him.* He was thereby discharged."

~~POINT III~~.

Rejection of parol evidence offered by appellant in explanation of circumstances under which the agreement "C-4" was delivered, was harmful error.

Under this point it is necessary to examine the agreement marked Exhibit "C-4" which appears as Exhibit "2" attached to the original bill on page 11 of the state of the case. It discloses that the only parties to this agreement were Newark Cleaning & Dye Works, Inc., Samuel Greene, Morris Colton and the Estate of Theurich, the present appellant.

Slatoff, the respondent, is and was a stranger to this contract. At the trial we sought to prove by parol evidence that at the time the Theurich Estate entered into this agreement with the Newark Cleaning & Dye Works, Inc., Greene and Colton, Theurich reserved his right to sue Slatoff for the balance of the deficiency claim and that such reservation was agreeable to the Newark Cleaning & Dye Works, Inc. and Messrs. Greene and Colton. This offer of proof and the ruling of the court appears on page 61 of the state of the case, folio 36 and runs to page 64, folio 24. The specific question sought to be asked and objected to was:

"Examination by Mr. Colton of Mr. Greene:

Q. Did Mr. Lipis have any conversation with you relative to Mr. Slatoff's liability? A. He did.

Q. What was that conversation?

Mr. Zucker: I object to that."

State of case, page 62, folios 6 to 11.

Mr. Zucker's objection was sustained by the court on page 63, folio 23, on the ground that it was an attempt to violate the terms of a written

instrument, and was barred by the parol evidence rule.

We respectfully submit that in this respect the court fell into error. Slatoff was not a party to the contract and that being so, the parol evidence rule was not applicable.

Shreve v. *Crosby*, 72 N. J. L. 401, 63 Atl. 333, Court of Errors and Appeals.

Facts: In this suit a certain written power of attorney was introduced in evidence and the plaintiff in the suit undertook to prove by parol certain conversations which took place between the parties named in the instrument at the time that it was drawn up and signed, for the purpose of explaining the circumstances under which the instrument was drawn and delivered. Objection was made to this evidence. Mr. Justice Pitney, speaking for the Court of Errors and Appeals on this point said:

> "We think this evidence was properly admitted. The paper did not purport to embody any contract between the parties to the suit. The rule that parol evidence will not be admitted to vary the terms of a written contract (Naumberg *v.* Young, 44 N. J. Law, 331), does not apply as between strangers to the contract, nor as between a party and a stranger. * * * The fact that it was in writing was of no special significance, save as it rendered it more convincing as evidence of the witness' former statement. Testimony of what transpired at the time the paper was signed, explanatory of its purpose, was admissible."

The very question raised under this point was considered by the U. S. Circuit Court of Appeals for the Seventh Circuit in the case of

O'Shea v. N. Y., Chicago and St. Louis Railroad Co., 105 Fed. 559.

Facts: In that case O'Shea was injured while employed by the Chicago Railroad, by being struck by a post erected by the Burlington Railroad, on whose tracks the locomotive was traveling at the time of the accident. O'Shea settled by release his claim against the Burlington Railroad for $1,200 and commenced suit against the Chicago Railroad for his injuries. This latter railroad answered that O'Shea had released the Burlington Railroad, a joint tort feasor, and that therefore it was released. As to this the court said:

> "The oral testimony allowed at the trial under objection of the defendant in error, clearly established that it was not intended by either party that the document which O'Shea was to sign should be anything more than a covenant not to sue the Burlington Railroad, that company being willing to give the sum stated in the paper for that covenant. In other words, the paper does not express the actual agreement of the parties. The question then arises whether such oral testimony was admissible. We think that it was. * * *
>
> But this rule (parol evidence rule) as stated by Mr. Greenleaf on Evidence (section 279) is applied only in suits between the parties to the instrument, as they alone are to blame if the writing contains what was not intended, or omits that which it should have contained. It cannot affect third persons, who, if it were otherwise, might be prejudiced by things recited in the writings, contrary to the truth, through the ignorance, carelessness or fraud of the parties, and who, therefore, ought not to be precluded from proving the truth, however contradictory to the written statements of others." See also Whortman on Evidence, 1923. In a suit between a party and a stranger, neither is concluded by the contract, but either may give evidence differing from it. Lee *v.* Adsid, 37 N. Y. 78; McMaster *v.* Ins. Co., 55 N. Y. 222, 88 N. Y. 591, 152 N. Y. 20, 88 Fed. 207.

