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BILL OF COMPLAINT.

In Chancery of New Jersey

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

Complainant, Elrae Corporation, a corporation of the State of New Jersey, respectfully shows that:

1. On December 17, 1925, complainant purchased of the Central Corporation, a corporation of the State of New Jersey, lands and premises situate in the City of Atlantic City, County of Atlantic and State of New Jersey, described as follows:

> BEGINNING at a point in the South line of Atlantic Avenue distant 90.47 feet East from the Easterly line of New York Avenue and extending thence (1) Eastwardly, along the Southerly line of Atlantic Avenue, 18.17 feet to a point in a brick party wall; thence (2) Southwardly, parallel with New York Avenue 150 feet to the Northerly line of Central Avenue; thence (3) Westwardly, parallel with Atlantic Avenue, 18.17 feet; thence (4) Northwardly, parallel with New York Avenue, 150 feet to the Southerly line of Atlantic Avenue, and the place of BEGINNING.

2. The above conveyance was made subject to a certain mortgage in the amount of $50,000, existing on said lands and premises made by Bruno Garr and Rosa, his wife, and Robert Heilig to George P. Proffatt and Katharine B. Proffatt, dated September 14, 1923, and recorded on September 17, 1923, in the office of the Clerk

of Atlantic County in Book No. 274 of Mortgages, page 297.

3. On December 4, 1925, the Second National Bank of Atlantic City, N. J., a corporation under the laws of the United States of America, and Joseph Thompson and Walter Hanstein, trading as Thompson & Hanstein, served a notice on the Central Corporation that the said mortgage was assigned by the said George P. Proffatt and Katharine B. Proffatt to Isidor Schmiedler under date of April 9, 1925, which assignment is recorded in the office of the Clerk of Atlantic County in Book of Assignments No. 73, page 106, and that the purpose of said assignment was to secure the said Second National Bank of Atlantic City, N. J., in the sum of $23,200, and the said Thompson & Hanstein in the sum of $2,000. Said notice was turned over to this complainant by the Central Corporation, and a copy thereof is annexed hereto and made a part hereof.

4. On March 19, 1926, Bankers Trust Company, a corporation of the State of New Jersey, served a notice on Cassman & Gottlieb, attorneys for this complainant, that they were the owners of the mortgage above mentioned by assignment from George P. Proffatt and Katharine B. Proffatt, which assignment is dated December 21, 1925, and recorded in the office of the Clerk of Atlantic County on December 22, 1925, and said Bankers Trust Company has demanded of this complainant that said complainant pay to it the interest due on said mortgage on March 14, 1926, in the sum of $1,500, a copy of which notice and a bill for interest covering said amount of $1,500 is annexed hereto and made a part hereof.

5. On or about April 6, 1926, said Thompson & Hanstein, attorneys for the Second National Bank of Atlantic City, N. J., served notice on Cassman & Gottlieb, attorneys of this complainant, that the Second National Bank of Atlantic City, N. J., is the owner of the mortgage hereinbefore mentioned by assignment as hereinbefore mentioned, a copy of which is annexed hereto and made a part hereof.

6. Said Bankers Trust Company still claims that it is the owner of the mortgage hereinbefore mentioned and demands that the interest in the sum of $1,500 due on March 14, 1926, be paid to it, and upon the failure to make said payment within thirty days, of said time, in accordance with the terms of said mortgage, that the said mortgage will be foreclosed for the failure to pay said interest.

7. Said Second National Bank and Thompson & Hanstein still claim that they are the owners of the mortgage hereinbefore mentioned and have warned complainant not to pay the said sum of $1,500 to anyone but them.

8. Complainant has been and still is unable to determine to which of the aforesaid claimants the sum of $1,500 rightfully belongs.

9. Complainant has always been willing and still is willing to pay the said sum of $1,500 to such person or persons as is or are lawfully entitled to receive the same and to whom said complainant can pay it in safety; and the said complainant hereby offers to pay said sum of $1,500 into court.

10. Complainant has not in any way colluded and does not in any wise collude with the said

Bankers Trust Company, Thompson & Hanstein and Second National Bank, or with any of them, respecting the aforesaid matters, and that the said complainant has not been indemnified by the said defendants or any of them, but brings this suit of complainant's own free will and to avoid being molested or injured touching the matters contained in this bill of complaint.

Complainant is without adequate remedy in the courts of law, and therefore prays:

1. That Bankers Trust Company, the Second National Bank of Atlantic City, N. J., and Joseph Thompson and Walter Hanstein, trading as Thompson & Hanstein, who are defendants in this suit, may answer this bill of complaint and each statement therein made, and may interplead and determine their rights to said sum of $1,500.

2. That the complainant may be ordered to pay said sum of $1,500 into this court.

3. That the said defendants may be enjoined and restrained from commencing or instituting any action or actions, suit or suits or other proceedings against the complainant to recover said sum of $1,500, or to foreclose the hereinbefore mentioned mortgage because of the failure of this complainant to pay said sum of $1,500 to the said defendants or any of them.

4. That the complainant, upon the payment into this court of said sum of $1,500 and upon procuring the said defendants to interplead and settle their rights to the said sum of money according to law and the practice of this court, may be ordered, adjudged and decreed to be discharged from all liability to said defendants

or any of them arising out of the transaction in this bill of complaint set forth.

5. That the complainant may be paid out of the said fund of $1,500, the complainant's costs of these proceedings.

6. That a writ of subpoena may issue commanding the said defendants to answer this bill of complaint and to abide by such decree as this court may make in the premises.

CASSMAN & GOTTLIEB,
Solicitors for and of Counsel
with Complainant.

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

HARRY GOTTLIEB, of full age, being duly sworn according to law, on his oath deposes and says: I am the assistant secretary and assistant treasurer of Elrae Corporation, the complainant in the foregoing bill, and its duly authorized agent for the purpose of making this affidavit; said bill of interpleader against the defendants has been filed by the complainant in this cause without any fraud or collusion between the said complainant and the said defendants or any of them; that said complainant has not exhibited its said bill at the request of said defendants or any of them and has not been indemnified by the said defendants or by any of them, but has exhibited its said bill with no other intention than to avoid being sued or molested by the said defendants touching the matters in the said bill of complaint contained.

HARRY GOTTLIEB.

Sworn and subscribed before me
this 10th day of April, 1926.

ELIZABETH R. POWELL,
Notary Public of N. J.

THOMPSON & HANSTEIN
Counsellors at Law
Law Building
Atlantic City, N. J.

December 4th, 1925

Central Corporation
Harry Cassman, Pres.
Law Building,
Atlantic City, N. J.

Dear Sir:—

The Central Corporation is the owner of a piece of property on the South side of Atlantic Avenue, 90.47 feet East of the East line of New York Avenue, being 18.17 feet on Atlantic Avenue and 150 feet in depth. The property is subject to a first mortgage of $50,000.00 made originally to George P. Proffatt and Catherine B. Proffatt, and Catherine B. Proffatt assigned her interest in said mortgage to George P. Proffatt, and George P. Proffatt, under date of April 3, 1925 assigned the mortgage to Isidor Schmiedler. This was for the purpose of securing through this assignment the Second National Bank of Atlantic City in the sum of $23,200 and Thompson & Hanstein in the sum of $2,000.00.

This letter is written for the purpose of giving notice to the Central Corporation that the Second National Bank and Thompson & Hanstein

have the interest as above stated in said mortgage.

Respectfully yours

THOMPSON & HANSTEIN

By Joseph Thompson

T:H

To Cassman & Gottlieb, Esquires:

Take notice that the Second National Bank of Atlantic City, N. J., is the owner of that certain mortgage made by Bruno Garr and Rosa, his wife and Robert Heilig to George P. Proffatt and Katherine B. Proffatt, dated September 14th, 1923 and recorded on September 17th, 1923 in the Atlantic County Clerk's Office in Book 274 of mortgages, page 297, covering premises in the south line of Atlantic Avenue, distant 90.47 feet east from the east line of New York Avenue, being 18.7 on Atlantic Avenue by 150 feet in depth.

THE SECOND NATIONAL BANK OF ATLANTIC CITY, N. J.

By Thompson & Hanstein
Attorneys.

BANKERS TRUST COMPANY
Atlantic City, N. J.

March 18, 1926.

Messrs. Cassman & Gottlieb
Real Estate & Law Bldg.
Atlantic City, N. J.

Gentlemen:

We are informed that you represent the owners of land and premises known as 1428 Atlantic Avenue, against which we hold mortgage $50,000.00 Robert Heilig and Bruno Garr, et ux. dated September 14, 1923 payable at any time within ten years from the date thereof, assigned to us by George P. Proffatt, et ux.

We are enclosing bill for six months interest to March 14, 1926 and would appreciate if you would place same in the hands of the present owners.

Very truly yours,

E. FORREST CRAMER,
Treasurer.

BANKERS TRUST COMPANY
Atlantic City, N. J.

March 18, 1926.

Messrs. Cassman & Gottlieb
Real Estate & Law Bldg.
Atlantic City, N. J.

Interest 6 mos. to March 14, 1926
on $50,000.00 mortgage covering
land and premises known as 1428
Atlantic Ave., Atlantic City, N. J. $1500.00
Received payment

Treasurer.

A true copy.

CASSMAN & GOTTLIEB,
Sol'rs of Complt.

ANSWER AND COUNTER-CLAIM OF BANKERS TRUST COMPANY.

IN CHANCERY OF NEW JERSEY.

Between ELRAE CORPORATION, *Complainant,* *and* BANKERS TRUST COMPANY, *et als.*, *Defendants.*	*On Bill, &c.* *Answer & Counter-Claim.*

The answer and counter-claim of Bankers Trust Company in the above-stated cause:

This defendant, answering the bill of complaint filed in the above-stated cause, says:

1. It admits the allegations contained in paragraph 1 of said bill.

2. It admits the allegations contained in paragraph 2 of said bill.

3. It neither admits nor denies the allegations contained in paragraph 3 of said bill, and leaves complainant to prove the same.

4. It admits the allegations contained in paragraph 4, and says that it is a bona fide holder of said mortgage for the full consideration of $50,000.

5. It neither admits nor denies the allegations contained in paragraph 5, and leaves complainant to prove the same.

6. It admits the allegations contained in paragraph 6.

7. It neither admits nor denies the allegations contained in paragraph 7, and leaves complainant to prove the same.

8. It neither admits nor denies the allegations contained in paragraph 8, and leaves complainant to prove the same.

9. It admits the allegations contained in paragraph 9.

10. It admits that complainant has not colluded with the Bankers Trust Company, but as to the remaining allegations contained in said paragraph, this defendant has no knowledge and leaves complainant to prove the same.

COUNTER-CLAIM.

By way of counter-claim exhibited against defendants, Second National Bank, Joseph Thompson and Walter Hanstein, it says:

1. That during the month of March, 1925, and sometime prior thereto, George P. Proffatt had been absent from the State of New Jersey, and that during his absence a proceeding in Chancery had been instituted against the Guarantee Electric Company, and a Receiver had been appointed therein.

2. That the Receiver appointed therein had instituted a proceeding in Chancery of this State, to fasten liability of the debts of said Guarantee Electric Company upon the said George P. Proffatt, and to that end, had caused to be issued an order of sequestration against the property of the said George P. Proffatt.

3. That among the other properties of George P. Proffatt sequestered, was a property situate

in Northfield, N. J., and a mortgage for $50,000, mentioned in complainant's bill of complaint.

4. That immediately upon said Proffatt's returning to Atlantic City, about the 1st of April, 1925, he had an opportunity to sell and dispose of said Northfield property, provided it could be disposed of at once.

5. That at about this time, Isador Schmeidler approached Proffatt to make some provision for securing the Second National Bank of an indebtedness to it from some of the stockholders of the Guarantee Electric Company, of which Proffatt was not one.

6. That during the conversation with said Schmeidler, Proffatt stated that if he could secure the release of the Northfield property from the sequestration, so that he could dispose of it at that time, he would be willing to guarantee the indebtedness spoken of by Schmeidler due the Second National Bank. Whereupon, Schmeidler promised and assured him, Proffatt, that if he would execute an assignment of the $50,000 mortgage, mentioned in this suit, and such other papers as were deemed necessary, that he, Schmeidler, would guarantee that said Northfield property would be released from said sequestration.

7. That thereupon, and relying upon said release, the said Proffatt executed said assignment.

8. That the said Schmeidler utterly failed to secure the release of said property from said sequestration, and by reason thereof, Proffatt lost the sale of his said property.

9. That defendant, Second National Bank, and defendant, Thompson & Hanstein, had full knowledge of the promises and assurances of the said Schmeidler touching and concerning said release from said sequestration, and also full knowledge and information of Schmeidler's failure to secure the release of said Northfield property from said sequestration, and full knowledge and information touching the failure of the consideration for said assignment prior to the date when said mortgage was presumed to have been sold by said Schmeidler and purchased by said Second National Bank.

10. That prior to the alleged sale of said mortgage by the said Schmeidler, said mortgage had been assigned by said Proffatt to defendant, Bankers Trust Company.

11. That the said Schmeidler gave notice, neither to Proffatt nor to the Bankers Trust Company of any intention upon the part of said Schmeidler to expose said mortgage to sale.

12. That the said Isador Schmeidler approached said Proffatt upon Proffatt's return to Atlantic City, at the instance of the Second National Bank, its servants and agents, and said Second National Bank, its servants and agents, colluded with the said Isador Schmeidler in inducing the said Proffatt to enter into the assignment and other papers executed by the said Proffatt to the said Schmeidler, with the fraudulent intent of subjecting Proffatt's mortgage to the payment of a debt to the Second National Bank, not from Proffatt, but from strangers, and said Schmeidler continued to collude with said Second National Bank, its servants and agents, through the entire proceed-

ings, including the sale of said mortgage, the giving of the notices given, and in failing in the giving of notices as hereinabove alleged, and in pursuance of said fraudulent and collusive intent have made the representation to the said George Proffatt hereinabove set forth.

13. That the said proceedings had been between Isador Schmeidler and George P. Proffatt, and between Isador Schmeidler and the Second National Bank, for the purpose of subjecting said mortgage property to the alleged debt of the Second National Bank, were contrary to the statute of frauds in such case made and provided, and were void.

That by reason of the matters and things aforesaid, this defendant prays:

1. That a subpoena issue to the said Second National Bank, Joseph Thompson and Walter Hanstein, commanding them to answer, without oath, the allegations in this counter-claim contained.

2. That the title to said mortgage may be adjudged and decreed to be in this defendant and said assignment may be canceled of record.

3. That the Second National Bank may be decreed to have no right, title or interest therein.

4. That this defendant may have such other and further relief in the premises as shall be agreeable to equity and good conscience.

W. LINDLEY JEFFERS,
Solicitor for and of Counsel with
Defendant, Bankers Trust Company.

STATEMENT OF SECOND NATIONAL BANK OF ATLANTIC CITY, N. J.

IN CHANCERY OF NEW JERSEY.

Between ELRAE CORPORATION, *and* BANKERS TRUST CO., *et al.*	*Statement of Second National Bank of Atlantic City, N. J.*

The statement of The Second National Bank of Atlantic City, New Jersey, in the above-entitled matter respectfully shows that:

1. On or about the 9th day of April, 1925, George P. Proffatt, being then indebted to The Second National Bank of Atlantic City, New Jersey in the sum of $23,200.00, together with the interest on $8,600.00 from April 1, 1924, to date of payment, and also being indebted to Joseph Thompson and Walter Hanstein, trading as Thompson & Hanstein in the sum of $2,000.00, and being at that time the owner of that certain mortgage made by Bruno Garr and Rosa, his wife and Robert Heilig, to George P. Proffatt and Katharine B. Proffat dated September 14, 1923, recorded September 17, 1923 in Book 274 of Mortgages, page 297, to secure the sum of $50,000 covering premises in the south line of Atlantic avenue distant 90.47 feet eastwardly from the easterly line of New York avenue, being 18.7 feet on Atlantic avenue and 150 feet in depth regular, and the one-half interest of said Katherine B. Proffatt having been assigned to the said George P. Proffatt, the said George

Statement of Second National Bank of Atlantic City, N. J.

P. Proffatt assigned said mortgage unto Isidor Schmeidler by assignment bearing that date and recorded April 23, 1925 in the Atlantic County Clerk's Office in Book 73 of Assignments of Mortgages, page 106.

2. On the said 9th day of April, 1925, the said George P. Proffatt entered into an agreement with the said Isidor Schmeidler under the terms of which the said George P. Proffatt authorized the said Isidor Schmeidler to sell or dispose of said mortgage at such time as would appear advisable to the said Isidor Schmeidler for the purpose of making the payments aforesaid, which said agreement the Second National Bank stands ready to produce when required.

3. On that same date, and as part of the consideration for the transaction aforesaid, the said Second National Bank assigned, transferred and set over unto the said Isidor Schmeidler so much of its claim against the Guarantee Electric Company, Inc. as was represented by a note of the Guarantee Electric Company, Inc. held by it in the sum of $14,600, which said Guarantee Electric Co. Inc. was at that time in the hands of a Receiver, with whom a claim for said $14,600.00 had been filed by the said Second National Bank of Atlantic City.

4. On said 9th day of April, 1925, said Isidor Schmeidler and George P. Proffatt entered into another agreement under the terms of which the said Isidor Schmeidler agreed that he would collect the dividend upon said claim so assigned to the said Isidor Schmeidler, and pay the same over to the said George P. Proffatt.

5. Subsequently and on the 5th day of April, 1926, which was the time deemed by the said

Statement of Second National Bank of Atlantic City, N. J.

Isidor Schmeidler most advisable and pursuant to due notice, the said Isidor Schmeidler offered said mortgage at public sale, and sold the same and said mortgage was on that date bought in by the said Second National Bank and was by the said Isidor Schmeidler duly assigned to it.

Wherefore, the said The Second National Bank of Atlantic City, N. J. claims that it is the owner of said mortgage and entitled to the interest due thereon.

THE SECOND NATIONAL BANK OF ATLANTIC CITY, N. J.,

By THOMPSON & HANSTEIN,
Solicitors.

SUPPLEMENTAL STATEMENT OF SECOND NATIONAL BANK.

IN CHANCERY OF NEW JERSEY.

Between ELRAE CORPORATION, *Complainant,* *and* BANKERS TRUST COMPANY, *et als.,* *Defendants.*	*On Bill, &c.* *Supplemental Statement of Second National Bank.*

The supplemental statement of the Second National Bank in the above-entitled matter, answering the allegations filed by the Bankers Trust Company, defendant, says that:

1. It denies that the Bankers Trust Company is the bona-fide holder of the mortgage in question for the full consideration of $50,000.00.

2. Said Bankers Trust Company took said mortgage with knowledge, either actual or constructive, of the prior assignment of the same unto Isidor Schmeidler, predecessor in title of the said Second National Bank, and said Isidor Schmeidler did not obtain said assignment by any fraud, but the same was freely and voluntarily made to him. Said Isidor Schmeidler did not promise the said George P. Proffatt that if he would execute an assignment of the $50,000.00, mortgage and such other papers that he, Isidor Schmeidler, would guarantee that the Northfield property would be released from the sequestration, as alleged in the allegations of

Supplemental Statement of Second National Bank.

the Bankers Trust Company. The assignment to the said Isidor Schmeidler was for a good and valuable consideration.

3. The assignment to the said Second National Bank was for a good and valuable consideration. The sale of the mortgage by the said Isidor Schmeidler was held after notice thereof had been given to the attorney of the said George P. Proffatt.

4. The allegations of the said Bankers Trust Company do not set up any legal grounds for granting it a priority over the rights of the Second National Bank in said mortgage.

5. Said Bankers Trust Company is in laches.

6. Neither the Second National Bank, nor Thompson & Hanstein, had any knowledge of any such representations as are alleged in the answer of the Bankers Trust Company, and if the same were made, they were made without any authority from the Second National Bank, or Thompson & Hanstein.

THOMPSON & HANSTEIN,
Solicitors for The Second National Bank.

AMENDMENT AND SUPPLEMENT TO STATEMENT OF SECOND NATIONAL BANK OF ATLANTIC CITY, N. J., ETC.

IN CHANCERY OF NEW JERSEY.

Between

ELRAE CORPORATION,
Complainant,
and
BANKERS TRUST COMPANY, *et als.*,
Defendants.

On Bill.

Amendment and Supplement to the Statement of Second National Bank of Atlantic City, N. J., in Answer to the Allegations of the Bankers Trust Company, and Amendment and Supplement to the Answer of The Second National Bank of Atlantic City, N. J., to the Counter-claim of the Bankers Trust Company.

The Second National Bank of Atlantic City of New Jersey amending and supplementing the statements heretofore made herein, in reply to the allegations of the Bankers Trust Company, by leave of the Court respectfully shows:

1. The Bankers Trust Company never became the owner of the mortgage referred to herein. Some time prior to the 21st day of December, 1925, George P. Proffatt and his wife, Katherine B. Proffatt, conceived the idea of defeating the effect of the assignments which had

been made of said mortgage, vesting title thereto in Isidor Schmeidler for the benefit of the Second National Bank of Atlantic City, N. J., and Joseph Thompson and Walter Hanstein, trading as Thompson & Hanstein, and, upon and about the 21st day of December, 1925, the said Bankers Trust Company through its officers and agents, with full knowledge of the said assignment to said Isidor Schmeidler, as aforesaid, united with the said George P. Proffatt and Katherine B. Proffatt in said plan and scheme.

To carry out said plan and scheme, the parties aforesaid caused a written assignment of said bond and mortgage to be made by the said George P. Proffatt and Katherine B. Proffatt to the Bankers Trust Company upon the 21st day of December, 1925, and coincidentally caused a check to be drawn by the Bankers Trust Company to the order of George P. Proffatt and Katherine B. Proffatt for the sum of $50,000, and then, coincidentally, caused said check to be endorsed by the said George P. Proffatt and Katherine B. Proffatt and handed back to the said Bankers Trust Company, and then caused the said Bankers Trust Company to issue a certain certificate of deposit to the order of the said Bankers Trust Company, and then, coincidentally, caused the said Bankers Trust Company to issue a certain other certificate certifying that the said Katherine B. Proffatt had deposited with the said bank for safe keeping the said certificate of deposit for $50,000, payable to the said Bankers Trust Company, and caused an agreement to be made between the said Katherine B. Proffatt and the said Bankers Trust Company indemnifying said Bankers Trust Company against any loss that it might

sustain by reason of its having taken said mortgage.

The result of the transaction was that, although the records show that the said Bankers Trust Company had taken the said mortgage by assignment and had advanced $50,000 thereon, the fact was that it had not advanced any sum whatever thereon, and the agreement between the parties was that no moneys would be paid by the said bank to the said Katherine B. Proffatt until the moneys due upon the said mortgage had been collected, and the proceeds thereof were actually in the possession of the said bank, free and discharged of the rights of any person whomsoever.

The said George P. Proffatt and Katherine B. Proffatt and the Bankers Trust Company, through its agents, designedly, and in combination and collusion with each other, caused the said transaction to be completed in the manner aforesaid for the sole purpose of having it appear that the said Bankers Trust Company was a bona fide holder of said mortgage for value, whereas, in fact, it was not, and for the purpose of permitting the said George P. Proffatt and Katherine B. Proffatt to avoid the effect of the assignment made to the said Isidor Schmeidler, as above set forth, and so that in litigation which might ensue, the said Bankers Trust Company might claim that it was a bona fide purchaser for value without notice of said assignment and might prove its allegation by offering in evidence before the Court the said assignment of mortgage to it by the said George P. Proffatt and Katherine B. Proffatt, and the said check for $50,000 made by the said

Bankers Trust Company to the said George P. Proffatt and Katherine B. Proffatt, and endorsed by them, which said assignment and check, upon the face of the instruments, would show that there had been an advance of $50,000 by the said Bankers Trust Company upon the taking by it of the assignment of said mortgage, withholding from the Court the other documents hereinabove referred to, thus concealing the true facts in the case.

2. In pursuance of such conspiracy and combination, as aforesaid, entered into with the design and purpose of permitting the said George P. Proffatt and Katherine B. Proffatt to escape the effect of the assignment made to the said Isidor Schmeidler, as aforesaid, and to impose upon the Court, the said Bankers Trust Company in this cause filed an answer and counter-claim and in the answer alleged that it was the bona fide holder of the said mortgage for the full consideration of $50,000, although it knew that in truth and fact it was not a bona fide holder of said mortgage for the said full consideration of $50,000, and although it knew, at the time of the filing of said answer, that it had full knowledge at the time it took said assignment of the previous assignment made by the said George P. Proffatt to said Isidor Schmeidler, and this defendant says that the said Bankers Trust Company did have such knowledge of said assignment, as aforesaid, and to prove the truth of its allegations that it was a bona fide purchaser for value of said mortgage, the said Bankers Trust Company caused one Wilbur Shinn, its secretary and treasurer, to be sworn before the Court, and upon oath to identify said check for $50,000, and caused said

check to be offered in evidence, as well as the assignment of the said mortgage by the said George P. Proffatt and Katherine B. Proffatt to the said Bankers Trust Company, and caused the said Wilbur Shinn to identify entries upon the books of the said Bankers Trust Company indicating that the said Bankers Trust Company had in fact paid to the said George P. Proffatt and Katherine B. Proffatt the said sum of $50,000, and, further, caused one E. Forrest Cramer, one of its employees, to be sworn before the Court and to swear that the said Bankers Trust Company had bought the said $50,000 mortgage, and that said check for $50,000 was given in payment therefor, and caused the said E. Forrest Cramer to swear that nothing was received by the said Bankers Trust Company at the time the said $50,000 was paid, except said assignment of mortgage, and caused the said George P. Proffatt to be sworn before the Court as a witness, and thereupon, and after having been sworn, the said George P. Proffatt under oath said that he received the said $50,000 represented by said check from said Bankers Trust Company in cash, and that he had turned it over in cash to the said Katherine B. Proffatt in the presence of the officials of said Bankers Trust Company, and testified under oath that the said $50,000 in cash was put, by the said Katherine B. Proffatt, in her pocketbook and carried away from the said Bankers Trust Company by her; that said testimony was false to the knowledge of the said Bankers Trust Company and to the knowledge of the said George P. Proffatt and the said George P. Proffatt so falsely testified in pursuance of the conspiracy and agreement between

the parties aforesaid, to have it appear that the said Bankers Trust Company was in fact a bona fide holder of said mortgage for value; that the said Bankers Trust Company caused to be called as a witness in said cause, to support its allegations, the said Katherine B. Proffatt, and said Katherine B. Proffatt was sworn and after being sworn did testify under oath that the said Bankers Trust Company did in fact purchase said mortgage, whereas, in truth and fact she knew that the form which the transaction took of a purchase of said mortgage was merely for the purpose of attempting to place the said Bankers Trust Company in a position of a bona fide purchaser for value so that the said George P. Proffatt and Katherine B. Proffatt could avoid the effect of the assignment of the said mortgage to the said Schmeidler, as above set forth. Only when it became apparent that investigation would disclose the certificate of deposit, agreements, etc., which were made between the parties at the time the assignment of the mortgage was made to said bank, did the said Bankers Trust Company cause said instruments to be produced to the Court. But, notwithstanding the existence of said instruments, the said Katherine B. Proffatt did knowingly falsely say, under oath, that she could obtain the $50,000 from the said Bankers Trust Company at any time and that she did not want the money, and the said Katherine B. Proffatt did knowingly, falsely testify that she did not know that she was not going to get anything out of the transaction until the mortgage was paid. The testimony of the said Katherine B. Proffatt, to the effect that the mortgage was purchased by the bank and that she could have had the money

whenever she wanted to take it, was false to her knowledge and to the knowledge of the Bankers Trust Company and of the said George P. Proffatt, and was given for the purpose of inducing the Court to believe that the transaction was a purchase when in fact it was not, so that the said George P. Proffatt and Katherine B. Proffatt could avoid the effect of the assignment made to the said Schmeidler, as hereinbefore set forth.

3. Bankers Trust Company is not a real party in interest in this cause. The real parties who have any interest in said mortgage are the said George P. Proffatt and Katherine B. Proffatt, and whatever interest they may have is held by the said Bankers Trust Company as a naked trustee, and the answer and counterclaim of the said Bankers Trust Company was filed in the interest of the said George P. Proffatt and Katherine B. Proffatt and in their interest alone, and the sole purpose of injecting the said Bankers Trust Company was that it might be made to appear to the Court that the Bankers Trust Company was a bona fide purchaser for value and so stand in a better position than would the said George P. Proffatt and Katherine B. Proffatt.

The conduct of the said Bankers Trust Company, George P. Proffatt and Katherine B. Proffatt is inequitable both with respect to the transaction of the alleged purchase of said mortgage and with respect to the conduct of the trial of the cause and was designed for the purpose of deceiving the Court. And, by reason of their conduct as aforesaid, neither the said Bankers Trust Company nor the said George P. Prof-

fatt nor the said Katherine B. Proffatt can have any relief in this Court.

That, while the said Katherine B. Proffatt and George P. Proffatt are not technically parties to the record, they are in fact parties to this litigation, the said George P. Proffatt and Katherine B. Proffatt being represented by counsel actively participating in the trial, and said cause has been conducted on behalf of the said Bankers Trust Company by counsel for the said George P. Proffatt and Katherine B. Proffatt, and they are bound by the proceedings herein as if they had been technically parties to the record.

TESTIMONY.

IN CHANCERY OF NEW JERSEY.

Between	
ELRAE CORPORATION, *Complainant,*	*On Bill of Interpleader.*
and	
BANKERS TRUST COMPANY, *et al.,*	*Final Hearing.*
Defendants.	

Atlantic City, N. J., May 17, 1928.

Before Hon. Robert H. Ingersoll, Vice-Chancellor.

Appearances:

For the defendant Bankers Trust Company, R. H. McCarter, Esq., and W. Lindley Jeffers, Esq.

For the defendant Second National Bank and Thompson & Hanstein, Merritt Lane, Esq.

Mr. McCarter: We offer in evidence bond of Robert Heilig and Bruno Garr to George P. Proffatt and Katherine B. Proffatt in the penal sum of $100,000, dated the 14th of September, 1923.

(Bond received in evidence and marked Exhibit B. 1.)

Mortgage to secure the said bond made the 14th of September, 1923, between the same parties, Robert Heilig, Bruno Garr and Rosa Garr, his wife, to George P. Proffatt and Katherine B. Proffatt.

Wilbur Shinn, direct.

(Mortgage received in evidence and marked Exhibit B. 2.)

Assignment of the said mortgage by George P. Proffatt and Katherine B. Proffatt to Bankers Trust Company, dated the 21st of December, 1925, recorded December 22, 1925, in the Clerk's Office of Atlantic County.

(Assignment received in evidence and marked Exhibit B. 3.)

I offer in evidence check dated December 21, 1925, Treasurer's check of the Bankers Trust Company to the order of George P. Proffatt and Katherine B. Proffatt, for $50,000, endorsed by George P. Proffatt and Katherine B. Proffatt.

Mr. Lane: That is objected to on the ground it is not properly proven.

The Court: If that is the ground, I will sustain the objection.

WILBUR SHINN, sworn.

Direct examination by Mr. McCarter.

Q What position do you hold in the Bankers Trust Company? A Secretary and treasurer.

Q I show you check No. 2863, dated December 21, 1925, to the order of George P. Proffatt and Katherine B. Proffatt entitled for $50,000, and signed E. Forrest Cramer, Treasurer. Is that the check of the Bankers Trust Company as it appears to be to the order of those two people? A It is.

Q And was it—do you know the signatures of George P. Proffatt and Katherine? A Yes.

Q Are those their signatures on the back? A They are their signatures.

Wilbur Shinn, cross.

Q And that check was paid? A It was.

(Check offered in evidence.)

Cross examination by Mr. Lane.

Q What did you have to do with the transaction which resulted in the issuance of that check? A I had nothing to do with it. I was not with the Bankers Trust Company at that time.

Q Nothing to do with it at all? A No.

Q So you don't know anything at all about the transaction itself? A Except as it appears on the books.

Q On what books? A Bankers Trust Company books.

Q Books other than this check? A That is just the check there.

Q I know it. Does the transaction appear in some books of the bank? A Yes.

Q What books of the bank does it appear on? A We have the ledger sheet.

Q What other books of the bank does it appear in? A In our day book and put in this book from that.

Q What other books? A That is the only book except our minute book where it was approved by the Board of Directors.

Q Does the bank have a book which lists the assets of the bank? A Yes.

Q Which would show mortgages, for instance, which are held among the assets of the bank? A Yes, sir.

Q There is such a book? A Yes.

Q What is that book called? A It is right here, the ledger sheet, the general ledger. Our

mortgages were increased fifty thousand dollars on that date, December 21, 1925.

Q Yes, I know, but I am talking as of the present time, not as of that date. A Oh, yes, at the present time, yes, the same.

Q Has your bank a book which will show a listing of the assets of the bank and the accounts in which they are carried and the securities that the bank holds against them?

Mr. McCarter: One moment. I don't think that is cross examination.

Mr. Lane: Perhaps it is not.

Mr. McCarter: I object to it.

The Court: Sustain the objection.

Mr. Lane: Then I object to the offer of the check on this witness' testimony, because he doesn't know anything about the transaction, and the check has not in any wise been tied up with this particular transaction, a check of $50,000 only, issued by the bank.

Mr. McCarter: The check bears the same date as the assignment and is a check which he says is a check of the bank which has been paid to the order of the two assignors and bears their endorsement, therefore the bank paid fifty thousand dollars for that assignment. Now that is all there is to that.

The Court: As I see it at the present time there is nothing to show that this check was paid for that assignment. Of course, the ordinary thought would apply to the same transaction that occurred on that date, but, so far as the testimony is concerned,

there is nothing to show that. I will admit the check. Whether or not it proves what you think it proves is a different thing.

(Check admitted in evidence and marked Exhibit B. 4.)

By Mr. McCarter.

Q What is the document you hold in your hand? A It is the ledger sheet from the general ledger giving the amounts of bonds and mortgages that we hold.

Q As of what date? A Well, that runs from May 19, 1925, to May 4, 1926.

Q Now, is there entered on that date any—is there on this ledger sheet any reference to this fifty-thousand-dollar mortgage that we have been talking about? A On December 21, 1925, there is a debit entry of $50,000 increasing our mortgages by $50,000.

(Ledger sheet offered in evidence.)

Mr. Lane: I object to the offer of this sheet in evidence. The witness has said he knows nothing about that. I want to cross examine on this paper, on this sheet you have offered.

The Court: Sustain the objection. If you desire to cross examine on the sheet you may do so.

By Mr. Lane.

Q Did you have anything to do with the making up of that sheet? A I did not.

Q You were not with the bank then? A No.

Q And you only find it as one of the records of the bank? A Yes, sir.

Q That is all you know about it? A Yes.

Q I suppose that sheet is continued on from 1926, the last date, up to the present time? A Yes, sir.

Q And that sheet does not purport to show what the situation with respect to that mortgage is at the present time, does it? A Not this sheet.

Q Not that sheet? A No.

Q You would have to go on down to the present time? A To the present time.

Q And that sheet does not show either what collateral the bank might hold for this $50,000?

Mr. McCarter: I object to the question.

The Court: I will permit it.

Q Does it? A Yes.

Q There is such a book in the bank, isn't there? A Yes.

Mr. McCarter: I object.

The Court: I will permit it.

(Ledger sheet admitted in evidence and marked Exhibit B. 5.)

Mr. McCarter: If your Honor is of the view that there has not been an identification of the check with the assignment of the mortgage, being the same day, the same parties, the amount of the mortgage, I would say that we have sent for a gentleman who knows it, was with the bank at the time, will be here in two or three minutes, and we will have to ask your indulgence long enough to have him come. In the meantime this witness can be further cross examined.

Mr. Lane: I have no further cross.

The Court: Can't you take up your next witness?

Mr. McCarter: That will be our case.

Mr. Lane: If it will save any time, I offer in evidence assignment of mortgage made by Katherine B. Proffatt to George P. Proffatt, recorded in the office of the Clerk of Atlantic County in Book 73 of Assignments, page 105, and so forth.

(Assignment received in evidence and marked Exhibit S. 1.)

Assignment George P. Proffatt to Isadore Schmeidler, dated April 9, 1925, recorded in the office of the Clerk in Book 73 of Assignments, page 106, on the 23rd of April.

(Assignment received in evidence and marked Exhibit S. 2.)

Assignment of mortgage by Isadore Schmeidler to the Second National Bank on April 5, 1926, recorded in Atlantic County Clerk's Office, Book 80 of Assignments, page 257 and rest.

(Assignment received in evidence and marked Exhibit S. 3.)

E. FORREST CRAMER, sworn.

Direct examination by Mr. McCarter.

Q Are you connected with the Bankers Trust Company? A Am I?

Q Yes. A No, sir.

Q Were you in December, 1925? A Yes, sir.

E. Forrest Cramer, cross.

Q I show you a bond and mortgage for fifty thousand dollars made by Robert Heilig and Bruno Garr, upon premises in Atlantic City, to George P. Proffatt and Katherine B. Proffatt, and an assignment of that mortgage from George P. Proffatt and Katherine B. Proffatt to the Bankers Trust Company of Atlantic City, which are already in evidence, and I show you a check on the Bankers Trust Company, Treasurer's check, dated the same day as the assignment, December 21, 1925, to the order of George P. Proffatt and Katherine B. Proffatt, for $50,000, which appears to be signed by E. Forrest Cramer; is that your signature? A Yes, sir.

Q Are you familiar with the transaction? A Yes.

Q What was the check for $50,000, what was the consideration of the check of $50,000 to which I have just alluded? A We bought a mortgage, the $50,000 mortgage, I think it was.

Q Just look at the mortgage. A From Katherine Proffatt and George Proffatt.

Q Witness is shown bond and mortgage and assignment already in evidence as exhibits Bankers Trust Company 1, 2 and 3, and identifies that as being the mortgage? A We brought this mortgage, the Bankers Trust Company did, rather.

Q And that check was given? A In payment thereof; yes, sir.

Cross examination by Mr. Lane.

Q Who had charge of that transaction? A I had charge of it.

Q Were you the highest official in the bank who passed upon it? A Well, the Board always passes upon investments.

Q Were you the highest official, aside from the Board, who had anything to do with this transaction? A I carried out the Board's instructions; yes, sir.

Q Did you have the negotiations which led to the purchase of this mortgage, is what I am asking?

Mr. McCarter: I object as immaterial and not cross examination.

Mr. Lane: I submit this, he has been called to show that this check was in payment of this particular transaction. I think I am entitled to go into the transaction.

The Court: I will permit it.

Q (Question repeated.) A No.

Q Who did for the bank? A Well, it has been quite some time, and we have so many of those things that I don't just remember about that.

Q Well, I know it has been quite some time, and you have been away from the bank now for how long? A Over a year.

Q And yet you remember the transaction and you can say that this check was in payment of this mortgage, now can't you remember who on the part of your bank had the negotiations in charge?

Mr. McCarter: I again respectfully object to the question as not cross examination, and irrelevant.

The Court: I have permitted it and it has been answered. Permit the question.

A I don't know whether it was Mr. Richards or Mr. Grossman.

Q Either one or the other of those gentlemen? You had nothing to do with it yourself?

Mr. McCarter: With what?

Q The negotiations which led up to the transaction? A Oh, no. I take instructions from the Board of Directors.

Q You merely mechanically carried out your instructions? A The Board purchased this mortgage and instructed me to give a check for it.

Q Now at the time that check was given, what else was received by the bank besides that assignment of mortgage?

Mr. McCarter: I object to it as not cross examination.

The Court: Sustain the objection.

Q Was there anything else which the bank received at the time this $50,000 was paid—

Mr. McCarter: Same objection.

The Court: I will permit it.

Q —except this assignment of mortgage? A No.

Q That is all the bank got? A That is all.

Q Do you know whether the bank got anything further for the payment of that $50,000?

Mr. McCarter: That I object to.

The Court: Sustain the objection.

Q Do you know whether the bank got anything further for the assignment of that mort-

gage and the payment of that $50,000 in connection with or to secure the repayment of the $50,000?

Mr. McCarter: I object to that.

The Court: Sustain the objection.

Q Was this transaction entered upon the books of the bank? A Yes, sir.

Q What books? A Well, it was entered on our general ledger and carried as an asset of the company.

Q Entered—will you tell me the names of the books of the bank in which this transaction appeared?

Mr. McCarter: I object to that. I can't see, counsel has some point about this and can make it in his case, I take it, and not cross examining this witness as identifying the particular check with the particular mortgage.

The Court: Yes, I will sustain the objection.

Q Is there any other book of the bank than this general ledger in which the fifty thousand dollars, either the fifty thousand dollar check or the fifty thousand dollar mortgage is entered?

Mr. McCarter: I object to the question.

The Court: I will permit that question.

A Yes, we have a little card where we keep our mortgages listed, a check card of the interest payments.

Q And that is the only other book of the bank? A That is all, yes, sir.

Q In which— A In addition to the general ledger.

Q In addition to the general ledger, the sheet of which is here? A Yes, sir.

Q The book that you have identified, or the check that you have identified is attached to a stub check book, treasurer's check book. Is there any other book in the bank in which that item of $50,000 is entered other than that stub check book? A The card that I referred to, check card of interest payments, regarding the interest payments.

Q No, I am now talking about your $50,000 check out of your bank, where does that appear, what general book of the bank does that appear in? A Treasurer's check register.

Q Does that show checks out and checks in to the account?

Mr. McCarter: I don't think that is cross examination, your Honor.

The Court: I will permit that question.

A When they are issued and when they are paid.

Q No, checks into the account? A Well, when they issue the treasurer's check they credit it and when they come in and it is paid they charge it. That is, I am talking about the book transaction now of that particular account.

Q Now what I am trying to get at is this, this fifty thousand dollars was drawn out of the treasurer's fund, that is, the funds of the bank? A That is right, yes, sir.

Q Of course there is debit and credit side to that account? A Yes, sir.

Q What book of the bank contains the debit and credits? A Treasurer's check register.

Q So that, to use an illustration, if the treasurer or the bank had received, we will say, a week before this $50,000 check was paid out, $100,000, it would appear in the treasurer's check register? A Repeat that question again.

(Question repeated.)

A If we received a hundred thousand?

Q Yes. A No.

Q Where would that appear, that is what I am trying to get at. A You mean as a deposit? There are several ways we can get money into the bank.

Q To the bank, a payment to the bank? A Well, it all depends on what the payment was for.

Q To be disbursed in payment of this $50,000 mortgage, as an illustration?

Mr. McCarter: Your Honor thinks that is cross examination?

The Court: I will sustain the objection at the present time.

Mr. McCarter: He is pumping. He is going around trying to get some information.

The Court: I have sustained the objection.

Q You have identified a check which is paid by the bank out of the funds of the bank. In what book of the bank, if any—and you say, as I understand it, that that $50,000 so paid out were funds of the bank; is that right? A That is right, yes, sir.

Q In what book of the bank will it be disclosed as to where the bank got that $50,000?

Mr. McCarter: I object to the question as not cross examination.

The Court: Sustain the objection.

Q How do you know that $50,000 is funds of the bank? A Are you asking me that question?

Q Yes. A Well, when a bank makes an investment they use their own funds.

Q How do you know it? How do you know that particular $50,000 drawn out of the bank by a treasurer's check was the funds of the bank? A There wasn't any exception, it was in the regular line of investment.

Q Anybody can go to the bank and purchase a treasurer's check, can't they? A No.

Q Well, I say anybody, you can go get a cashier's check; cashier's check and treasurer's check are the same thing, aren't they? A If you are properly identified.

Q You can go and give the bank $25,000 and you can get in exchange for their cashier's check or treasurer's check? A Not always.

Q You can, it is done, isn't it? A It may be done, but it isn't done in all banks.

Q It has been done in your bank, hasn't it? A If they are properly identified. I wouldn't issue a treasurer's check to a stranger for $25,000.

Q Of course not, but if I am properly identified and desire to use, for some reason or other, a cashier's check rather than a certified check, I can get the bank to give their cashier's check, can't I? A Yes.

Q And it would be drawn on this fund, wouldn't it? A No, it would be drawn against the $25,000 that you handed in.

Q But it would be drawn out of this check book, wouldn't it? A After the twenty-five thousand was put in, yes.

Q It would be drawn out of this check book, wouldn't it? A That check would be used.

Q Now, I say to you, to what book of the bank I can go to find whether or not these $50,000 were funds of the bank or were funds which were put there by somebody else?

Mr. McCarter: Object to the question, already been overruled about a dozen times.

The Court: Sustain the objection.

GEORGE P. PROFFATT, sworn.

Direct examination by Mr. McCarter.

Q Mr. Proffatt, you live in Atlantic City? A Yes, sir.

Q Are you and your wife proprietor of a hotel here? A Yes, sir.

Q Which hotel? A Rio Grande.

Q Rio Grande? A Yes, sir.

Q And do you know Isadore Schmeidler? A I do.

Q Did he occupy any position of trust and confidence with you during the years 1924 and 1925?

Mr. Lane: I object, if the Court please, to that characterization. He can tell us what he did.

The Court: Yes; sustain the objection.

Q What was he doing for you during those years? A Mr. Schmeidler, while I was away, acted as power of attorney for me.

Q Did you give him a power of attorney to sign checks? A I did.

Q Did he, while you were away from time to time, manage your affairs for you? A Yes, sir.

Q Now, were you formerly engaged in the business of buying and selling electric apparatus and fixtures? A Yes, sir.

Q What name was used by you in that business? A Guarantee Electric Company.

Mr. McCarter: I offer in evidence a copy of the certificate of incorporation of the Guarantee Electric Company, filed, after having been recorded, on the 13th of October, 1922, in the office of the Secretary of State.

(Certified copy received in evidence and marked Exhibit B. 6.)

Q I notice that this certificate purports to be signed by George P. Proffatt, Katherine B. Proffatt and Walter Hanstein, they are you, your wife and Mr. Hanstein of Thompson & Hanstein? A Yes, sir.

Q Under whose legal advice were the proceedings for this incorporation conducted? A Mr. Hanstein's.

Q Now you received how much stock in that company? A $25,000.

Q That would be—

Mr. McCarter: At our request the receiver of the company has produced the

stock book and I offer in evidence certificate No. 1 for 250 shares issued to George P. Proffatt on the 17th of October, 1922.

(Certificate received in evidence and marked Exhibit B. 7.)

Q So that you got originally 250 shares? A Yes, sir.

Q The payment that you received for your stock and the stock that was issued to your wife was the assets of this business concern that you had handed over, that you had theretofore conducted? A Yes, sir.

Q And that was under Mr. Hanstein's supervision? A Yes, sir.

Q Now how long did you continue the owner of that stock? A I think in about September of the following year, I think it was, of 1922, you say the company was incorporated, and I think I sold mine in September.

Q I show you two agreements dated respectively the 11th and 15th of September, 1923, between George P. Proffatt and Llewellyn R. Huber and Thomas Emerson, respectively. Look at those agreements and see if they are agreements for the sale by you of a portion of your stock in that company to these gentlemen and if the sale was made at the time these agreements bear date or about that time. A Yes, sir.

(Agreements offered, received in evidence and marked Exhibits B. 8 and B. 9.)

Q Now that covers the sale of your stock to Messrs. Huber and Emerson. Did you sell any more stock to any other person, and if so, who

and when? A Mr. Frank Shinnen, I think, for $500.

Q That covers the entire transaction? A Yes.

Q When was that effected? A I think I sold him that stock right after the company was incorporated, on a note.

Q Then on and after the dates of those sales, the agreement for which has just been instituted, did you continue to own any stock in this company? A No, sir.

Q During the winter of 1925 were you here in Atlantic City or away? A I was away.

Q Where were you in, say, February and January of 1925? A In February?

Q January, winter of 1925, before your return in the spring of that year? A I was in Key West, Florida.

Q Key West, Florida? A Yes, sir.

Mr. McCarter: Now I offer in evidence so many of the papers in the case of Clifton C. Shinn, Receiver of Guarantee Electric Company, against George P. Proffatt and Katherine B. Proffatt, defendants, as are necessary to elucidate the transaction with particular reference to paper entitled, "Writ of sequestration," directing the sequestration of all the property of the defendant George P. Proffatt, dated the 28th of March, 1925, and signed by Bolte, Sooy and Gill, Solicitors, and Thomas Barber, Clerk. I will state to your Honor that that paper includes specifically the farm I alluded to out in Northfield. Will it be marked or identified, or identifies itself, I suppose?

The Court: Identifies itself. Not necessary to physically mark it.

Q How did you learn, Mr. Proffatt, of the fact that this writ of sequestration had been issued? A My son sent me a letter to Key West with a clipping from the paper.

Q Did you then come home? A I immediately made preparations.

Q And did you see Mr. Schmeidler shortly thereafter? A Yes, sir.

Q Where? A Met him on Atlantic avenue near the Marine Trust.

Q Mr. Schmeidler is the person named in the assignment that Vice-Chancellor Lane has put in evidence from you to him? A Yes, sir.

Q The same Mr. Schmeidler? A Yes, sir.

Q Can you tell us about when it was you first saw him with reference to this matter? A It was about one or two days after I came back, I met Mr. Schmeidler on the street and he said to me—

Mr. Lane: I object to conversation between Mr. Schmeidler and this witness as not binding at all upon the Second National Bank, or upon Thompson & Hanstein.

Mr. McCarter: Your Honor will see as the case progresses that Schmeidler was a mere intermediary for the bank, and the assignment was made to Schmeidler and whatever consideration Schmeidler got for that assignment binds, of course, the bank, and when the bank took from Schmeidler, as it did later, by the assignment that is in evidence, it took subject to the equities that existed at the time between Proffatt and

Schmeidler, if there was any consideration or if the consideration failed, it is our claim, of course, the bank is subject to that. Now we want to show that Mr. Proffatt was induced to make the assignment upon certain representations with reference to this property and that on the faith of those representations he made the assignment and that those representations were that this property would be relieved from this writ of sequestration, that he, upon the faith of that representation, made the assignment to Schmeidler. Now, Schmeidler took an assignment on April 9, 1925, and held it for a year, when, about April 5, 1926, it was assigned, as appears by the assignment in evidence, to the Second National Bank. With regard to the fact that, as I stated upon my professional word, it will appear from the papers later to come, that in that matter the bank's interest was being protected or said to be protected because the bank had this loan from other people, that they were anxious to secure apart altogether from that, Schmeidler had no interest in that loan at all except as he was acting for the bank, and for Thompson Hanstein, that there was no consideration, or if the consideration failed in the transaction between Schmeidler and Proffatt, of course the consideration fails between Schmeidler and the bank, and we want to offer this evidence as to what transpired between Schmeidler and this man as showing the consideration for the transaction, and I think it is perfectly competent.

Mr. Lane: I have another objection I desire also to put on the record as well as the one I have already made, and that is that the Bankers Trust Company is in no position to question this transaction.

The Court: I will permit the question subject to a motion to be stricken if it is not connected up.

A Mr. Schmeidler said to me, "What are you going to do with reference to the bank money?" I said, "Isadore, I can't do anything, because all my stuff is tied up." "Well," he said, "George, you ought to do something." I said, "Well, I can't do anything now," I said, "because my stuff is all tied up." "Well," he said, "George, you ought to do something in regard to it." "Well," I said, "I will let you know." So that was done for that day. The next day I came in and I met a man by the name of Mr. Hart, Wilfred Hart, and he said, "George," he said—

Mr. Lane: I object to this.

The Court: Sustain the objection.

Q Never mind about the conversation with Hart just at this time. At the time in question, that is, the particular time when you were having the conversation which, as I understand it, was renewed the next day or thereabouts with Schmeidler, did your wife owe the bank, Second National Bank, anything? A Yes, sir.

Q How much? A $8,600.

Q Did you owe the bank anything? A I did not.

Q We will now leave out Mr. Hart. Just tell us what further conversation transpired between you and Schmeidler on the next day, whenever it was, down to the time of April 5th, when a certain paper was signed? A So the next day I seen Mr. Schmeidler and I told him that I had a chance to sell my Northfield property for $75,000 providing I could get it released.

Q Released from what? A From the act of sequestration.

Q Act of sequestration? A Yes. He said, "I will go in see Mr. Sooy and see what I can do."

Q Who said that? A Mr. Schmeidler.

Q All right. A And for me to see him the next day. I seen Mr. Schmeidler the next day and he said, "George, I seen Mr. Sooy and he said it is all right for to release the Northfield property."

Q Where was this conversation you are just now alluding to? A Right in front of the Marine Trust Company Bank.

Q All right, go on. A And Mr. Schmeidler said to me, he said, "Well, now, don't you think, if I get that property released for you, George, that you should secure the Second National Bank on the loan?" "Well," I said, "if you are positive, Isadore, that you can secure it, secure the release," I said, "certainly," I said, "because I can sell it for $75,000." That he agreed to do. So I went home and told my Mrs. all about the transaction, and the next day her and I came over in the afternoon in Mr. Schmeidler's office, he repeated the conversation that he and I had had about releasing the property, about seeing Mr. Sooy—

Q One moment. What interest, if any, did your wife have in this mortgage? A She was half owner; it was a joint mortgage.

Q Half owner of the mortgage? And had Mr. Schmeidler in his talk with you made any suggestion with reference to how you should secure the bank for this other indebtedness? A Then when we came back into Mr. Schmeidler's office, Mrs. Proffatt and I, Mr. Schmeidler explained the whole transaction that he and I were talking about, about releasing the Northfield property, and I told him it was a joint mortgage owned by Mr. and Mrs. Proffatt. He said, yes, he knew that, and all the time we were talking Mr. Schmeidler would make trips back and forth outside, I suppose to Mr. Hanstein's office, that I don't know—

Mr. Lane: I object to that.

The Court: Sustain the objection. Let it be stricken.

Q Where was Mr. Schmeidler's office? A It is right opposite the hall.

Q In this building? A Yes, in the same building.

Q In the same building with Thompson & Hanstein? A Yes.

Q Go on. A Then he came in and said, "Everything is all right, George," so immediately Mrs. Proffatt and I walked into Mr. Hanstein's office and they got together and drew up the papers.

Q Drew up what? A Drew up the assignment from Mrs. Proffatt.

Q To you? A To me. And then the assignment from me to Mr. Schmeidler, and then an agreement—

Q Now— A Then the agreement with Mr. Schmeidler.

Mr. McCarter: Have you that document, gentlemen?

(Paper produced by Mr. Hanstein.)

Q I show you paper dated the 9th of April, 1925, between George P. Proffatt, party of the first part, and Isadore Schmeidler, party of the second part; is that your signature and is that the signature of Mr. Schmeidler? A Yes, that is my signature.

Q Is that the paper that was then and there assigned in the way you have described? A Yes, sir.

(Paper offered in evidence and marked Exhibit B. 10, reading as follows:

"This agreement made the 9th day of April, 1925, between George P. Proffatt, party of the first part, and Isadore Schmeidler, party of the second part, for and in consideration of the sum of one dollar each to the other in hand paid, the receipt whereof is hereby acknowledged, witnesseth:

"Whereas the said party of the first part has assigned unto the party of the second part all that certain mortgage made by Bruno Garr—and so forth— covering premises in the southerly line of Atlantic avenue distant"—and so forth—"for the purpose of securing unto the Second National Bank of Atlantic City, N. J., the payment of the sum of $23,200, together with interest on $8,600, from April 1, 1924, to date of payment, and also the sum of $2,000 to Joseph

Thompson and Walter Hanstein, trading as Thompson & Hanstein. It is understood and agreed that the party of the first part does hereby authorize the party of the second part to sell or dispose of said mortgage at such time as shall appear to the party of the second part advisable for the purpose of making the payments aforesaid and to that end the party of the second part is hereby authorized to do any and all things necessary for the carrying out of the purposes of this agreement and the rendering over to the party of the first part of any surplus remaining after the sale of the said mortgage and the payment of the debts aforesaid. Party of the second part does hereby agree with the party of the first part that he will follow and completely carry out the terms of this agreement and will hold the said mortgage for the securing of the debts above set forth, and will at the time that seems most advisable to him sell said mortgage and pay the debts aforesaid and will pay over to the party of the first part the surplus remaining after said sale.

"In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written."

Q Did you carry that paper away with you that day? A No, I left it in Mr. Hanstein's office.

Q I seem to have in the papers a duplicate of it. Did you carry that away that day, the duplicate? A No.

Q Left that also? A Yes.

Q Did you at the time you assigned the mortgage surrender the bond and the mortgage? A I did not.

Q Have you ever done that? A I did not.

Q Now after that document had been thus prepared and signed was anything further said by Mr. Schmeidler which led to the preparing of another document? A Isadore said to me, he said, "George, in order to show you that I am on the level," he said, "I will give you an agreement that all the money received by the Second National Bank," he said, "as dividend I will turn over to you." I said, "What do you think they will pay?" "Well," he said, "as I understand, forty or fifty per cent." I said, "Fine, that is all right, Isadore."

Q Was it after that conversation that this document which I will now show you was signed? A Yes, sir.

Mr. McCarter: Let me have the second document, please.

(Paper produced by Mr. Hanstein.)

Mr. McCarter: I offer in evidence document executed in the same way, or, rather, signed first by Isadore Schmeidler and then by Proffatt, apparently unwitnessed, dated the 9th of April, 1925.

(Paper received in evidence and marked Exhibit B. 11.)

Mr. McCarter: "Whereas Isadore Schmeidler has received an assignment from the Second National Bank of Atlantic City, New Jersey, of a claim of $14,600, which the said Second National Bank had against the Guarantee Electric Company, Incorporated;

"Now therefore this agreement made this 9th of April, 1925, between Isadore Schmeidler, party of the first part, and George P. Proffatt, party of the second part, for and in consideration of the sum of a dollar each to the other in hand paid, the receipt whereof is hereby acknowledged, witnesseth:

"Party of the second part does hereby agree that he will file claim for said sum of $14,600 with the Receiver of the Guarantee Electric Company, Inc., and collect the dividend paid upon the same, and upon receipt of said dividend will pay the same over to George P. Proffatt.

"In witness whereof the parties have hereunto set their hands and seals."

Signed by Schmeidler and Proffatt.

Q Well, what occurred with reference to securing the release of the Northfield property from the writ of sequestration? A I went and seen Mr. Schmeidler two or three times afterwards and he just simply said, "I can't do nothing," and never released it.

Q Upon his failure to make good on the release, what, if anything, did you say with reference to completing this transaction? A He asked me on two or three occasions, he wrote to me to produce the mortgage and bond, and I told Mr. Schmeidler repeatedly, I said, "You didn't live up to your agreement, and I am not going to live up to mine," and I didn't give it to him.

Q Now what did you understand the facts to be with reference to the sums of $23,200 and the $2,000 and the $8,600 mentioned in the first of

the two papers? Did you owe any of that money? A I did not.

Q The $8,600 was the indebtedness of Mrs. Proffatt? A Mrs. Proffatt.

Q To the bank? A Yes.

Q The $2,000, do you know anything about that? A No, that was—

Q Thompson & Hanstein? A Yes.

Q It was not your debt? A No, sir.

Q Now, the $23,200, how did you understand that was made up? A I think the $23,200 was made up of the $14,600, something like that, that the Guarantee Electric Company owed the bank at that time.

Q And— A The eighty-six hundred of Mrs. Proffatt.

Q Did you employ any attorney to represent you in these sequestration proceedings? A Yes, sir.

Q Whom? A Mr. Bourgeois and Mr. Richards.

Mr. McCarter: I offer in evidence from the same file order dated 9th of June, 1925, advised by Vice-Chancellor Ingersoll, releasing among other things the Northfield property and the mortgage from the writ of sequestration, and I also offer in evidence the final decree in the cause in which the writ of sequestration issued, dated the 9th of June, 1925, directing that the complainant's bill be dismissed with costs.

Q Now you knew, did you not, or were informed that the firm of Bolte, Sooy & Gill represented the receiver of the Electric Company in these sequestration proceedings? A Yes, sir.

Q And bearing in mind now the fact that this transaction, these documents in the order that you have described, were signed on the 9th of April, how long do you think it was previous to the 9th of April, 1925, that Mr. Schmeidler first broached the subject of your securing the bank for this loan and Thompson & Hanstein for that $2,000? A I was only back two or three, well, about two days when Mr. Schmeidler seen me.

Q And therefore it was somewhere between about the first of April and the 9th of April? A Yes, sir.

Q That the conversation occurred? A Somewhere along there, yes.

Q I notice by the terms of this mortgage the interest was payable in September and March; who received the interest for September, 1925? A I did.

Q When was it that you—about when, how soon after the transaction was it, do you think, that you told Schmeidler that you were not going to deliver that bond and mortgage or carry the matter out because of the fact that he failed to make good on the release of the property? A Oh, I guess I have told Mr. Schmeidler a half a dozen times.

Q About how soon after the 9th of April, which is the date when the assignments were made? A How soon afterwards?

Q Yes. A Possibly about a week.

Q Now did you ever receive any notice of a proposed sale or disposition of this mortgage that had been assigned or pledged in this way? A I did not.

Q Did either Schmeidler or the Second National Bank commence any suit against you

to recover possession of the bond and mortgage? A No, sir.

Cross examination by Mr. Lane.

Q Are you interested in this suit in any way? A Interested in this suit?

Q Yes. A The only interest I have got is the interest of the mortgage.

Q What interest have you got in that mortgage? A What interest have I got in the mortgage?

Q Yes. A Haven't got any, I guess.

Q Do you know, or what about it? What do you know about it? A All I know is I sold it to the Bankers Trust.

Q Are you interested in any way at all in this litigation? A Not that I know of.

Q Not that you know of? A No.

Q Why, you know whether you are going to get any benefit from this litigation or whether you are not going to get any benefit from this litigation? A The only thing I know, I sold the mortgage to the—I thought I am only acting as a witness.

Q I want to know whether you know whether you are going to get any benefit from this litigation or not? That is perfectly clear. A That I don't know.

Q Well, why don't you know whether you are going to get any benefit from it or not? A I don't know.

Q You don't know whether you are going to get any benefit from this litigation or not; now is that right? A That is right.

Q I show you a check to your order for $50,000, which appears to be endorsed by both

of you, yourself and your wife, and marked "Paid, 2/19/25," without any deposit in any bank, however; did you receive that money in cash?

Mr. McCarter: I don't think that is cross examination.

Mr. Lane: I think I can show the interest of this witness, if the Court please.

The Court: I will permit it.

A Did I receive the money in cash?

Q Yes. A Yes, sir.

Q What did you do with it? A Turned it over to Mrs. Proffatt.

Q What did she do with it? A I don't know.

Q Haven't the slightest idea what happened to that $50,000? A No, sir.

Q Don't know where it is now? A No, sir.

Q And you never spent it? A No, sir.

Q So far as you know, Mrs. Proffatt has it somewhere? A Yes, sir.

Q $50,000 in cash? A That I don't know. I turned it over to Mrs. Proffatt.

Q You don't know whether she put it in a bank account or whether she still has it in cash or anything about it? A No, sir.

Q Haven't the least idea? A No.

Q The last you saw of that $50,000 was when you were in that bank; isn't it? A That is right.

Q The last thing you saw of that $50,000 in cash was in that bank; is that right? A That is right.

Q On that day? A Yes, sir.

Q On that day you turned it over in the presence of the banking officials to Mrs. Proffatt; is that right? A That is right.

Q In cash? A That is right.

Q In their presence? A Yes, sir.

Q You don't know a thing of what happened to it after that? A No, sir.

Q Is Mrs. Proffatt here? A Yes, sir.

Q In court? A Yes, sir.

Q When did you retain Mr. Bourgeois? A When did I retain him?

Q Yes. A After I signed the agreement with Mr. Schmeidler.

Q How soon after you signed that agreement with Mr. Schmeidler? A I should judge about a week or ten days afterwards.

Q When did you retain Senator Richards? A About the same time.

Q So that you had both Mr. Bourgeois and Senator Richards within a week after this transaction; is that right? A Yes, sir.

Q You also had Mr. Corio, didn't you? A I went to Mr. Corio to get a lawyer, and he brought me into Mr. Bourgeois.

Q How soon after you had signed these papers at Thompson & Hanstein's office was it that you went to Mr. Corio? A To the best of my recollection, about two or three days.

Q Two or three days? A Yes.

Q Did you tell Corio about this transaction? A I told him that I had signed an agreement, that was all, and I wanted a good lawyer, and Mr. Corio took me in to Mr. Bourgeois.

Q Did you tell Mr. Bourgeois about the transaction that you had had in Mr. Hanstein's office? A I showed him the agreement.

Q Showed him the agreement, is that right? A Yes, sir.

Q Which agreement was it that you had that you showed him?

Mr. McCarter: I object as not cross examination, and as calling for a communication between attorney and client.

The Court: Sustain the objection.

Q Did you have a copy of the agreement? A Did I have a copy of it?

Q Yes. A Yes, sir.

Q Where is the copy that you had?

Mr. McCarter: I have got it here.

Q Mr. McCarter produces an agreement and I ask you whether that is the copy which you had? A Yes.

(Copy of agreement offered, received in evidence, admitted by consent, and marked Exhibit S. 4.)

Q Where and when did you get that copy? A Got it in Mr. Hanstein's office a couple of days after it was signed.

Q But before you went to Mr. Corio? A Oh, yes, before I went to Mr. Corio.

Q So that you went up to Mr. Hanstein's office to get the copy of this agreement? A That is right.

Q And the arrangement was made on that day, wasn't it— A No.

Q Wait. —that you had signed the agreement, that you were to get a copy of it within a couple of days? A Yes.

Q And you went back to get the copy of the agreement? A That is right.

Q Did you tell Mr. Hanstein at that time that the deal was off? A No, I didn't. I don't remember.

Q Well, now, just take your mind back to that time and tell me whether or not you did. A I don't remember.

Q Don't you know you did not?

Mr. McCarter: Hanstein?

Mr. Lane: Hanstein, yes.

A I don't believe there was anything said. I don't believe Mr. Hanstein gave them to me. I went in there and the girl handed them to me.

Q Did you ever tell Mr. Hanstein that the deal was off? A No.

Q Why not?

Mr. McCarter: I object.

A Didn't have any dealings with Mr. Hanstein.

Q What? A I didn't have any dealings with Mr. Hanstein.

Q You knew that this agreement was to secure, among other things, Thompson & Hanstein, didn't you? A After the agreement was signed, that is all I know about it.

Q When the agreement was signed that night in Mr. Hanstein's office, you knew that the purpose of that agreement was to secure the Second National Bank and Thompson & Hanstein; didn't you? A That is right.

Q And within a couple of days you went to Mr. Corio and you knew that Mr. Schmeidler had not carried out his agreement; didn't you?

Mr. McCarter: He didn't say before he went to see Corio he knew it. I object to that question.

The Court: Sustain the objection.

Mr. Lane: I withdraw it.

Q Was it before or after you went to see Mr. Corio that you say you knew that Mr. Schmeidler would not carry out his agreement? A This was after I went and seen Mr. Corio.

Q Why did you go to see Mr. Corio then when it was Mr. Schmeidler's business, according to the agreement, to get the sequestration discharged? A I didn't go to Mr. Corio to get the sequestration discharged.

Q Why did you go to Mr. Corio? A I went to Mr. Corio to secure a good lawyer and he took me over to Mr. Bourgeois.

Q To secure a good lawyer for what purpose? A To act as my lawyer on the act of sequestration.

Q Mr. Schmeidler had agreed with you that he would get the sequestration out of the way? A No.

Q What had he agreed to do? A He agreed to release the property at Northfield, New Jersey.

Q How soon after he had made that agreement was it that you knew that he was not going to do that thing, or he said he couldn't do it? A Oh, I guess possibly a week or ten days, maybe two weeks.

Q At any rate, within a week or ten days after this transaction, you knew that Schmeidler was not going to get this property then released from the writ of sequestration? A Yes, sir.

Q You knew he hadn't carried out his agreement? A Yes, sir.

Q You knew that this agreement had been made for the protection of Thompson & Hanstein and the Second National Bank? A Yes, sir.

Q You have known Hanstein for how many years? A Well, I have known him for a good many years, possibly fifteen.

Q And you were very friendly with him, weren't you? A Yes.

Q Why didn't you tell him then that the deal was off? A I looked to Mr. Schmeidler to release it.

Q But Mr. Schmeidler had failed and you had told him you were not going to carry through the deal, why didn't you tell Hanstein, for whose protection this deal was made, that the deal was off? A I didn't see any necessity of telling Mr. Hanstein.

Q You knew that you had signed these papers? A Yes, sir.

Q You knew that Thompson and Hanstein had the papers or that Schmeidler had the papers? A That is right.

Q You knew that the assignment of mortgage had been recorded?

Mr. McCarter: No, had not been, was not recorded until the 23rd.

Q Didn't you know that the assignment of mortgage was recorded? A I do not.

Q You don't know anything about that? A No.

Q But you knew that assignment of mortgage could be recorded, didn't you? A Oh, yes.

Q You have been familiar with real estate transactions enough to know that? A Yes.

Q And you never went to Thompson & Hanstein and demanded back the papers, did you? A No.

Q Why not? A I don't know.

Q You don't know? A No.

Q You never told Thompson & Hanstein or Mr. Hanstein at any time of Schmeidler's agreement, did you? A Mr. Hanstein knew it, it was drawed up in his office.

Q I didn't ask you that. There is nothing in any one of these papers about any agreement on the part of Schmeidler, is there? A On the part of Schmeidler?

Q There is no agreement in writing by Schmeidler that he would get the property released from the writ of sequestration, that you know of, is there?

Mr. McCarter: The papers will speak for themselves.

Mr. Lane: I want his knowledge.

The Court: I will permit it.

A No, nothing in the papers.

Q Nothing in the papers? A It was agreed in his office.

Q Whose office? A Mr. Schmeidler's office.

Q At the time you were in Hanstein's office, nothing was said about that, was there? A Nothing was said at all.

Q Nothing was said and yet that was the secret consideration? A That was the idea.

Q For your signing these papers; is that right? A Yes, sir.

Q Why in the world, when you went in Thompson & Hanstein's office and were drawing up these papers, why didn't you say something

as to the consideration? A Mr. Schmeidler was doing all the talking to Mr. Hanstein.

Q You were sitting there? A It was all understood before I went in.

Q Why didn't you tell Mr. Hanstein, when you came there for the purpose of putting your agreement in writing, why didn't you tell him what the whole agreement was? A Mr. Schmeidler told him in front of me.

Q Did Mr. Schmeidler say, "I have agreed to get the writ of sequestration dismissed"? A No, sir.

Q Then he didn't tell him what the agreement was, did he? A He told him he agreed to release the property at Northfield.

Q He did? A He explained the whole understanding in his office.

Q Why didn't you tell me that a minute ago when I asked you? A Yes.

Q Why didn't you tell me a minute ago when I asked you whether or not anything was said in Mr. Hanstein's office as to Mr. Schmeidler releasing this property? A He told just the conversation we had in Mr. Schmeidler's office, Mr. Schmeidler told it to Mr. Hanstein, and the papers were drawed up.

Q Now you say that in Mr. Hanstein's office Mr. Hanstein was told that Schmeidler had agreed that he would release the Northfield property; is that right? A Yes, sir.

Q Why didn't you say that in the first place? A I don't know, just came to me.

Q Forgot it? A I guess I did.

Q So that Hanstein knew of Schmeidler's agreement to release that Northfield property, is that right? A Yes.

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Q Then why didn't you go back to Hanstein when Schmeidler didn't carry out his agreement and tell Hanstein that Mr. Schmeidler had not carried out the agreement and you would have nothing further to do with it? A After I seen that Mr. Schmeidler didn't carry out his agreement and I engaged my attorney, Mr. Bourgeois, I just released it from my mind, I didn't pay any more attention.

Q You told Mr. Bourgeois and Mr. Richards all about it, did you? A Yes, sir.

Q In April of 1925, is that right? A That is right.

Q You are sure of that? A Positively.

Q Do you remember writing a letter to Mr. Bourgeois on or about the 10th of March, 1926? A I don't know—I couldn't recall that unless I could see it.

Q I show you a letter from Mr. Bourgeois to Mr. Hanstein and I ask you if you by reading what Mr. Bourgeois says you said in the letter to him, whether—just read that and see if it refreshes your recollection as to your having written such a letter to Mr. Bourgeois in March of 1926? A Yes, that is just about the tone of the letter I wrote to him.

Q About March of 1926? A Yes, somewhere along in there.

Q Isn't that the first time you told Mr. Bourgeois anything about the transaction with respect to Schmeidler's having made any agreement to carry out this or, rather, to get this property released, and so forth? A No, sir; I showed Mr. Bourgeois that agreement the same day that I hired him.

Q Senator Richards, too? A That is right.

Q But isn't that the first time—just read that letter or think—I don't want you to read it again, takes too much time, but you remember now what that letter says, wasn't that the first time that you indicated to Mr. Bourgeois that Mr. Schmeidler's or that the consideration for that agreement was that he, Mr. Schmeidler, would get a release of this property and that Mr. Schmeidler had not carried out his agreement; wasn't that the first time? A No, indeed.

Q Sure of that now? A Positively, because I explained the agreement thoroughly to Mr. Bourgeois and to Mr. Richards.

Q The whole agreement? A Yes, told them why I signed it and everything, when I showed it to them. They said I was foolish.

Mr. Lane: I ask that this—

Mr. McCarter: I have no objection. I think the letter—

Mr. Lane: I am not offering it in evidence.

(Letter marked S. 5 for identification.)

Q At the time you told this to Mr. Bourgeois and Senator Richards, was there any suggestion made that Mr. Hanstein should be notified and the bank should be notified? A No suggestions made at all.

Q No suggestion of that kind was made? A No.

Q I note that in this letter which you have identified as a copy of which you have identified as being a letter sent by you to Mr. Bourgeois on or about March 10, 1926, you said—

Mr. McCarter: One moment. I have the letter here.

Mr. Lane: I call for the letter, then.

Mr. McCarter: That is, I have his copy. I guess I have the original letter, too, probably.

A Maybe that is a copy of the same letter.

Mr. McCarter: I have the original letter here.

Mr. Lane: Is it in typewriting?

Mr. McCarter: Yes. There is the original letter, Miami Beach, March 6th.

(Letter produced by Mr. McCarter.)

Q I note that in this letter—

(Copy of letter produced by Mr. McCarter marked S. 6 for identification.)

Q I notice that in this letter which has been marked S. 6 for identification, you say, "I think it best now not to settle for anything. I did want to do the right thing and pay $8,600 and $1,000 to Hanstein, but I think we had better let it come to trial and not give him anything, then we can see who is right, Hanstein or Proffatt." What did you mean when you said that you wanted to do the right thing and pay the $8,600 and the $1,000?

Mr. McCarter: I object to it as immaterial and not cross examination.

The Court: I will permit it.

A What I meant, if Mr. Schmeidler had lived up to his agreement I would have paid the whole thing in full.

Q Your wife was responsible for the $8,600 which was secured by this agreement absolutely, wasn't she? A But I took the responsibility on myself.

Q Your wife had a one-half interest in this mortgage, didn't she, up to the date this transaction took place? A Yes, sir.

Q And her interest in this mortgage as well as yours was transferred, wasn't it? A Her interest in this mortgage? I didn't get that.

Q Her interest in this mortgage was transferred to you and then you transferred it to Schmeidler? A Yes.

Q What was the $1,000 to which you referred? Mr. Proffatt, I understood you to say a few moments ago you didn't know anything about what that $2,000 was for?

Mr. McCarter: Your Honor, I still feel, with deference, this is incompetent, this is in a spirit of compromise, Mr. Bourgeois approached Mr. Hanstein with a view of settling this controversy, and Mr. Hanstein made certain statements with reference to the transaction which varied from Mr. Proffatt's statements to Mr. Bourgeois, whereupon Bourgeois writes to Proffatt in Florida the letter in question, and Proffatt replies that in the course of his reply, meeting the contrary statements of Mr. Hanstein, he says, "I have been very glad to have paid eighty-six hundred plus one thousand, or $9,600, but now I won't pay anything." Now I don't think what he meant by a thousand and what he did this and meant that, when it was an offer of compromise of this claim of twenty-eight or nine thousand dollars, is competent.

Mr. Lane: I submit that this letter, which is written by Mr. Proffatt to Mr. Bourgeois, and which was by Mr. Bourgeois, the copy of which was by Mr. Bourgeois transmitted to us, if we can ask this witness, or throw doubt on this witness' story at all on the stand by anything contained in that letter, it is within my right to do it.

The Court: I will permit it.

A That was for stock that was purchased by Mr. Walter Hanstein from Mrs. Proffatt. He gave Mrs. Proffatt a thousand dollars for his stock, ten shares.

Q So that you did know at least what one thousand dollars of the two thousand dollars which was secured by this agreement of April 9, 1924, was, didn't you?

Mr. McCarter: I object to that. That is Thompson & Hanstein.

The Court: Sustain the objection.

Q Do you know what the $2,000 referred to in the agreement of April 9, 1925, represented? A Only to reimburse Mr. Thompson and Hanstein, that is the only thing I know.

Q Reimburse them for what? A I imagine for the stock.

Mr. McCarter: Not what you imagine. If you know, say so. If you don't know, say so. I object to imagination.

The Court: Sustain the objection. Answer the question.

Q I want to know what you thought or what you imagined at the time of the transaction. Of

course I don't want your imagination or thoughts now, but whatever was in your mind at the time that this agreement was signed, I want to know. What did you then think this $2,000 was for? A To reimburse Mr. Hanstein for his share of the stock, of the thousand dollars that he purchased from Mrs. Proffatt, and the other thousand dollars I just can't get in my mind.