The question then arises whether the defendant in error here was a 'stranger' to this agreement in the sense in which the term is employed in the rule. It is true that the subject matter upon which the agreement operated was the joint wrong of the two railway companies, and the defendant in error could avail itself of an accord and satisfaction or release between O'Shea and the Burlington. To this extent it may be said not to be a stranger to the matter, *but it was no party of the contract and was not bound by it.* If the writing had been simply a covenant not to sue the Burlington, would it not have been open to the defendant in error to prove that the paper did not express the truth; that what purported to be merely a covenant not to sue was in fact an accord and satisfaction for the injury? The estoppel must be mutual and both must be bound or neither."

A case *exactly* on point with ours is that of

Wyke v. *Rogers,* 50 Eng. Chancery 312, 42 Reprint 609.

The facts are sufficiently disclosed in the opinion by Lord Chancellor Lord St. Leonard.

"In this case the plaintiff entered into a bond as surety for L400 of which L120 have been paid, and L280 remain due. A promissory note was given by the principal debtor to the creditor for the latter sum, payable at two months.

The effect of this transaction at law was in no manner to impeach the bond; but the question might arise whether the promissory note did not of necessity, in the absence of any agreement being proved to the contrary, operate as a discharge of the surety; that is to say, whether it was simply a collateral security, or whether it was not a security which gave time to the principal debtor.

All the cases prove that, where an instrument is taken which might otherwise operate as a discharge of the surety, there will be no discharge if the remedies against the surety

are preserved. In the present case, an action was brought on the bond, to which the defendant, the plaintiff here, had no defence, he therefore comes to equity for relief. This court, however, cannot interfere against a legal obligation, unless an equitable case is made out; and it must therefore be shown that the transaction in question released the plaintiff from the obligation. No such case has been attempted to be made out, and I give no opinion upon it; because it is perfectly clear in law that an agreement which would of itself operate to release the surety shall not have that effect, may be proved by parol evidence.

It was said at one time, in the course of the argument, that parol evidence could not be admitted to impeach the promissory note. This, however, was not the purpose for which the evidence was sought to be introduced; it was only to prevent the collateral operation of that note by showing that it was not intended to prevent proceeding on the bond, and thus to release the surety. If the evidence had not been admissible, the plaintiff ought not to have allowed the case to go to the master; but such was the course taken, and a great deal of evidence has in consequence been gone into, the result of which is clearly against the plaintiff. The defendant, having sworn in her answer that there was an agreement that the promissory note should not affect her security, the plaintiff said that that answer was not to be relied on, and the court therefore directed the inquiry. The result has been to prove, in the most distinct manner, that it was understood between the parties that the defendant's remedy on the bond was not to be affected; so that even if I was to reverse the decree, nothing more could be done than has been done already.

Cases were cited to show that the reservation of the rights against the surety ought to have appeared on the face of the promissory note; they, however, prove no such thing. They were cases of regular deeds or written

instruments; and the court held that their effect could not be taken away by a mere parol agreement. In the present case the finding of the master is plain; it is, in effect, that there was a general dealing and a general understanding which, in point of law, amounts to a stipulation that prevented the promissory note in equity from having the effect of discharging the surety. What, then, a judge of this court has to decide is, whether or not there was in truth such an agreement as the defendant contends for; the evidence shows that there was; and the master's report appears to me to be right.

I must, therefore, dismiss the appeal, and with costs."