Q Don't you remember that that other one thousand dollars was for legal services rendered by Thompson & Hanstein in the matter of this incorporation of this company, and so forth? A Possibly so.

Q At any rate, you were satisfied with that at the time, weren't you? A Yes, sir.

Q As I understand it, when you wrote this letter of March 16, 1926, to Mr. Bourgeois, with respect to settlement, in which you said that it was best not to settle for anything, that in your view at that time and your thought at that time you had no interest in this case at all?

Mr. McCarter: He hasn't said so.

Mr. Lane: I am asking whether he did or not.

A Well, I guess the letter speaks for itself.

Q I am not asking, I think it does, too, Mr. Proffatt, but as I understood your testimony, you said that you had no interest in this litigation so far as you knew, and I am asking you whether that was your thought in March, 1926, when you wrote this letter in which you told them not to settle? Did you have any interest then or didn't you? A No, I don't think I did.

Q You don't think you did? You are rather hazy as to what your interest is, aren't you? A Yes.

Q How long did Mr. Bourgeois continue to act as your lawyer?

Mr. McCarter: I think that is utterly immaterial.

Mr. Lane: I will connect that up in a moment.

Mr. McCarter: I want to know its materiality.

The Court: At the present time it seems to have no materiality. I will hear you on that.

Q Did you know that Mr. Bourgeois was present or had a representative present at the sale of this mortgage? A Sale of this mortgage?

Q Yes, by Mr. Schmeidler?

Mr. McCarter: I object as not cross examination.

The Court: Sustain the objection.

Mr. Lane: If the Court please, this witness has said he had no knowledge or no notice whatever of the fact that this mortgage had been sold. Now I am attempting to show that he did.

A I didn't.

The Court: I have sustained the objection.

Q Is it the fact that you had no knowledge that this mortgage was to be offered for sale by

Mr. Schmeidler? A I had no knowledge whatsoever.

Q Is it a fact—when did you first find out that it had been sold? A After I returned from Miami Beach, Florida.

Q When? A I returned about the 23rd of April, 24th or 25th, something like that.

Q Of nineteen twenty— A 1925.

Q Now the date of the sale—

Mr. McCarter: 1926.

A 1926—yes, 1926 I was in Florida.

Q The date of the sale was on or about the 5th of April, 1926.

Mr. McCarter: There is no evidence of that. The assignment is that date, there is no evidence at all about the sale. There is no evidence before the Court that there was any sale. He can't bring that all out on cross examination of this witness, that is for your proof.

Mr. Lane: If the Court please, this witness has been put on the stand for the purpose of showing he had no knowledge of any sale. I am trying to show that he did.

Q Were you in Florida—you were in Florida, of course, in March, 1926, because this letter was written from Miami. How long did you stay there? A I arrived home, let's see, I can tell, about the 23rd of April, so I must have left then about the 20th of April, something like that, takes about three days to get up, along about that time.

Q Now, upon your return here to Atlantic City, you ascertained that there had been some kind of a sale of this mortgage, didn't you? A Yes.

Q From whom? A I didn't pay any attention.

Q From whom did you ascertain it? Who did you hear it from? A I think I heard it on the street my mortgage had been sold.

Q Is that the only way that you heard it? A That is about the only way I heard it.

Q Now is that the—did you go to see anybody about it? A No.

Q Did you see Mr. Bourgeois about it? A No, I don't think I did.

Q Did you see Mr. Bourgeois about the—you had been communicating, while you were in Miami, with Mr. Bourgeois, and he had been acting as your lawyer in this transaction, hadn't he?

Mr. McCarter: I object. Bourgeois did what he did. They are trying, your Honor, on cross examination to fasten some constructive knowledge for something that don't appear yet, but they are going to try to bring something that Bourgeois received notice of this proposed sale. Now, if they are trying to prove that, let them prove it, and then show the facts, but they can't work anything out on cross examination.

The Court: I am limiting the question to what this man knew. Sustain the objection.

Mr. Lane: Does your Honor sustain the objection?

The Court: Yes.

Q Do I understand it that you had no talk with Mr. Bourgeois about this transaction after you returned to Atlantic City about the 23rd of April, 1926?

Mr. McCarter: After?

Q After. A Oh, after?

Q Yes. A I talked to him when I came back.

Q I know you talked to him when you came back, but I want to know when it was after you came back in April, 1926, that you talked to him about this transaction? A Oh, I couldn't set any date on possibly a week or ten days.

Q A week? Didn't Mr. Bourgeois inform you at that time, when you talked to him about a week or so after you had returned from Atlantic City, did he inform you at that time that this mortgage had been sold?

Mr. McCarter: I object to the question.

The Court: I will permit it.

A I think he did.

Q Now how long before this transaction took place in April, 1925, had you known Mr. Schmeidler? A I have known Mr. Schmeidler, I guess, ten or fifteen years.

Q In business with him, weren't you, at one time? A In business with him at Mays Landing only.

Q I say you were in business with him at one time? A We bought Mays Landing together.

Q And he acted, as I understand it, while you were away—when did you go away, by the way?

Mr. McCarter: Which time do you mean?

Mr. Lane: First time.

A Along in May, I think.

Q Of 19— A '24, I think it was.

Q Of '24? A Yes, I think it was May, 1924.

Q How soon after was it, before or after the appointment of the receiver for the Guarantee Electric Company? A Oh, that was long before.

Q Before the appointment of the receiver for the Guarantee Company? A Yes.

Q And at that time you had disposed of all your stock in the Guarantee Company, as I understand it? A Yes.

Q Now, as a matter of fact, these agreements which have been offered in evidence and your sales of this stock were only agreements to sell, you never actually sold the stock, did you? A Yes, sir.

Q Didn't you hold the stock as collateral for the payment of the moneys due under the agreement? A I did not.

Q I note that in the agreement B. 9, which is the agreement between Proffatt and Huber, it is provided that you shall assign and properly execute and deliver or cause to be properly executed and delivered unto the said Huber a certificate of stock for the shares herein mentioned upon the date that the said Huber shall pay or cause to be paid the said note of $7,500, together with the cash payments as mentioned aforesaid; was that note for $7,500 which is referred to ever paid? A The note in full? I don't think so.

Q So that the agreement with Mr. Emerson, it is in exactly the same language as the other

agreement, except with respect to the amount of the note, which in that case is $4,900, was that ever paid? A No, I don't think it was. Something was paid on account, but I couldn't recall.

Q So that under the terms of your agreement the time never came when you should transfer that stock, had it? A I think the stock was transferred when I received the notes, if I am not mistaken. I wouldn't like to state. The stock is there.

Q I notice that in the stock stub book—

Mr. McCarter: Might I ask, Vice-Chancellor, Judge Shinn is waiting here to prove a formal thing. May we just call him?

Mr. Lane: No objection whatever.

(Witness temporarily withdrawn.)

CLIFTON C. SHINN, sworn.

Direct examination by Mr. McCarter.

Q You were the receiver of the Guarantee Electric Company, Incorporated? A I was.

Q And your attorneys were Bolte, Sooy & Gill? A Yes.

Q Under your direction these proceedings for sequestration were taken? A Yes.

Q I don't have the papers here appointing you receiver. This bill seems to have been filed February 27, 1925. How long before then, if you can tell, Judge, were you made receiver? A It may be that the bill will set that out.

Q Was it some time, do you think, in August, 1924, was it about August, 1924? A I can't give you the date, Mr. McCarter, no.

Q Do you find it recited there? A This bill does not seem to indicate when I was appointed.

Q All right; never mind. I won't detain you any longer. If necessary, we will put that in later, Judge.

Mr. Lane: Might I call Mr. Bishop, who desires to go to New York this afternoon, a matter of proving a formal thing, I think?

WILBUR C. BISHOP, sworn.

Direct examination by Mr. Lane.

Q Mr. Bishop, you are connected with the office of Thompson & Hanstein? A I am.

Q And were connected with that office on the 5th of April, 1926? A That is right.

Q Did you, on or about the 30th day of March, 1926, post certain notices with respect to the sale of this mortgage, and also did you make certain service? A I did.

Q Did you at the time make an affidavit as to how that was done, a copy of it? A I did.

Q Will you refresh your recollection from the affidavit and tell me what you did? A On March 30th I posted five notices, copies of which are annexed to this affidavit marked Exhibit A, at the places recited in this affidavit.

Q Which are what? A To wit, banking house of the Atlantic Safe Deposit & Trust Company, banking house of the Second National Bank in Atlantic City, bulletin in the corridor of the Real Estate & Law Building, the bulletin board in the corridor of the District Court of Atlantic City, and the bulletin board in the cor-

ridor of the Guarantee Trust Building in Atlantic City. Also on the 31st of March, 1926, I mailed in Atlantic City copies of notices which are annexed to the affidavit and marked Exhibit B, to Mr. George P. Proffatt, at 324 North Rhode Island avenue, Atlantic City, to Mr. George P. Proffatt, 244 North Rhode Island avenue, Atlantic City, New Jersey. On the 30th of March I inquired of Mr. Bourgeois' office for an address for Mr. George Proffatt, and was advised by his office that no one there knew his address. At that time I talked with Mrs. Newell, Mr. Bourgeois' secretary, Mr. Bourgeois being out of the office. On th 31st of March, 1926, I inquired of Mr. Bourgeois personally for the address of George P. Proffatt, and Mr. Bourgeois advised me that he did not know of any address, but that he thought Mr. Proffatt was somewhere in the South and would return to Atlantic City within a few days.

Q Now, did you serve or leave with Mr. Bourgeois any copy of this, do you remember? A I served on the 30th of March, 1926, I served a copy of the notice Exhibit B on Mr. Bourgeois' office, on Mrs. Newell, Mr. Bourgeois' secretary.

Q Which one of these places where you posted are places used in Atlantic City for the posting of public notices? A Why, the bulletin boards in this building, the corridor of the District Court, and the Guarantee Trust Building are all used generally for the posting of public notices.

Q For the sale of lands by the Sheriff? A For the sale of lands by the Sheriff, and similar notices from constables and sergeants at arms.

Mr. Lane: I offer that notice, the one he has referred to as Exhibit B.

Wilbur C. Bishop, cross.

Q Are all the notices alike, Mr. Bishop? A A and B are different notices, I think.

Mr. Lane: Then I offer them both.

Mr. McCarter: I object to any notice that was left with Mr. Bourgeois, the fact that he posted a notice, copy of the notice that they posted, I don't object to.

Mr. Lane: The copies are—

The Court: I will permit them to be marked.

(Copies referred to received in evidence and marked Exhibits S. 7 and S. 8.)

Cross examination by Mr. McCarter.

Q Now, Mr. Bishop, what are these documents marked Exhibits A and B? What are they, what became of them, they are notices of what? A Exhibit—well, the one that was marked S. 7 is the one that was posted at the five different places that I have indicated. The one that was marked S. 8 is the one that was mailed, or a copy of the one that was mailed to Mr. Proffatt at the two addresses I have indicated, and served on Mr. Bourgeois' office.

Q Who prepared these notices, Exhibits S. 7 and S. 8? A They were prepared in the office of Thompson & Hanstein, I believe, but I don't know who prepared them.

Q You didn't prepare them? A I don't recall whether I did or not.

Q Under whose direction were you proceeding in doing what you did do? A The firm's.

Q When were you first told to do this, how long before the time that you did it, March 30th or 31st? A I can't recall that.

Q Did you see a notice that came from Mr. Bourgeois, after your attempted service upon him—do you remember seeing, shortly after you left the paper at Mr. Bourgeois' office, a document like that I now show you? A So far as I know, I never saw that document.

Mr. Lane: We will admit that was served upon us, Mr. McCarter, if you want that. I have the original here.

Mr. McCarter: I offer, then, the copy.

(By consent copy referred to received in evidence and marked Exhibit B. 12.)

Mr. McCarter: "To Isadore Schmeidler, Atlantic City, N. J. Dear Sir: A few days ago a notice addressed to George P. Proffatt was served on me, which notice appears to have been executed by yourself, and which stated that you propose to sell a certain mortgage covering premises on the southerly side of Atlantic avenue, and so forth, which notice stated the sale was to take place on the 5th of April, 1926, at ten o'clock in the forenoon, at the Second National Bank Building, Atlantic City, New Jersey. This is to notify you that I do not represent George P. Proffatt in the above matter, and am not authorized to accept service for him of such notice, and don't know where he is and have not been able to communicate with him. Bourgeois & Coulomb, George A. Bourgeois. Dated April 5, 1926."

George P. Proffatt, cross.

GEORGE P. PROFFATT, resumed.

Cross examination (resumed) by Mr. Lane.

Q I notice, Mr. Proffatt, that the stock stubs for the stock, fifty shares which you sold to Thomas Emerson, that one is dated September 15, 1923, and the stub for the stock which you sold to Mr. Huber is dated October 24, 1923. Do you know what became of the stock certificates? A The stock certificates?

Q Yes. A Original stock?

Q Yes. A Yes.

Q What? A They were put up at the Equitable Trust Company for a loan.

Q Loan made to whom? A That I made of $14,000 to the bank and the company, Mr. Emerson put up his $5,000 worth of stock, Mr. Huber put up his $19,500 worth of stock, and I borrowed $14,000 and turned it over to Mr. Huber, which I have got a check for.

Mr. McCarter: Borrowed of whom?

A Equitable Trust Company, and that was put up as collateral. This is the Equitable Trust Company loan.

Q At that time? A Yes, sir.

Mr. McCarter: At what time do you mean?

Mr. Lane: That is October, 1923.

By Mr. McCarter.

Q What is the time that loan was made, that is what he wants to know. A I couldn't recall

that, it shows right there at the time the loan was made, I think.

Q Does the memorandum you made for me give you the date? A No. When was that loan made? I can tell, that is Mr. Schmeidler's check when he paid it.

Q Never mind, now. A No, it wasn't at that time.

By Mr. Lane.

Q It was November 10, 1923, wasn't it? A The loan was made?

Q Yes. A No, the loan was made in—I don't recall—I did have it—let's see—

Q Haven't you got the cancelled note there which gives it to you? A No. You see I haven't, I have got only Mr. Schmeidler's check where he drawed it out of my account, but I think that was in, just before I had went away.

Q Which was what date? A That was along in May, I think, of 1924. You see I sold the stock to the company, that is, to Mr. Huber and Mr. Emerson, in November, 1923, and then I think the following May they borrowed $14,000 down at the Equitable Trust Company.

Mr. McCarter: May I make this suggestion, I have a memorandum here which this gentleman made for me, which gives the date of this loan from the Equitable. Perhaps you can refresh his recollection by looking at that.

A Yes. Then I can.

George P. Proffatt, cross.

By Mr. McCarter.

Q Do you remember making a memorandum for me? Look at this memorandum and see if you can, by referring to it, refresh your recollection as to when you made this loan in the Equitable Trust, if that is the right date. I don't know. That is when you gave me that. A Yes.

Q What is the date? A November.

By Mr. Lane.

Q November 10th, exact date is November 10, 1923, isn't it? A Yes.

Q And that was a loan made by you from the Equitable Trust Company on your note; is that right? A Yes.

Q And was secured by this stock which was transferred by you? A Mr. Huber's stock and Mr. Emerson's stock, it wasn't my stock.

Q That is, the stock certificates were put up? A Yes.

Q When that loan was paid off, you received those stock certificates, didn't you? A Yes.

Q And you got them yet? A Yes.

Q You got them in your pocket now, don't you? A I don't know; maybe I have.

Q You had two stock certificates, I would like to see. A There they are, sir. (Producing certificates.)

Mr. Lane: I offer them.

(Stock certificates received in evidence and marked Exhibits S. 9 and S. 10.)

Q Now your wife received $25,000 of this stock at the inception, didn't she? A Yes, sir.

Q How long did she retain her ownership? A That I don't know.

Q Don't you know anything about it? A No, I couldn't tell that exactly.

Q Well, did you have anything to do with her transferring her stock? A No.

Q Who did handle her business for her? A The only recollection I have that Mrs. Proffatt had sold to George Lichtenstein $5,000 worth of stock, I think, five thousand to Thomas Emerson, five thousand to Llewellyn Huber, five thousand to Bart A. Bullock, two thousand, I think, to Marshall Berkins, and two thousand to William F. Ash, and a thousand dollars to Mr. Hanstein. I think that comprised her stock, as near as I can remember.

Q Now, all of those transactions you know took place in the month of October, 1922, don't you? A Yes, sir, I think they did.

Q Well, you acted for your wife, didn't you? A In the transaction?

Q Yes. A No, Mr. Hanstein and Mr. Thompson was our attorney at the time.

Q I know, but didn't you act for your wife? In these business transactions didn't you act for your wife? A No, I didn't act for her.

Q Who got the money which was paid for this stock by Lichtenstein? A Mrs. Proffatt.

Q Did it go into her bank account? A Yes, sir.

Q Is that bank account for October, 1922, available? A I don't know.

Q What bank was it in? A Second National Bank.

Q And went into her bank account in the Second National? A Yes, sir, I think that was on a note for that, I think George's was, and then he paid it off.

Q All of these, as a matter of fact, all of these sales were on notes? A Yes.

Q And nobody paid anything off except Lichtenstein? A Oh, yes.

Q Who else? A Marshall Berkins paid.

Q Berkins and Lichtenstein? A Yes, and I think everything was paid but part of Mr. Huber's note, and part of Mr. Emerson's note, which makes the eighty-six hundred, I think that is the only amount that has not been paid.

Q So that the indebtedness of Mrs.—how about the fifty shares of Bart A. Bullock? A That I think was returned by Bart to the company. I don't know about that.

Q Returned to whom? A I think that was returned to the company.

Q It wasn't paid for by Bullock to Mrs. Proffatt, was it? A No.

Q She didn't get the consideration for that? A No, I don't think so.

Q Now, the $8,600 which you have just mentioned, that $8,600 were notes discounted or was represented by notes discounted by the Second National Bank, which notes were given in payment by the purchasers for this stock to Mrs. Proffatt? A That is right.

Q Now at the time this company started out, the only assets which were transferred to it as a consideration for the issuance of this $50,000 of stock, was your business, wasn't it?

Mr. McCarter: I object. What is the materiality of that upon this question?

The Court: Like to hear you on that, Mr. Lane.

Mr. Lane: The materiality, if the Court please, is the consideration and the reason

why this man made the agreement which he made securing the Second National Bank. It is stated and he has said under examination and direct examination that there was no consideration by him for the making of this agreement except the promise of Schmeidler. He has said he was under no obligation to the Second National Bank. I propose to show that he was under an obligation to the Second National Bank, that reason being the manner in which his company was incorporated, and that he recognized that obligation, and that it was in recognition of that obligation that he made this agreement, and not because of any supposed promise on the part of Schmeidler at all. To do that I have got to show either a moral, or legal or other sufficient obligation on the part of Mr. Proffatt.

Mr. McCarter: How can the fact, if it be a fact, that the stock was watered in this Guarantee Electric Company create any liability on this man's part to the bank, which was not the company, which was not its receiver, and which had nothing to do with the thing?

Mr. Lane: Was a creditor.

Mr. McCarter: One moment. It became a creditor afterwards, and the receiver filed his bill, on these very things as receiver, those averments formed the basis of the right of sequestration, and when the matter came on to be heard before your Honor the bill was dismissed and the writ of sequestration removed. Now how can they retry that question for the purpose of showing that, in some way or other, the bank, which was a

creditor, they say, was in some way led into loaning money to the company afterwards? It don't appear that he, Mr. Proffatt, represented anything to the bank. It don't appear, so far as appears, he had nothing to do with the bank, and with the loan, and if the theory be that the bank became a creditor, and therefore was entitled to hold Mr. Proffatt upon the matter in some way, why that is *res adjudicata*, against the creditor, because the creditor as representative of the receiver set up in the papers, to which I invite your Honor's attention, if you don't remember it, and your Honor dismissed the bill.

Mr. Lane: It is quite material, if the Court please, whether there was a legal obligation on the part of Mr. Proffatt or not, it is quite immaterial as to whether upon the trial it was determined that he was under no legal obligations, if in fact he assumed, and the bank was claiming that there was a legal obligation, which legal obligation was thrown out afterwards, illegal perhaps, he recognized that was sufficient and is sufficient consideration, outside of anything else, for the making of this agreement, even if it were not a completed transaction, which it is. He has a right to recognize what I call, for lack of a better word, a moral obligation, arising out of the circumstances which he recognized.

The Court: Objection sustained.

Q At the time you made this agreement with Mr. Schmeidler and had these talks with Mr. Schmeidler, you knew, did you not, that the

Guarantee Electric Company had borrowed $15,000 from the Second National Bank? A Oh, yes.

Q You knew at the time that loan was made, that it was made, didn't you? A I knew they made a loan.

Q You knew before the loan was made that it was intended to be made, didn't you? A I did not.

Q You did not? A No.

Q Are you sure about it? A Positive.

Q For the purpose of—do you remember being present at a meeting, a special meeting of the Board of Directors of the Guarantee Electric Company, held on the first day of November, 1922? A Well, that I couldn't say from memory.

Q Don't you remember that a meeting was called for the specific purpose of passing upon the matter of the making of this loan from the Second National Bank? A That would be in the minute books, I couldn't recall.

Q Don't you remember it? A No.

Q I show you what purports to be a minute book and ask you if those are the minutes of a special meeting of the Board of Directors of the Guarantee Electric Company, Inc., at which you are recited as having been present, and tell me whether you, after reading it, don't recollect that you were present, and that resolution or authority was passed?

Mr. McCarter: What is the date of that?

Mr. Lane: November 1, 1922.

A Yes, I guess that is right.

Q Then you did know the loan of $15,000 was to be made from the Second National Bank, didn't you? A Yes.

Q You were mistaken a few minutes ago when you said you didn't know? That is right, isn't it? A That is right.

Q Now, as a matter of fact, your recollection having been refreshed as to your knowledge that the loan was to be made, don't you remember that you went into the Second National Bank and arranged for the loan? A That I did not.

Q Sure of that? A Positive.

Q Do you know a Mr. Cochran? A Yes, sir.

Q Of the Second National? A Yes, sir.

Q And you have known him for a great number of years? A Considerable number of years, yes, sir.

Q And you have done business with him and with that bank for a period of how many years? A Oh, five or six years, I guess, ten years.

Q At that time you were running the same kind of a business as the Guarantee Electric Company subsequently carried on in corporate form, as an individual, weren't you? A That is right.

Q And your account was in the Second National Bank, wasn't it? A That is right.

Q And your relations with the Second National Bank were pleasant, weren't they? A Yes, sir.

Q They accommodated you from time to time? A Yes, sir.

Q In rather large amounts? A Yes, sir.

Q And you always paid off? A Yes, sir.

Q Now, don't you recollect that—and you discussed with the officers of the Second National Bank your business relations, didn't you, as a depositor who gets accommodations discusses with the banker? A That I couldn't say.

Q You don't remember that? A No, I don't.

Q You remember, when you changed your business from that of an individual trading under this name to that of a corporation; you remember that? A Yes, when the company was incorporated, yes.

Q The purpose of that was to permit Mr. Huber and Mr. Emerson to get an interest in the company, wasn't it? A Yes.

Q That was the purpose? A Yes.

Q And you told Mr. Cochran that, didn't you? A Mr. Cochran knew that the company was incorporated.

Q I know it, and he knew it because you told him, and knew it before it was incorporated because you told him you were going to incorporate, didn't you? A Yes, Mr. Hanstein got up the incorporation papers.

Q I know it, but I am now talking about Mr. Cochran. Mr. Cochran knew it because you had told him; isn't that so? A Oh, yes.

Q You had talked it over with him? A Yes.

Q And you also told him before the incorporation that the purpose was to let Mr. Huber and Emerson have an interest in it, didn't you? A Yes.

Q And you told him you were going to continue the business, didn't you? A That I was going to continue?

Q Yes. A He knew we were going to continue business.

Q You were going to still be interested in the company? A Oh, yes.

Q You told him that, didn't you? A Oh, yes, he knew it, didn't have to tell him.

Q You also told him before or at the time or about the time this note was discounted, that the business was to go on just as it had before and that you would be responsible for what the company did, didn't you? A No, I never told him about being responsible, the company would go on just the same.

Q You remember that you told him it would go on just the same but you don't remember that you told him that you would be responsible for all the accommodations the company got? A No; had Mr. Cochran asked me to go on the note, I would have went on it.

Q Had he asked you would have gone on it? A Yes, sir.

Q Yes, of course, but you told him, you indicated to him—

Mr. McCarter: One moment.

Mr. Lane: Wait until I get through.

Mr. McCarter: One moment.

Mr. Lane: You can't object to what I am going to do until I say it.

Q You indicated to Mr. Cochran that if he had asked you to go on the note you would have gone on, didn't you?

Mr. McCarter: I object.

The Court: Sustain the objection.

Q Don't you remember telling him that—

Mr. McCarter: When was this, please?

Mr. Lane: Before this note was discounted.

Q Don't you remember telling him that you considered that any advances that were made for the corporation was for your benefit? A No, sir.

Q Don't remember that? A No, sir.

Q And don't you remember telling him that you would stand behind whatever the company did? A I did not.

Q There was, however—you do remember, however, that there was a discussion or talk between you and Cochran as to the business management and the fact that the business was to go on as before? A Oh, yes.

Q You remember that? A Yes.

Q So that from the very beginning in November—so that in the very beginning of the discount of this $14,000, your attitude was that you wanted to take care of the Second National; didn't you?

Mr. McCarter: I object.

The Court: Sustain the objection.

Mr. McCarter: Can't make a man legally responsible for a debt by an attitude.

Mr. Lane: I say, in response to that, it is quite immaterial, I repeat, whether he was legally responsible or whether he wasn't.

The Court: I understand. I have sustained the objection.

Q Mr. Schmeidler had taken care of your business while you were away from the—I can't keep these dates in my mind—you said when

you went away about May, 1924? A 1924, somewhere along there.

Q And you then went where? You went where during that period of time? A I went over on the other side, then came back home and went down to Key West, Florida.

Q You were away for how long? A I was away from May until about the following April, 1925.

Q About a year? A Yes.

Q During that period of time, as I understand, Mr. Schmeidler took care of your business? A Yes, sir.

Q Under a power of attorney? A That is right.

Q And he wrote you from time to time letters, did he not? A I couldn't say that, whether I got any letters from Mr. Schmeidler or not.

Q Well, didn't you write him letters? A I may have. I couldn't say, been so long.

Q Making inquiries as to what was going on?

(Recess taken until 1:45 o'clock P. M.)

AFTERNOON SESSION.

Trial of cause resumed at 1:45 P. M.

GEORGE P. PROFFATT, resumed.

Cross examination (resumed) by Mr. Lane.

Q Do you remember receiving from—during the time that you were away, any communica-

tions from the Second National Bank? A I think I received a cablegram.

Q Have you that cablegram? A I have not.

Q Do you remember the contents of that cablegram? A I couldn't recall.

Q Wasn't it urging you to come home to take care of matters? A I couldn't recall.

Q Have no recollection as to what it was? A No.

Q Do you remember having received a cablegram from Mr. Hanstein? A Yes, I received a cablegram, I think, from Mr. Hanstein.

Q That was in July, 1924? A I wouldn't say the date, but I received one.

Q You haven't a copy of that? A No.

Q Do you remember what that was about? A I do not.

Q Do you remember that was urging you to come home, or inquiring as to when you were coming? A I couldn't say.

Q You wrote Mr. Hanstein during the time that you were away, didn't you? A I think I did.

Q I show you a letter dated in Rome, I think, July 31, 1924, and ask you whether you sent that letter to him, whether that is your handwriting? A Yes, that is my handwriting.

(Letter offered, received in evidence, admitted by consent, and marked Exhibit S. 11.)

Q I notice that in this letter you say, "I see no reason for suit by the Second National Bank." To what did you refer? A I meant a suit against the company.

Q You referred, you think, to the— A Guarantee Electric Company, Incorporated.

Q Against the company? A Yes.

Q You say in that letter, "But you just keep things going until I arrive." What did you mean by that?

Mr. McCarter: Well, can he interpret his language?

Q What did you refer to? A That must have been in reference to the cablegram I received from Mr. Hanstein.

Q But you have no recollection now as to what that cablegram contained? A No.

Q Do you recollect as to whether or not when you said, "but you just keep things going until I arrive," whether you referred to corporate matters? A No, I couldn't say.

Q You had no interest in the corporation, did you? A No.

Q Can you tell me or can you recollect anything else that it might refer to except the corporate matters? A I cannot.

Q You can't? A No.

Q I show you another letter and ask you whether that is in your handwriting? A Yes.

Q And that was sent while you were away, was it not? A Yes.

Q Have you any recollection or can you tell from the contents of the letter as to about when it was sent? It bears no date. A No, I could not.

Q That was sent by you, I notice at the heading is, "Pete, give this to Walter"; who is Pete? A My boy, son.

Q He was on this side? A Yes, he was over here, Atlantic City.

Q This was sent to him, enclosed in a letter from you, with directions to give it to Mr. Hanstein? A Yes.

(Letter offered, received in evidence, and marked Exhibit S. 12.)

Q I notice in this letter you state: "I did not run away and I am not any ingrate. I know you and the Judge was my friends and what I told you also"—to what did you refer when you used the word "and what I told you also"? A I can't recall that.

Q Didn't you refer to an agreement that you made with Mr. Hanstein before you went away that you would take up the stock of Thompson & Hanstein. A That I couldn't say.

Q Will you say that it did not refer to some such agreement on your part? A I couldn't remember.

Q Then you wouldn't say there wasn't such a statement made by you before you went away? A No, I wouldn't say.

Q "I also"—you say in this letter, "I also remember the bank when I was in need to buy my property"—the bank that you referred to was the Second National, wasn't it? A Yes, sir.

Q Do you know what it was that led you to say in this letter to Mr. Hanstein, or make the statement in this letter to Mr. Hanstein, "I also remember the bank"? A I do not.

Q You don't know—you have no recollection of that as to what it was that induced you to say that? A No, not at the time.

Q Now wasn't it a statement on your part, didn't you refer to a statement which had been

made by you before you went away that you would take care of the bank? A I couldn't say.

Q Will you say that you did not make such a statement before you went away? A I didn't make it.

Q You will say with reference to that that you did not make such a statement? A Yes.

Q You don't remember whether you made a statement as to Thompson & Hanstein, but you do remember that you did not make such a statement with respect to the bank? A That is right.

Q But you can't tell me what it was that caused you in this letter to, after you used the words "and what I told you also," referring to Mr. Hanstein, "and I also remember the bank," you can't tell me what it was that led you to say that? A No, I don't. It is too long.

Q Now I also show you a letter or postal card, postmarked London, September 13, 1924, and ask you whether you sent that postal card to Mr. Cochran of the Second National? A Yes—no, that is not my writing.

Q Did you cause that to be sent? Whose writing is it? A My wife's.

Q It is your wife's writing? Did you know that it was sent? A I did not.

Q That is the first time you have seen it? A The first time I have seen it.

Q But that is your wife's handwriting? A My wife's handwriting.

(Postal card marked S. 13 for identification.)

Q How long after you returned was it that you saw Mr. Schmeidler for the first time? A About a couple of days.

Q He had acted, or did you and he have a talk as to what had occurred in your absence? A Yes, sir.

Q And I suppose that talk took a considerable time? A No doubt but what it did.

Q He went over with you, he had been acting for you as under a power of attorney? A That is right.

Q And I suppose he went over with you what he had done and what he hadn't done? A Yes, sir.

Q He told you, or did you know before that a suit had been brought by the receiver of the Guarantee Electric Company and your property had been sequestered? A Yes, sir.

Q Did you know it before? A Yes, sir.

Q How did you get that information? A My boy sent it to me in Key West, Florida, a copy of it.

Q Just at the time the advertisement was made of the issuance of the writ? A I don't know just exactly.

Q It was a newspaper, regular legal advertisement, wasn't it? A Yes.

Q Was that the first that you knew that such a suit had been instituted? A Yes, sir.

Q It was almost immediately upon your getting that advice you came home? A Yes, sir, to the best of my knowledge.

Q You and he went over what the suit was about, you and Schmeidler? A Yes, sir.

Q And he told you that the receiver claimed that the stock of the company had not been paid

for, and that you were responsible as to stockholder for the debts? A That I couldn't say.

Q What did he tell you the nature of the suit was? A He told me that he thought the suit was brought on by the Guarantee Electric Company against me to sequestrate my property.

Q But didn't he go into any details as to what right they had against you? A No, that wasn't discussed, I don't think.

Q Now, at that time you had in your mind coming back to Atlantic City and re-establishing yourself in business, didn't you? A No, sir.

Q Are you sure of that, that nothing was said about that at all? A Nothing at all.

Q How was it that the securing of the Second National Bank came up? A How was it?

Q Yes. A I went to Mr. Schmeidler, that is, I met him, and I told him, that is when I seen Mr. Schmeidler the first time, he said, "George, are you going to take care of the bank in any way?" I said, "I can't do anything until after the suit," and the next day I see Mr. Schmeidler and I also rehearsed it with him. "Well," he said, "I think the bank should be taken care of." "Well," I said, "I can't do anything until after the suit, because I am all tied up."

Q Now, did he tell you why it was, did he say why it was that he thought the bank should be taken care of? A No, I don't believe that was discussed.

Q Well, did you ask him why he thought that the bank should be taken care of rather than somebody else? A I don't believe that was discussed even.

Q That is all that was said upon that except simply the statement by him, "I think the bank should be taken care of," and the statement by

you, "I can't take care of the bank until this suit is disposed of"? A That was all at that meeting.

Q Those are the only words he used, are you sure of that? A Yes.

Q You didn't suggest to him as to why he was so interested in the bank being taken care of? A I did not.

Q He didn't suggest to you any particular reason as to why you should be careful to take care of this bank to whom you were not responsible at all? A No, I don't think that was ever mentioned.

Q How is it—why was it that you, when he said that you should take care of the bank and you knew that you were not responsible to the bank, why didn't you say, "What have I got to do with it? Why should I secure this bank?" A I don't think there was anything said at that meeting at all.

Q I am trying to get at as to why you didn't say that, why did you, instead of saying that, say, "Well, I can't do anything until this suit is dismissed?" A I couldn't.

Q I know you couldn't. But why didn't you say, "What reason have I got at all to satisfy this bank? A I don't believe there was any reference made to it at all.

Q I know. You didn't consider yourself responsible to the bank in any way, did you? A No.

Q I am asking you, if you can take your mind back to that time, as to how it is that you did not immediately, when he said to secure the bank, why you didn't say, "Why should I?" A Just didn't say it, I guess. I don't remember it.

Q Now don't you remember that you said to him that you wanted to establish yourself in business again in Atlantic City, and he said, "Well, if you want to do that, it is up to you to take care of this bank?" A That was never discussed.

Q And no other reason was discussed, that reason wasn't discussed and no other reason was given for his solicitude with respect to the bank or as to any reason why you should take care of the bank? A No.

Q Now you talked about this matter—when was it, in the course of the proceedings or in your talks with Mr. Schmeidler that he suggested that although your property was tied up, you had a mortgage? A I just didn't get that question.

(Question repeated. (Question withdrawn.)

Q When was it, in the course of the proceedings that Mr. Schmeidler suggested something being done with this mortgage? A About the second or third time that I met Mr. Schmeidler I told him I had a chance to sell the Northfield property.

Q Then what was said? A And I told him if I could get it released that I could sell it.

Q Yes? A And he said that he would go and see Mr. Sooy and try and get it released.

Q Yes? And then what else did he say? A And I said, "Well, if you can get it released, I don't mind helping the bank out because I can sell it for $75,000, and I think that is an awfully good price." He said, "Have you got an offer?" I said, "Yes, a bone fide offer of $75,-

000." He said, "I will go and see Sooy and see what I can do."

Q Now Sooy was counsel for the receiver, wasn't he? A Yes, sir.

Q He was not counsel for the bank, was he? A No, he was counsel for the receiver.

Q And this claim you knew was a claim not of the bank against you as to the bank, but the receiver against you, that is right, isn't it?

Mr. McCarter: What claim?

Mr. Lane: The claim which resulted in the sequestration.

Q The sequestration proceedings were brought not by the bank but by the receiver?

Mr. McCarter: If you know. Don't surmise, just tell what you know.

A I think that sequestration was brought out, that is, to sequestrate my property.

Q And that was a receiver's suit, wasn't it? A Yes.

Q And Mr. Sooy was counsel for the receiver? A Yes.

Q And Mr. Schmeidler said that he had gone to the receiver's counsel and that he could get the sequestration lifted or released, and you then said that if that was so you would be willing to secure the bank; is that right? A That is right.

Q Now what connection in your mind was there between a release by the receiver of the receiver's claim and the securing of the bank? A He wanted me to secure the bank, if he got my property released in Northfield, that I agreed to do if he would have the property released.

Q Who was this person to whom you had a contract to sell this property? A Mr. Hart.

Q And when was that, when did you have the opportunity to sell that property to Mr. Hart? A I was only back about one day when I met Mr. Hart at New York avenue and Atlantic. He said, "George, have you got the Northfield property yet?" I said, "Yes, but it is tied up." He said, "If you can deliver it I will get you $75,000." I said, "I will let you know," then is when I went to Mr. Schmeidler.

Q That was the extent of your offer? A Yes.

Q That is all that took place between you and Hart? A Yes.

Q At any time? A Oh, no.

Q As to this property? A Yes. We afterwards had a talk about it.

Q Did you sell the property? A Afterwards.

Q After the sequestration proceedings were released? A Yes, sir.

Q To Hart? A No, sir.

Q To his client? A No, sir.

Q Through him? A No, sir.

Q In connection with the prior offer? A No.

Q When did you sell it? A I sold it in July, I think, to Mr. Lee James and Shoyer.

Q For what price? A Fifty thousand cash.

Q After the release, after the sequestration was released, did you go back to Mr. Hart? A No, I didn't bother any more.

Q So that with respect to the sale of this property you only had that one conversation with Mr. Hart on the street? A Yes.

Q And he offered you then or said he would get, as I understood you, that he would get $75,000 for you for it? A Yes.

Q Then after the property was actually released in July, or four months later, you did not again talk to Mr. Hart? A No.

Q Although he had not in the meantime told you or you had not been informed in the meantime he could not get the seventy-five? A I told him afterwards, after I had seen him first, that I could not release the property, that was the time I signed the agreement with Mr. Schmeidler and the property was not released.

Q But you did not go back to him at all after you actually were in a position when you could sell the property? A No, because I figured fifty thousand cash was better than seventy-five on time, because I needed money.

Q So that the seventy-five thousand—that is the reason why you didn't go back? A Yes.

Q The seventy thousand dollars was on time, and the fifty you got was in cash? A Yes.

Q You deliberately chose the latter offer? A Yes, sir.

Q Because it was cash? A Yes, sir.

Q And what date was it that you sold the property, do you remember? A That I don't know, some time in July, I think.

Q Now you knew Mr. Sooy, didn't you? A Mr. Sooy, Frank Sooy? Yes, sir.

Q How long had you known Mr. Sooy? A Oh, I have known Mr. Sooy for a good many years.

Q Knew him intimately, personally? A Just to say, "How-de-do," and like that.

Q You also knew Judge Shinn, didn't you? A Yes, just to say "Hello."

Q Well, you had known him for how many years? A Oh, I guess eight or ten years.

Q Did you make any—did you make any inquiry of Mr. Sooy or Judge Shinn as to getting this property released? A I did not.

Q At any time? A I did not.

Q And when Schmeidler, after Schmeidler told you, a very short time after he had made this agreement to get the property released, you didn't then go to Sooy or to Judge Shinn and try to find out about it? A I did not.

Q Although you had this offer of $75,000 depending upon the outcome? A I didn't go to see him.

Q Why didn't you go to Judge Shinn or Mr. Sooy? A I just didn't go.

Q Now can you tell me about how many times you talked to Mr. Schmeidler before or went into—before you and your wife went to Mr. Hanstein's office? A About two or three times, I should judge.

Q And then you all went to Mr. Hanstein's office? A That is right.

Q Do you remember whether Judge Thompson was there at that time? A I couldn't recall.

Q Do you remember asking Mr. Hanstein whether he would represent you? A I couldn't recall that.

Q You won't say it didn't take place? A No.

Q Do you remember that Mr. Hanstein said that he would not, do you remember anything of that? A No.

Q Do you remember seeing Judge Thompson at that same time and asking Judge Thompson whether the firm of Thompson & Hanstein would represent you?

Mr. McCarter: When, about, do you mean?

Mr. Lane: At the time they had that meeting in Mr. Hanstein's office.

A I couldn't recall.

Q What? A I couldn't recall.

Q You won't say that statement was not made? A No, I couldn't recall that. I can't recall it just now.

Q Do you remember Judge Thompson's remark that he would not talk about representing you at all until the Second National Bank and Thompson & Hanstein had been secured? A I don't recall it.

Q You won't say that that was not said? A No.

Q After you returned in April and before you went to Mr. Hanstein's office and signed this agreement, you had seen Mr. Hanstein, hadn't you? A I think I met Walter on the street.

Q But you don't remember ever coming to his office? A No, I couldn't recall that.

Q Do you recall any conversation at any time up to the time, up to and including the time that you actually signed the agreement in Mr. Hanstein's office, in which the representation of you by Thompson & Hanstein was discussed either between you and Mr. Hanstein or Judge Thompson? A I don't recall that.

Q You will not say that it was not discussed, will you? A No.

Q Don't you remember that it was because—Thompson & Hanstein had been your lawyers, hadn't they? A Well, there was nobody my lawyer when I was away. I didn't need any.

Q I don't mean when you were away, before you went away they had been your counsel? A Yes.

Q And had been your counsel for how many years? A I think they had been counsel for about two or three years.

Q And your relations with them were always pleasant as indicated by the correspondence? A Yes, very pleasant.

Q Now, don't you remember that the reason why you went to Mr. Bourgeois with this sequestration case was that because at that conference that was held that night in Mr. Hanstein's office, Mr. Hanstein and Judge Thompson had told you that they would not represent you? A I don't recall that.

Q Do you recall what led to the change in counsel? A Do I recall? No, I can't recall it.

Q You don't recall what it was? A No.

Q That induced you to retain Mr. Bourgeois instead of Mr. Hanstein or Judge Thompson in this sequestration case? A No, I couldn't recall.

Q Haven't any recollection of the reason? A No.

Q And you knew when you got to Mr. Hanstein's office—by the way, was your wife there all the time? A Yes, my Mrs. was present.

Q There was a stenographer there, too, wasn't there? A I couldn't recall that, whether they were there or not.

Q Miss Barber—do you know Miss Barber in Mr. Hanstein's office? A Yes.

Q Do you know a stenographer named Miss Barber? A Yes.

Q Do you remember her being there and taking the dictation? A I think so. I think she was present.

Q Now the first agreement that was dictated was the agreement providing for the assignment

of the mortgage to Mr. Schmeidler, wasn't it? A No.

Mr. McCarter: That is not a correct definition.

Q Which paper was it that you think was the first one that was dictated? A To the best of my knowledge, the first paper dictated was the assignment from Mrs. Proffatt of the mortgage to me.

Q Now, to the best of your knowledge, which one was the next, that is Exhibit S. 1—now to the best of your knowledge which was the next paper dictated? A I think the next one was my assignment by me to Mr. Schmeidler.

Q That is Exhibit S. 2. Now which was the next one that was executed? A That agreement of Mr. Schmeidler's.

Q That is B. 10? A Let's see the agreement. Yes.

Q Now, which was the next one? A That was the agreement after this were signed, Mr. Schmeidler said, "To show you I am a good fellow, George," he said, "all the proceeds," he says, "from the bank," he says, "I will turn over to you," and he immediately signed another agreement and we signed that.

Q So the agreement B. 11 was signed? A Yes, that is right.

Q Now these agreements, the two assignments and the agreements between yourself and Schmeidler, Exhibit B. 10—were those agreements—who dictated those agreements? A I think Mr. Hanstein dictated them to his stenographer.

Q Were those agreements, these three agreements or papers, documents, dictated while the

stenographer was there all at one time? A No, I don't think so.

Mr. McCarter: Which do you mean, Vice-Chancellor?

Mr. Lane: The two assignments and agreement B. 10, the agreement between Proffatt and Schmeidler with respect to the assignment.

A I think they were dictated and the girl wrote them and they were brought in one to a time, and we signed them and then the other one was dictated, just in rotation.

Q You have no recollection of the three first ones being dictated at one sitting or one time and then the girl going out and drawing them and then there being this talk about your having an assignment or Mr. Schmeidler being willing to give you an assignment of the claim of the Second National Bank, and the girl being again brought in and that dictated to her, and going out and drawing that up? A The agreement for Mrs. Proffatt was dictated, the assignment of the mortgage to me, first, and the girl brought it back, as I understand it, to the best of my recollection, then the agreement of my assignment of the mortgage over to Mr. Schmeidler was next, and then the agreement between Mr. Schmeidler and I, that is that long agreement, whatever that exhibit was, that was dictated, that was brought in and signed, and after they were signed Mr. Schmeidler said, "In order to show you I am a good fellow, George, I will give you the proceeds which is coming out of the bank," he says, "to turn over to you."

Q So that the assignment back of Schmeidler or of the Second National Bank of Schmeidler's

agreement to give you the dividends on the claim of the Second National, that was an afterthought? A Yes, that was an afterthought.

Q But the others were all part of the one transaction? A Yes.

Q Now, are you quite certain that that is the way that that Exhibit B. 11, which is the agreement by Schmeidler reciting his receiving an assignment from the Second National Bank of the claim and his agreement that he would collect the dividends and give to you, are you sure that is the way that came about? A Yes.

Q Don't you recollect that while these papers were being dictated or after the three first had been dictated, that you said, "Now, I am securing this bank, and giving up this mortgage, and I think it fair that I should have the bank's claim against the company"? A I didn't say it.

Q That wasn't your suggestion at all? A No, sir.

Q It came purely voluntarily from Schmeidler without any suggestion on your part? A That is right.

Q How were the figures of $23,200, which are referred to in the agreement of the 9th of April, 1925, B. 10, how were those figures arrived at? A I think it was $8,600 for the two notes that was in the bank, and the fourteen thousand six hundred, I think that was it.

Q Yes, I know, but that is obvious, those are the figures included, but how did those figures come to be included, what was the method by which you reached that result, or what happened? A Why, the $14,600 and $8,600 would make that, wouldn't it?

Q I know it would, but how were those figures —the bank held other claims, didn't they? A That I don't know.

Q Don't you know that the bank held at that time a note of the Guarantee Company which had been discounted on July 20, 1923, for $5,600, and another note for $500 which had been discounted by the company on April 12, 1924? A I did not.

Q Do I understand that you thought at the time you had this talk in Mr. Hanstein's office that you were securing the entire indebtedness of the bank from the Guarantee Electric? A So far as I knew.

Q And that was your intent at the time, to cover all of the indebtedness of the Guarantee Company to the bank?

Mr. McCarter: His intent was to do what he did. He didn't know whether any more or not. I object to the question. It calls for a conclusion.

The Court: I will permit it.

Q Was that your intent at the time, to secure the bank for all the moneys due to it by the Guarantee Company? A I don't know. I couldn't answer that.

Q You can't answer what your intent was; is that right? A No.

Q Now, Mr. Proffatt, don't you remember that in that discussion that took place in Mr. Hanstein's office, in which Mr. Hanstein participated, don't you remember the question came up as to what indebtedness of the bank you were going to secure, and don't you remember that the items were mentioned, the $14,000 which had been discounted in November, 1922, the $2,000 of Thompson & Hanstein, $8,600 upon which your wife was responsible, and the $5,600 which was discounted on July 20, 1923, and the $500 which

was discounted on April 12, 1924, don't you remember that you then said that you were quite willing to secure the $14,000 because that indebtedness was incurred at the time when you were connected with the company, but that you could see no reason why you should secure the $5,600 and the $500 which had been discounted at the time when you had nothing to do with the company? Don't you remember that? A I do not.

Q So, with no recollection of any such conversation in which these specific or those amounts were mentioned— A No, there was no conversation.

Q You have no recollection of any—by the way, how long were you there? A How long was I where?

Q At Mr. Hanstein's office, how long did that conversation take place? A Just long enough to draw up the agreements.

Q Yes, I know, but do you remember what time you got to the office? A No, I don't.

Q It was in the afternoon? A Yes, it is in the afternoon.

Q Do you remember you worked in the office until after seven o'clock to get this thing through? A I don't know. I won't say that.

Q Took a couple of hours, didn't it, or more? A I couldn't say that.

Q And your recollection, so far as your recollection goes now, you don't remember of any discussion of figures as to what figures should be included in this security? A No.

Q You don't remember Mr. Hanstein, while you were talking and while figures were being discussed, while the matter was being discussed, you don't remember Mr. Hanstein having a pad

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in front of him and putting down certain figures? A No, I don't.

Q But Schmeidler, before you went up to Hanstein's office, had not discussed with you these figures— A He had not.

Q —or what part of this indebtedness you should secure? A No.

Q So that you really did not know what the genesis of this indebtedness was that you were securing? A No.

Q Is that right? A Yes.

Q Well, you knew that the genesis of the $2,000 was the indebtedness of Thompson & Hanstein; you knew that, didn't you? A Well, yes; I think a thousand dollars was for stock to Mr. Hanstein.

Q And the other was for legal services? A That I don't know.

Q Do you know who first brought up the question of the securing of Thomspon & Hanstein? A That I couldn't say, either.

Q As I understand you, I may be mistaken, when you had your talks with Schmeidler, he didn't say anything about Thompson & Hanstein, he talked all the time about the bank? A I don't know whether that was discussed with Mr. Schmeidler or not. I don't know.

Q So that you have no recollection at all as to how that was injected into this agreement? A No.

Q Do you remember—your relation with Mr. Schmeidler continued friendly, didn't it? A Yes, sir.

Q Continued friendly right down to November, 1926, well, continued down to November, 1925, at least? A Yes, I have always been very friendly with Mr. Schmeidler.

Q And those relations continued very friendly although he—right along, although he had not carried out his agreement? A Yes, we just met and spoke on the street.

Q But otherwise continued quite friendly? A Yes.

Q And had business relations with him, didn't you? A No, sir.

Q Not at all after that? A No, sir.

Q I show you a letter dated November 18, 1925, and ask you if that is in your handwriting? A Yes, that was a letter that Mr. Schmeidler wrote to me and I answered it and told him to call at the house any time he wanted to, and I would discuss it with him.

(Letter offered, received in evidence, marked Exhibit S. 14.)

Q Have you his letter which he wrote to you to which this was a reply? A I have not.

Q I show you a letter dated November, copy of a letter rather, dated November 20, 1925, and ask you whether you received the original of that letter? A I think I did receive a letter from Judge Thompson about that time.

Q What is your best recollection as to whether—

Mr. McCarter: What is the date of that, please?

A This is November. I may have a letter there.

Mr. McCarter: I have got it. I will find it in a minute. You can use the copy

if you want to, but I would rather have the original.

(Original letter produced, offered, received in evidence and marked Exhibit S. 15.)

Q Did you reply to that letter? A I did not.

Q This letter is dated November 20, 1925, from Thompson & Hanstein, and is a demand on you that you pay or they would proceed against the security on the 21st day of December, 1925. You didn't reply to that, as I understand it, but on the 21st day of December, 1925, you assigned this mortgage to the Bankers Trust Company? A Yes, sir.

Q Did you show Mr. Bourgeois or Mr. Richards this letter of November 20, 1925? A I don't think I did.

Q Have you any recollection as to whether you did or not? A No, I couldn't recall.

Q Did you tell them that you had received such a letter? A I could not recall it.

Q Who was it with whom you first had any negotiations—who was it on the part of the bank with whom you first had any negotiations which finally culminated in this assignment of the 21st of December, 1925? A Senator Richards.

Q And when for the first time? A That I couldn't recall.

Q Can you tell me whether it was prior to the letter of November 20, 1925, or after the letter of November 20, 1925? A I think it was just about a day before I assigned that mortgage to them, I walked in and asked them did they want to buy the mortgage, it was some time in December, I asked them did they want to buy

the mortgage and they said they would consider it and leave the mortgage here and they would let me know, so the next day I think they purchased the mortgage.

Q That, you think, was a couple of days before the 21st of December, 1925? A Yes, I think that is right.

Q The only person in the bank with whom you had any negotiations were Senator Richards? A That is right.

Q And he had been counsel in this sequestration case? A Yes, sir.

Q You don't recollect whether you told him about the receipt of this letter from the Second National Bank which you had at that time? A No, I don't recall.

Q You were not concealing anything from the senator, of course, were you? A I don't see why.

Q Well, you had already told him away back in April that you had assigned it to the Second National Bank, hadn't you? A I had already told him back in April?

Q Yes. A That I don't remember whether I told him or not.

Q I thought you said this morning that you told Mr. Bourgeois and Senator Richards when you retained them as counsel in this sequestration case, all about this transaction? A Yes, and I showed them the agreement.

Q You had told? A Yes.

Q Well, did Senator Richards say to you when you talked to him about this mortgage, "What about the Second National Bank?" A That I couldn't recall.

Q Don't recollect? A No, don't recollect the conversation.

Q Haven't any recollection of the conversation at all? A No.

Q Is that right? A That is right.

Q Now, do you remember about the 5th of May, 1926, receiving a letter from Mr. Schmeidler, enclosing you a check for $408.85? A Yes, I think I did receive a letter from him about that time.

Q And you received the check? A Yes.

Q And that check, or the letter, rather, stated that that check was the dividend which had been received—

Mr. McCarter: Why—there is the letter.

Q There is the letter, isn't it? A Yes, that is right.

(Letter offered, received in evidence and marked Exhibit S. 16.)

Q Now there was enclosed in that letter the check for $408.85 which it referred to in it, wasn't there? A Yes, sir.

Q Did you reply to that letter? A I did not.

Q What did you do with the check? A Tore it up.

Q Tore the check up? A Yes.

Q On the day you received it? A I couldn't say that.

Q Have you any recollection as to when you tore this check up? A Maybe two or three days afterwards, something like that, couldn't say it was on the same day.

Q Did you show this letter of May 5, 1926, to anybody? A I don't think I did.

Q Did you have any conversation with Senator Richards about it? A No.

Q Did you show the check to anybody? A I did not.

Q When did you turn this letter over, this letter of May 5, 1926, that has just been marked Exhibit S. 16, has just been handed to me by Mr. McCarter—to whom did you turn this letter over? A They were in my files and I turned it over to Mr. McCarter when I turned him over the rest of the stuff.

Q When was that? A That was when I engaged Mr. McCarter in the case.

Q When was that? A That is—couldn't exactly recall, about a month ago or two months.

Q You had not turned this letter over to Mr. Jeffers before? A No, I don't think Mr. Jeffers had it at all.

Q Did you retain Mr. McCarter? A Did I retain Mr. McCarter?

Q Yes. A Mrs. Proffatt, as I understand it, retained him.

Q Mrs. Proffatt retained Mr. McCarter? A Yes.

Q Do you know what interest Mrs. Proffatt has in this case? A I don't know.

Q You don't know? A No.

Q But you do know that Mrs. Proffatt retained him? A Yes, Mrs. Proffatt, as I understand.

Q To get back to this time when you were in the Bankers Trust Company and this $50,000 transaction took place, was that $50,000 that you referred to this morning in cash passed over the counter? A It was handed to Mrs. Proffatt and I.

Q By whom? A That I couldn't say, but it was handed, whether it was Mr. Cramer, I think it was Mr. Cramer, the man, if I ain't mistaken, at the bank.

Q And what part of the bank were you in at that time? A I think we were in the back office.

Q So that it was handed over the table? A Yes, sir.

Q Do you remember the kind of bills they were? A Couldn't recall that.

Q Do you remember how large a package it made? A Couldn't recall that.

Q Do you remember whether there were any bills larger than a thousand dollar bill? A That I couldn't recall. I remember it was just handed over.

Q Have you in your mind's eye what fifty thousand dollars would look like in thousand dollar bills, fifty one-thousand-dollar bills? A No, I couldn't say.

Q What did Mrs. Proffatt do with it? A That I don't know.

Q Well, you were right there, as I understand it? A Yes, I gave it to Mrs. Proffatt.

Q It was handed to you first and then you turned it over to Mrs. Proffatt, then what next happened to it? A I think Mrs. Proffatt put it in her pocketbook.

Q Did you see her put it in her pocketbook? A Yes, sir.

Q And then what kind of a pocketbook was it? A That I couldn't state, she carries so many, liable to have one pocketbook one day and another another day. I couldn't say the color or size.

Q I am familiar with that, depends upon the shade of the dress sometimes? A Yes.

Q And you and she left the bank together? A Yes, sir.

Q And then where did you go, home? A That I don't know, whether we stopped on the road. I guess we went home, I don't know.

Q And you have never seen that, you didn't see that fifty thousand dollars that night? A I couldn't recall. No, I don't think so.

Q And you never saw the fifty thousand dollars again? A No.

Q And Mrs. Proffatt didn't tell you where she was going to put this fifty thousand dollars in cash that she was carrying around? A No.

Q Have you a safe home? A Safe? No, sir.

Q You and she didn't stop at any bank and put it anywhere? A No.

Q There is no place to keep it in your home? A Oh, yes; we can keep it in our home, keep it like we do any other money, I guess.

Q Where would you keep fifty thousand dollars in cash in your home? A In Mrs. Proffatt's pocketbook.

Q Fifty thousand dollars in cash? A Yes.

Q You think you would keep in your home in a pocketbook, is that right? A Yes.

Q By the way, Mrs. Proffatt was quite a sick woman, wasn't she, before you went away in April—before you went away the first time, that was April or May, 1924, wasn't it? A Yes, Mrs. Proffatt was sick.

Q She was very ill? A Yes, she had been operated on.

Q And you stayed away because of her illness? A Yes.

Q After you returned in April, 1925, then did you stay continuously in Atlantic City until July, 1925, at the time the suit was tried? A Yes, sir.

Q And then you went away again, did you? A Yes, the following January.

Q Following January you went away, and where did you go then? A I drove down to Miami, Florida.

Q Mrs. Proffatt went with you? A No, Mrs. Proffatt stayed home.

Q She stayed here; then how long did you stay in Miami, Florida? A I stayed in Miami, Florida, till about the 20th of April.

Q Then you returned, that was April, 1926? A Then I returned here.

Q Then how long did you stay here then? A From April, I stayed right along.

Q You have been here ever since? A Yes, sir.

Q Had Mrs. Proffatt been ill since she returned in April, 1925? A Had she been ill?

Q Has she been? A No, only she is ailing all the time.

Q She has been ill for several years? A Yes, she was operated in March.

Q Of nineteen— A While I was away.

Q That is last, 1926? A Yes.

Q March, 1926? A Yes.

Q At the time of the transaction in Mr. Hanstein's office in the signing of these agreements, where was that mortgage, the physical mortgage itself? A Where was the mortgage?

Q Yes. A That I couldn't say what bank that was in, because it was in some safe deposit vault, that I couldn't say just what bank it was in.

Q It was in the safe deposit box? A Yes.

Q But you don't know which safe deposit box? A That I couldn't recall.

Q How many safe deposit boxes did you have at that time? A I had one, I think, in the Marine Trust, and one at the—no, I didn't have —in Second National, had one at the Marine Trust at that time, and I think, and one at the Second National.

Mr. McCarter: I can't hear you.

A I said I had one at the Marine Trust, I think, and one the Second National, I don't know which one it was in.

Q You don't know which one of those safe deposit boxes it was in? A No, I couldn't state.

Q Have you still got those safe deposit boxes? A No.

Q Have you any safe deposit box? A Yes, sir.

Q Where?

Mr. McCarter: I object to it.

The Court: Sustain the objection.

Q You stated that you received the interest on this mortgage which was due, I think, in September, 1925, is that right? A Yes.

Q How did you receive it? A Marine Trust Company received through the settlement of Mr. Garr selling the property and turned it over to our account in the Marine Trust Company, deposit to our credit in the Marine Trust Company.

Q I don't understand that. A Mr. Garr sold the property 1428 to another firm, I don't know which firm it was, but on the day it had settlement they had to pay off, I think, $5,000, and was due in interest on the $50,000, and the Mar-

ine Trust Company deposited that to our credit in the Marine Trust Company Bank. I had a banking account at that time at the Marine.

Q When did you know that that transaction had been put through in that way? A I knew it after the settlement went through. We seen it was deposited to our credit.

Q But you had nothing to do with the sale at all? A No, I had nothing to do with the sale of it at all.

Q And when the Marine Trust Company had the transaction through, without any instructions from you, when they got this interest they deposited it to your account? A That is right.

Q You hadn't told them that the Second National held that mortgage as security, had you? A No.

Q At the time you sold this mortgage to the Bankers Trust Company, assignment dated 21st of December, 1925, how was the price of $50,000 fixed? A How was the price $50,000 fixed?

Q Yes. A I agreed to sell the mortgage for the face of it, I guess, that it is, the only thing I know of.

Q I know, but I don't want any guess work, if you can give me what actually occurred, how was the price of $50,000 fixed, fifty thousand, quite a little money? A I took it in to Senator Richards and asked him if he wanted to buy a mortgage.

Q How was the price $50,000 fixed? A That was the face value of the mortgage.

Q So it was fixed at the face value of the mortgage? A No doubt but what it was.

Q I don't want "no doubt but what it was"; you were there; I wasn't there. I want to know how it was fixed. A Yes, sir.

Q That is the way it was fixed? A Yes. sir.

Q There was more than $50,000 due at that time on that mortgage, wasn't there? A That I couldn't state.

Q Well, now, that assignment was in December, and the last interest date was September, so there was three months' more interest due, wasn't there? A September, November, December, something like that, when I sold it to them for just that amount.

Q What was said about that? A Nothing said that I know of.

Q Nothing said about that item which amounts to $750, a quarter of three thousand? A Yes, that was never discussed.

Q Nothing was said about that at all? A No.

Q The only figure which you said was $50,000? A That is right.

Re-direct examination by Mr. McCarter.

Q Mr. Proffatt, you are not a lawyer? A No, sir.

Q When you came back, having learned from your son, through the advertisement, of the announcement of the sequestration proceedings, prior to that time had you ever heard of sequestration proceedings? A No.

Q Did you have at the time, either when you were still in Florida or upon your return here, an intelligent idea of what that meant beyond the fact that all your property was temporarily tied up? A I did not.

Q And included in that property that was tied up was this particular mortgage for $50,000, wasn't it? A Yes, sir.

Q Now, you spoke of going to Mr. Corio to get him to take you to a good lawyer, and his having taken you to Mr. Bourgeois; what did you want a good lawyer, why did you get Mr. Bourgeois and later Senator Richards? A I got Mr. Bourgeois to represent me at the case of the sequestration proceedings.

Q And was that true also of Senator Richards? A Yes, sir.

Q Who came in later? A Yes, sir.

Q That was your purpose in employing both of those gentlemen? A Yes, sir.

Q To represent you in this sequestration matter? A Yes, sir.

Q Now your attention was called to a letter from you, dated March 6, 1926, to Mr. Bourgeois, written in Miami, Florida— A Yes, sir.

Q —in which you were asked, and after your attention was called to it you were asked if you had ever previously told Mr. Bourgeois of Schmeidler's promise to release the property at Northfield as a consideration for your executing this document. I show you a letter dated March 2, 1926, on the letterhead of Bourgeois & Coulomb, written four days, March 2, 1926, before your reply to Bourgeois, from which Vice-Chancellor Lane quoted, and ask you if that is the letter that you got from Mr. Bourgeois, to which the letter of the 6th of March is a reply? A Yes, this is the letter from Mr. Bourgeois and my reply, you had it here.

(Letter offered in evidence.)

Mr. Lane: I have no objection to that letter, of course, except that I object to it being considered as proof of the statements therein contained. Mr. Bourgeois puts Mr.

Hanstein in the position of having stated certain things.

Mr. McCarter: The significance of the letter is, your Honor, that the letter itself speaks of Bourgeois having been told this feature about this consideration some time before.

(Letter admitted in evidence and marked Exhibit B. 13.)

Mr. McCarter: "Mr. George Proffatt. Dear Sir: I took up the question of adjustment of the bank matter with Mr. Hanstein, and he gave me a different version of it from what you had stated. Your statement to me was that you were in no way responsible for the original loan made by the bank to the people who purchased your stock, and that the assignment was made because they promised you that if you would make the assignment to secure them, they would assist so that your property would be released from the sequestration and the suit would be terminated or quashed, and upon that consideration you signed the assignment."— I won't read the rest of the letter now.

Q Now have you ever lived on North Rhode Island avenue? A No, sir.

Q Did Schmeidler know where you lived? A Yes, sir.

Q Did you realize when Schmeidler first opened negotiations with reference to securing the bank that he was representing the bank? A What is that?

(Question repeated.)

Mr. Lane: I object to that because it presupposes Schmeidler was representing the bank, and there is no evidence to that effect at all.

Q For whom, at the time of these negotiations, at the time, did you suppose Schmeidler, in whose interest was Schmeidler acting? A Second National Bank.

Q Was anything said by Schmeidler to you with reference to a reason for not putting this part of the agreement as expressing the consideration in the paper? A Mr. Schmeidler said that if he would put it in writing here in this agreement that he did not think he could get the property released at Northfield. He agreed to release the property at Northfield, and he said if it was put in writing he didn't think he could get it released.

Q Did he speak of anyone probably objecting if it were put in writing that way? A He spoke in regard to Mr. Sooy.

Q Now was Miss Barber, this associate, this secretary of Mr. Hanstein, in the office where the rest of you sat all the time, or only when she was receiving dictation? A Only when she was receiving dictation from Mr. Hanstein.

Q Did you ever receive any communication from Judge Thompson or Thompson & Hanstein touching this matter, from the 9th of April, 1925, when the assignment was made, until that letter of November 2, 1925, to which your attention has been directed, where he wrote you a letter? A I had not received a word from him.

Q Subsequently to that did you hear anything from him or them? A No, sir.

Q Now you told us that on one or two occasions, Mr. Schmeidler requested you to surrender the bond and mortgage which you retained and that you said no, that he had not delivered the goods, so to speak, and therefore you would not give up the bond and mortgage to him, and the thing was off, or words to that effect. Had that conversation occurred, had those requests been made by Mr. Schmeidler to you before the receipt of this letter of May 5, 1926, enclosing the dividend? A Oh, yes.

Q And why, therefore, did you destroy the check? A I figured Mr. Schmeidler did not live up to his agreement; and I wasn't going to live up to mine.

Q Did you tell Senator Richards in your negotiations with him that you considered the deal off because of their failure to live up to their deal and therefore the assignment that had previously been made by you to Schmeidler was in your opinion ineffective? Did you tell that to Senator Richards, too? A Senator Richards was acting as my attorney and he knew it, I guess. I told him that.

Q He knew that at the time of the deal which resulted in a transfer to the Bankers Trust Company of the mortgage? A Yes, sir.

Q On July 31, 1924, which is the date of the letter that you wrote to Mr. Hanstein from Cape de Monte, in Rome, what stock, if any, did you own in the Guarantee Electric Company? A None.

Q None whatever? A No.

Re-cross examination by Mr. Lane.

Q Mr. Proffatt, just what was it that Mr. Schmeidler said to you about not putting this

agreement in writing? A You mean the releasing of the property?

Q Yes. A Mr. Schmeidler said that if he put it in the agreement, that possibly they couldn't get it released.

Q Did he tell you why? A No, I don't think that was discussed.

Q I thought you said that he said something with regard to Mr. Sooy? A Oh, yes.

Q Go ahead and tell us about it. A Mr. Schmeidler, when I said to him, "How about putting it in the agreement, Isadore?" "Well," he said, "if you put that in the agreement I don't think you can get it released because I think I am going to show it to Sooy," something like that, along that line.

Q Suppose he was going to show it to Sooy, what had the fact this agreement would be contained in the writing have to do with not getting it released, even if he did show it to Sooy? A That I don't know.

Q Well, was it intended to fool Sooy? A That I don't know.

Q The only purpose of keeping it out of the writing, if by showing it to Sooy with it in the writing he couldn't get it released, was to fool Sooy, wasn't it? A That I don't know.

Q Well, the reason, if you didn't put it in the writing, because if you did put it in the writing you couldn't get it released, it was to fool somebody, wasn't it? A I don't know.

Mr. McCarter: He says he doesn't know.

Q Take your mind back to that occasion when Mr. Schmeidler said to you, "I don't want to put this in writing, because if I do put

it in writing I can't get this property released." What did you think he meant? A I don't know.

Q You didn't know what he meant? A No, sir.

Q You knew that he meant that if he showed it to Sooy he wanted Sooy not to see what the agreement was, didn't you? A No, don't know that.

Q So you didn't know why it was to be left out of this agreement? A I do not.

Q You didn't know at the time, although Mr. Schmeidler told you that he could not get it released if he had it in, because he would have to show it to Sooy, but you didn't have any least idea as to why it was to be left out? A No.

Q Was that statement made in the presence of Mr. Hanstein? A I think it was made in the presence of Mrs. Proffatt and I.

Q Was it made in the presence of Mr. Hanstein, is my question? A That I couldn't say.

Q You don't remember? A No.

Q Whether it was made—you do know, though, at least you said this morning, I think, that the agreement made by Schmeidler to get this release was stated in the presence of Mr. Hanstein? A Mr. Schmeidler came in and told Mr. Hanstein just what had transpired in his office.

Q And you were there and you heard Mr. Schmeidler say to Mr. Hanstein that he had agreed to get the release of this property; is that right? A Yes.

Q Well, is it, now? A I don't get your question right.

Q My question is clear, did you hear Mr. Schmeidler say in the presence of or to Mr.

Hanstein that as consideration for this assignment that you were giving, he, Schmeidler, was to secure a release of your property? A That I couldn't say.

Q Now, as I understood your testimony this morning upon the first occasion, you said, no, it wasn't stated in the presence of Mr. Hanstein, upon the second occasion you said it was stated in the presence of Mr. Hanstein. Now what is the fact? A It was either talked of in Mr. Schmeidler's office, I am pretty sure, I can't remember what was said because Mr. Schmeidler and Mr. Hanstein were talking together. He may have said it, but I didn't hear it.

Q I don't want any questions. I want to know whether or not you heard Mr. Schmeidler intimate, in the presence of Mr. Hanstein, that he, Schmeidler, was going to secure a release of your property as the consideration for that assignment? A I didn't hear it in Mr. Hanstein's office.

Q There is no doubt now about that? A Yes.

Q Now, Mr. Thompson and Hanstein had been your lawyers for years, several years; why didn't you speak up then and say that you were getting as consideration for it, the agreement, of Schmeidler to release your property? A That I don't know.

Q You don't know why you didn't say so? A No.

Q But you are certain you didn't say it? A Yes.

Q Schmeidler didn't tell you to conceal it from Hanstein, did he? A No, there was nothing said about it.

Q Where was it that he said anything about leaving it out of the writing? A When he was talking to Mrs. Proffatt and I in his office.

Q Well, were you discussing the writing, the physical paper writing then? A Yes, discussing about the agreement in his office.

Q You didn't have any form of agreement then, did you? A No.

Q You didn't begin to talk about how this was to be put in writing until you got to Hanstein's office, did you? A He told Mr. Hanstein how to put it in, when Mr. Schmeidler came in he told Mr. Hanstein.

Q How to put what in? A About the agreement we have had in his office.

Q Leaving out any agreement on his part? A That I didn't hear him say anything about that, because I was busy.

Q You kept—you told me that you had written S. 14, the letter of November 18th, signed "George," to Isadore, sent by you to Mr. Schmeidler in response to some letter written by him to you, and you also stated in response to Mr. McCarter's question on cross examination that you had not received any demand either before those letters which have been specifically referred to from Thompson & Hanstein. Now I ask you to look at these four copies of these letters and ask you whether you received the originals of those from Mr. Schmeidler? A Yes, I think I received those.

(Copies offered, received in evidence and marked respectively Exhibits S. 17, S. 18, S. 19 and S. 20.)

Q Now did you answer any of them except the last one, November 17th, to which the one

of November 18th is the reply? A I did not, to the best of my knowledge.

Q Did Mr. Schmeidler come down to see you in response to your letter to him of November 18, 1925, do you remember? A He did not.

Q You don't remember sitting down in response to any one of those letters and writing a letter, "No, the deal is all off"? A No.

Q You have told Mr. McCarter that you told Senator Richards that you considered the deal, and then you said also that Senator Richards was acting as your attorney and knew it. When did you tell Senator Richards that? A That I couldn't recall.

Q About, now? A I couldn't recall just when, but I remember saying it.

Q How long before you made the assignment to the Bankers Trust in December, 1925? A I couldn't state any date, but I remember saying it.

Q Was it months before or weeks before or days before or hours before or at the time? A I couldn't state.

Q Have you any recollection of telling it to him at the time you had the negotiations with respect to the purchase of this mortgage? A That I couldn't state.

Q Have you any recollection—what did you mean when you said that Senator Richards was your attorney and knew it, what had you in mind then when you said that? A Well, I imagine that he had seen the agreement between Mr. Schmeidler and I.

Q Is that all you had reference to? A That is all.

Q Now try to fix, if you can, as definitely, was 1925, that you told Senator Richards that

you considered the deal off? A I couldn't state, you see it has been so long, I don't remember.

Q You have no—it certainly was not this year? A No.

Q Was it during the time that the sequestration case was being tried and before the final decree? A I couldn't remember.

Q You have no way by which you can fix that at all? A No.

Q As to when you said you considered the deal all off? A No, I could not.

Q When you said you considered the deal off to the Senator, what did the Senator say to you? A That I don't remember.

Q Don't remember that? A No.

Q Did the Senator suggest—try to refresh your recollection—did the Senator suggest, well, better notify the Second National Bank to that effect, any suggestion of that kind made? A No suggestion.

Q You know there were no such suggestions? Senator suggest you better notify Thompson & Hanstein who were secured by this assignment? A That I can't remember.

Q Will you say there was no suggestion of the kind made or you don't remember whether there was any suggestion? A Don't remember whether there was any such thing like that said.

Q At least, at any rate, you didn't notify Thompson & Hanstein or the Second National Bank, did you? A No, sir.

Q And you didn't direct Senator Richards to notify either of those people who were secured by this assignment? A That I couldn't say.

Q How long had you been in business in Atlantic City before April, 1925? A How long had I been in business in Atlantic City?

Q Yes. A About ten years.

Q How many? A About eight or nine years.

Q As the Guarantee Electric Company? A Yes—well, now, I was in for myself, that is right, about nine years.

Q That company was incorporated to deal in electrical supplies and deal in contracts for the furnishing of houses, municipal contracts, and so forth? A Yes, that is right.

Q And did a very large business, didn't it? A That is right.

Mr. McCarter: I object.

Q And you were familiar with that business and conducted it yourself, didn't you, about ten years? A Yes, about that time.

Q While not a lawyer, you would consider yourself a business man, wouldn't you, and successful, too, wouldn't you? A Well, I don't know.

Q You say that you thought that Mr. Schmeidler was representing the Second National Bank during this transaction? A To the best of my knowledge.

Q Well, I know, but what is your knowledge about it, what did he say? A Wasn't any knowledge about it at all.

Q He had your power of attorney, he was representing you, wasn't he, all during the time you were away, wasn't he? A Yes, sir.

Q When did he change over and represent the Second National? A I guess he got that after I returned.

Q What did he do, what happened that indicated to you that he was representing the

Second National? A He wanted to get the Second National loan in; that is the only thing I know.

Q So you think—then the only thing that he did or the only thing that indicated to you that he might be representing the Second National was because he showed solicitude with respect to securing the Second National indebtedness, is that the idea? A Yes, that is the only thing I do know.

Q That is the only thing? A Yes.

Q He never said he was representing the Second National, did he? A No.

Q You never asked him if he was representing the Second National, did you? A That I couldn't say.

Q You haven't any recollection of having asked him whether he was representing you or representing the Second National? A That I couldn't say.

Q You don't remember anything about that? A No.

Q But you do remember he never told you who he was representing? A No, he never said.

Q As a matter of fact, your relations after you returned from this trip with Schmeidler were precisely the same as your relations were before? A Yes.

Q Now do I understand you to say that you never lived on North Rhode Island avenue? A Yes, sir; I did not.

Q Did you ever receive mail there? A No, sir.

Q Do you know who does live at 324, who did, rather—I don't care who does now—who did live, on the 30th of March, 1926, 324 North

Rhode Island avenue, or what kind of a place that is? A No, I do not.

Q Do you know the number 244 North Rhode Island avenue? A No, sir.

Q You lived on Caspian street, didn't you? A Caspian avenue.

Q 222 Caspian? A Yes.

Q When did you live there, when did you move there? A I don't know, I couldn't say exactly the day and date. It was along in about the latter part of 1925, I think, some part of 1926, I think I stayed there a year.

Q Letter that has been referred to by counsel of March 2, 1926, B. 13, says, "I took up the question of adjustment of the bank matter with Mr. Hanstein and he gave me a different version of it from what you had stated." Had you had prior correspondence with Mr. Bourgeois to this letter of March 2, 1926, with respect to an adjustment? A No, sir.

Q When did you go to Miami? A In January, I think, about the 13th.

Q 1926? A Yes, sir.

Q And you had not been back to Atlantic City between January, 1926, and March 2, 1926, is that right? A No, I had not been back.