50 C. J. 116, paragraph 196, holds similarly:

"A reservation cannot be implied, but must be express, and clear, although not necessarily formal. It cannot be made at a time later than that of the transaction which discharged the surety. The reservation may be oral, but if the transaction between the creditor and the principal is evidenced in writing, and the effect of admitting an oral reservation would be to vary the written one, evidence of the oral reservation is inadmissible."

It is clear therefore that the foregoing citations represent ample authority for the acceptance by the court of our parol evidence offered. In attempting to prove the parol reservation we were not attempting to vary the terms of the agreement "C-4". That agreement is silent as to Slatoff. We were attempting to prove a verbal agreement on a subject matter not covered by the contract, and consequently, we were not violating the parol evidence rule.

There was another theory on which our evidence was admissible and that is the rule in equity which permits parol evidence to be accepted for the purpose of proving the intention of the parties in entering into the written contract.

This rule was best exemplified in the case of *O'Brien* v. *Paterson Brewing & Malting Co.*, 61 Atl. 437, 69 N. J. Eq. 117.

Facts: Complainant executed and delivered a note and chattel mortgage to the defendant, which instruments were full and complete legal instruments on their face. However, at the time of the delivery, it was verbally agreed between the parties that those instruments were not to be legally binding. After defendant instituted proceedings at law to enforce the legal instruments, the complainant filed a bill in chancery to restrain and the question of admissibility of the verbal agreement was the important issue. The court allowed the evidence and had this to say:

> "It has been said that the rule sustaining the sanctity of written contracts against parol evidence is as strictly maintained in equity as at law, but I cannot admit the accuracy of that statement. I have made a careful examination of the authorities upon that subject, and they do not sustain it, except in the matter of the true construction of a contract. But when we come to the inquiring into the objects and purposes of a writing equity is more liberal, and will not permit a written contract to be used for purposes for which it was not intended."

And thus we see that this proffered evidence was admissible on the further ground that we had a right to show that there was never an intention to release Slatoff and to show for what purpose the agreement, Exhibit "C-4", was drawn up and delivered. To bar such evidence would result, as it has in this case, in permitting the holder of a mere naked equity (the respondent herein) to defeat appellant's just claim by the use of an instrument in a manner never intended by the parties to it.

There is another legal justification for the admission of this parol evidence. The true consideration for any written contract can always be shown by parol.

Dieckman v. *Walser,* 168 A. 582, 114 N. J. Eq. 382, Court of Errors and Appeals.

In this case the court permitted parol evidence to prove a verbal mortgage assumption agreement by a grantee.

> "The rule permitting inquiry into the fact of payment of the consideration is designed to prevent the injustice which ofttimes results from the strict doctrine of estoppel, especially when applied to a clause merely formal, and to reach the justice of the case. Its object is to ascertain and give effect to the intention of the parties. It is grounded in reason and sound policy. Particularly in the statement of the consideration in deeds of conveyance is not the practice. A rule that would shut out all inquiry into the consideration would undoubtedly work injustice. It would give an effect to instruments of this character not intended by the parties. The injustice of its application to the instant case is manifest."

We could, with propriety, paraphrase this language of Mr. Justice Heher to the instant case and thereby show the necessity for declaring the parol evidence admissible.

> "The rule permitting inquiry into the facts of the intent and purpose of a contract is designed to prevent the injustice which ofttimes results from the strict doctrine of the parol evidence rule, and to reach the justice of the case. Its object is to ascertain and give effect to the intention of the parties. It is grounded in reason and sound policy. A rule that would shut out all inquiry into the intention and purposes of a contract would undoubtedly work an injustice. It would give

> an effect to instruments not intended by the parties. The injustice of such an application to the instant case is manifest."

The consideration for the execution and delivery of the agreement "C-4" was not only the $2,000 named therein but the willingness of the Newark Cleaning & Dye Works, Inc., and Messrs. Greene and Colton to accede to Theurich's reservation for the right to sue Slatoff. We therefore had a right to prove by parol just what the consideration was and in so doing we would not violate the parol evidence rule as it has been construed by our courts, especially in the *Dieckman* v. *Walser* case, *supra.*

As to this third point, we therefore respectfully submit that the proffered parol evidence was admissible for the following reasons:

1. It did not violate the parol evidence rule because the respondent was not a party to the contract "C-4" but was in fact a stranger thereto.