Q "I took up the question"—this is Bourgeois speaking to you—"of adjustment of the bank matter with Mr. Hanstein, and he gave me a different version of it from what you had stated." Had you had any communication with Mr. Bourgeois between the date you left for Florida in January and the date you received this letter in March? A I had not.

Q When was it that you had a talk with Mr. Bourgeois which resulted in his taking up the question of adjustment of the matter with Mr. Hanstein? A That I couldn't recall.

Q It was before you left, apparently? A Yes, sir.

Q And you had authorized him to take up the adjustment of the matter with the bank, is that right? A That I don't know.

Q You don't remember that? A No.

Q The language of Mr. Bourgeois: "I took up the question of adjustment of the bank matter with Mr. Hanstein," that doesn't refresh your recollection that it was a question of adjustment which you and he had discussed before you left? A No, that I couldn't recall.

Q Can't recall it? A No.

Q You don't know how it is that he came to take up the adjustment of this matter? A No.

Q You didn't know at the time you received this letter of March 2nd, came out of a blue sky, I suppose? A No.

Q What did you think it referred to? A I couldn't state.

Q Now before you replied to Mr. Bourgeois in the letter of March 10, 1926, you had carefully read this letter of his of March 2, 1926, hadn't you? A Yes, sir.

Q And you understood what he said in his concluding portion of the letter, "If Hanstein's version is correct, it would doubtless create a good consideration for the making of the assignment by you. If, on the other hand, his version is not correct, and your version is correct, then the assignment would be unenforcible, because it would either lack consideration or, if there had been a consideration for it, that consideration would have failed when they failed to make good their promise." You understood that language, didn't you? A I think I did.

Q You understood exactly what Mr. Bourgeois was getting at? That is true, isn't it? A Yes.

Q In the light of that, you wrote your reply of March 10th?

Mr. McCarter: He replied to that letter.

Q You did, didn't you? A Yes, sir.

Q That language of Mr. Bourgeois and the legal situation clearly before you, that is right, isn't it? A I don't know.

Q That is all.

Mr. McCarter: That is all.

Mr. McCarter: Gentlemen, have you the books? I would like to have the books of the Second National Bank showing this loan and when payments were made and all about it.

WILLIAM H. GIBERSON, sworn.

Direct examination by Mr. McCarter.

Q Mr. Giberson, what position do you have or hold in the Second National Bank? A Note teller.

Q How long have you been connected with the bank? A Roughly, around twenty-one years.

Q Have you the books of the bank which show a loan somewhere in November, 1922, by the bank to the Guarantee Electric Company? A I have, sir.

Q Will you produce them? A Yes, sir.

Q What was the date of the loan? A November 2, 1922.

Q What entry do you find here that shows that? A $15,000, two months' note.

Q In the name of— A Guarantee Electric Company, Incorporated.

Q That produced proceeds what, $14,845? A $14,845.

Q Which went to the credit of the Guarantee Electric Company? A Guarantee Electric Company, Incorporated.

Q What did the bank have in the way of paper to secure that loan? A Well, now, that I couldn't say.

Q Why can't you say it? A Because I am only the note teller.

Q There are other—was that loan reduced? A Finally reduced, yes, sir.

Q Will you give me the history of that note, please? A Sure.

Q We have got it started November 2, 1922, $15,000, discounted. What credits remain on it? A On January the 2nd they paid a thousand dollars.

Q Who did? A Guarantee Electric Company.

Q All right, January 2, 1923? A 1923.

Q Go on.

Mr. Lane: Hadn't you better give us the renewals of the notes?

Mr. McCarter: I am conducting this examination.

A You want each and every renewal?

Q I want what the history of that loan is—very funny, isn't it? A No, indeed. On Janu-

ary 2nd, there was $1,000 paid, falling due on February 15th. On February 15th, it was renewed in full for $14,000, falling due March 15th, renewed in full.

Q That is to say, a new loan for a thousand dollars was made? A New loan for four-
10 teen thousand was made.

Q The note before was $15,000? A Made one payment.

Q All right, so a new loan for fourteen thousand was made? A No, we don't make them that way. We take a renewal.

Q Whatever you want to call it, renewal by the Guarantee Electric Company? A Guarantee Electric Company, yes, sir.

Q For fourteen thousand? A Yes, sir.
20

Q Go on. A Fell due March 15, 1923.

Q What happened? A It was renewed again in full March 15, 1923.

Q Without any payment? A Without any payment.

Q Go on. A Falling due April 16th. On April 16th they paid $250, making it $13,750. On May the 16th it was renewed in full for one month, falling due June 18th.

30 Q Yes. A On June 18th—

Q Nineteen twenty— A 1923.

Q Go on. A They paid $250 on it, falling due July 18th. July 18th they paid $250, leaving it $13,250. On August 20th they paid $250.

Q That is 1923 yet? A That is 1923, falling due on September 20th. September 20th they paid $250 again, leaving it $12,750, due October 22nd.

Q Go on. A October 22nd, they paid $150, making the note fall due November 22nd. On
40

November 22nd they paid $200, leaving $12,400 due on December 24th.

Q 1923? A Yes, sir.

Q Go ahead. A December 24th I think it was renewed in full. Renewed in full on December 24th, still $12,400. On January 24th—

Q 1924? A Yes, sir.

Q Go ahead. A They paid $100, leaving $12,300.

Q Go on. A On February 27th, they paid $300, leaving twelve thousand. Now on March the 25th there was two little notes combined with the original note, one of fifteen hundred and one of twelve hundred and fifty, and one of twelve thousand, and they reduced it $150, leaving the balance $14,600.

Q Just let me see if I get that right, on this last date two what you call little notes, two small notes of the Guarantee Electric Company? A Yes, sir.

Q Were discounted by the bank? A That is, they were small notes here, Mr. McCarter, if you want to look at this a moment, there is one thirteen hundred, which was not in the original amount of fifteen thousand, that was reduced $50, leaving $1,250. This one fifteen was renewed in full, coming down here on this date, with the $12,000 note, those two notes were combined, the three notes, leaving $14,750, on which they paid $150.

Q See if I get this right. The original indebtedness by the payments that you have recited had reduced the note? A The original note.

Q The original note to $12,000? A Correct.

Q When on the date specified, which was the 25th of what?

The Court: March, 1924.

Q 1924? A That is right.

Q Two additional loans, one of $1,500 and the other $1,250 were made by the bank to the Guarantee Electric Company? A No.

Q What? A They were combined with the original note. They had been running small loans.

Q When were those two what you call small loans first made? Can't you tell? A No, not exactly. I see they are running through here right along, Mr. McCarter. I couldn't tell just exactly.

Q At any rate, at the time you speak of, March 25, 1924, the balance due on those two small loans was combined with the balance due on the original loan, making a new note for $14,750, is that right? A On which $150 was paid, leaving $14,600.

Q All right. Go right on. A That ends that one.

Q What? A Then we are to $14,600. April 25th, $14,600 renewed in full, falling due May 15th.

Q 1924? A Yes, sir. On May 15th, same amount, $14,600, renewed in full, falling due June 16, 1924. On June 16th, $14,600 renewed in full, due July 16, 1924. July 16th, $14,600, falling due and protested.

Q What time was it protested? A 1924.

Q July? A 16th.

Q 1924? A Yes, sir.

Q Is that the last event in connection? A That is the last event in connection with that note.

Q Now, will you endeavor between now and the next time we meet to look up and be able to tell us the origin of those two so-called small loans, when they came into the picture? A I will try my best.

Q Now, you don't recall by whom those notes were endorsed? A I think they were just straight Guarantee Electric Company, Incorporated, by the officers.

Q Endorsed by the officers? A I imagine so, but it has been so long.

Q Mr. Huber and Mr.— A Mr. Emerson, I imagine.

Q They were not endorsed in any way or shape by Mr. Proffatt, were they? A So far as my recollection goes, no.

Mr. Lane: We will concede on the record that they were not, and if it will help anything with the situation of the two thousand, August 1, 1923, fifteen hundred dollars November 14, 1923, if he can find it there with that assistance as to the date.

A Those the original dates?

Mr. Lane: Original dates of the two thousand note August 1, 1923, $1,500 note November 14, 1923.

A They don't show in this book.

Q Have you the notes here?

Mr. Lane: We have the $14,600 note. Mr. Hanstein have you got the smaller notes?

Mr. Hanstein: No, they would be turned back, but you have the other notes that the company is obligated for.

Mr. Lane: Of course we haven't the $2,000 and $1,500. They were consolidated into the $14,600.

Mr. McCarter: Next hearing like to have those notes too.

Mr. Lane: They were consolidated with that and returned. There is the $5,000 note which has not yet been referred to, and $500 note which I cross examined Mr. Proffatt on, which he said he didn't know anything about. Here are the two notes which paid up the $8,600 of Mrs. Proffatt.

Cross examination by Mr. Lane.

Q You stated in response to counsel's question that you thought the notes were endorsed by the officers of the company? A I did, yes, sir.

Q Personally? Have you any recollection of that? A I didn't mean personally, no, as officers.

Q As a matter of fact, none of these notes bore the endorsement, personal endorsement of anybody? A No, as officers I said.

Q Only as officers? A Yes.

By Mr. McCarter.

Q Was there any collateral for this note at any time? A None ever handed to me.

Q Well, you know, don't you, whether there was any collateral for that loan? A So far as I know there wasn't any collateral.

Q Will you look that up and make sure? A It would show on the note, Mr. McCarter.

Q Beg pardon? A It would show on that note. That is not a collateral form of note. That is just a straight note.

Q I don't know anything about your methods, or anything else. I am asking you as a matter of fact if there was any collateral for that note? A I will look it up for you, if you wish.

Q I wish you would. A All right, sir.

By Mr. Lane.

Q Will you look at this note June 16, 1924, and tell me whether that is the last note that was in the bank which consolidated the balance due on the fifteen thousand and two and fifteen hundred? A That is the last renewal.

Q That is the last renewal? A That is the last renewal.

Q Does that note show upon its face to you as a banker and accustomed to the knowledge and custom of your bank, whether there was or was not collateral on that obligation? A There was not, according to the note.

Q Would it show on the note if there were? A It would on the note.

Mr. Lane: I offer the note.

(Note received in evidence and marked as Exhibit S. 21.)

By Mr. McCarter.

Q Do you keep any record of the collateral that you do receive? A Yes, sir.

Q You have no record here of that kind? A No record of the Guarantee Trust Company.

Q The book that is before you does not contain the notations of collateral? A It would if it was a collateral note.

Q The book before you? A Yes, sir, this is the book right here.

Q That shows that this therefore was not? A Was not a collateral note.

Q What I mean is you sometimes take a straight note and yet deposit collateral with it, don't you? A Not in this case.

Q I am not asking you about this case. A No, as a rule, I don't know anything about the collateral the bank takes. I am not in as an officer.

Q I ask you isn't it a fact that sometimes collateral is received? A I imagine so, Mr. McCarter.

Q You know so, don't you? You are not an ignoramus. You are quite a man there. You know something about this, don't you? A I suppose there is in some cases, yes, sir.

Q Would that appear if it were straight note with collateral, would that appear in that book there? A No, sir.

Q Will you before the next day which has been set for the trial of this case kindly look up your collateral book so that you can be cock sure whether or not there was any collateral was ever received by the Second National Bank for any of these loans that you have specified? A All right, sir.

Q Very good. That is all, thank you.

LLEWELLYN R. HUBER, sworn.

Direct examination by Mr. McCarter.

Q Mr. Huber, I believe you have been sick, is that right? A Yes, I was sick for a couple of months.

Q Are you the Llewellyn R. Huber mentioned in Exhibit B. 9 which is an agreement between Mr. Proffatt and Llewellyn R. Huber for the sale of some stock in the Guarantee Electric Company by Proffatt to you? A Yes, sir.

Q I show you a certificate of stock number 18 for 195 shares, dated the 24th of October, 1923, to Llewellyn R. Huber, was that stock issued to you? A Yes, sir.

Q Beg pardon? A Yes, sir.

Q What did you give, note or cash, to Mr. Proffatt for that stock? A Why, I gave him some cash and note to Mr. Proffatt. Bought some from Mr. Proffatt and some from Mrs. Proffatt.

Q Now, I show you a letter from Thompson & Hanstein addressed to Mr. L. Huber, Kentucky and Marmora avenues, City, dated April 30, 1924. Did you receive that letter? A Yes, sir.

Q This letter refers to a note of yours for $2,000? A Yes.

Q Did you give Thompson & Hanstein a note for $2,000? A Mr. Hanstein.

Q Mr. Hanstein? A Yes.

Q Do you remember when that was? A No, I can't remember the date. It must have been about three months, probably, before that letter was written. I am not sure. I can't remember the date.

Q Do you know what the consideration of that note to Thompson & Hanstein for $2,000 was? A If I remember it right it was for two shares of stock in the company.

Q Do you know whether or not it was for some services that Thompson & Hanstein claim to have performed for the company? A I can't tell you that.

Q In other words, its development? A Yes.

Cross examination by Mr. Lane.

Q Did you have a purchaser in mind? A At that time we were not looking for purchasers. Purchasers were looking for property.

Q Did you have a purchaser in mind? A Not a particular one, no.

Q You were not going to be the purchaser? A No.

Q You didn't have any particular purchaser in mind? A Not a particular one, no.

Q What you said was you could sell it for $75,000? A Yes.

Q How long after that was it that he told you that he couldn't get it released? A I saw him two or three times; I couldn't give you a time on that. Probably several weeks.

Q You don't know? A Not by days, no.

Q Haven't any idea? A No, it was maybe two or three weeks. I would say within a month, to make myself safe.

Q That is all.

(Further testimony adjourned until June 15, 1928, at 9 o'clock A. M.)

Atlantic City, N. J., June 15, 1928.

Trial of cause resumed at 9:30 A. M.

Appearances as before noted.

Mrs. KATHERINE B. PROFFATT, sworn.

Direct examination by Mr. McCarter.

Q Mrs. Proffatt, you are the wife of George P. Proffatt? A Yes, sir.

Q How long have you lived in Atlantic City? A About twenty-one years.

Q Have you ever lived on Rhode Island avenue? A No, sir.

Q Have you ever lived at 234 or 324 Rhode Island avenue or whatever those numbers are? A No.

Q Now, going back to 1925, do you remember where you lived in that year? A Yes, I lived at 544 North Vermont avenue.

Q North what? A Vermont.

Q Vermont avenue. Is that an apartment or a house? A A house.

Q And you and your husband lived there? A Yes.

Q How long did you live, from when until when did you live there? A We rented that house in June and we lived there until October.

Q Of 1925? A Yes.

Q In October, 1925, where did you move to? A To 222 Caspian avenue.

Q How long did you live there? A Until April.

Q What year? A 1926.

Q In April or May, 1926, where did you move? A We took the Rio Grande Hotel.

Q Where you are still living? A Yes.

Q You and your husband keep the Rio Grande, do you not, now? A Yes.

Q And have kept it since the month of May, 1926? A Yes.

Q During your residence on Caspian avenue, did Mr. Schmeidler ever come there? A Yes, he came there a couple of times, but I wasn't home.

Q You didn't see him? A No.

Q Now you were formerly a stockholder in the Guarantee Electric Company? A Yes.

Q How much of an interest did you originally have in the stock of that company? A $25,000.

Q That is one-half? A Yes, sir.

Q And you sold out your stock about when? A I don't know, some time in the summertime, around July or August.

Q Of what year? A I think it was in 1922.

Q It is not worth while, I think, to ask you the details of the persons to whom you sold your stock, but, as the result of that did you become liable and are you still liable to the Second National Bank for any money? A Yes, I am.

Mr. Lane: Now, I object to that part of the question that says is she still liable; that is purely a conclusion of law.

Mr. McCarter: I didn't mean that, Vice-Chancellor. What I meant was, does the bank still hold your note?

A Yes, that I endorsed.

Q For how much? A One is for forty-two hundred and the other is for forty-four.

Q Making altogether eighty-six hundred dollars? A Yes.

Q As you understand it, that liability, if it be a liability, you are not trying to steal anything on that, is in what form? A It is two notes.

Q Given by? A Given by Mr. Emerson and one by Mr. Huber, and I endorsed them.

Q And were Emerson and Huber purchasers of part of your stock? A Yes.

Q And this represents the amount that they still owe you? A Yes, sir.

Q For your stock? The notes were discounted at the bank and you endorsed them? A Yes.

Q Now, about when did your indebtedness on this account amounting to $8,600 arise, or when was it first created for that amount, when was it liquidated to that amount? A When I sold my stock.

Q Immediately? A Yes.

Q Was it eighty-six hundred from the start? A No, it was five thousand each note and they reduced it.

Q Now, do you remember receiving word of what we call, we lawyers, the fact that your husband's property in Atlantic City had been sequestered? A Yes.

Q Where were you when that word came to you? A Key West, Florida.

Q Then you came home? A As soon as we could, yes.

Q Did you learn, through the medium of your husband, that it was proposed to have an interview with Mr. Schmeidler? A Yes.

Q Can you tell us about how long you had been home when that word came to you? A Well, about three or four days.

Q And did you accompany your husband to meet Mr. Schmeidler? A Yes.

Q Where did you go? A Mr. Schmeidler's office.

Q In this building? A Yes.

Q What time of day do you recall that interview to have commenced? A I think it was between two or three o'clock, around that time.

Q Now, will you please recall—who were present in Mr. Schmeidler's office? A Mr. Proffatt, Mr. Schmeidler and myself.

Q Please tell us as well as you can from your memory what was said.

Mr. Lane: I object to this upon the same ground that I objected to Mr. Proffatt's testimony, that it is not binding upon the bank.

The Court: I will permit. You may proceed.

A We went to Mr. Schmeidler's office and Mr. Schmeidler says if I wanted to pay off the notes off that were still in the bank, that I endorsed, and I says, "Sure I do," and Mr. Schmeidler says, "Will you sign an agreement?" And I says, "Yes, I sure will," and then we went into Mr. Schmeidler's office and we talked this agreement over, and then he went into Mr. Hanstein's office.

Q Now, had any other notes been suggested? A Not to me, no, just the $8,600 that I was supposed to—that I endorsed.

Q When did you first hear any mention made of also paying or securing a note in that bank of fourteen thousand dollars? A Why, when

Mr. Schmeidler spoke to Mr. Proffatt about it in his office.

Q Now, what did he say about that? A Well, he says to George if he would stand good for the money, and George says, "Well," he says, "I have an offer for my property over in Northfield and if I can sell that," he says, "I will."

Q What did Mr. Schmeidler say? A Mr. Schmeidler asked us to draw up an agreement.

Q And you said he said, "If I can sell that," was the fact that that property as well as the other property tied up by a writ of sequestration mentioned? A Yes.

Q Just say what he said about that. A Mr. Schmeidler said that he could release the property for us if we signed this agreement to secure the bank their money.

Q Now did you then go anywhere, you and your husband and Schmeidler? A We went in Mr. Hanstein's office.

Q Tell us the best of your recollection what occurred there. A Mr. Hanstein drew up the agreement and I assigned my half of the mortgage over to Mr. Proffatt and then Mr. Proffatt, he signed a paper, and then Mr. Schmeidler gave him another paper to sign. I just signed the one paper.

Q Do you remember some transaction at the Bankers Trust Company? A Yes.

Q Where had the bond and mortgage that was assigned first by you assigning your half interest and then by Mr. Proffatt assigning it over to Schmeidler, where had that bond and mortgage been? A Safe deposit vault.

Q I call your attention to the fact that there is in evidence in this case an assignment of the same bond and mortgage by Mr. Proffatt and

yourself to the Bankers Trust Company, dated December 21, 1925, that is a few days before Christmas in 1925.

Q Now will you please tell us all that you know with reference to that assignment of that mortgage to the Bankers Trust Company? A Well, Mr. Proffatt came home, I was growling at Mr. Proffatt because I signed my half over and he came home one night and he says, "Come on, Katie, we are going to sell the mortgage," he says, "and I will see that you get yours." And we go to the Bankers Trust Company and I was speaking to Mr. Cramer and he bought the mortgage off me.

Q I show you paper, check already marked in the case Exhibit B. 4 5/12, being a treasurer's check on the Bankers Trust Company to the order of George P. Proffatt and Katherine B. Proffatt, and see that it purports to have been endorsed by both your husband and yourself. Is that your endorsement? A That is mine, yes.

Q And your husband's endorsement as well? A Yes.

Q Now, after that was endorsed, what next occurred? A Well, I got a certificate of deposit.

Q In the bank? A Bankers Trust Company, yes.

Q For how much? A $50,000.

Q And what did you do with that certificate of deposit? A I put it in a safe deposit box.

Q I show you a document, look at it and see if that is the document that you say you put in the safe deposit box? A Yes, sir.

(Paper offered, received in evidence and marked Exhibit B. 16.)

Q When did you get that out of the safe deposit box? A The certificate?

Q That paper? A This morning.

Mr. McCarter: If it be any accommodation to Mr. Giberson, we will let this lady step aside and call him.

Mr. Hanstein: He can wait.

Q Now, Mrs. Proffatt, you say you put the certificate of deposit in the safe deposit vault, that is the paper you put in the safe deposit vault, is it? A That is the one, yes.

Q Now, what became of the actual certificate of deposit? A That is at the bank.

Q Back with the Bankers Trust Company? A Yes. They have that there.

Q Was there any agreement entered into between you and the Bankers Trust Company at the time you left the certificate of deposit there? A Yes, we had an agreement.

Q I show you a document bearing date the 21st of December, 1925, between George P. Proffatt and Katherine B. Proffatt, of the first part, and the Bankers Trust Company of the second part, purporting to be signed by your husband and yourself in the presence of Mr. Jeffers; is that the document you refer to? A Yes.

(Agreement offered, received in evidence and marked Exhibit B. 17.)

Q Did you ever receive any notice or word or information to the effect that it was proposed to sell the bond and mortgage in question in this suit which had been assigned on the 9th day of

April, 1925, as you have explained in the early part of your testimony, did you ever get any such notice? A No, I didn't.

Q Did you ever hear that it was proposed to be done? A No, I didn't.

Q Were you—where were you on or about in the month of April, 1926? A 222 Caspian avenue.

Cross examination by Mr. Lane.

Q Mrs. Proffatt, did you ever have fifty thousand dollars in cash in the office of the Bankers Trust Company? A No.

Q Did you ever in the presence of your husband, take fifty thousand dollars in cash and put it in your pocketbook and carry that away from the bank? A No.

Q There never was any fifty thousand dollars in cash or any other sum in cash at that time, was there? A It was in check, not cash.

Q Cash I am talking about, bills? A Check, not cash.

Q There never was any cash passed, was there? A No.

Q And there never was any money taken by you from the bank or anything else taken by you from the bank? A Yes, there was money, but not that amount that day.

Q I am talking about that day. A No, not fifty thousand.

Q Did you talk with your husband before he went upon the stand here? A No.

Q About this case? A About what?

Q About this case? A No.

Q You didn't talk with him at all? A No.

Q You are living with him, aren't you? A Yes.

Q And there was no talk between you before you went on the stand? A No, I talked with my lawyer but not with Mr. Proffatt.

Q Did you tell your lawyer this same story that you told on the stand here now? A Yes, I certainly did.

Q Was your husband present when you told him? A Yes.

Q And heard all that you said? A Yes.

Q Before you had made this assignment to the Bankers Trust Company you had received a letter from Thompson & Hanstein dated November 20, 1925, which was a demand that you either pay the amount due the Second National or that they would proceed on the security—

Mr. McCarter: One moment, how does that appear?

Q —isn't that so? A I didn't get it.

Q Did you know about it? A No.

Q You never heard about that? A No.

Q Your husband never told you, before you went to the Bankers Trust Company on the 21st day of December, 1925, that on the 20th day of November, 1925, he had received a demand from Thompson and Hanstein? A No.

Q You knew nothing about that? A No.

Q How did you come to go to the Bankers Trust Company? A My husband told me to go there.

Q Well, what led up to it? A We were arguing about my signing over half of my mortgage.

Q When did you start to argue with your husband with respect— A After I got home and woke up, that is when.

Q Wait. A What a fool I was.

Q When did you start to argue with your husband about your having assigned the one-half, your one-half interest in this mortgage? A As soon as I got home out of the office of Mr. Hanstein.

Q That night? A Yes, sir, that night.

Q That very night? A Yes.

Q And did your husband—what did your husband say about it at that time? A Oh, he said it will be all right, don't worry.

Q He said it will be all right, don't worry? A Yes.

Q And the next morning you knew, or the next two days later you knew he went back to the office of Thompson and Hanstein and got a copy of the agreement that he signed, didn't you? A No, I didn't.

Q You didn't know that? A No.

Q He didn't tell you that? A No.

Q When did you next say anything about it to your husband, or was it continuous? A Continuous.

Q Right up until the time that you had this transaction with the Bankers Trust Company? A Yes.

Q Did your husband tell you that he had been receiving notice from Mr. Schmeidler about the matter? A No.

Q He never told you that he had received any communication from Mr. Schmeidler? A No.

Q Or that Mr. Schmeidler had talked to him about it? A No.

Q He told you nothing of that kind? A No.

Q Then do I understand that—by the way, how long before you went to the Bankers Trust

Company was it that your husband first spoke to you about going to the Bankers Trust Company? A Why, I guess it was about six months, seven months, around that time, I don't know exactly.

Q Six months before you went to the Bankers Trust Company? A To sell the mortgage.

Q He told you what? A He said, "We will sell the mortgage," he said he is going to sell the mortgage.

Q Six months before you went? A Yes.

Q That was six months before you went? A Yes, before we went to the Bankers Trust.

Q Tell you why he didn't go to the Bankers Trust Company then? A No.

By Mr. McCarter.

Q Is this the certificate of deposit that you received that day, Mrs. Proffatt? A Yes.

(Certificate offered, received in evidence and marked Exhibit B. 18.)

By Mr. Lane.

Q Well, was anything said by your husband during this six-months period before you actually went to the Bankers Trust, as to going to the Bankers Trust? A No.

Q Now, then, just tell us everything that was said which led to your going physically to the Bankers Trust Company? A Arguments between my husband and I that led to it.

Q I know, but you went to the Bankers Trust Company on December 21st. Now, how did you happen to go to the Bankers Trust Company at that time, what did your husband

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say to you? A My husband says, "Come on, we will go to the Bankers Trust Company and sell the mortgage." That was all that was said.

Q Those were the only words were used? A That was all.

Q And not a word with respect to the notice which your husband had received in November making a demand for payment? A No.

Q At that time you were living where? A Caspian avenue.

Q And were friendly with your husband? A Yes.

Q Were you conducting a business there? A No.

Q Or were you just living there? A Just living there.

Q You had been in business with your husband, hadn't you? A Yes, sir.

Q How many years had you been actually in business with him? A I guess about ten or twelve years.

Q You were actively engaged in it with him? A Oh, yes.

Q And you continued to be actively engaged with him after the corporation was formed, didn't you? A Yes.

Q And right down to when did you cease your active intervention in the business? A After I had sold my—

Mr. McCarter: What business are you speaking of?

Mr. Lane: Your husband's business, electric business, whatever it was.

A After I sold my stock I went out of the Guarantee Electric then, we took a trip to

Florida; when we came back I went back and I worked at the Guarantee Electric for twelve dollars a week to help them out.

Q Now before you went and took your trip to Florida, and before you sold your stock, what did you do, what was your part in the business? A You mean before I sold my stock?

Q Yes. A I was half owner.

Q I don't mean that, just that? A I attended to the store and I done the buying, and seen the electricians got their stock or the material, for the jobs.

Q Is that the same kind of work that you actually did in the business before your husband turned it into a corporation? A Yes.

Q In other words, you and your husband from the very beginning operated that business together? A Yes.

Q Now this certificate of deposit, or, rather, not a certificate of deposit, a certificate by the Bankers Trust Company—it is a certificate of deposit, it is a certificate of deposit of a certificate of deposit, Exhibit B. 16, you say you took that away from the Bankers Trust Company? A Yes.

Q Where did you put it? A In my safe deposit box.

Q Where? A Marine Trust Company.

Q How long did it stay there? A Until today.

Q And this agreement, B. 17, did you have a copy of that agreement also? A No.

Q You never had a copy of that? A No, Mr. Jeffers had it.

Q That remained with the bank? A Mr. Jeffers.

Q Or with Mr. Jeffers who was the bank, and the certificate of deposit payable to your order also remained with the bank? A Yes.

Q What was said—you signed, you and your husband both signed this agreement, B. 17. What was said between you and any officer of the bank leading up to your signing those papers? A All Mr. Cramer said, that they were willing to buy the mortgage, and Mr. Proffatt says, "I will sign it over to you," and Mr. Proffatt did.

Q Yes, I know, and then what was said, a person assigns a mortgage usually, or sells a piece of property, they usually take the money. You didn't take the money. Now, what was said that led up to it?

Mr. McCarter: She took the check.

Mr. Lane: Yes, I know she took the check and endorsed it.

A I took the check and endorsed it.

Q Right then and there? A He says, "Do you want the money?" I said, "No, I will leave it right here."

Q What else was said? A That was all that was said.

Q Wasn't something else said? A Not that I know of.

Q There is an agreement there which you signed which leaves this certificate of deposit as collateral for the bank. What was said that led up to that?

Mr. McCarter: No use getting excited. We are not deaf.

Mr. Lane: No, I have your same fault.

A Wasn't anything said but that Mr. Proffatt was going to sign the mortgage over to me and then I says, the bank said they would buy it. What else did you want to know?

Q I want to know how you came to leave the fifty thousand dollars with the bank under an agreement which the bank, permitted the bank to hold that fifty thousand dollars as collateral for the payment of the mortgage, what was said that led to that? A Well, I don't remember what was said.

Q You signed this paper: now what was said that led you to sign this paper, B. 17? Read it and see what it is about. What was said? A Well, the only thing was said, in this agreement, if any trouble or losses came up we would be responsible for it, wouldn't make any trouble for the bank.

Q That is exactly what I want to get at, what was said that led to all that, what was said about it? A I don't remember what was said about it.

Q You don't remember what was said about that? A No.

Q All that you can remember as to what was said was that the bank said they would buy the mortgage? A Yes.

Q But you can't remember any of the other details? A No, I don't remember.

Q As a matter of fact, from the sale of this mortgage you haven't gotten any cash now, one cent, have you? A What is that?

Q (Question repeated.) A No.

Q Not even the interest on the certificate of deposit? A No.

The Court: Counsel just spoke of that certificate of deposit as being payable to

Mrs. Proffatt. Is that so, as a matter of fact?

Mr. Lane: The actual certificate of deposit signed by the Bankers Trust Company?

The Court: I think you better read that into the record.

Mr. Lane: I think perhaps both better go in, for your Honor's information the actual certificate of deposit is made to Mrs. Proffatt, then the certificate the bank gives them that it is payable to the Bankers Trust Company.

The Court: Let me see that. I think you are mistaken. The certificate of deposit was a certificate that Katherine B. Proffatt has deposited in this bank $50,000 payable to the order of Bankers Trust Company.

Mr. Lane: I beg your Honor's pardon.

Mr. McCarter: At the suggestion of the Court, counsel will now read into the record the two documents that have both been called certificates of deposit, the first one being the one produced by Mrs. Proffatt in her evidence in response to the question, "Please produce the certificate of deposit," and which is marked Exhibit B. 16:

"Bankers Trust Company, Atlantic City, N. J., December 21, 1925. This certifies that Katherine B. Proffatt has deposited with this bank for safe keeping the following described property, namely a certificate of deposit number 133, $50,000, dated December 21, 1925, payable to the Bankers Trust Company, to be delivered upon the order of the depositor or her legal representatives

or attorneys on the return of this certificate. This receipt is not negotiable, and is not transferrable. The property may be delivered without the return of this receipt at the option of the bank. In the effort properly to care for and preserve the property deposited hereunder, the bank will exercise as great precautions as it exercises to safeguard its own property, but, in spite of such precautions, should said property or any of it be lost, destroyed or stolen, the bank will not be liable and beyond the exercise of such due diligence no liability whatever shall attach to the bank by reason of said deposit, nor shall the bank be liable for property returned or delivered to any person who shall produce either the original receipt or any authorized duplicate, unless written notice previous to such delivery shall have been given to the bank by or on behalf of the depositor setting forth said receipt has been lost, mislaid or stolen, or has otherwise passed from the possession of the owner. The depositor agrees promptly to withdraw said property should the bank request that it be withdrawn. Signed Bankers Trust Company by E. Forrest Cramer."

"I hereby acknowledge receipt of the above described property this 21st of December, 1925," then on the left in pen, "I concur in all the foregoing and agree to each of the above conditions." No signature.

Then the second paper that has been produced and marked B. 18 is as follows:

"$50,000. Bankers Trust Company, Atlantic City, N. J., December 21, 1925.

Katherine B. Proffatt has deposited in this bank $50,000 00/100 payable to the order of Bankers Trust Company on the return of this certificate properly endorsed, with interest at four per cent. per annum, if left one month. E. Forrest Cramer, Treasurer. No. 133."

Q Now, Mrs. Proffatt, when was this agreement B. 17 and where was it signed? A Mr. Jeffers' office.

Q In what building? A Chelsea National Bank.

Q How far is that from the building of the Bankers Trust? A Just about catercornered across the street.

Q When was it signed with reference to the transaction at the bank, or was all of this transaction carried out at Mr. Jeffers' office? A No, the certificate of deposit I got in the bank, that was transferred in the bank, and the agreement in Mr. Jeffers' office.

Q Which was done first? A I think the certificate of deposit I think was. You see I am not sure.

Q What did you do, go to the bank and then go from the bank to Mr. Jeffers' office, how was it? Tell me what happened from the time you went into the bank that morning. A I don't know. Couldn't say, really.

Q Well, did you get the—who accompanied you from the bank to Mr. Jeffers' office? A Mr. Proffatt, once or twice, and once I went alone.

Q Well, did you pass back and forth between the bank and Mr. Jeffers' office two or three times that day? A No, I don't think it was

the same day. You see I don't remember, it has been so long.

Q You were dealing with a fund of $50,000, now can't you remember some of the details? Did you have this, did you go to Mr. Jeffers' office—did you first have any talk about, which officer of the bank did you have any talk about this transaction with first? A Mr. Cramer.

Q And he was at the bank? A Yes.

Q So that you went with your husband direct to the bank? A Yes, to Mr. Cramer.

Q Now, can you remember what was said between you and Mr. Cramer or between your husband and Mr. Cramer when you were present, which led you to go to Mr. Jeffers' office? A You see I can't recall that.

Q Can't you recall any of it? A I can recall about him saying that they were going to purchase the mortgage off of me.

Q Yes, I know, but was anything said that would indicate why it was that, if they were purchasing the mortgage, they did not give you the money? A I could have had the money, but I didn't want it.

Q It was because you didn't want the money? A No, I just told them to hold the money there for me.

Q You know that you left the money there under an agreement that it was to be responsible for the debt, didn't you? You know that you were not going to get anything out of this transaction at all until this mortgage was paid, didn't you? A No.

Q Well, did you read this agreement? A Yes.

Q You know that the bank is entitled to the $50,000 if the bank does not collect on the mortgage?

Mr. McCarter: I object. The agreement will speak for itself.

Mr. Lane: I am asking her her own knowledge.

Q Do you know that? A Yes.

Q How did that come about? A I don't know what to answer on that.

Q Did anybody say to you that it would be better for you to have the bank in the position of bona fide purchaser for value of that mortgage? A No.

Q Was there anything of that kind said at all? A No.

Q Well, what was said? A The only thing was said that they were going to buy the mortgage, as I told you.

Q Nothing with respect to the bank's being put in a position of a bona fide purchaser was said, nothing of that kind? A Not at the bank, no.

Q Anywhere? A In Mr. Jeffers' office we made that arrangement.

Q What was said? A That if any trouble should come up from the selling of this mortgage that I would stand for it, and I said yes.

Q Well, then, if you were not to get the money until the mortgage was paid, why was it that the mortgage was transferred at that time at all, why didn't you continue to hold it?

Mr. McCarter: She didn't say she wasn't to get the money on this until the mortgage was paid.

Mr. Lane: She did at one time.

Mr. McCarter: I haven't heard it? I object.

The Court: I sustain the objection.

Q When were you to get the $50,000? A When I turned the mortgage over.

Q When were you to get the $50,000 from the bank after you had given the $50,000 to the bank to insure it against any loss on the mortgage? A Any time I wanted it.

Q You thought that you could have gotten it at any time? A Yes, I could have got it.

Q Under this agreement? A I suppose so.

Q Did you know that the agreement provides that the bank should hold that until there was no loss on the mortgage or to insure them?

Mr. McCarter: What clause do you refer to in the agreement? Don't misquote. I don't think purposely, of course, but let's have the exact phraseology of the agreement.

Mr. Lane: The agreement provides: "Whereas to induce the Bankers Trust Company"—listen to this, please: "Whereas to induce the said Bankers Trust Company to purchase said bond and mortgage and as a condition precedent to its purchase and the sale, the said Katherine B. Proffatt agrees to execute and deliver to the said bank her certificate of deposit to the Bankers Trust Company in the amount of $50,000 to guarantee and insure the payment of the said bond and mortgage according to the terms thereof,

"And whereas said George P. Proffatt and Katherine B. Proffatt to further induce the said bank as aforesaid, and as a further condition precedent, agree to well and suf-

ficiently save, defend and keep harmless and indemnify the said Bankers Trust Company of and from all loss, damage, costs, charges, liability or expenses it may sustain by reason of purchasing said bond and mortgage;

"Now this agreement witnesseth for," and so forth—"the said Proffatts jointly and severally agree at all times hereafter that we will well and sufficiently save and defend and keep harmless and indemnify said Bankers Trust Company, a banking corporation, of and from all losses, damages, costs, charges, liability or expense that it may incur by reason of purchasing from us the above-described mortgage, and further that I, the said Katherine B. Proffatt, for the consideration aforesaid, do hereby agree to execute and deliver to the said Bankers Trust Company my certificate of deposit to the Bankers Trust Company in the amount of $50,000 to guarantee and insure payment of the aforementioned bond and mortgage, according to the terms thereof."

Q Under the terms of that agreement you knew that the Bankers Trust Company had the right to hold that $50,000 certificate of deposit, didn't you? A I don't think I did, no.

Q You don't think you did? A No, I don't think I did.

Q Although you read this agreement before you signed it? A Yes, sir.

Q And you have never made any demand since 1925 to get any part of this $50,000, have you? A I couldn't because the courts had tied up the interest of it.

Q You haven't made any attempt, have you? A No, I can't.

Q What was said in Mr.—can you tell me when it was that this agreement that you signed was first mentioned? A That one there, you mean?

Q Yes. A Why, when we went in and sold the mortgage.

Q What was said about it? A Well, they asked if we can draw an agreement that if any trouble come up over this mortgage, if I would stand responsible, and I said yes, and that is how the agreement was drawn up.