2. We had a right to show the intentions and purposes of the parties to the contract "C-4" at the time they executed and delivered same.

3. We had a right to show, by parol, the full consideration for the execution and delivery of the agreement "C-4."

Wherefore, by reason of the foregoing, we respectfully submit that the decree of the Court of Chancery should be reversed with costs.

Sholem Lipis,
Solicitor for Defendant-Appellant.

Isadore H. Colton,
Of Counsel.

New Jersey Court of Errors and Appeals

Between

ELLIS SLATOFF,
Complainant-Respondent,

and

EDWARD E. THEURICH, surviving executor of the Estate of Edward Theurich, deceased,
Defendant-Appellant.

On Appeal from Chancery.

BRIEF ON BEHALF OF RESPONDENT.

(Italics ours except where otherwise stated.)

Statement.

This is the second time that this case has come before this court. The record is identical with the record on the first appeal, except for the addition of this court's opinion, the remittitur, the decree on reversal, the notice of appeal, and the petition of appeal (S. C., pp. 78-91).

> See *Slatoff* v. *Theurich*, 123 N. J. E. 593, No. 211, February, 1938 Term (S. C., p. 82).

The present appeal is from a final decree in Chancery entered September 19, 1938 on the advice of Hon. Alfred A. Stein, Vice-Chancellor granting respondent the relief prayed for in the Bill of Complaint—which was primarily to restrain mortgage deficiency suits instituted in New Jersey and New York against him by appellant (S. C., p. 84).

The basis for such relief was that upon the bond in question, to appellant's knowledge, Newark Cleaning and Dye Works, a corporation, was the principal debtor, and Slatoff, Colton and Greene were sureties,—notwithstanding all parties to the bond appeared to have signed as joint principal obligors—and a formal discharge by appellant mortgagee creditor of Newark Cleaning and Dye Works, the principal debtor, had effected a complete discharge of respondent Slatoff, the surety.

On the first appeal the present respondent appealed from a dismissal of the Bill of Complaint after final hearing. This court reversed the dismissal in an opinion by Bodine, *J.* (S. C., p. 78). That decision completely disposed of all the meritorious questions which had been raised, holding, among other things, that the compromise agreement (S. C., p. 11), discharging Newark Cleaning and Dye Works from liability on the bond, likewise discharged Slatoff, if he were a surety (S. C., p. 80, l. 40, etc.).

After the case had been remitted to the court below, the learned Vice-Chancellor, feeling that the opinion of this court disposed of all the meritorious issues, entered a final decree following the prayer in the Bill of Complaint (S. C., p. 84).

Appellant (mortgagee) now urges the following three grounds for reversal:

> 1. The rejection of all evidence of the agreement, conversations and transactions between the appellant and Messrs. Greene, Slatoff and Colton, prior to September 1, 1925, the date of the deed, bond and mortgage was harmful error.
>
> 2. There was no evidence adduced by the respondent on which the court could properly find as a fact that appellant had either actual or constructive knowledge of respondent's suretyship.

3. The rejected evidence concerning Exhibit "C-4" should have been admitted in support of the First Separate Defense of the answer.

Preliminary Argument.

Respondent maintains that after the opinion of this court on the first appeal had unequivocally settled the legal effect to be given the instrument of discharge (Ex. II, S. C., p. 11), the Chancery Court had no alternative but to sign the decree on reversal and final decree in the form in which it was actually entered.

Respondent will deal separately, *infra,* with the three principal points made by appellant in his brief, but *in limine* urges that a number of the grounds for reversal contained in the formal petition on appeal (S. C., p. 89), are without legal merit for the following reasons:

> Grounds Nos. 1, 2, and 3 merely state what the Chancery Court decreed *without specifically pointing out the judicial error complained of,* and consequently do not present any alleged error for this Court's consideration.
>
> *Booth* v. *Keegan,* (E. & A. 1932), 108 N. J. L. 538;
>
> *Coral Gables* v. *Duval,* (Sup. 1937), 118 N. J. L. 129.