Q Did they say anything about as to why they wanted such an agreement? A No.

Q Nothing of that kind said? A No.

Q Was anything said at Mr. Jeffers' office—by the way, were you present at Mr. Jeffers' office while this agreement was being drawn? A No, that was the only understanding that I had, all that I knew was just to protect them.

Q Was it all paid for, I mean was it all drawn, was the agreement all drawn when you went to Mr. Jeffers' office? A No, it was drawn up while we were there.

Q Was anything said, anything at that time as to the purpose of this agreement? A No, just that I would be responsible if any trouble.

Q Who was present at that time? A Mr. Jeffers and I.

Q Who else? A That was all.

Q That was all? A I think so, I think was just Mr. Jeffers and I.

Q Wasn't your husband there? A I don't think he was there that day.

Q Where was he? A I don't know.

Q Well, he had gone to the bank with you, hadn't he? A Yes, he went to the bank with me.

Q Then where did he go before you went over to Mr. Jeffers' office? A I just don't know. I don't know where he went.

Q But he wasn't there? A No.

Q Do you know when he signed the agreement? A He signed it, he must have went there after me, because after we came out of the bank Mr. Proffatt went some place, he had some place to go, and I went over to Mr. Jeffers' office and I was in Mr. Jeffers' office a while and ready to come out when Mr. Proffatt came.

Q You don't think Mr. Proffatt was there and signed this agreement at the same time you signed it? A No, I don't think he was.

Q Now let's go back for the moment to the time when you made the assignment to the Second National in Thompson & Hanstein's office, do you remember—

Mr. McCarter: One moment. She didn't make the assignment to the Second National Bank.

Mr. Lane: The assignment to Schmeidler, not the assignment to the Second National.

Mr. McCarter: Let's get it straight.

Q Who was present at Mr. Hanstein's office after you went to that office? A Mr. Hanstein, Mr. Schmeidler, Mr. Proffatt and I.

Q What was said there? A Well, we, I said that I was willing to pay my, the notes that I had endorsed for Mr. Huber and Mr. Emerson, then Mr. Schmeidler says, "Well, you will

have to draw up an agreement to secure the bank." I says, "I will," which I gladly done, and then Mr. Proffatt and Mr. Schmeidler got talking about this other note of the Guarantee Electric.

Q Was this in Mr. Hanstein's office? A No, Mr. Schmeidler's.

Q No, I am taking you from Mr. Schmeidler's office, I want to know what was said in Hanstein's office when Hanstein was present, that is all. A Mr. Hanstein drew up the papers.

Q Yes, but what was said? A Mr. Schmeidler explained to Mr. Hanstein that we were willing to sign these papers to secure the bank their money for the notes that I was on, and then Mr. Hanstein said that I had to sign over my share of the mortgage to Mr. Proffatt, which I gladly done.

Q Go on, what else was said? A What happened after that I didn't pay any attention, I signed my half over.

Q I want to know what was said as to what was being secured? A Well, all our stuff was tied up, our properties and money in bank and everything.

Q Yes, I know that. A And they said they would relieve this sequestration if we signed this paper and that is the reason we signed it.

Q Was that said in Hanstein's office? A Yes, that came up in Hanstein's office, too.

Q What was said in Mr. Hanstein's office in Mr. Hanstein's presence about that? That is what I am trying to get at. A Mr. Schmeidler said that he could release that sequestration for us if we would secure the bank.

Q In Mr. Hanstein's office? A It was said in Mr. Hanstein's office or Mr. Schmeidler's.

Q In Mr. Hanstein's presence, is that right? A Yes, I think Mr. Hanstein was there too.

Q I want to know. A Yes.

Q I want you to be as certain about this as you can be as to whether or not that statement was made in Mr. Hanstein's office in Hanstein's presence? A Yes, it was.

Q So Mr. Hanstein could hear it? A Mr. Hanstein was there, yes.

Q Did anybody ask how Mr. Schmeidler was going to get this sequestration released? A No.

Q Did Schmeidler volunteer any information as to how he was going to accomplish it? A He said he would see Mr. Sooy about it and get a release for us.

Q Did he say how or what influence he could bring about or what he had to do with it? A Why, he said he was a good friend of Mr. Sooy's and he could get it released for him.

Q Did he say that in Mr. Hanstein's office so that Mr. Hanstein could hear it too? A Yes.

Q Sure of that? A Yes, I am.

Q Was the $14,000 of notes of the Second National Bank referred to in Mr. Hanstein's office? A Yes, that is where the agreement was drawn up.

Q So that the agreement then, the mortgage was then assigned for the purpose of securing those two obligations? A Yes.

Q Was anything said as to why it was that the obligation of the $14,000 should be secured by Proffatt? A No, just to release the sequestration so we could sell the Northfield property.

Q Well, the Second National Bank wasn't a party to the sequestration, was it? A I think they are the ones that done it.

Q Was anything said about the Second National Bank being a party to the sequestration? A That I don't remember.

Q You don't remember anything of that? A No, I don't.

Q Did you—when was the $14,000 obligation first mentioned or referred to? A Mr. Schmeidler's office, he was talking to Mr. Proffatt about it.

Q What did he say? A Well, I don't know, I didn't pay much attention to that, because that didn't interest me.

Q Can you remember? A No.

Q Can't remember anything about it? A No, I don't remember.

Q Now, your obligation upon which you were liable was some $8,600? A Yes.

Q The mortgage was a $50,000 mortgage? A Yes.

Q You had a half interest in it? A Yes.

Q Why were you willing to assign your half interest to secure not only your $8,600 but also the $14,000, the obligations of the bank? A That is what I wonder why.

Q You thought about it afterwards? A Yes.

Q Not then, is that right? A That is right. That is true.

Q There was also something else secured by that assignment, wasn't there? A Not that I know of.

Q Did you hear something said about $2,000? A No, I didn't pay much attention to what they were saying.

Q Did you hear something said about the two thousand dollars to Thompson and Hanstein? A No.

Q You didn't hear that in Thompson and Hanstein's office? A No, I did not.

Q Nothing—didn't you know what the amounts stated in this agreement were? A No.

Q The only two items that you know are the eighty-six and the fourteen? A Yes.

Q And not a word was said that you recollect now in either Schmeidler's office or Hanstein's office as to an additional amount of $2,000? A No. You see Mr. Schmeidler and Mr. Proffatt were talking about that, that didn't interest me. It was the eighty-six that I paid attention to.

Q And the first time that you had any talk about the assignment of the mortgage with anybody was when you went to Schmeidler's office, is that right? A Yes.

Q You hadn't talked it over with your husband before? A No, he said Mr. Schmeidler wanted to see me.

Q So you had had no talk about it before you went to Schmeidler's office? A No.

Mr. Lane: If the Court please, at this time I desire to move to amend the pleadings filed in this case on behalf of the Second National Bank by asserting or inserting an allegation charging that the answer and particularly the counter-claim of the Bankers Trust Company, in which it relies on the fact and asserts that it is the bona fide holder of said mortgage for the full consideration of $50,000, is an attempt

on the part of the Bankers Trust Company or in reality upon the part of the Proffatts to impose upon this Court, and that the transaction which took place at the Bankers Trust Company was a mere cover for the purpose of putting the Bankers Trust Company in the position where, upon the surface, it could assert a claim of a bona fide purchaser for value and without notice when, in fact, it knew that it was in no such position, and that it is therefore under a long line of cases—

Mr. McCarter: Is that to go in the answer?

Mr. Lane: No, that is not to go in the answer—and that the position taken by the Bankers Trust Company is a fraud upon this Court.

Mr. McCarter: I object.

Mr. Lane: Without putting it in the answer we say that the amendment is based upon a long line of cases, including the decision by Vice-Chancellor Buchanan in Gosswick, I think, it is, against Gosswick, the case of Vice-Chancellor Berry in Clark against Windsor Company, and the case of Vice-Chancellor Berry in the Newark Dry Cleaning Company against Gross.

Mr. McCarter: I object to the proposed amendment. That would be to amend the answer that was filed before the information which counsel for the other side seems to think justifies the conclusion of the character he makes with reference to the transaction appeared. If they want to file a supplemental answer, something another of that

kind, perhaps your Honor would accord them that privilege, but I say that they can't amend their answer to include and be technically as if it was originally filed that way, to state an exigency that they claim has arisen by testimony that they have just heard. It should be a supplemental answer in the pleading in the cause. I therefore object to the motion that is made.

Mr. Lane: I have no pride as to whether you call it an amendment or whether you call it a supplemental answer. In fact, technically, it is an amendment and not a supplemental answer. A supplemental answer sets up matter not that has been discovered since the filing of the original answer, but which has happened since the filing of the original answer. The facts on which I rely all happened prior to the filing of the answer, but were unknown to the Second National Bank until this minute.

The Court: I will permit the filing of such a pleading, and as to its form I may have to rule whether it is presented in form.

Mr. Lane: I didn't intend either to bind myself as to the technical form, I only wanted to get the idea, and I thought it was my duty to speak as soon as I had the information.

The Court: The pleading will be permitted in accordance with the suggestion.

WILLIAM GIBERSON, recalled.

Direct examination by Mr. McCarter.

Q Now, Mr. Giberson, when you were last here you were asked to look up and produce, if you could, two or three different matters. In the first place you were asked to produce two others notes, if you can, one for $2,000 and one for $1,500, which you testified were later incorporated, at page 154, into the indebtedness that had commenced in the form of a note of the Guarantee Electric Company for $14,600? A Yes, sir.

Q Have you produced them? A Yes, sir.

Q Will you please let us see them? A You mean the records? I haven't the notes.

Q Did you hear my question? A Maybe I took you wrong.

Q What record have you of those notes? A I have it right here for you. Want me to read it?

Q Let's have the record that you have of the notes. A On August 1, 1923, we discounted a note for the Guarantee Electric Company for $2,000, falling due on September 4th. On September 4th there was $200 paid on that note for one month, falling due, October 4, 1923.

On October 4th it was reduced $100, making it $1,700 due on November 5, 1923. On November 5th, the note was renewed for the full amount, $1,700 for one month, falling due on December 5, 1923. On December 5th $100 was paid, making the note $1,600 due January 7, 1924. On January 7, 1924, the note was reduced $100 for one month, falling due on February

7th. On February 7th the note was renewed in full for one month, falling due on March 7th.

Q What year? A 1924. On March 7th the note was renewed in full again, falling due on March 25 for $1,500. On November 4, 1923, we discounted a note of fifteen hundred—

Q One moment. You are now proposing to mention that $2,000 note? A Leaving it down to $1,500 due on March 25th.

Q What became of that $1,500 note? A That is the last due date. Now I am coming to it on this next note. On that date, March 25th, we combined a note for $1,500 and a note for $1,250, a note for $12,000.

Q Now, the note for twelve thousand that you combined, as you have just related, was the amount that remained due on the original note of $14,600? A That is correct.

Q Now, in addition to the note that you have just referred to that was combined with the indebtedness of twelve thousand, what other note was combined? A On November 14, 1923, we discounted an additional note for $1,500.

Q Note of whom? A The Guarantee Electric Company, falling due on December 14th. December 14, 1923, it was renewed in full for one month, falling due January 14, 1924. On January 15th, they paid $100, making the note $1,400, due February 14, 1924. February 14, 1924, they paid $100, falling due on March, making it $1,300, falling due March 14, 1924. On March 14, 1924, they paid $50, making the note fall due on March 25th.

Q For how much? A $1,250.

Q What became then of that note? A On March 25th it was combined with the $12,000 and the $1,500?

Q Making a new note? A Of $14,750, on which they paid $150.

Q On that day? A On that day.

Q Leaving the indebtedness on that day how much? A $14,600.

Q What is this date that you have just alluded to of the combination? A March 25, 1924.

Q What became of the original note, $14,600? A It was protested.

Q I mean the original note now? A It was reduced to $12,000, the original note was—

Q Do you understand the English language? A Yes, sir; try to.

Q What became of the note that started the indebtedness that we have been alluding to, namely a note for $14,600? A It was credited to the account of Guarantee Electric Company, the proceeds.

Q Well, the bank had the note, didn't it? A Sure we had the original note.

Q What became of it? A Why, when a note is renewed we usually hand it back to the party that gives it.

Q You haven't got the note? A No.

Q And you assume it was handed back to the party that gave it? A Yes, certainly.

Q So that, so far as these matters are concerned, the only note that the bank holds at the present time is the note for $14,700, I think you said? A $14,600.

Q What? A $14,600.

Q $14,600, dated March 25, 1924? A According to the record; yes, sir.

Q Was it dated then? A According to the records, Mr. McCarter.

Q Which note itself is a combination of the residue due on the original indebtedness plus the

residue due on two other notes? A That is correct.

Q As you have described? A Yes, sir.

Q What is the amount of that? A $14,600.

Q Now, I also asked you, Mr. Giberson, if you recall, to look up any collateral book or records which your bank has with reference to any collateral that was deposited by the Guarantee Electric Company at the time of the incurring of the original indebtedness on the 2nd of November, 1922, for $15,000. A So far as the records show, there was no collateral, so far as the records show, Mr. McCarter.

Q Why do you say so far as the records show? A Well, of course, if we give a collateral note we show it somewheres, if a man gives a collateral note we show it on the note there is collateral.

Q But you have just said, when we give a note, were you giving a note or taking a note? A When I give a note, I show the collateral right on it.

Q I am not interested, Mr. Giberson, in how many notes you give or don't give. I am talking about the note given to the Second National Bank. Please confine your answers entirely to that matter. A According to the records we had no collateral.

Q No collateral? A No collateral with that note.

Q What records have you got that you refer to? A All I have got here is the record of the original transaction.

Q You said the other day that you have what is known as a collateral book. Have you got that here? A No, sir.

Q What? A No, sir.

Q Is there such a book? A There is now. There was not at that time.

Q At the time on November, 1922, November 2, 1922, you find the bank had no such collateral book? A We had a card system.

Q Had what? A A card system.

Q Well, have you produced your card system of that period? A No, I have not.

Q Why not? A Because we didn't have any collateral with that loan.

Q Well, have you looked in the card system to see? A I know according to the way the note was made, we had no collateral with it.

Q Have you looked at the card system to see? A No, I didn't look at the card system.

Q Have you got the note, the $15,000 note? A No, I haven't the $15,000 note.

Q You haven't seen it since when? A Why, a month, one month note was due, I will tell you when I saw it.

Q I am asking you when you last saw the— A The $15,000 note? When it was handed to Mr., whoever renewed the note of the Guarantee Electric Company, one month from that date.

Q That would be about December, 1922, wouldn't it? A That is right.

Q Now, you say because you remember the form of the note, therefore you didn't look, as you promised to look, at the collateral records, to see if you had any collateral for it? A I didn't have to look at the collateral records, Mr. McCarter: I knew there wasn't any collateral with that note.

Q What is your position and was your position in the bank at that time? A Note teller.

Q You do not negotiate the loans, do you? A No, I don't.

Q All that you do is after a loan is directed to be made by an authorized official of the bank, you enter the record, do you? A That is the idea.

Q You don't determine whether there shall or shall not be collateral? A I do not determine anything.

Q As of the date November 2, 1922, there was a card system in vogue, as I understand you, by which any collateral that was received to secure a note discounted or taken by the bank, was entered? A Yes, sir.

Q Who entered that on the card system? A I would enter that on the card system if there was any collateral.

Q You haven't produced the card system nor haven't looked it for this transaction, have you? A Because I know there wasn't any collateral with it.

Q Well, what has happened since the last day you were here about a month ago when you said you were uncertain? You haven't seen the note since, have you? A Did I say I was uncertain?

Q I think so. A I don't recall saying that.

Q Have you seen the note since? A The note? No, I haven't seen that note.

Q You mean to give the impression by your replies that you specifically remember the exact form of the note? A I do.

Q How many notes do you suppose have passed under your vision since November 2, 1922? A I have no idea.

Q Thousands, haven't they? A Yes, thousands.

Q Remember them all? A Well, I can remember a lot of them.

Q What? A I can't remember them all, but I can remember a lot of them.

Q Remember a lot of them? A You bet.

Q What was the form of this note? A Just an ordinary promissory note.

Q Give it. A I couldn't read it off, as many as I handle, I couldn't read one off right to memory now.

Q Who was it signed by? A Guarantee Electric Company.

Q By? A That, I think, by George P. Proffatt.

Q What? A Guarantee Electric Company by George P. Proffatt, President. I am not certain.

Q Didn't you tell us at the last hearing that that was signed by Mr. Huber and Mr. Emerson? A I did not.

Q You did not? A No, sir.

Q Was it endorsed by anybody? A Guarantee Electric Company, as far as my knowledge goes.

Q Endorsed? A Certainly, made payable to themselves or ourselves, rather.

Q I am asking you what it was. A That is as far as I know.

Q Now, you said before it was endorsed by the officers of the company, do you wish to change that? A Did I say that before, too?

Q Yes, I recall distinctly you did. A I don't recall that.

The Court: Page 154.

Q My memory happened to be right for once. Didn't you say that, Mr. Giberson? A Maybe I did.

William Giberson, recalled, direct.

Q Page 154 you were asked: "Endorsed by the officers? A I imagine so, but it has been so long." Remember saying that? A I may have said that. I imagine so.

Mr. Lane: I object to that question. That question has got to be taken in connection with page 155. He said, "Not endorsed by them personally but only as officers."

Mr. McCarter: All right.

Mr. Lane: You are now confusing the witness.

Mr. McCarter: I am not confusing the witness at all.

The Court: I will permit it. It is in the testimony.

Q Do you still adhere to the answer that you gave on page 154 of the evidence at the last hearing in reply to the question speaking of this particular note: "Endorsed by the officers? A I imagine so, but it has been so long." Do you still imagine so? A I still imagine so.

Q Do you know whether or not the bank required a presentation of a resolution of the Guarantee Electric Company before discounting that note? A I couldn't say.

Q Do you know that Mr. Proffatt was president at that time? A No, I don't.

Q Why did you say—don't you know he was not president at that time? A Beg pardon?

Q Don't you know he was not present at that time? A No, I don't know that he was not president.

Q Don't you know he never was president of the company? A No, I don't.

William Giberson, recalled, direct.

Q What prompted you a moment ago to say that that note, as you recalled it, was signed by George P. Proffatt, president? What prompted you to say that? A I always understood that he was the head of the company.

Q Then your statement as to your recollection of how that note was signed was based upon your understanding that he was president of the company, is that it? A I suppose so.

Q What? A Yes, sir.

Q It was not based upon this wonderful memory of yours, that question altogether? A Not that, no.

Q It was simply based upon the idea that you had or supposed that Proffatt had been president? A Yes.

Q Now, before we get down, referring to your record of these renewals, before we get down to March 14, 1924, for what length of time were the renewals of the $1,300 note at that time, one month, weren't they? A The last note was renewed for one month, $1,300 was renewed February 14th to March 14th.

Q Now—and had been renewed every month for a period of how long? A Four months, five months, from November 14, 1923, to 2/14/1924.

Q That is four of five months? A Yes, sir.

Q Now on March 14, 1924, for how long a period was it renewed? A Renewed until March 25, 1924.

Q That is eleven days? A That is correct.

Q Why was that? A To make it come due when the March note came due of $12,000.

Q And then the combination was made? A That is it; yes, sir.

Q And the same process was gone through with reference to the other? A The $2,000 note.

Q $2,000 note? A That is correct.

Q You said on the last occasion of renewal instead of it being renewed for the regular time of a month as it happened for some different time, it was only renewed until the, being the due date of the large note? A Yes, sir.

Q And upon the maturity of that, all three were incorporated into one? A Into one; yes, sir.

Q Now, did you make out these notes yourself? A No, sir.

Q What? A No, sir.

Q Were you told by any officer of the bank why this change in the monthly renewal was made? A No, sir.

Q Who would make out these notes? A They were made up in the office of the Guarantee Electric Company.

Q You saw no one from the Guarantee Electric Company in connection with these matters? A In regards to what?

Q These renewals? A No.

Q Or the original discount on the 2nd of November? A No, sir.

Q When was the change in the system of books with reference to collateral made from the card system to a collateral book? A I think about a year and a half ago.

Q Since each of these transactions closed? A You mean since this transaction closed?

Q Or these renewals? A Oh, yes.

Q Since March 24th? A It has been changed since then.

Q Within a year? A Yes, sir.

Q Do you carry in your head—how many notes do you suppose your bank has under discount at a given time? A I couldn't say.

Q Well, five hundred? A Oh, maybe a couple of thousand.

Q And that was true also in 1924? A Yes.

Q And in 1922? A Yes, sir.

Q Of course you couldn't carry in your head the collateral that was outstanding for every one of the two thousand notes, could you? A No, hardly, they are not all collateral.

Q So a record was kept of them? A A record of all collateral.

Q Until about a year ago that record was in the card system? A Yes, sir.

Q And still you haven't either looked at or produced the card system in vogue on November 2, 1922, have you? A You didn't ask me for that, Mr. McCarter, to produce it. You asked me to look up and find out whether this note had any collateral as far as my knowledge goes.

Q What is your answer to my question? I will tell you what I asked you for later. What is your answer to my question? A No, I haven't produced it.

(Question repeated.)

A No, because I knew there wasn't any collateral on that note.

Q Now I call your attention to the very last question I put to you on page 158: "Will you before the next day which has been set for the trial of this case, kindly look up your collateral book so that you can be cock sure whether or not there was any collateral ever received by the Second National Bank for any of these loans that you have specified? A All right, sir."

Q You haven't done so, have you? A I told you, Mr. McCarter, that there wasn't any collateral on that loan.

Q You haven't done so, have you? A Yes, I have done so, because I know there wasn't any collateral.

Q Have you between the time you were on the stand on the last occasion and today looked up the collateral record in your bank to see whether or not there was any collateral ever received by the Second National Bank for any of the loans that you have specified? A No.

Q It seems to me, perhaps it may be I haven't made it clear, see if this is right: The original indebtedness of the Guarantee Electric Company to the Second National Bank was created November 2, 1922, by discounting a note for $15,000? A That is correct.

Q That note had by payments been reduced on the 24th of March, 1925, to what, $14,600? A Taking the other two notes in consideration, yes, sir.

Q What had that note? A That note had been reduced to $12,000.

Q On what date? A On March 25, 1924.

Q I want you to please give us—perhaps you have given it, but I haven't a memorandum of it—when did the two other notes first start? A The fifteen hundred and the two thousand, the two thousand August 1, 1923, the fifteen hundred on November 14, 1923.

Q Now, I show you a check dated July 19, 1923, to the order of the Second National Bank, signed Guarantee Electric Company, by Huber, President, and Emerson, Treasurer. That check was paid, wasn't it? A Yes, sir.

Q What was that for? A I don't know whether it concerns a note or what.

Q Any way of telling? A No way by these records.

William Giberson, recalled, direct.

Q Beg pardon? A No way by these records of telling.

Q Well, did the Guarantee Eelctric Company in the month of July, 1923, have any other notes on discount in your bank than the notes you have been talking about here? A It may have been a collection note out of town.

Q Answer my question, please. A I can't tell by these records, Mr. McCarter.

Q Can't tell what? A Whether they had one or not on that date.

Q Haven't you before you— A I had the book of original entry and other credit entries.

Q Do you find any other notes of the Guarantee Electric Company discounted by your bank? A I don't find any on July 18th. I find one on July 18th.

Q What? A On July 18th there was one due for $13,500, which was reduced to $13,250.

Q July 18th what year? A 1923.

Q Then is this check in payment of that? A It couldn't be, for the reduction was only $250.

Q All right. What other note? A What other note on that date?

Q Besides these that we have been speaking of? A Haven't any other notes here so far as I know on this record.

Q That is the complete record, isn't it? A Yes, sir.

Q What? A Yes, sir.

Q Now, I show you a check No. 559 of the Guarantee Electric Company, signed by Huber, President, and Emerson, Secretary and Treasurer, to the order of Second National Bank for $500, dated August 1, 1923. That was paid,

wasn't it? This check was paid, wasn't it? A Yes, sir.

(Checks offered in evidence.)

Mr. Lane: I object to them on the ground they have not been connected up with anything in this case.

The Court: Let them be marked for identification at this time.

(Checks marked Exhibits B. 19 and B. 20 for identification.)

Q This last one, the $500 check that has just been shown you, is the payment reducing the $13,000 loan that you spoke of, isn't it? A I can't say how it is when there is only $250 paid on it.

Q Well, is it? A August first, you say?

Q Don't get excited. Just keep cool. Look at your papers and see. I don't know. I am asking for information. A I don't find any record of any payment like that.

Q Then you don't know what that is for? A No.

Q Do you specifically remember each one of the several notes being notes on renewal both of the original loan of $15,000 under date of November 2, 1922, and the $1,500 and $2,000 note, do you personally remember the form of each of those? A I know it is in a regular form note.

Q Do you remember? A No, I don't.

Q Have you looked for the records of any of these renewals in your collateral book or card system to see whether there was collateral in connection with them?

William Giberson, recalled, direct.

I am not speaking now of the original note. I am talking about the renewals of either the original indebtedness of fifteen thousand, less the discount, or any of its renewals, or the two thousand and the fifteen hundred or any of their renewals, or of the new note that originated on the 25th of March, 1924, for $14,600, as I remember it. Have you looked? A No.

Q What? A No, I have not looked.

Q Why haven't you? A Because the original note was not collateral and all the way through, according to my knowledge, and our records does not show collateral.

Q What records do you refer to? A Why, the records from the book. We mark them right in the line here collateral, or if they are endorsed.

Q Have you looked in any of your records, including the collateral book records, to show whether there was ever received from the Electric Company, as collateral for any of these loans, some stock of the Flanders Hotel Company? A I never found any record of it.

Q Well, if you haven't looked you haven't found anything, have you? I asked you if you have looked? A No, I haven't looked.

Q If you did receive some collateral of the Flanders Hotel Company, it ought to appear on the card system? A It ought to appear on the collateral—it should be a collateral form of note showing right in there just the collateral.

Q Will you answer my question? A If we have any, yes. There was supposed to be collateral put up at the usual—

Q In the card? A If it is a collateral form of note.

(Question repeated.)

A According to our record, Mr. McCarter, I don't know—

Q Will you answer my question? You haven't looked at the card system, you told us. I ask you if it be a fact the bank did receive as collateral for any of these notes that you specified or any of their renewals, some capital stock of the Flanders Hotel Company, it would appear on the card system? A If it was put up as collateral, yes, sir.

Q All right. That is all.

By Mr. Lane.

Q Will you kindly look between now and two o'clock so you can say that you have looked at the card system or any other records of the bank, and tell us whether or not there is any collateral on any of these notes? A I will, sir.

Q Now, counsel referred to page 154 of your testimony and asked you whether your imagination was the same now as it was then. I am now referring to page 155 of your testimony, in which you said, in which the following occurred:

"You stated in response to counsel's question that you thought the notes were endorsed by the officers of the company? A I did, yes, sir.

"Q Personally have you any recollection of that? A I don't mean personally, no, as officers.

"Q As a matter of fact, these notes bore the personal endorsement of anybody? A No, as officers, I said.

"Q Only as officers? A Yes."

Is your recollection now the same as it was then? A That is correct.

Q Now, let's see if we can't get these notes straightened out a little bit. In the first place

there never was an original $14,600 note, was there?

The Court: Just one minute. I am just wondering whether I won't be confused. Is there any confusion?

Mr. Lane: There isn't any confusion if you take all of this testimony and analyze what it has been—

The Court: I am not limiting you, only I didn't want to become confused.

Mr. Lane: I am going to run over it as I understand it.

The Court: All right; you may do so.

Q In the first place, there is no original $14,600 note, is there? A Originally the note was $15,000.

Q Will you answer my questions and answer yes or no— A No.

Q —and stop at that. There was an original $15,000 note dated November 2, 1922, due on March 25, 1924, had been reduced to $12,000, that is correct, isn't it? A Correct, yes, sir.

Q There was an original $2,000 note dated August 1, 1923, which on March 25, 1924, had been reduced to $1,500, that is correct? A That is correct.

Q There was an original $1,500 note dated November 14, 1923, which on March 25, 1924, had been reduced to $1,250; that is correct, isn't it? A That is correct.

Q That makes $14,750 due on March 25, 1924, upon which there was paid $150, reducing the indebtedness on March 25, 1924, to $14,600, and a new note was given for $14,600 at that date; that is correct? A That is correct.

William Giberson, recalled, cross.

Q That note was due April 25, 1924, renewed and due again on May 15, 1924?

Mr. McCarter: I don't know, Mr. Lane better take the stand.

Mr. Lane: I am cross examining.

Mr. McCarter: I haven't gone beyond that.

Mr. Lane: Yes, you have in your direct examination.

Mr. McCarter: I don't think so.

Mr. Lane: You went down to this meeting.

The Court: I will permit it.

Mr. McCarter: Let the witness testify; don't let Mr. Lane put words in his mouth.

The Court: If the objection had been made at the start of this testimony where the witness was instructed only to answer yes or no, I think I probably would have sustained it, but it has not, and almost the last question upon this point.

Mr. McCarter: Your Honor—I am not quibbling; I am quite as anxious to get through as your Honor, and more, probably. I am simply calling attention to the fact I have no recollection of going beyond that $14,600 on July 24th.

The Court: I think it has been protested.

Mr. McCarter: And that it went to protest. Now if counsel wants to bring in anything about that afterwards, I think he should make this witness his witness and not lead him.

The Court: I don't know that it makes any difference. On March 25, 1924, a note

for $14,600, which became due April 25th, renewed in full, became due May 15th, renewed in full, came due June 16th, renewed in full, on July 16th, the note $14,600 was protested.

Mr. Lane: That is correct, and that is all in the testimony and my only object in repeating it here was to have it concretely in the history of these notes.

Q Now, will you examine your records and ascertain whether or no there wasn't on July 20, 1923, a note for $5,600 of this Guarantee Electric Company discounted not included in these other notes at all? A On July 20th, $5,600 note discounted, due August 20th.

Mr. McCarter: What do you say about it?

A $5,600 note due August 20th.

Q Now, I don't want to go through the whole history of that note, but that note was reduced to $5,000, was it not, and became due on July 28, 1924?

Mr. McCarter: I object to that as immaterial.

The Court: Sustain the objection.

Mr. McCarter: The check that was shown the witness, your Honor, bears date July 19, 1923, and is for $6,056.

Mr. Lane: That check has never, has not been shown to have anything to do with this transaction, and hasn't anything to do with the note I am referring to. Counsel asked whether there were any other notes, and I am showing him that there were.

William Giberson, recalled, re-direct.

The Court: I will permit the line of testimony.

A $5,000 note fell due on July 28th.

Q 1924? A That is correct.

Q Was that note ever paid? A Now, Mr. Lane, I couldn't say what was done with that.

Q Look it up between now and two o'clock? A All right.

Q Will you find out whether on April 12, 1924, a note for $500 on demand was discounted? A What was it, Mr. Lane, again?

Q April 12, 1924. A April 12, 1924, demand loan of $500.

Q Was that note ever paid? A My records show Proffatt a loan September 30, 1926.

Q Now please tell me was it ever paid? A No.

Q That is all.

By Mr. McCarter.

Q After looking at the checks that were shown you, marked Exhibit B. 19 and B. 20, have you any doubt that Mr. Huber and Mr. Emerson were respectively the president and secretary and treasurer of this company as early as 1923? A If the checks are signed by them they must have been the officers.

Q Will you, between now and two o'clock, also look up your books and if possible ascertain what these two checks B. 19 and 20 respectively, dated one July 19, 1923, for $6,056.24, and August 1, 1923, for $500, which seem to have been paid to the bank, were for, and bring your books along if you find anything about them? A All right, sir.

By Mr. Lane.

Q Now, in order to assist you in that—

Mr. McCarter: I don't think we want to in court assist the witness to find out something he is going to find out before two o'clock.

Q Will you examine to find out, at the time you examine for counsel, and ascertain whether or not on the 19th day of July, 1923, at the giving of this $6,056.24, that the money was not paid to the bank for use in the purchasing or taking up of the stock of B. A. Bullock of $5,000, William Jordan of $1,000, and interest of $56.24, and also whether or not the check of August 1, 1923, for $500, was not in connection with the transfer of a savings account of Mrs. Proffatt?

Mr. McCarter: We, of course, your Honor, reserve the right to put in an answer to this proposed amendment.

The Court: Surely.

Mr. McCarter: We rest.

ISADORE SCHMEIDLER, sworn.

Direct examination by Mr. Lane.

Q Mr. Schmeidler, where do you live? A Atlantic City.

Q Do you know Mr. Proffatt? A I do.

Q How long have you known him? A Fifteen years.

Q Were you ever in business with him yourself? A I was.

Q When and where? A In Atlantic City and Belcoville, that would be five or six years ago.

Mr. McCarter: Where?

A Atlantic City and Belcoville.

Q What was the nature of the business? A Electrical business.

Q Were you in the—when was it that you severed any business relations with him, I mean in the electrical business, about how long before this transaction in 1925? A Oh, immediately prior to that, probably there may have been some accounts that were not even settled then.

Q Did you have any connection with the corporation known as the Guarantee Electric Company? A No.

Q You knew of the incorporation of that company, of course? A Yes.

Q When did Mr. Proffatt leave Atlantic City? A Some time after the incorporation of that company.

Q Can you tell me about when? A No, I couldn't give you a date.

Q When he was away, did you hold a power of attorney from him? A Yes.

Q Now, do you remember when he returned after the writ of sequestration had been issued, I don't mean the date, do you remember the occasion of his returning and coming back? A Yes.

Q How soon after he returned did you see him? A Probably immediately.

Q At some time after his return was there a conversation between you and him as to securing

the bank and so forth for its indebtedness? A Yes.

Q Just tell me about how long after his return that was and how it came about and what was said? A Well, it was probably immediately after he returned, naturally he saw me, as he did any number of times, and discussed the situation of these notes—

Mr. McCarter: One moment. Let's have the conversation, not Mr. Schmeidler's conclusions about it.

The Court: Yes, tell us what was said as near as you can.

A I don't recall word for word what was said.

Q You don't have to. A I can only recall the general conversation.

Q Give me the substance of what was said between you? A The discussion consisted of talking about the notes that were owing to the Second National Bank. He had told me any number of times that he thought that the Second National Bank should be paid, and I agreed with him and said that in order to protect his future credit, particularly as he was going to go into business again, as soon as Mrs. Proffatt's health would allow him, that it was advisable for him to protect and pay everyone that he owed in order to protect his future credit.

Q Go ahead, what else was said? A He said that he wanted to pay the Second National Bank and Thompson and Hanstein, and I said, "Well, then, why don't you pay them?" He said, "I haven't the available cash." "Well," I said, "George, you have property and mortgages, and you should in some way satisfy the Second Na-

tional Bank and Thompson and Hanstein, and probably it would be a good thing to talk this over with Mr. Hanstein and you may think of some suggestions whereby you could protect them." That was done.

Mr. McCarter: What was done?

A We saw Mr. Hanstein.

Q Now, this conversation, did you have a conversation in your office before you saw Hanstein at which there were present Mr. Proffatt and Mrs. Proffatt? A Yes.

Q What was said at that conversation in your office? A The same trend of conversation, that the bank should be protected.

Mr. McCarter: I object.

The Court: Yes.

Mr. McCarter: I move that be stricken, your Honor.

The Court: It will be stricken.

Q Tell us what was said as nearly as you can recollect the substance of it? A As I recollect it was suggested that the mortgage—

Mr. McCarter: Who suggested?

A I don't recall whether I suggested it or Mr. Proffatt suggested it, that the mortgage be put up for security in the payment of these particular notes.

Q Were there any particular notes referred to in the conversation? A No, just referred to as the amount of money that was owing to the Second National Bank and Thompson and Hanstein.

Q Now, did you go from your office to the office of Mr. Hanstein? A Yes.

Q Who went? A Mrs. Proffatt, Mr. Proffatt and myself.

Q And was Mr. Hanstein present, of course? A Mr. Hanstein was present.

Q Tell me what conversation took place at that time as nearly as you can recollect it? A The conversation that took place was Mr. Proffatt and Mrs. Proffatt wanted to secure the Second National Bank and Thompson and Hanstein, and that they were willing to put up the mortgage in the amount of $50,000 to secure that money.

Q Were the papers signed on that day? A I believe they were.

Q Were they drawn on that day while everybody was present? A Yes.

Q Do you recollect which papers were drawn first? A The paper assigning Mrs. Proffatt's interest to Mr. Proffatt.

Q What paper was drawn second? A The paper assigning from Mr. Proffatt to myself.

Q And what paper was drawn thirdly? A An agreement between Mr. Proffatt and myself regarding certain moneys that would probably come to me that belonged to Mr. Proffatt.

Q As dividends? A As dividends.

Q How did that paper, the latter one, which is B.11, how did that paper come to be executed? What was the conversation which led to the execution of that paper? A Mr. Proffatt said that there would probably be some dividends and if there were he felt that they should be paid to him and not paid to anyone else.

Q Was there a discussion in Mr. Hanstein's office as to what particular notes were to be

secured by this assignment, was there any figure named?

Mr. McCarter: Can't he tell us the conversation?

The Court: I think you are entitled to the conversation.

Q Give us your recollection of the conversation? A I recollect that there was some talk regarding the figures, but I can't recall any particulars.

Q Who was that conversation between? A Mr. Hanstein and Mr. Proffatt.

Q Have you any recollection of any figures being written? A I have not.

Q Did you have any connection with the Second National Bank? A No connection whatsoever.

Q Did you have any connection with Thompson and Hanstein? A No connection.

Q Did you at the time you saw Mr. Proffatt and Mrs. Proffatt at your office or at any other time tell Mr. Proffatt or Mrs. Proffat that you would secure the release of the writ of sequestration on the Northfield property, I think it has been referred to, or any other property? A I did not.

Q Did Mr. Proffatt at that time or about that time tell you that he had had a chance to sell or had a chance to sell the Northfield property for $75,000 provided he could get it released, or language to that effect? A I don't recall that.

Q Did you tell him that you would see Mr. Sooy and see what you could do, or language to that effect? A I certainly did not.

Q Did you later or at any other time tell him that you had seen Mr. Sooy and that he, Mr.

Sooy, had stated that it was all right to release the Northfield property? A I did not.

Q Did you say to him that if you could get the property released, then he should secure the Second National Bank, or language to that effect? A I did not.

Q Did he say to you that if you were positive that you could secure it, then he would secure the bank and Thompson and Hanstein? A I did not.

Q Did any conversation of that kind take place at all? A Did not.

Q At any time? A At no time.

Q Was it you who suggested this agreement that any moneys which were received as dividends should be turned over by you and this $14,600 should be turned over by you to Mr. Proffatt? A I did not.

Q Was there any talk in Mr. Hanstein's office or anywhere else with respect to the amount of dividends which might be expected upon that claim? A I don't recall any other discussion.

Q After this transaction was completed, did you have any conversation with Mr. Proffatt in which he insisted that you had done nothing and that you had not done the thing that you promised to do, to wit, to release or get the release of the Northfield property? A There was not.

Q Was there at any time when he said to you that you did not live up to your agrement and "I am not going to live up to mine," or any words to that effect? A He did not.

Q Who was it that first suggested the securing of Thompson & Hanstein, you or Mr. Proffatt? A Mr. Proffatt.

Q Was there any conversation between you and Mr. Proffatt, either in your office or in the

office of Mr. Hanstein, or at any other place, in which it was suggested that your agreement to get this release should be kept out of any written agreement, because you had to show it to Mr. Sooy or because Mr. Sooy might not release the property if he knew about it, or anything of that kind at all? A There was not.

Q Mr. Schmeidler, I show you an agreement that has not yet been offered in evidence and I ask you whether you received that agreement or assignment, ask you whether you received that assignment from the Second National Bank?

Mr. McCarter: What paper is that?

Mr. Lane: It is not in evidence. It is an assignment from the bank to Mr. Schmeidler of their claim of the $14,800?

A Yes.

(Assignment offered, received in evidence and marked Exhibit S. 22.)

Cross examination by Mr. McCarter.

Q When was it you were in business with Mr. Proffatt? A Prior to the organization of the Guarantee Electric Company, Incorporated.

Q Were you connected then with the business known as the Guarantee Electric Company before the incorporation? A No.

Q What was your association with Mr. Proffatt? A Mr. Proffatt and I were equal partners in purchasing a lot of material from the people who had purchased the Government plant at Belcoville, that was a partnership proposition between he and I.

Q That was after the war? A That was after the war.

Q And that was an isolated transaction in which you and he were partners to buy up the material from the Government and sell it? A Yes, sir.

Q You had nothing to do with the electric business? A Nothing to do with the Guarantee Electric Company. This was electrical material, incidentally.

Q What years was that? A I guess around '22 or '23.

Q How long did it last? A About a year, I guess.

Q Well, now, this was after the incorporation of the electric business? A Before the incorporation of the Guarantee Electric Company.

Q Well, that seems to have been incorporated in 1922. A Then we were in business in 1921, about.

Q At any rate, that matter was closed out? A Yes.

Q About when? A Sometime prior, as I recall, to the formation of the Guarantee Electric Company, Incorporated.

Q Now, how familiar were you with the affairs of the Guarantee Electric Company? A Well, which one? The Guarantee Electric Company or George Proffatt?

Q Either or both? A Well, I was not famaliar with their affairs at all except I used to go in their store pretty often.

Q Well, you knew, did you not, that Mr. and Mrs. Proffatt took equal shares of the stock on the creation of the corporation and later sold their stock; did you not? A No, I did not.

Q You didn't know that? A I did not.

Q Well, do you recall how soon after the creation of the corporation it was that Mr. Proffatt went away and you became his legal representative acting under a power of attorney? A Well, it was very soon after that; I don't recall exactly.

Q Have you got that power of attorney? A I don't know whether I have or not.

Q If we come back after luncheon, will you take the opportunity to see if you can find it? A It would be some job, I think, to find it; I don't know where I would keep it.

Q You had a regular written power of attorney, did you not? A Yes.

Q To transact all his business while he was away? A I don't recollect now whether it was transacting all of his business; I think there was some limit to it, but I don't just recall what it was.

Q You did transact his business? A I transacted some business, yes.

Q You signed checks? A Yes, I signed some checks.

Q How many? A I don't recall.

Q I show you a check dated September 23, 1924, to the order of the Equitable Trust Company for $6,866.50, signed "George P. Proffatt by Isadore Schmeidler, attorney." Look at that check and see if you signed it as his attorney or agent? A I did.

Q And tell us if you during his absence, on his behalf did not pay that check in settlement of the amount that remained due from him to the Equitable Trust Company, on a loan that he had endorsed with that company? A Yes.

Q And you knew of the fact that he had endorsed the note to the Equitable Trust and was

liable legally for the debt and the note was not paid and this remained due after the entire obligation by endorsement or collateral had been satisfied? A I think this was all that remained due.

Q And that was done during his absence, wasn't it? A Yes, I think it was.

(Check offered, received in evidence and marked Exhibit B. 21.)

Q How long was he away? How long was Mr. Proffatt away when you were holding his power of attorney? A I don't recall.

Q As near as you can? A Well, he was back and went away again, and then came back and went away again, probably, I guess, the whole matter extended over a period of a year and a half.

Q From about when until when? A Well, some time—I couldn't recall the months.

Q Can you recall the years? A I don't know whether I could recall the years. I know some time in '24.

Q Well, do you recall the fact that while he was away and while you were thus acting, that the Electric Company was put in the hands of a receiver and a writ of sequestration issued undertaking to tie up all of Mr. Proffatt's property? A I don't recall that he was away.

Q You don't? A No, sir.

Q You say he was not away? A I don't know.

Q Did you hear of the matter of his property being tied up? A Yes.

Q From whom? A I don't recall.

Q Did you know that he and his wife returned unexpectedly from Florida because of in-

formation that they had received from that effect? A No, I did not.

Q Well, were you at that time, namely, during the years 1924 and 1925, acting under the power of attorney? A I can't recall that.

Q Evidently you were, and in September 23, 1924, you signed this check? A Yes.

Q How much longer did you act? Can't you tell at all? A I don't recall how much longer I did act.

Q Well, you have spoken of having some talk after Mr. Proffatt got back with him about securing the bank? A Yes.

Q You were in no way connected with the bank? A I was not.

Q Had no interest in the bank? A No interest at all.

Q Haven't yet? A Haven't any now.

Q Don't act for the bank? A I did not act for the bank.

Q What? A No way at all.

Q Did not act for the bank? A No, don't act for the bank.

Q For Mr. Bacharach, its president? A Don't act for Mr. Bacharach, its president.

Q Then in the talk that you had with him—how did you happen to have this talk with him about securing the bank? A Mr. Proffatt had discussed with me any number of times that he again would enter into business in Atlantic City.

Q He what? A He would again enter into business in Atlantic City as soon as Mrs. Proffatt's health would allow it.

Q Well, how often had you seen—when had you last seen Proffatt before these talks about securing the bank occurred that you have alluded

to? A I don't recall the time we had seen each other—

Q Don't you know you hadn't seen him for months? A No, I don't. We would see each other very often over the last few years.

Q Did you go to Florida? A What is that?

Q Did you go to Florida to see him? A No, I did not.

Q When you say you would see him very often, you mean when he was in Atlantic City? A Certainly.

Q You mean to say you don't remember that he came back from Atlantic City about his property being tied up? A He came from—

Q From Florida to Atlantic City? A No, I don't recall at that particular time, I don't.

Q Now again I ask you what interest you had in holding the interviews that you have spoken of with Mr. Proffatt, in holding the interview that you had in your office with Mr. and Mrs. Proffatt, and in later going to Mr. Hanstein's office while certain papers were signed, what interest did you have? A My interest was in Mr. Proffatt with whom I am very friendly, whom we had been in business before, and we had been in business together before with, and he wanted me to go in business with him again.

Q When has he said that? A Oh, any number of times, discussed it at his home in Northfield and here in Atlantic City.

Q When last before these interviews that I have just alluded to? A Probably discussed at one of these interviews.

Q But you haven't told us about that, that he during these interviews then was going into business with you? A He suggested that I go

into business with him after Mrs. Proffatt got well.

Q Did he talk about going into business with you in the interview in your office or in Hanstein's office? A I don't recall.

Q Again what interest had you that led you to have the interview in your office and later the interview in Mr. Hanstein's office which resulted in the signing of these papers? You say you were not interested in Thompson and Hanstein or interested in the bank? A I was interested in Mr. Proffatt.

Q Interested in Proffatt? A Yes.

Q If you were interested in Proffatt, why didn't you notify him of the sequestration suit? A I don't recall any proposition regarding that suit at that time.

Q Did you know that at the instance of the Second National Bank the receiver had been induced to take proceedings resulting in tying up all of Mr. Proffatt's property and his wife's too, didn't you know that? A I don't recall that.

Q What? A I don't recall that at that time.

Q You were operating under a power of attorney for him? A I don't know whether I was power of attorney for him at that time.

Q Has it ever been revoked or cancelled, the paper? A I believe it has.

Q When? A I don't know.

Q By writing? A I don't recall that.

Q Will you look for the power of attorney, and also try to look for the revocation? A I will.

Q Have you got so many papers and such a large mass of documents that it would be a great difficulty to find either one of them? A It probably would. Yes, I have.

Q Now, you say you were acting for Proffatt in this matter? A That is right.

Q What? A That is right.

Q What was the first talk you had with Proffatt resulting in going into Hanstein's office and execution of certain papers? A I couldn't specify a first talk, we had a number of talks.

Q Well, who suggested going into Mr. Hanstein's office after the interview in your own office? A I don't recall that.

Q Did you know at that time that Thompson and Hanstein were the regular attorneys of the Second National Bank and that Judge Thompson was the leading director of it? A Yes.

Q Had you at that time any information with reference to a note held by the Second National Bank amounting to $14,600? A In a general way I think I did.

Q How did you learn it? A Mr. Proffatt.

Q Proffatt? A Proffatt gave me the information.

Q When? A At one of these talks.

Q You mean immediately before the papers were signed? I mean by that within a week of the time that the papers were signed? A I would imagine so, yes.

Q That is the first information you had? A Well, I wouldn't say that was the first, I don't recall what we may have heard about it a good long time before that.

Q You can't tell us when you first heard it or who told you? A I couldn't tell you when I first heard of it, but when I did, Mr. Proffatt told me about it.

Q Beg pardon? A I say when I did, Mr. Proffatt told me about it.

Q Do you know Mr. Cochran? A Yes.

Q When did you hear of a claim of Thompson and Hanstein aggregating $2,000 which is referred to in these papers? A About the same time that I heard about the other notes.

Q When was that same time, can't you tell us? A No, I can't give you any date.

Q Was it a year before? A No, it was about the same time of the signing of this agreement.

Q First time then you had ever heard of the Thompson and Hanstein claim for $2,000 or the bank's claim for $14,600, or the claim of the bank against Mr. Proffatt for $8,600, was a very short time before the interview in your office? A I wouldn't say positively, it may have been four or five months before that.

Q Four or five months? A It may have been.

Q From whom? A From Mr. Proffatt.

Q Did you see Proffatt between May, 1924, and April, 1925? A I don't recall that.

Q What? A I could associate the time with the signing of that agreement.

Q One moment. Don't you know that Proffatt was away from Atlantic City between May, 1924, and April, 1925? A I am not sure as to the time.

Q Have you any recollection that a long time elapsed, practically a year, during all of which he was not in Atlantic City previous to the short time before the execution of these papers? A I didn't know that it was that long. I knew he was away for some time but I didn't know it was that long, don't recall that it is that long.

Q Well, you knew it was months, didn't you? A Yes.

Q Didn't you know it was six months? A I don't recall the length of time.

Q Now, when had he told you, before he went away, about these notes? A I don't recall the time.

Q When had he told you about the Thompson & Hanstein obligation? A As I recall it, they were all discussed at the same time.

Q Whenever it was? A Yes.

Q So, not having seen him for some time, you did see him shortly before these papers were executed and he again, as you say, spoke of these specific obligations? A Yes.

Q Is that right? A That is right.

Q What reason did he give for speaking of them? A He didn't give any reason for speaking of them.

Q He just spoke of them? A He just spoke of them from the standpoint that he wanted to protect his future credit, that he intended to go in business again.

Q Did anybody in the Second National Bank know that you had a power of attorney from Mr. Proffatt? A I don't know.

Q All right, very good. Didn't Thompson and Hanstein draw that power of attorney? A I don't recall who drew that.

Q What? A I don't recall who drew that power of attorney.

Q Well, you have told us that in one of these interviews, anyway, just before the papers were executed, that Proffatt said he wanted to pay the bank and Thompson and Hanstein? Did he say what bank? A Second National Bank.

Q Then he said he wanted to pay the Second National Bank? A Yes.

Q Did he say what he wanted to pay? A I don't recall the specific amount, no.

Q All right, very good. But you testified, you said, "Why don't you do it?" And he said he had no cash, and that you replied, "George, you have property and mortgages," and that you said, you continued, "You should pay the Bank and Thompson and Hanstein." Now, didn't you know at that time that his property was tied up? A I don't recall that.

Q What? A I don't recall that his property being tied up at that time.

Q Well, who had had charge of his affairs while he was away? A That only—I don't know.

Q What? A I don't know. I know what I had charge of.

Q What affairs did he have? A The only affair that I had any knowledge of was the note that I secured for him at the Equitable Trust Company, and that was the only matter in which I acted for him, was the matter that I secured for him at the Equitable, that is the only business that I transacted for him all during the time of my power of attorney that I recall, but I did see that those moneys were paid because I interceded at that bank for him to secure that loan.

Q Did you sign or endorse the paper that was discounted by the Equitable Trust? A No.

Q Well, who suggested that interview in your office? A I don't recall.

Q Who suggested Mrs. Proffatt being there? A I don't recall that.

Q You had no interest in the transaction other than helping your friend Proffatt? A Absolutely not.

Q And you were helping your friend Proffatt to get ready to go into business again? A Yes, I wanted to protect his credit.

Q Did you know whether he was an endorser or on, to use a banking phrase, the note in the bank? A What bank?

Q Second National? A I did not.

Q Did not? A No.

Q Didn't know the nature of the obligation, if any, of Mr. Proffatt to Thompson and Hanstein? A As told me by Mr. Proffatt, yes, and that also and the burden of the bank notes, too, we discussed those, too, I think in my previous answer I answered no, when you bring up at the time that the Thompson and Hanstein obligation there probably was discussed at the same time, the bank obligation.

Q I only ask your recollection, I don't want any probable business at all. Now how long a time was spent in your office? A I don't recall.

Q Well, was it an hour or was it fifteen minutes? A Oh, probably a half an hour.

Q A half hour? A Probably.

Q What was being discussed during that half hour? A I don't recall all the discussion.

Q Don't recall? A No.

Q Your recollection is rather obscure as to the whole conversation, isn't it, Mr. Schmeidler? A The only point that I remember is saying—

Q Won't you answer my question? Your recollection as to what transpired in your office during the half hour or so that you were there is rather obscure? A I don't think so.

Q There was no one there but Mr. and Mrs. Proffatt and you, was there? A That is right.

Q What was said? A We discussed the matter of securing the bank and Thompson and Hanstein. Discussed Mrs. Proffatt's health.

Q Nothing was said about securing the bank? A Yes.

Q Go on and tell us what was said. A Well, I can't remember the words that were said.

Q Was the amount of the indebtedness to the bank referred to? A I don't recall.

Q Was the amount of Thompson and Hanstein's alleged claim referred to? A I don't recall that.

Q Was the amount of Mrs. Proffatt's indebtedness referred to? A I don't recall that.

Q Well, somebody suggested, whether you or Proffatt, that a mortgage be assigned, didn't they? A Yes.

Q Did you suggest that or Proffatt? A I don't recall who did suggest that.

Q And don't you recall that some figures were named as indicating the amount for which that assignment should be made as collateral? A I don't recall any figures being mentioned in my office.

Q Don't recall any figures being mentioned in your office? Still you were all acting in this matter for Proffatt? A Yes.

Q What? A That's right.

Q And had no purpose of object as acting for the bank? A No.

Q Well, when the assignment was proposed of this $50,000 to secure the bank and Messrs. Thompson and Hanstein, to whom was it proposed that assignment should be made? A I don't recall that. I know it was made to me.

Q I beg pardon? A It was made to me, but I don't know whose suggestion.

Q I didn't ask you that. That we are coming to in a minute, Mr. Schmeidler.

(Question repeated.)

A I don't recall.

Q When did it first cross your mind, as you now remember, that you were to be the assignee of this mortgage? A I don't recall the time.

Q You don't recall the time? A No.

Q You knew of this mortgage, didn't you, for $50,000 upon this Atlantic avenue property that Proffatt was interested in? A Yes.

Q When did you learn for the first time that Mrs. Proffatt was a co-owner of that mortgage? A I don't recall the time.

Q Did you know before the interview in the office commenced? A I don't recall that.

Q I have forgotten what you said, and I will take the liberty of repeating the question. When was it first suggested that this proposed assignment should be to you rather than the Second National Bank? A I don't recall at what time that was suggested.

Q And you don't recall who made the suggestion? A No, I don't.

Q Well, now, you finally went into Thompson and Hanstein's office? A Yes.

Q That was in the same building? A That is right next door.

Q That is your office? A Right adjoining.

Q Same floor? A Same floor.

Q Had Thompson and Hanstein any knowledge that this interview was to take place so far as you know? A I don't recall that.

Q Don't you remember that in the interview in your office before you went into Thompson and Hanstein's, that Mr. Proffatt said that he had had an offer for the Northfield property, but that, owing to the fact that it was tied up by these sequestration proceedings, he was not, as things then stood, able to accept that offer? A I do not.

Q Beg pardon? A I don't remember that.

Q Will you say something of that kind was not said? A I can say that it was not said.

Q Well, when you went into Thompson and Hanstein's office, you saw Mr. Hanstein? A Yes.

Q Did you see Judge Thompson? A I don't remember.

Q Now, what was said when you went into Thompson and Hanstein's office? A As I recall, it was suggested that—

Q Who suggested? A I think Mr. Proffatt's suggestion.

Q What? A That he was willing to assign the $50,000 mortgage to secure the Second National Bank and Thompson and Hanstein.

Q I wish to have the whole story, as you recall that, the whole conversation that occurred in Thompson and Hanstein's office before the papers were prepared, to the best of your recollection.

(Recess taken until 1:30 o'clock P. M.)

AFTERNOON SESSION.

Trial of the cause resumed at 1:30 P. M.

ISADORE SCHMEIDLER, resumed.

Cross examination (resumed) by Mr. McCarter.

Q When had you seen Thompson and Hanstein or either of them last before you and Mr. and Mrs. Proffatt went into their office? A I don't recall.

Q Did Mr. Proffatt or Mrs. Proffatt have with them, when they were in your office and when you all went into the office of Thompson and Hanstein, the $50,000 mortgage? They didn't, did they? A I don't remember that.

Q What? A I don't remember that.

Q Had you spoken at all to Thompson and Hanstein of the proposition that, as you express it, Proffatt should restore his credit? A I don't remember that.

Q The claim of Thompson and Hanstein was, as you understood it, a claim against the Electric Company? A I don't recall whether it was a claim against the company or a claim against Mr. Proffatt.

Q You can't recall that? A No.

Q Who first mentioned the existence of such a claim to you? A I don't remember who mentioned that.

Q Well, who mentioned the note that Mrs. Proffatt was responsible for? A I don't remember who mentioned that.

Q Did you know anything about it? A I—

Q Look at me. A I had and I did.

Q Never mind looking over there, look at me. A I recall that there was a discussion about notes, but I don't recall who first mentioned them.

Q Well, before you went—before they came to your office, did you know of the fact that Mrs. Proffatt was indebted to the Second National Bank? A Yes.

Q Who told you that? A I don't remember.

Q You had not mentioned to Thompson and Hanstein of the fact that Proffatt was anxious to pay their claim, had you? A I don't recall.

Q You do not seem to recall anything about this much, Mr. Schmeidler? A Well, I am trying to recall everything I can about it.

Q All right. A But I don't want to make a statement that I can't recall.

Q Well, all through you acted as the agent and friend of Proffatt and not at all the agent and for the bank, did you? A That is right.

Q From beginning to end? A That is right.

Q I show you two letters dated November 17, 1925, and November 10, 1925, which have been marked in this case, and which, I think, appear to have been written by you. Do you recall having written them? A Yes.

Q While I think of it, I notice that the one dated November 10, 1925, is addressed to Mr. George Proffatt, 324 North Rhode Island avenue, Atlantic City, New Jersey. Tell us why you put that there. A I received information that that was his address. I couldn't find him and someone told me that he was living there.

Q When you—didn't you know that he was away at the time? A No. I heard that he was back in town.

Q Well, I show you a letter written within —who told you he lived at Rhode Island avenue? A I don't recall who told me he lived at Rhode Island avenue. I recall that I was told that he lived at Rhode Island avenue, and I was also told that he lived at Caspian avenue.

Q Well, on November 10, 1925, within ten days, ten days earlier than the letter I have just showed you— A You just gave me this one.

Q November 17, 1925, ten days later than the letter I have just shown you, you wrote to Mr. Proffatt at 222 Caspian avenue, didn't you? A I did.

Q How did that happen? A I was told that he lived at 222 Caspian avenue.

Q Did you have anything to do with the sending of the notices of the proposed sale of this mortgage? A Yes.

Q And did you give to the office of Thompson and Hanstein the address Rhode Island avenue? A I don't recall whether I did or not.

Q Now, just think. He didn't appear in the directory as living at Rhode Island avenue, did he? A I don't think so.

Q What? A I don't think so.

Q Now, don't you recall that you gave to somebody in connection with Thompson and Hanstein's office, when the notice of the proposed sale of this mortgage was prepared, the address of Rhode Island avenue that is contained on that notice? A I don't recall that.

Q What? A I don't remember that.

Q Do you know why they didn't send the notice to 222 Caspian avenue when on November 17, 1925, you had written to Mr. Proffatt at that address? A I do not.

Q Now, you were still, had no representation of the bank in the matter of this we are talking about any way at all, had you? A No representation of the bank.

Q When you wrote Proffatt under date of November 10, 1925, "Dear George: Have been trying for some time to get in touch with you regarding the mortgage held by me, as I would like to be relieved of the responsibility. Would appreciate if you will get in touch with me at once so the matter can be cleaned up." Whom did you represent in writing that? A Represented myself.

Q Yourself? A Surely.

Q Had nobody spoken to you from the bank or Thompson and Hanstein before writing that letter? A I don't recall the time, but they did speak to me about getting the matter cleaned up, but I don't recall the time.

Q Well, before writing that letter, had anybody spoken to you? A Probably they did.

Q Who? A That I don't recall.

Q And why, if you were Mr. Proffatt's friend in this matter, and didn't in any way have any interest in the bank, what prompted you to write the letter of November 17th, seven days after the one just alluded to, in which you say: "Please get in touch with me as soon as possible"? A The same reason.

Q No other explanation? A No other explanation than I wanted to get it cleaned up.

Q Now, after you were in Thompson and Hanstein's office, Mr. and Mrs. Proffatt did not leave the office until the whole thing was finished up, did they? A That is right.

Q Beg pardon? A Yes, that is right.

Q You recall the fact, do you not, that the document that was signed this 9th of April, 1925, reads: "That whereas, party of the first part" —that is Proffatt—"has assigned unto the party of the second part that certain mortgage made by Bruno Garr and Rosa, his wife, and Robert Heilig, to George P. Proffatt and Katherine B. Proffatt, dated September 4, 1923, and recorded September 17, 1923, in Book 274 of Mortgages, page 297, and so forth"—if Thompson and Hanstein did not know that you were coming in, how did they have those details? A They were discussed right then and there.

Q I know, but did they dream them? How did they know the date of the mortgage, where it was recorded and where the property was? A That was discussed right at that time.

Q Discussed, I know, but in the agreement where did they get the information? A From Mr. Proffatt.

Q Did Proffatt have the mortgage with him? A I don't recall whether he had the mortgage or not.

Q Don't you know that he swore the other day, and isn't it true, that it was not there, but was in the safe deposit box? A No, I don't know that.

Q Well, do you say now that he had the mortgage with him? A No.

Q Again I ask you if it be true, as you say, that as far as you know Thompson and Hanstein did not know that you were coming, and those papers were written up before Mr. and Mrs. Proffatt left the room, how did Thompson and Hanstein have the information about the details of that mortgage with which to draw it? A

They got the information from Mr. Proffatt right while I was there.

Q In other words, you think that Mr. Proffatt was able to remember that the mortgage that he proposed to assign was the mortgage made by Bruno Garr and Rosa, his wife, and Robert Heilig, to Proffatt and Katherine Proffatt dated September 14, 1923, and recorded September 17, 1923, in Book 274 of Mortgages, page 297. Do you think Proffatt remembered all that? A I think so.

Q Is that your best answer to that? A Yes.

Q That he was able to evoke from his head all of those details with reference to that mortgage? A The information must have come from somewhere.

Q Yes, that is what I am saying. Now, didn't Thompson and Hanstein have the information? A I don't know.

Q What? A I don't know.

Q You still think they did not know you were coming in? A I don't know whether they did or not.

Q Didn't you tell us a little while ago that you had not spoken to them about it at all and that after Mr. and Mrs. Proffatt talked to you in the office you said, "Go in and see Thompson and Hanstein about it"? A I said I don't recall having spoken to them.

Q Now, do you think you had spoken to them? A No.

Q What? A I still do not recall having spoken to them.

Q How many papers were signed that day? A There was one paper from Mrs. Proffatt to George Proffatt and one—

Q What was that, what kind of a paper? A Conveying her interest to George Proffatt.

Q In what? A In the mortgage.

Q An assignment, you know what an assignment of mortgage is, don't you? A I think I would know an assignment if I saw one.

Q Is that it, is that what you mean? A I don't recall what it was.

Q All right, go on, what else? A There was a paper from George Proffatt to me.

Q What was that? A That was turning over to me the mortgage to hold as security for these notes.

Q In each of these assignments of mortgage, its date, its makers, its place of record, were all mentioned, weren't they? A I think so.

Q All right. Now go on. What else, if anything? A I don't recall any further papers.

Q No more papers executed that day? A Not that I recall.

Q Than those two assignments? A Not that I recall.

Q Now, try and think, Mr. Schmeidler. A There was—whether it was embodied in that last paper I mentioned or not, I don't recall, but there was a paper, or it was embodied in that one, that I talked about, regarding the dividends that I might receive.

Q I ask your best recollection of the papers that were executed that day. A Yes.

Q You have already told us there were two assignments, namely an assignment from Mrs. Proffatt to Mr. Proffatt, and again an assignment of that same document from Mr. Proffatt to you. Now, was there anything else executed, and if so, what? A I don't recall anything else.

Q You don't recall? A No.

Q Everything was closed up before Proffatt and his wife left, wasn't it? A I think so.

Q Any of the bank officials up there? A No. I don't know, Mr. Hanstein was a bank official or not.

Q Do you know Mr. Evans, the president of the bank, and Mr. Cochran, the secretary? A Yes.

Q You have produced and had marked in evidence a document, or counsel has produced and had marked in evidence a document purporting to have been executed the 9th of April, 1925, signed Lewis Evans, President, and Cochran, Secretary; were they up there? A No.

Q Then that paper was not executed before Mr. and Mrs. Proffatt left, was it? A I don't recall.

Q What? A I don't recall.

Q Well, if they were not there, then it was not executed, was it? A I don't know.

Q Well, do you think it was executed before? A I don't know.

Q Did you ever see that paper before? A Yes.

Q When did you see it before? A I couldn't recall the time.

Q I am referring to S. 22. What do you mean to say you couldn't recall the time? A I just don't remember the time that I saw this. I know that I have seen it.

Q Now, put on your thinking cap and look at Exhibit S. 4, which is the paper purporting to have been made the 9th of April, is that your signature? A Yes, sir.

Q You signed it? A I did.

Q On the day it bears date? A Yes, sir.

Q Do you now recall that that paper was executed?

Mr. McCarter: I don't know whether your Honor knows which paper that it.

The Court: I don't.

(Question repeated.)

A Yes.

Q Had you forgotten that? A No, I don't think I had forgotten it. I think I mentioned this paper.

Q Didn't I ask you what other paper— A Wasn't this—

Q One moment. Now, didn't I ask you a few minutes ago, since we came in from luncheon, whatever papers were executed besides the two assignments from Mrs. Proffatt to Mr. Proffatt, and Mr. Proffatt to you, and you said you couldn't remember any other papers executed? A This was what I understood to be the assignment, this is what I had in mind.

Q That is what you understood to be the assignment? A Yes, this is what I had in mind, where he transferred to me this mortgage.

Q You see it says, "Whereas the party of the first part has assigned to the party of the second part a certain mortgage," and so forth? A Yes.

Q You mean to say you think this was the assignment? A As I recalled it.

Mr. McCarter: Will you produce the assignment, gentlemen? It is in evidence.

Q Aren't you among other things a dealer in real estate? A Yes.

Q Are you a broker, too? A Yes.

Q Have a license? A Yes.

Q You mean to tell me you don't know what an assignment of mortgage is? A I do.

New Jersey State Library

Q You tell me you don't know what an assignment is or you do know? A I do.

Mr. Lane: Do what?

Mr. McCarter: Do know.

Q Now, look at S. 1 in this case, assignment of mortgage, Katherine Proffatt to George P. Proffatt, isn't that what you had in mind when you said that Mrs. Proffatt assigned some paper to Mr. Proffatt? A Yes.

Q That is it, isn't it? A Yes.

Q Look at S. 21, which is an assignment of mortgage, George Proffatt to yourself; isn't that an assignment of mortgage? A Yes.

Q Now, you mean to tell me that when you talked about an assignment of mortgage, you referred to S. 4? A I didn't recall whether it was all embodied in one agreement or whether there was two separate papers, but now that I see them I recall those two assignments and one agreement.

Q Well, is that all the papers that were executed? A That is all the papers that I recall.

Q Did you hear Mr. Proffatt acknowledge S. 4 before Miss Barbour? A Yes.

Q You did? A Yes.

Q Sure of that? A Yes.

Q You are not thinking of the assignment now? A I wouldn't say positively.

Q What? A I wouldn't say positively just what paper it was.

Q Did you hear S. 4 dictated? A Yes.

Q Who suggested that the assignment should be to you and that you should be the party of the second part in S. 4? A I don't recall.

Q What? A I don't remember.

Q You, the friend and agent of the Proffatts, acting only for them, don't remember how it is that you were made the assignee of the document? A I don't recall who suggested it.

Q Can't recall who suggested that nor why it was done? A Oh, yes, I know why it was all done.

Q Why you were chosen as the person to whom these assignments and agreements should be made? A No, I don't know why I was chosen.

Q Who fixed that? A Mr. Proffatt fixed it.

Q Proffatt fixed it? Where? A In my office.

Q Before you went in to Hanstein's office? A I think so.

Q So, now you recall some more about what transpired in Proffatt's office, namely, that there was to be an assignment—in your office—there was to be an assignment of a mortgage from Mrs. Proffatt to Proffatt, and in turn an assignment thereof to you, and that in addition to that there was to be a paper accompanying the same stating the situation? A I don't recall that being in my office. I am not sure where that was.

Q You told us just a moment ago that you now recall that Proffatt arranged for that in your office, didn't you? A I don't think I said that.

(Answer repeated.)

A I was mistaken when I said that. I don't recall that Proffatt fixed that in my office. I didn't understand your first question.

Q Didn't understand it? A No, I didn't, or I wouldn't have answered it that way.

Q Where did he fix it or did he fix it at all? A It was arranged in Mr. Hanstein's office.

Q Didn't seem strange to you, if you were not the representative of the bank or were not the representative of Thompson and Hanstein, why all these papers should be made to you? Did that seem strange to you, the friend and big brother of Proffatt, did that seem strange to you? A No.

Q It didn't? A No.

Q And did it seem strange to you, if the situation was as you have described it, that the discretion should be left with you as to when any sale of this property should be—of this mortgage should be had? A No.

Q In other words, did you understand that Thompson and Hanstein, the attorneys for the bank, were making this deal by which Proffatt's credit should be restored, that it was to Proffatt's friend, you, to declare when the bank should ever realize on that mortgage?

Mr. Lane: I object to that upon the ground that the instrument does not bear any such interpretation at all.

Mr. McCarter: I will read the clause.

Mr. Lane: I know the clause exactly, but that is all subject to supervision of the court.

Mr. McCarter: All what?

Mr. Lane: All subject to supervision of the court. He is trustee under that instrument.

Mr. McCarter: I don't want the case argued now.

Mr. Lane: You are putting the construction on it.

Mr. McCarter: The construction I made I think is borne out by the following clause in the paper. Your Honor will recall that Mr. Schmeidler is the second party: "Understood and agreed that party of the first part does hereby authorize the party of the second part"—that is you—"to sell or dispose of such mortgage at such time as shall appear to be to the party of the second part advisable for the purpose of making the payments aforesaid, and to that end party of the second part"—you—"is hereby authorized to do any and all things necessary for the carrying out of the purposes of this agreement and the rendering over to the party of the first part any surplus remaining after the sale of said mortgage and payment of the debts aforesaid."

Q Now, you understand that, don't you? A Yes.

Q You understood it at the time, didn't you? A Yes.

Q Strike you as strange that you, the friend, and as I called you before, the big brother of Proffatt, should be given that discretion, and if you didn't want to exercise it then it never would be exercised? A I don't see anything strange about it.

Q Don't, eh? All right. Still you say you didn't in any way represent the bank? A I did not.

Q Do you recall that the paper further says: "Party of the second part does hereby agree with the party of the first part"—you hereby agree with Proffatt that you will fully and completely carry out the terms of this agree-

ment and will hold said mortgage for the purpose of securing the debts above set forth and will at the time that seems most advisable to him, that is you, sell said mortgage and pay the debts aforesaid and pay over to the first party the surplus remaining, remember that? A Yes.

Q Did that seem strange? A Doesn't seem strange.

Q If you were representing Mr. Proffatt? A It don't seem strange to me.

Q Well, when did the bank first bring the matter to your attention which resulted in your writing the letters I showed you a few moments ago to Mr. Proffatt, one at Rhode Island avenue and the other at Caspian avenue? A Some time before those letters were written.

Q Who spoke to you? A Mr. Hanstein spoke to me, I recall. I don't recall anybody else speaking to me.

Q Had you seen Proffatt in the meantime between the 9th of April, 1925, and the dates those two letters were written, the following November? A I think I did.

Q Did Proffatt enlighten you as to how his credit had been affected by the fact that Mrs. Proffatt's note in the Second National Bank was overdue? A I don't recall that.

Q What? A I don't recall that.

Q Did Proffatt explain to you how his credit had been affected by the fact that a bill of Thompson and Hanstein against the Electric Company amounting to $2,000, had not been paid? A The conversation affected his future credit.

Q Beg pardon? A The conversation affected his future credit as to when he expected to go in business again.

Q What is your answer to my question? A I don't get your question, Mr. McCarter. No.

Q Didn't Proffatt explain to you how or what relation between his credit in starting business existed or would exist and the failure of his wife to have paid a note for $8,500 in the Second National? A Yes.

Q What did he say? A He said that it would affect his future credit in the event that those debts were not paid and that he wanted to protect the bank and Thompson and Hanstein.

Q Did he say how the failure or his ignoring or failing to secure Thompson and Hanstein in their claim of two thousand dollars against the Electric Company would have any relation to his credit in the future? A I don't recall.

Q Do you recall how the sum of $23,200 mentioned in the paper S. 4 was reached? A I do not.

Q What? A I do not recall.

Q Well, who reached it? A Mr. Hanstein and Mr. Proffatt.

Q Mr. Hanstein and Mr. Proffatt? That you might not pay—there is the paper—for the purpose of securing unto the Second National Bank of Atlantic City, N. J.,— A Yes, I saw the figure.

Q "The payment of the sum of $23,200 together with interest on $8,600 from April 1, 1924, to date, and also the sum of $2,000 to Joseph Thompson and Walter Hanstein trading as Thompson and Hanstein"—what is your recollection as to how those figures were reached and who suggested them? A They were reached after discussion by Mr. Hanstein and Mr. Proffatt.

Q What discussion did Mr. Hanstein have in that matter? What did Mr. Hanstein say in this discussion? A I don't recall.

Q What? A I don't recall that.

Q Did he know the amounts, the amount of the note held by the bank? A Yes, sir.

Q Hanstein knew that? A I think so.

Q Had he gone out for the information? A I don't know.

Q Did he go out while you were there? A No.

Q Didn't telephone, either, did he? A I don't remember that.

Q Do you know how the date April 1, 1924, was selected as the time from which interest on the $8,600 note of Mrs. Proffatt was reached? A I don't recall that.

Q You knew that the bank had Mrs. Proffatt's note for $8,600, didn't you? A Yes.

Q When did you learn that? A During this discussion.

Q And you don't know how the date of it was reached? A No, I don't recall.

Q You mean to say that Proffatt remembered the date of his wife's note? A I don't remember.

Q What? A I don't remember that.

Q Do you mean to say that Proffatt knew the exact amount of the note of the Electric Company in the bank? A I don't recall that.

Q Did you understand that all of the notes in the bank of the Electric Company were included? A I don't recall that.

Q What? A I don't recall that.

Q Well, if he was anxious to restore or to establish his credit, do you think that that would be assisted by paying or arranging to pay or

secure only a portion of the debt in the bank? A I don't know.

Q Do you now recall that, in addition to $14,600, there were other notes in the bank of the Electric Company? A I think so.

Q What? A I think there were.

Q And don't you know that they were not included in this? A I don't recall that.

Q What? A I don't recall that.

Q Did you at the time suppose that all of the bank's indebtedness would be guaranteed or taken care of by Mr. Proffatt? A I don't recall that.

Q Was there any discussion about that? A I think there was some discussion.

Q What was the discussion? A I don't remember.

Q Did you become the purchaser of all the, from the receiver, of all of the claims against the Guarantee Elecrtic Company? A I did not.

Q All the bills of the Guarantee Electric Company? A I did not.

Q Did you know Mr. Proffatt's address when he was in Italy? A I think I did.

Q And did you give it to Thompson and Hanstein before they sent that cable? A I don't remember.

Q Well, now think. A I don't recall whether I did or not.

Q What? A I don't recall whether I did or not.

Q Did you also give it to Mr. Cochran before he sent the cable? A I am sure I didn't give it to Mr. Cochran.

Q Sure you didn't? A Yes.

Q You are not sure you didn't give it to Thompson and Hanstein, are you? A That is right.

Q Was anything said either in your office or Hanstein's office as to why the assignment was not made direct to the bank? A I don't recall.

Q Was anything said why they did not make an assignment, if they wanted some other third person, to some independent man rather than to you, the big brother of the assignor? A I don't recall.

Q You know what we lawyers and real estate operators and brokers frequently speak of declarations of no offset are, don't you? A Yes.

Q Did you make a suggestion that such a document be obtained at this time? A I don't remember that.

Q Don't you remember that? A No.

Q Did Thompson and Hanstein make that suggestion? A I don't remember.

Q Now, it appears that on or about the 6th of April, 1926, you sent a notice or had a notice posted and mailed to North Carolina avenue—Rhode Island avenue? A Yes, sir.

Mr. McCarter: I offer it in evidence. Will you produce that notice, please? The advertisement and the notice in Mr. Bishop's testimony.

Mr. Hanstein: I think they were in evidence.

Mr. McCarter: Yes, I know they are.