> Grounds Nos. 4 and 5 merely state that the Chancery Court erred in refusing to permit a certain question to be answered, and in refusing to admit into evidence a certain document *without setting forth precisely how or why such action constituted legal error.*
>
> *Booth* v. *Keegan, (supra).*

Grounds Nos. 6 and 8 respectively state (a) that the Chancery Court erred *in failing to make a specific finding of fact* that appellant had knowledge of respondent's suretyship; and (b) that there was no adequate proof before the Chancery Court from which it could find that respondent was a surety on the bond in question. *These grounds are not argued or comprehended within the three formal grounds relied upon in appellant's brief, and consequently must be regarded as having been abandoned.*

Cleaves v. *Yeskel,* (E. & A. 1928) 104 N. J. L. 497;

Fidelity v. *Chausmer,* (E. & A. 1938) 120 N. J. L. 208.

Ground No. 9 broadly states that the Chancery Court erred in refusing to admit evidence of alleged transactions, conversations and negotiations *without specifying a precise offer of such proof, a definite ruling by the court thereon, and the judicial error committed by such ruling.* Accordingly, no legal ground for reversal is presented.

Booth v. *Keegan, (supra).*

This leaves only Ground No. 7 which states that there was *"no adequate proof"* before the Chancery Court that appellant had *knowledge* of respondent's suretyship.

It is urged therefore, that the appellant's arguments contained under Points I and III are not supported by legal grounds contained in the petition on appeal. This appeal, consequently, could properly be limited to a consideration exclusively of Point II.

Notwithstanding that appellant failed to present any legal ground for reversal in his petition on appeal as a basis for Points I and III in his brief, and without respondent waiving his right to have this court disregard the arguments therein except as contained in Point II, respondent will answer appellant's three points, because none of them are meritorious.

The real, underlying, meritorious issues were decided by this court upon the previous appeal, and the present review is wholly captious and frivolous, and appears to have been prompted by a desire to unduly prolong litigation that already has been contested for almost three years in the New Jersey Supreme Court, the New York Supreme Court, the Chancery Court and this Court.

POINT I.

The Chancery Court committed no reversible error, as argued by appellant, in excluding from the evidence Exhibit D-3.

A.

In *limine,* respondent calls the Court's attention to the fact that while this exhibit appears to have been excluded at one point (S. C., p. 65, l. 29), it was nevertheless admitted at another place in the testimony (S. C., p. 60, l. 14).

As a matter of fact, the exhibit must have been considered by the court below, since it was printed as part of the record in this court on the first appeal, and appears as part of the record on this appeal, *not as an exhibit offered and excluded, but as an admitted exhibit* (S. C., p. 112, l. 26).

B.

Assuming, but not conceding, that Exhibit "D-3" was not admitted or considered by the Chancery Court, nowhere is there stated any *legal* ground entitling such exhibit to be admitted. On the other hand, there are numerous grounds why its alleged exclusion was proper, and why such exclusion was not harmful or prejudicial.

First, on its face it was not a binding contract upon anybody, because it was signed by only one person, Samuel Greene (S. C., p. 116, l. 22), and there was no proof or tender of proof of delivery to anyone.

Second, it could not in any way be binding upon Slatoff, because he had not signed it, he was not named in it, and there was no proof or tender of proof that he had authorized it or had had anything whatever to do with it.

Third, it could not be part of the *res gestae* of the actual delivery of the bond which is the basis of all this litigation, *because the parties to, and the terms of the actual sale of the property from appellant to Newark Cleaning and Dye Works were altogether different from those set out in Exhibit "D-3".*

The exhibit referred to a sale for $10,000 cash, and a $10,000 mortgage for one year; the terms of actual sale *between different parties* were $5,000 cash and a $15,000 mortgage for six years. Therefore, there were intervening events of serious consequence which prompted the court to properly exclude the proffered instrument.

But looking broadly at the entire argument presented by appellant's first point, what could have been gained by the admission of every bit of testimony and evidence regarding conversations, transactions, and agreements preceding the deliv-

ery of the deed, bond and purchase money mortgage?

Could anything have changed respondent's suretyship created by his signature to a bond when admittedly he received no consideration therefor?

How could the Court spell out anything but a suretyship in view of the deed running to Newark Cleaning and Dye Works, *the purchase money mortgage signed only by Newark Cleaning and Dye Works,* and the bond secured thereby being signed by the corporation and its individual officers?

Appellant cites *Reinfeld* v. *Fidelity Union Trust Co.,* 123 N. J. E. 428 (Ch. 1938), and *Burack* v. *Mayers,* 121 N. J. E. 135 (Chanc. 1936), affirmed 122 N. J. E. 5, as authority for the admission of agreements, conversations, and transactions antedating the delivery of the bond in question. A reference to these decisions will quickly show that the admission of everything that appellant requested would have availed him nothing.

In the *Reinfeld* case, a corporation applied to a mortgage company for a loan of $225,000, secured by a first mortgage on real estate in Newark. The mortgage company agreed, *provided the four individuals interested in the corporation went on the bond.* They consented, and the transaction was consummated. The balance of the loan ($36,400), after discharging prior liens was paid to the corporation, and within a day or so, this sum, along with $3,600 more, was paid out as dividends to the four individual bondsmen—$10,000 each.

The issue of suretyship was one of the underlying issues in the *Reinfeld* case, and in analyzing the foregoing facts, Vice-Chancellor Bigelow said:

> "Although $36,400 of the Guaranty Company loan was very shortly distributed by

> Essex Realty Holdings, Inc., among the four stockholders, the presumption is that they received it as a dividend, and not that they took it as money borrowed by them individually from the Guaranty Company. *The individuals joined in the bond to the Guaranty Company only because of the insistence of that company that they do so. All the money loaned was used to pay off liens on the property of the borrower or else was paid directly to the borrower. The four individuals, in equity, were sureties on the bond to the Guaranty Company, and this the Guaranty Company knew.* Burack *v.* Mayers, 121 N. J. Eq. 135; *Id.* 122 N. J. Eq. 5."

Again, in deciding the *Burack* case, the same Vice-Chancellor dealt with a situation in which Harry and Ephraim Burack jointly signed a bond secured by a mortgage on Ephraim's property. The consideration was represented by a check of the mortgagee, made payable to Ephraim alone. *This latter circumstance is similar to the fact in the instant case that the deed was drawn to Newark Cleaning and Dye Works, as the sole grantee.*

In concluding that the relationship created by the foregoing circumstances established that Ephraim was the principal debtor, and Harry was a surety, Vice-Chancellor Bigelow said:

> "A bond and mortgage given at the same time in a single transaction must be construed together in the endeavor to ascertain the actual contract; the terms of each are qualified by applicable provisions of the other. Security Trust, etc. Co. *v.* Paper Board Co., 57 N. J. E. 603; Church of Sacred Heart *v.* Pingree Holding Co., 105 N. J. E. 97. The bond and mortgage before me, taken together, point rather strongly to Ephraim as the principal debtor. Another circumstance with the same trend is that the loan was made by check of Mayers payable to Eph-

raim and deposited in the latter's bank account * * * . On the whole case, I am satisfied that complainant (Harry Burack) was a surety."

Accordingly, the two cases relied upon by appellant are the very decisions which indicate that his Point I is without merit. The most that appellant could hope to establish by the allowance of the greatest latitude would be a case that could rise no greater in factual proof than what has just been related with respect to the Reinfeld and Burack decisions. In view of the terms of the deed (S. C., p. 92), the bond (S. C., p. 11), and the purchase money mortgage (S. C., p. 96), in the case at bar, no evidence of prior transactions could spell out a relationship therefrom *other than suretyship.*

This court, on the first appeal, in commenting upon the foregoing documentary facts which could not be contradicted or contraverted, said:

> *"The deed of conveyance and the bond and mortgage tend to indicate that the complainant (Slatoff), executed the bond as surety for the corporate obligor."*

In Point II herein, respondent will show how *knowledge* of respondent's suretyship was brought home to appellant, but, so far as the *existence of the suretyship* is concerned, the facts speak for themselves, and *conclusively* establish such relationship.

POINT II.

There was ample proof that appellant had knowledge of respondent's suretyship.

Respondent maintains that not only was there ample proof that appellant knew of respondent's suretyship on the bond from the moment it was

signed, but that the nature of such proof could not be contradicted or controverted, and accordingly was conclusive.

First, the bond, which was signed by a corporation and three individuals, accompanied a purchase money mortgage signed only by the corporation, and constituted part of the consideration for the purchase of real estate by the corporation alone. (See deed, S. C., p. 92.)

Second, the recitals in the executor's deed executed by appellant specifically state that *all* the consideration represented by the purchase price was paid by Newark Cleaning and Dye Works, (S. C., p. 92, ll. 20-30; S. C., p. 93, ll. 35-40).

If the consideration for the conveyance of the property to the corporation was paid by the corporation alone, how could the signature of respondent on the bond be regarded in any capacity other than surety?

In support of the contention that appellant *knew* of the suretyship from the moment the bond was delivered, respondent refers again to *Reinfeld* v. *Fidelity Union Trust Co.,* 123 N. J. E. 428, where Vice-Chancellor Bigelow considered a series of facts substantially the same as the ones in the instant case, and concluded at page 431, with the following sentence:

> "* * * The four individuals, in equity, were sureties on the bond to the Guaranty Company *and this the Guaranty Company knew.* Burack *v.* Mayers, 121 N. J. E. 135; 122 N. J. E. 5."

In both the *Reinfeld* and *Burack* cases, the Court found suretyship to exist, *and knowledge thereof possessed by the creditor.* And, in coming to that conclusion, the Court did not have any *proof of knowledge* stronger or more extensive than existed in the case at bar. The deciding

factors in these cases were the transfer of the loan proceeds to the principal debtor, and the delivery of the security for the loan solely by the principal debtor.

It is submitted, therefore, that there was both legal and factual warrant for the conclusion that Slatoff was a surety on the bond in question *to the knowledge of appellant.* It was not incumbent upon the Chancery Court to make a *specific* finding of such knowledge in the final decree. The granting of injunctive relief pursuant to the prayer in the bill presupposes, and is based upon the accepted proof that such knowledge exists.

POINT III.

The exclusion by the Chancery Court of parol evidence to contradict or contravene the discharge of Slatoff the surety, effective upon the discharge of the principal debtor, did not constitute reversible error.

The legal effect of the compromise agreement, (S. C., p. 11) was considered by this court on the first appeal. *At that time the appellant here urged throughout his brief that a reservation of his right to sue Slatoff for the deficiency was contained in the compromise agreement.* This court summarily disposed of that contention as follows:

> "It is urged, however, that the complainant was not entitled to any remedy because there was a reservation in the composition agreement of the right against the surety. *However sound this argument may be as a matter of law if the reservation of the right appeared upon the face of the document need not be considered, because as a matter of fact it does not.* The document is nothing more than a compromise of the estate's claim against the Newark Cleaning and Dye Works, Inc., and the two others."

Having failed in his attempt to establish that the reservation against Slatoff was contained in the compromise agreement itself, *appellant now claims that the reservation was oral,* and that he should have been allowed to offer proof that when the compromise agreement discharging the principal debtor was delivered, an oral agreement was made retaining the obligation alive against the surety.

It is apparent that appellant is not sure of his own position. First, believing that a reservation against Slatoff was contained in the written instrument, he urged that. Frustrated there, he now urges an oral reservation. Is appellant playing fast and loose, and is such conduct to be countenanced by this court?

But passing, for the moment, appellant's inconsistent positions, we consider the merits of appellant's argument that the parol evidence rule should *not* have excluded proof of an oral reservation against Slatoff when the compromise agreement was delivered.

The basis of the *inapplicability* of the rule, according to appellant, is that Slatoff was not a party to the agreement, and that the rule under such circumstances does not apply in favor or against strangers to the contract.

There are two answers to this contention.

First, this Court held, in the concluding paragraph of its decision on the first appeal, that the conferring of all the benefits of the statutes dealing with compromises of joint debtors *(R. S. 42:5-4* and *2:70-10)* upon the parties released,

> "does not deprive the complainant, (respondent here) of his equitable right to an injunction if in fact he was in equity a mere surety, and the debt of his principal has been composed. *Clearly, such composition impaired his rights or increased his risks.*"

(S. C., p. 81, ll. 26-31).

The effect of that doctrine is inescapable. It applies whether or not an oral reservation was proved. Just so long as the creditor discharges the principal debtor, or in any way prejudicially affects the surety's rights of subrogation or exoneration, the surety is discharged.

Second, the authorities relied upon by appellant are distinguishable on their facts, or the quotations themselves show that the general legal proposition contended for was not intended to apply to a case like the one at bar.

For instance, the entire section of appellant's brief found on pages 18a and 18b was before this court verbatim in appellant's brief on the first appeal. Consequently the references to *Williston, Corpus Juris,* and *Westervelt* v. *Frech*, 33 N. J. E. 451, do not lend any weight to appellant's argument. They were fully considered on the first appeal which was decided against appellant.

Again, *Shreve* v. *Crosby*, 72 N. J. L. 401, dealt with the purpose for which a power of attorney was delivered.

O'Shea v. *N. Y., etc. R. R. Co.,* 105 Fed. 559 is concerned with the question whether parol evidence was admissible to ascertain whether a certain document was a general release or a covenant not to sue.

In *Wyke* v. *Rogers,* (Eng.) 42 Reprint 609 the question involved was whether parol evidence was admissible to show whether the delivery of a promissory note by a principal debtor constituted an accord and satisfaction or was merely collateral security. Referring to the rule that an unambiguous, written instrument could *not* be impugned orally, the court said:

> "* * * They were cases or regular deeds or written instruments; and the court held that their effect could *not* be taken away by a mere parol agreement. * * *" (Appellant's brief, p. 23-24.)

Again, the quotation from *50 C. J. 116,* par. 196 bears out respondent's position:

> "* * * The reservation may be oral, *but if the transaction between the creditor and the principal is evidenced in writing, and the effect of admitting an oral reservation would be to vary the written one, evidence of the oral reservation is inadmissible.*"

Appellant has produced absolutely no authority holding that oral proof is admissible to show that a written discharge—such as the compromise agreement (S. C., p. 11)—is actually *not* a discharge at all. And that is exactly what appellant is urging in this case, because if the oral reservation against Slatoff were held to be enforceable, then Slatoff's right of subrogation would entitle him to sue the principal debtor on the bond, and the principal debtor under such circumstances would *not* have been discharged in the first instance.

The vicious circle just demonstrated shows how preposterous is the argument for which appellant is contending.

Appellant lastly urges under Point III that the oral reservation was admissible to show the intentions of appellant and the consideration of the transaction. A complete answer to this argument is that neither the consideration nor the intentions with which appellant executed the *unambiguous compromise agreement* were vital or essential issues in the court below.

The sole issues were:

1. the suretyship of respondent;

2. the knowledge by appellant of such suretyship;

3. the effect of the compromise agreement upon the suretyship.

All of these issues were determined adversely to appellant either in this court or in the Court of Chancery, and there was ample evidence to support such findings.

Conclusion.

For the reasons herein urged, the appeal herein should be dismissed as frivolous since all the meritorious issues here raised were finally decided and disposed of on the previous appeal, and the decree below should be affirmed.

February 1939, Term.

Respectfully submitted,

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On the Brief.

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