Q I am referring to S. 8 and S. 7. You heard Mr. Bishop testify in this case that he had put up and also mailed certain notices? A Yes.

Q And you yourself signed one of them, S. 8, did you not? A Yes.

Q Who prepared that? A Thompson and Hanstein's office.

Q At your suggestion? A Yes.

Q You were still acting as the friend of Proffatt? A I was.

Q How long since you had seen Proffatt? A It had been some time, I think I had tried to get in touch with him for quite a long while through letter.

Q You had heard that he was away, hadn't you? A Yes.

Q Now, what happened on this date that made you, the friend of Proffatt, attempt to give him a notice, by sending to Rhode Island avenue notice that reads as follows:

"Take notice that pursuant to that certain agreement between yourself and me bearing date April 8, 1925, you authorized me to sell or dispose of that certain mortgage therein referred to covering premises in the southerly line of Atlantic avenue 90.47 feet east from the easterly line of New York avenue, and being 18.7 feet on Atlantic avenue by 150 feet in depth, at such time as shall appear to me to be advisable. Take notice that I deem the 5th of April, 1926, at the hour of ten o'clock A. M. as an advisable time at which to sell the said mortgage and I will at that time, and at the banking house of the Second National Bank of Atlantic City, offer said mortgage at a public sale to the highest bidder therefor for cash." What had happened to induce you to sign and direct to be sent that notice to your friend, for whom you were acting, Proffatt, who was away, to your knowledge? A Mr. Hanstein had seen me quite a number

of times demanding that something be done regarding this matter, and I had written to Mr. Proffatt any number of times regarding this matter.

Q Now, had you turned from the big brother and became the agent of the bank at this time, or were you still the big brother? A I felt that I was acting for Mr. Proffatt.

Q Mr. Proffatt? A Still acting, yes.

Q In giving a notice of sale, by sending notice to a house on Rhode Island avenue, when you knew he was away, that that sale would take place within two or three days, of a mortgage of $50,000 given to secure an indebtedness of about, well, less than half? What, is that right? A I was carrying out the terms of the agreement.

Q That is the best you can say? Why didn't you go up and see Mrs. Proffatt and say, "Look here, where is George?" A I would have if I could have found her.

Q Did you go to Caspian avenue to see? A No, but I sent one of my—

Q Did you go to Caspian avenue to see her? A I did not.

Q And you signed the notice that was posted, as Mr. Bishop testified? A Yes.

Q And the same reasons induced you to do that as to do the others, sign the others? A Yes.

Q Why did you deem it advisable that on the 5th of April that mortgage should be sold? What had happened to make you deem it advisable that that should be sold on the 5th of April? A Mr. Hanstein had spoken to us any number of times that the matter should be straightened up.

Q Were you at the sale? A Yes.

Q You conducted it, didn't you? A Yes.

Q Were you shown a notice or a letter sent by Mr. Bourgeois before that sale took place? A I don't recall that.

Q Look at that document which I now show you, which is in evidence, although this doesn't seem to be the one that is marked, but it is in evidence, and see if you didn't see that document before the sale took place? A I don't recall this.

Q One moment. You mean to say you didn't know before you proceeded to sell that mortgage that Mr. Bourgeois had sent a communication of that character? A I don't recall it.

Q Addressed to Mr. Isadore Schmeidler, Atlantic City, New Jersey? A That is me. That is right.

Q You say you didn't get it? A I won't say that.

Q Don't you know you did get it? A No, I don't. I don't recall receiving it.

Q You were at the sale, weren't you? A Yes.

Q Knowing that Proffatt was away? A I was not so sure at the time whether he was away or not.

Q What? Did you ring up Mrs. Proffatt to ascertain if he had come back? A I don't recall that.

Q Did you go in Caspian avenue, whatever it was? A I sent some one.

Q Whom did you send? A A man in my office.

Q Who? A Charles Luckenbill.

Q When did you send him? A Well, before the time I sent this notice.

Q How long before? A A number of times as I recall it.

Q You sent Charles Luckenbill a number of times to find out if George did come back? A Yes.

Q How long before the 5th of April, 1926, did you send Charles Luckenbill, a clerk in your office, to Mrs. Proffatt's home at Caspian avenue to ascertain when George was coming back? A A number of times.

Q How long before the last time? A Probably a week.

Q Sure about that? A I think so.

Q Is he still a clerk in your employ? A He still is.

Q Did you give Thompson and Hanstein or Mr. Bishop the Rhode Island avenue address? A I don't recall.

Q Just think. You had written a letter in November to Rhode Island address, didn't you give that address to Thompson and Hanstein's office? A I don't recall.

Q Well, it isn't in the directory as Mr. Proffatt's address, is it, or wasn't then? A I don't remember that.

Q How did Thompson and Hanstein get the address or addresses on Rhode Island avenue? A I don't remember.

Q What? A I don't know.

Q Why didn't you see that one was sent to Caspian avenue? You had already written a letter to him there. A I don't know.

Q It wasn't done so he wouldn't get notice, was it? A No, it certainly was not.

Q Oh, no, sure not. Now I show you Exhibit S. 16, dated May 5, 1926. You wrote that, didn't you? A I did.

Q And sent it? A Yes.

Q To Caspian avenue? A Yes.

Q What had become of Rhode Island avenue this time? A I don't know.

Q Don't know? A Probably still there.

Q "I have just received check from Second National Bank in the amount of $408.85, which represents the final dividend of the Guarantee Electric Company and according with our agreement I am herewith enclosing a check in the above amount. Yours truly, Isadore Schmeidler." Remember writing that letter? A Yes.

Q How long before writing that letter had you seen Proffatt? A I don't recall.

Q Well, that is a pretty safe answer. Now, had you been requested by the Second National Bank in the meantime, before the sale, to secure the bond and mortgage? A I don't remember that.

Q Had you made any effort to collect the interest on the bond and mortgage? A I don't recall.

Q At the time of the sale you knew Mr. Proffatt's son? A Yes.

Q Pete? A Yes.

Q How old was he, about? A Pete ought to be about twenty-seven or twenty-eight now, I guess.

Q Did you ring up Pete and tell him that you, the friend of his father, had suddenly deemed it advisable to sell that mortgage, and were going to sell it, did you? A I spoke to Pete.

Q Did you tell Pete that you proposed to sell that mortgage? A I asked Pete where I could find his father.

Q You didn't answer my question. I will come to that later. A What was the question?

Q (Question repeated.) A I did not.

Q When did you ask Pete about the whereabouts of his father? A Just about the time of this transaction.

Q And where? A Atlantic and New York avenues once, and I think down in front of 1919 another time.

Q How long before the giving of these notices? A Some time before.

Q Well, how long? A I couldn't tell exactly how long before.

Q Well, you at that time had not deemed it advisable to sell, had you? A I don't recall just about what time it was.

Q Where was Pete employed at that time? A I think at the Atlantic City Electric Company. I am not sure whether he was employed there at that time, but he was employed there for some time.

Q Who were at the sale on behalf of the Second National Bank? A I think Mr. Cochran was there.

Q Anybody from Thompson and Hanstein's office? A I think Mr. Hanstein was there.

Q How much did the mortgage bring? A I don't remember the exact amount. I have a record of it.

Q Can you turn to it here? A I had an account here, a check book here, somewhere.

Q Refer to any papers you may have. A $26,246.34.

Q That was the amount that was claimed to be due at that time? A I don't recall that.

Q What is the memorandum or book you are referring to? A This is a check book of my

own on the Pacific Avenue National Bank where I deposited the check received from the sale.

Q Then you received a check for how much? A $26,246.34.

Q From whom? A Second National Bank.

Q What did you do with that check for that sale, spend it? A I gave the Second National Bank a check for $24,246.34.

Q Leaving a difference? A And I gave Thompson and Hanstein a check for $2,000.

Q How did you ascertain the figures $24,246.34 that you gave the bank? A I got that from Mr. Hanstein.

Q And the two thousand I suppose you got from Hanstein also? A Yes.

Q Do you know, did Mr. Hanstein tell you what the $24,246.34 represented that you should give the bank a check for that? A I don't recall right now.

Q You simply took Hanstein's direction and gave it, divided the money that way? A Probably.

Q Well, isn't that the fact? A It must be the fact, these figures check up that way.

Q When did you next see Proffatt? A I don't recall.

Q What? A I don't recall when I next saw him.

Q Did you make any effort to see him and explain why you, his big brother, had done what you had done? A I tried to see him, yes.

Q What effort did you make? A Inquiring.

Q Of whom and when? A I don't recall.

Q Who prepared the assignment that you executed on the 5th of April, 1926, which was in effect of this mortgage to the Second National Bank? A Mr. Hanstein.

Q And what is the date and what are the dates of the checks to the bank and Thompson and Hanstein respectively, of the two amounts you have named? A April 5, 1926.

Q Same day? A Same day.

Q How soon after the sale, immediately? A I don't recall.

Q What? A I don't recall whether it was immediately or sometime that day. I don't remember that.

Q Now you still want us to believe that in all this matter you were the representative of Mr. Proffatt? A I do.

Q What? A Yes.

Q Had Judge Thompson spoken to you at all in the interim about this matter? A I don't recall talking to Judge Thompson.

Q Were you aware of the fact that Judge Thompson had written Mr. Proffatt Exhibit S. 15, dated November 20, 1925, which is six months in advance of the sale, to the effect that, "I am directed by the Second National Bank of Atlantic City to call your attention to the overdue obligations that they hold against you. There has been no effort on your part to take care of this matter or to pay any attention to it since the matter was compromised and adjusted months ago. Unless this matter is taken care of at once we are authorized to proceed against the security which is held by Mr. Schmeidler. This, by all means, you should avoid. Let us hear from you at once"? A I don't remember that.

Q Never heard of that? A I don't recall that.

Q Who put the assignment from Mr. Proffatt to you on record? A I don't recall.

Q You know you didn't, don't you? A I don't think I did it.

Q Thompson and Hanstein did, didn't they? A I don't remember.

Q Now, Mr. Schmeidler— A I would guess that they did, but I don't actually know it.

Q You would guess that they did? Who paid Thompson and Hanstein for their services in this matter? A I don't know.

Q What? A I don't know.

Q Proffatt didn't, did he? A I don't know. I didn't.

Q You didn't? A I didn't.

Q Did you know this property that was mortgaged? A Yes.

Q That is a good mortgage, isn't it? A Yes, I think so.

Q Worthy property? A I think so.

Q That is all.

Re-direct examination by Mr. Lane.

Q Mr. Schmeidler, one or two questions. I show you a publication to George P. Proffatt and Katherine Proffatt. This is a notice of sequestration which was published in the newspapers on March 16, 1925, and which describes this mortgage and gives the date of record and everything else, and ask you whether you saw that or recall seeing it at the time in Thompson and Hanstein's office on this day that these papers were executed? A I do not.

Q Don't remember that at all? A No.

Q I show you a copy of the letter by the Second National Bank to you and ask you, signed by Mr. Evans, and ask you whether you re-

member receiving the original of that letter? A Yes.

Q Do you know how long Mr. Evans has been dead? A No, I don't.

Q You received the original of this? A Yes.

Q And can you tell me about when it was you received it? A I don't recall that.

Q Was it before the sale? A Oh, yes.

Mr. Lane: I offer it.

Mr. McCarter: Do I understand this is a letter he received?

Mr. Lane: This is a copy of the letter which the witness received, our copy, Second National's copy.

Mr. McCarter: No objection. Like to have him hunt for the original. It is undated.

(Copy of letter received in evidence and marked Exhibit S. 23.)

WALTER HANSTEIN, sworn.

Direct examination by Mr. Lane.

Q Mr. Hanstein, you are a member of the Bar of New Jersey and have been such for how long? A About fourteen years.

Q And you are a partner of Judge Thompson and practicing in Atlantic City under the name of Thompson and Hanstein? A Yes, sir.

Q And have been for how many years? A Seven or eight, I guess. I don't know.

Q And you know Mr. Proffatt, George Proffatt? A Yes.

Q How long have you known George Proffatt? A For seven or eight years, I would say, perhaps longer.

Q Did you know the business in which George Proffatt was engaged prior to the incorporation of the Guarantee Electric Company? A I did.

Q What business was he engaged in and how did you know? A We were his attorneys and he was engaged in business as George P. Proffatt trading as the Guarantee Electric Company.

Q For how many years prior to the incorporation of the company? A Well, he had been in that business for a great many years. I don't know how many. We had represented him for four or five years, I would say.

Q You incorporated the company? A We incorporated the corporation known as the Guarantee Electric Company.

Q Do you know how the stock of that—did you get any of the stock of that company? A Yes, Judge Thompson and I got twenty shares of stock of that company.

Q For what? A We got ten shares of it by paying for them at par to Mrs. Proffat, and we got ten other shares for legal services rendered to that company.

Q Did you receive any other compensation for the legal services rendered except the ten shares of stock? A No.

Q Do you remember about when it was that you got that stock? A No, but I could probably tell you from my check book. My check book shows that on November 20, 1922, I gave a check to Katherine B. Proffatt for a thousand dollars, and the check stub shows that ten more shares were received as a fee for incorporating.

Mr. McCarter: I beg pardon?

A I say the check stub shows that ten more shares were received as a fee for incorporating the company.

Mr. McCarter: Of course, I don't want to in any way—I don't think the fact that his stub says that has any reference to the matter. He may say, as he has said, but I don't think the fact it was entered on his check book proves anything.

The Court: No.

A I don't either.

Mr. McCarter: Except as a memorandum to remind him.

Mr. Lane: I don't either.

A That is my personal recollection of it as well.

Q Now, did you have anything to do with the negotiation of the notes which were negotiated in the Second National Bank by the Guarantee Electric Company or had you anything to do with that at all? A No, other than that I prepared the resolution perhaps that authorized the company to borrow.

Q Have you the minute book of the company here?

Mr. McCarter: Yes.

Q I show you the minute book of the company. Will you turn to the resolution which you refer to? A There (indicating).

Q Were you the secretary of the company at that time, on the first day of November, 1922? A I was.

Q Is that a correct record of what took place at that time? A Yes, sir.

Q And bears your signature? A Yes, sir.

Q And were there present the stockholders, Mr. George P. Proffatt, Huber, Emerson, Bullock, Perkins, Hanstein and Ash, at that meeting? A That is right.

This meeting was held pursuant to waiver of notice signed by all the directors, there were present the following, and then follows the names as I have just given you: "On motion of Mr. Hanstein the following resolution was put and unanimously carried: Be it resolved by the Board of Directors of the Guarantee Electric Company, Inc., that the officers of this company be and hereby are authorized to borrow $15,000 for two months from the Second National Bank of Atlantic City on the promissory note of this company.

"Be it further resolved that the officers be and hereby are authorized to make any and all necessary renewals of the same."

And then followed the adjournment.

Q Now, do remember when the Guarantee Electric Company got into difficulty? A I do.

Q About when was it? A Well, as to time I would not know.

Q What was the difficulty? A Well, I remember Mr. Proffatt had left the city, gone somewhere, and the company was not able to pay its bills.

Q Did that bring on a receivership? A Yes, that brought on a receivership.

Q Did you have any conversation with Mr. Proffatt with respect to the $2,000 of stock which you held in the company? A I did.

Q Prior to his going away? A I did.

Q What was said? A When I found out that Mr. Proffatt was undertaking to sell his stock and the stock of his wife in the company, I got in touch with him and I said, "Now, here, I am not in the electrical business and I am not interested in the electrical business. Judge and I bought $2,000 worth of stock in your company because you wanted us to do it, and if you are going to sell your stock and get out of this company I want to get rid of mine and I want to sell my stock," and he told me that he would not dispose of his stock without disposing of mine or buying it from me. That is, when I say mine, I am referring to mine and Judge Thompson's.

Q How is it that you did come to take that $2,000 worth of stock? A Well, Mr. Proffatt wanted us to. He was a client in the office and he said he wanted us to take some stock in the company, and we said all right, we will.

Q Now, during—did you know that there had been a suit commenced by the receiver against Proffatt to sequester or to realize, rather, upon an alleged stockholding liability? A Yes, sir.

Q And that in the course of that suit this writ of sequestration had been issued? A I knew that.

Q Where was Proffatt when that suit was commenced, do you know? I mean was he in Atlantic City? A No, he was out of town.

Q When did you first see Proffatt as a result of which these agreements which had been referred to were executed? A When did I first see him that resulted in this? Well, these agreements, so far as they affected Thompson and Hanstein, were merely a culmination of an understanding, promise by Mr. Proffatt—

Mr. McCarter: One moment. I don't think that is an answer.

A He wanted to know when was the first time I saw him.

Q I am now getting down to the events which led up to the physical signing of the papers: I don't mean what was said months ago. A Well, when he came back from somewhere, wherever he had been, he came into our office and you want to know what else took place then?

Q I want to know what was said. A He came in and said, "My property is tied up, they got a writ of sequestration"—although he may not have called it by name—and he wanted to know if we would represent him in that attack on his property, that suit against him. I told him that I, I do not know whether I gave him an answer or whether I didn't, but I took him in to Judge Thompson, and Judge Thompson said to him, in my presence, "Before we will discuss with you whether or not we will represent you in this matter you must take care of the Second National Bank and Thompson and Hanstein," and Mr. Proffatt said, as I recall this very distinctly, he said, "Well, if I do take care of the Second National Bank and Thompson and Hanstein, then will you represent me?" And Judge said, "You take care of them first and then I will discuss it with you."

Q Now, was that before that time, had you had any discussion with Schmeidler with respect to Schmeidler or anybody getting security for the Second National Bank or for Thompson and Hanstein? A Not with Schmeidler, no.

Q I am talking about Schmeidler? A No.

Q These papers were executed on the 9th of April I think, where? A In my office.

Q How did that come about? A Well, Mr. Schmeidler and Mr. and Mrs. Proffatt came into my office.

Q Did you have any advance information that they were coming upon that day? A I doubt it.

Mr. McCarter: I beg pardon?

A I don't recall that I had any information that they were coming on that day.

Q Do you know what time of the day it was? A My recollection is that it was in the afternoon, rather late.

Q Now, tell me what happened from the time they came in until the end, as nearly as you can recollect. A Mr. Proffatt said, "Well, I want to take care of you and Judge and the Second National Bank." I said, "All right." I said, "How are you going to do it?" He said, "Well, I have got a mortgage which I am willing to assign." I don't know whether he said to Schmeidler or just how that came about, but he says, "I have got a mortgage that I am willing to assign for the protection of the Second National Bank and Thompson and Hanstein." I said, "All right," and a discussion ensued as to, as I recall it, I sent down to Mr. Cochran and got a statement of what was due to the Second National Bank. I only knew it in a general sort of a way. I didn't have the specific amount. Mr. Cochran brought me up a statement, my recollection is that it was that very afternoon.

Q I show you a statement and ask you whether that is the statement that you refer to? A That is the statement that I got from Mr.

Cochran relative to Mr. Proffatt's, the Guarantee Electric Company account, Proffatt's account with the Second National Bank.

(Statement offered, received in evidence and marked Exhibit S. 24.)

Q Now, was there a discussion—go ahead and tell us. A If I may have that statement—I recall that, as I undertook to set up the figures of that for which the Second National Bank was to be secured, Mr. Proffatt objected to two of the items on this statement. He objected to the $5,000 note and he objected to the $500 note, and he said, "I don't feel that I ought to be obliged to pay those two notes." He said, "The Second National Bank loaned that money to the company long after I was gone, and they knew that I was not taking any part in the conduct of the company at that time," and he said, "I don't think they ought to hold me for that," and I felt a certain amount of equity in it and I said, "All right, I will see if I can get this through the other way," that is, with the mere agreement to pay the $14,600, and also the two notes which he never questioned, endorsed by his wife.

Mr. McCarter: I don't think—a moment—I don't think that is proper, did you say that, two notes which he never questioned?

A All right, I will withdraw it, the two notes endorsed by Mrs Proffatt, one of forty-two hundred and one of forty-four hundred.

Q Did he ever question those notes? A Not at all.

Q Go ahead, what else was said? A Now, then, he agreed he would pay the $14,600 and

the $8,600 of Mrs. Proffatt's, with interest from a given date on the $8,600, as I recall it, and I therefore proceeded to draw the agreements. First I drew an assignment from Mrs. Proffatt to Mr. Proffatt of her one-half interest in a mortgage that Proffatt wanted to deal with. Then I drew the assignment from George Proffatt to Mr. Schmeidler. Then I drew the agreement, I don't recall the number of it, but the agreement under which Schmeidler agreed to hold this mortgage as security for the protection of Thompson and Hanstein and Second National Bank. I don't recall the number of it.

Mr. McCarter: Hadn't you better identify it?

A There in only one agreement.

Q Identifies itself. Go on. What next? A Then Mr. Proffatt said, "Now, look here, this company, the Guarantee Electric Company, is in the hands of a receiver and will pay a dividend on this $14,600 note held by the bank, which would be a claim against the receivership. I, if I am going to pay this $14,600, I ought to get the benefit of any dividend that the insolvent corporation may pay on that $14,600," and I felt that that was fair, and accordingly drew another paper, which was an agreement on Mr. Schmeidler's part with Mr. Proffatt to collect that dividend for him, as I recall the tenor of it, and also prepared then an assignment from the Second National Bank to Schmeidler of that part of any dividend that came in of the $14,600 to Schmeidler for Proffatt's benefit. All those papers were signed that day by Mr. and Mrs. Proffatt and Mr. Schmeidler.

Q And delivered? A I don't recall whether they were actually delivered that day or not.

Q When did Mr. Proffatt get the papers that he was to get, the agreement, do you remember? A No, I don't remember. I would say that they were delivered that day, I think Mr. Proffatt said he came back a day or two later and got them, I don't recall that. I seem to recall that they were delivered that day.

Q Now that agreement that was executed by the Second National Bank, which has just been introduced in evidence this morning, assigning the dividends, or right to collect dividends, was that executed upon that day or later, do you remember? A I am not altogether clear on that. That may have been executed later, I don't remember.

Q How long did the conversation in your office take place? A I seem to recall that it took several hours, there was qiute a bit of discussion with regard to the amount for which Mr. Proffatt should be liable.

Q Who participated in the discussion with respect to these amounts for which the security was to be given? A Mr. Proffatt and myself I think were the only ones.

Q Was there anything said at that time as to why Mr. Proffatt should assume the obligation or to assume to guarantee the obligation on the $14,600? A I don't know whether it was said that day or some other day.

Mr. McCarter: Then your answer is, "I don't know," I suppose?

Q Do you remember anything having been said at any time with respect to that? A Yes.

Q When with reference to this day? A Well, unquestionably either that day or before that day, certainly before, and possibly also on that day.

Q What was said? A Proffatt told me on numerous occasions that he was going to take care of the indebtedness to the Second National Bank of the Guarantee Electric Company.

Q Did he say why? A Well, I don't know whether he said why or whether I knew why, I don't know.

Q In the discussion as to—was there any distinction drawn? You have already testified that there was a distinction drawn between the fourteen thousand six and the other two notes that were left out. Give me as much as you can of that conversation in which that distinction was drawn and why that distinction was drawn, if anything was said. A With regard to the fourteen thousand six hundred, that was an indebtedness that started out as a larger note, discounted by the Second National Bank for the Guarantee Electric Company when Mr. Proffatt was the active owner and active manager of the company, and that he took at that time, and stated, "I am willing to pay. I was in the company. The balance of it," he said, "as to the balance," he said, "I have transferred my stock," or something to that effect, and "I was away and the company,"—I recall quite well, he said, "When they loaned that money they were relying on the people who were then running it and not on me."

Q Now there is some discussion as to how it was that you got the details of the mortgage on that day. Do you remember how it was that you got it? A I seem to recall that I got it

off of that newspaper advertising that you have in your hands, and it has been in my file ever since that date.

Q I show you that newspaper advertisement and ask you whether that advertising was in your possession on that day. A To the best of my recollection it was in my hands on that day.

Q Do you recall how you got that advertisement? A No.

Q I notice it has a red mark, a red pencil right along the mortgage, the description of the mortgage. Do you remember that, who put that red mark there? A No.

Q When you found it in your files recently, was that red mark then there? A Oh, yes.

Mr. Lane: I offer that.

(Copy of advertisement received in evidence and marked Exhibit S. 25.)

Q Do you recollect who it was or how it came about that Schmeidler was selected as the person to take this assignment? A No, I don't. I don't recall whose suggestion that was.

Q Now at the time when they were in your office, was anything said by Schmeidler or by anybody to the effect that Schmeidler or anyone else had agreed or would agree or did agree that as consideration for this transaction going through, he would secure a release from this writ of sequestration of the Northfield property or any other property? A That was not said.

Q Was there any discussion of that kind at any time in your presence? A None whatever.

Q Between any of the parties involved? A None whatever.

Walter Hanstein, cross.

Q After this transaction took place, do you know—did Mr. Proffatt ever again approach you or ever approach you and ask that you represent him in this transaction? A No.

Q Was there—when did you first know that Mr. Proffatt had repudiated the agreement? A The first I knew of it was when Mr. Bourgeois came down to see me about right around the date when I got that letter from him, I presume a little before that date.

Q Where is that letter? A It is in my papers probably.

Q Won't you get it?

(Letter produced.)

Q That letter bears date March 10, 1926, it is S. 5 for identification. You did receive that letter from Mr. Bourgeois? A Yes, sir.

Q Now, with that letter before me, can you tell me about what date it was that you first knew that there was any idea on the part of Proffatt of repudiation? A I will say probably a week before this letter.

Q You had never received any notice of any kind, nature or description before that? A Not a word.

Cross examination by Mr. McCarter.

Q I didn't quite understand, Mr. Hanstein, the details of your original investment on your own behalf of that of yourself and Judge Thompson in the twenty shares of stock of the investment company. Will you please go over that? A One thousand dollars was paid in cash out of my personal account, and one thousand dollars was given to me in payment, given to us

in payment of our bill for services, and the way it was given was the company paid to Mrs. Proffatt one thousand dollars being the amount of bill, and Mrs. Proffatt held that thousand dollars and issued stock to us.

Q That is to say, if I get this right, you and Judge Thompson or both of you—I don't make any point of that— A I understand.

Q Actually put up, either by check or by money, a thousand dollars? A Yes.

Q Went into the treasury of the company as a cash contribution for ten shares of its capital stock? A No, I think not. I think we bought that stock from Mrs. Proffatt. The check is made to her order for $3,000.

Q You bought that stock of her? A Yes.

Q Then after the company had been organized and after the stock had been distributed to her husband and herself, fifty-fifty, that put her in possession of $25,000 worth of stock, and you and Judge Thompson paid her a thousand dollars for ten of her shares? A That is right.

Q And the other ten shares represented your fee for organizing the company, is that right? A And other work right around that time, I don't recall what it was.

Q I have before me the charter or certificate of incorporation which seems to have been filed October 13, 1922. Are you able to tell us when you received the stock in payment for your legal services in connection with that corporation? A No, but the stock book would probably show it. I don't have any personal recollection at all.

Q Please look at the stock book and tell us, if you can, when you did? A According to the stock book, our certificates of shares of stock were dated October 17, 1922.

Q October 2nd? A 17th, 1922.

Q For ten shares? A Twenty shares.

Q Twenty shares? A Yes.

Q Now, see if I understand it, then. Who is the assignor of those shares? A It doesn't appear on the books.

Q Well, if I understand your statement, of that twenty shares, ten should of come from Mrs. Proffatt for the cash paid to her, par, a thousand dollars, and ten should have come from the company as fee for services in incorporating it? A No, I thought I had explained that the company took our bill and paid it to Mrs. Proffatt, you see, whereupon she became the holder of money that belonged to Thompson and Hanstein, and instead of handing that money over to Thompson and Hanstein, she handed over her stock.

Q Well, how about the ten shares that you got for services? A That is what I am trying to explain to you, the ten shares that I bought for cash is a perfectly simple transaction, it seems.

Q Yes, I think so. A With regard to the bill for services, we handed the Guarantee Electric Company a bill.

Q Do you know when that was? A No, sir.

Q Any way of telling? A The receiver's records, as we had them at the last hearing, showed that charged to legal services.

Q If you can find out from them, I will be very glad if you do so. They are here, I guess. A It may take me some time.

Q How soon after the incorporation? A I don't have much recollection of the time end of the thing.

Q It was within a few months, wasn't it? A A few months, you say?

Q Yes. A I don't recall. I wouldn't dare to say how soon or how long it took to get it.

Q At any rate, you got your stock in October, 1922, for twenty shares? A According to the stock book.

Q Did that settle all liability that existed on anybody's part to you either for the stock you purchased of Mrs. Proffatt or your services? A Yes. We were paid when we got our stock.

Q I am frank to admit that my mind, after particularly this past week, isn't working as rapidly as it ought to, and I am going to beg the indulgence of the Court and counsel to have him once more explain to me because my friend whose mind is working, didn't seem to get it either, exactly, how he got through the medium of Mrs. Proffatt, because I have never been able to understand this stock matter, the thousand dollars that you and Judge Thompson put up, was arranged. A Now, you talking about the thousand dollars that we put up?

Q Yes. A The thousand dollars that we put up was a pure purchase of Mrs. Proffatt, one thousand dollars.

Q Now the other? A Now the other one you don't understand?

Q Yes, now the other one. A All right, as aforesaid, we had a bill for a thousand dollars which we handed to the Guarantee Electric Company. Now instead of the Guarantee Electric Company walking across the street and handing me a thousand dollars and then having me walk back across the street and handing it to Mrs. Proffatt to get ten shares of stock, the Guarantee Electric Company saved both of us a walk across

the street and gave Mrs. Proffatt a thousand dollars in payment of our bill, you see, and she paid our bill to us by giving us ten shares of her stock.

Q Now, did you continue to be counsel of the company after you organized it? A Yes, sir.

Q At an annual retainer of $250? A I don't recall.

Q I beg pardon? A I don't recall the amount, I don't recall if there was a retainer.

Q I show you a document dated December 17, 1923, seeming to be a bill to the Guarantee Electric Company in account with Thompson and Hanstein, and which seems to have been paid for $1,500. Please look at it and see if your firm gave that receipt? A No doubt of it.

Q Do you recall how that bill was sent on or after November 17, 1923, if the whole performance with reference to your services in incorporating had been settled as early as November, 1922? A No, I don't. I don't know that unless it may be that the stock was not issued on the date that appears on the stock. That is the only explanation I have for it.

Q Have you got your stock certificate? A Not here, I don't think. In fact, I don't know where it is.

Q You recognize that is a bill emanating from your office? A Our usual billhead, yes.

(Bill offered, received in evidence and marked Exhibit B. 22.)

Q Now, Mr. Hanstein, I am at a loss to understand, if your recollection of the transactions culminating in an issuance of stock to you for twenty shares on the, some time in October,

think you said, 1922, that you were rendering a bill to the company under date of November 17, 1923, "To fee for professional services re incorporation of Guarantee Electric Company, $1,000," I am at a loss to understand that and I would be very glad to have you explain it. A My only possible explanation can be that at that time we apparently had not gotten the stock despite the date in the stock book, that is the only way I can explain it to you.

Q Now I refer you to the stock certificate book and see if certificate, under the head Certificate No. 12, for 20 shares, see if you do not find on the stub Certificate No. 12 for 20 shares dated October 12, 1922, issued to Thompson and Hanstein of Atlantic City, and then below that, "Received the above certificate on October 17, 1922," signed "Thompson and Hanstein"? A Yes.

Q Is that your writing? A Yes, sir.

Q So it would then look as if in October, 1922, you had received your certificate for 20 shares? A Well, it may be that I dated the receipt on this date, I don't know.

Q Well— A That is, I don't have the slightest personal recollection of the date on which that certificate was delivered to me.

Q Have you the slightest personal recollection of this bill being sent that I hold in my hand, B. 22? A Of it being sent?

Q Yes. A No, I don't know anything about that.

Q I judge from that bill that your recollection will now be refreshed and that you will concede that you were charging an annual retainer of $250 a year, and incorporated those charges in that bill? A Oh, yes, of course, it clearly shows

here. Here is something significant on the bill, if you are interested, really anxious to find this date, I notice second item on the bill is "To retainer from Guarantee Electric Company from November 1, 1922, to November 1, 1923," and then $250, and then the next item is, "To retainer from Guarantee Electric Company from November 1, 1923, to November 1, 1924," which rather makes me think that—you see we wouldn't be collecting at the end of one year for retainer and the beginning of the next for retainer, it rather makes me think this thing is sort of a summary of the book account.

Q Looks to me, if I may venture a surmise, which we both are indulging in, that you thought, long as you hadn't had your retainer for the past year, you would put in a bill for that, and anticipate the next year, that would be possible, wouldn't it? A I don't know, I might have lost interest.

Q Whose handwriting is the receipt, Thompson and Hanstein? A I would say that is one of the young ladies' in our office.

Q I show you another bill which seems to bear date December 17, 1923, and purports to be signed by Thompson and Hanstein. Will you look at that bill? A Yes, sir.

(Bill offered, received in evidence and marked Exhibit B. 23.)

Q Now calling your attention to the last one, the one that has just been marked as 23, that surely is December 17, 1923, isn't it? A Yes, sir.

Q That is for several small items, fee to Secretary of State, Guarantee Electric Company,

that is the organization fee, isn't it? A Yes, no doubt of it.

Q Fee paid Broun Green Company, $11.37; that is for the stock certificate book? A Something like that.

Q Another item, what is that? A I don't know, undoubtedly something in connection with this company.

Q Then recording certificate of incorporation and filing of report, are all probably connected with the incorporation of this company? A Yes.

Q Now, it would look from that bill, which is now seen, the bill, that down until December 17th, 1923, your firm had not been reimbursed for your disbursements in connection with the organization of the company? A The company was incorporated, what date I don't recall.

Q October, 1922, I think.

The Court: Their shares of stock October 17, 1922, I think.

Mr. McCarter: Yes, recording October, 1922.

Q Now I show you another bill—

A Vice-Chancellor, there are some checks around here. May I look at them?

The Court: Yes.

A There was a credit to Guarantee Electric Company, I guess, at the last hearing, some of these checks relate to this.

Q Did you sell your stock to Mr. Huber? A No. I forget just what that arrangement was, but I don't think it was a sale. I think there was probably an agreement on part to buy.

Q Well, you are familiar with this letter, Exhibit D. 14, dated April 30, 1924, which Mr. Huber testified at the last hearing, as to having been received by you from him, to have been received by him from you, which reads, on the letterhead Thompson and Hanstein, April 30, 1924: "Mr. L. Huber: My dear Mr. Huber: I have your note of $2,000 falling due, as you know it wasn't paid. Someone from your office got in touch with me and advised me that you desired to renew the same for thirty days. I, of course, do not want to do anything that will embarrass you in the matter, but, as you will recall, we had a distinct understanding that you would pay $500 on account of this note when it became due, if that was possible, and if that was not possible, you would pay a smaller amount. It was not suggested at all that the note should be renewed without any payment. I trust that you will find it convenient to get in touch with me shortly so that we can adjust the matter. Very truly yours, Walter Hanstein."

Now, don't you recall that you had sold your stock to Huber, taking Huber's note for it? A Well, I do recall I took Huber's note on the payment of which note he was to get the stock.

Q When was that? A With regard to Proffatt's going away, I remember that it was subsequent to Proffatt's going away, without living up to his agreement.

Q After Proffatt went away you had sold the stock that you had bought, as you say, on this sort of reliance upon Proffatt, hadn't you, you had sold it? A No, I hadn't sold it. I had agreed to sell it.

Q I beg pardon? A I had agreed to sell it.

Q To Huber? A Yes, I agreed to sell it to Huber.

Q And taken his note? A Yes.

Q For $2,000? A That is right.

Q What? A Undoubtedly.

Q Had you transferred the security of the stock to him? A No, sir.

Q Where is the stock? A At least I don't think I did.

Q Where is the stock? A I dare say I have got it.

Q Did Huber give you his note for $2,000 with nothing to show for it? A He may have gotten a receipt for it. I don't recall exactly. I am quite sure I didn't give him the stock.

Q Was there any arrangement in writing between Huber and you? A There may have been.

Q I am asking you your best recollection. A I say there may have been but I don't recall any.

Q Now, Mr. Hanstein, of course I don't want to be disagreeable or unduly persistent, but this letter was shown you a month ago, when we were here, wasn't it? A Yes.

Q And you had a chance to look at it? A Yes.

Q Now you had forgotten all about the transaction when you saw the note, hadn't you? A I had what?

Q Forgotten all about this transaction until you were reminded by the letter? A I think I had. That is true.

Q In the meantime, have you been able to recall anything to the contrary that before April 30, 1924, you had sold to Mr. Huber, who was the president of the Guarantee Electric Company,

your 20 shares of stock? A Well, April—April 30, 1924? What date is that.

Q That is the date of this letter. A Well, I don't think I had delivered it to him. I am quite sure I hadn't. I had taken his note with the understanding that when he paid his note I would deliver the stock.

Q What became of the note? A I don't recall except that it was not paid.

Q You still have it? A I don't know, sir. I don't know.

Q Haven't you made any effort to ascertain any of the facts about this matter in a month that it has been in your mind? A No, sir.

Q Well, I am going to ask you if you are certain that the stock certificate was not delivered? A Well, I am reasonably certain, yes, sir.

Q What makes you think so, if you haven't got it? A Because I don't think that I would have handed over the stock to him without getting paid for it. I don't think I would have done it.

Q That is the only reason you think so? A That is quite a forcible reason to me.

Q When did you last see the certificate that you receipted to the company for on the 17th day of October, 1922, when did you last see that certificate? A I don't recall.

Q Now, on the 2nd of November, 1922, the date of the discount by the Second National of a $15,000 note of the Guarantee Electric, who were the officers of that company? A What was that, on the date of the discount of the Second National Bank who were the officers of what company, the Guarantee Electric?

Q Yes. A I think Mr. Huber was president, and I think I was secretary.

Q Mr. Emerson secretary and treasurer? A May have been.

Q At any rate, Mr. Proffatt was neither, was he, he was only a director? A I have got a memorandum there on my table.

Q You can refer to any memorandum. A I don't recall. You want to know when the directors met?

Q I want to know whether or not Mr. Proffatt on November 2, 1922, was an officer of the Electric Company? A I don't think he was.

Q You know he wasn't, don't you? A I don't think he was.

Q How long after that note was discounted at the bank was it before the company got into difficulties? A I don't remember.

Q A year? A My memory of dates is very poor; I wouldn't know whether it was a year or two years.

Q When you saw Mr. Proffat about April 9, 1925, in your office, did you tell him that you had sold your stock to Huber and taken his note for $2,000? A Well, you see at that time the stock wasn't worth anything, the company was in the hands of the receiver.

Q Answer the question. A I am just trying to reason out in my mind whether I would have.

Q If you don't recall, say so. A I don't recall.

Q Well, when was it, if you can recall, that Mr. Proffatt went away, the time that you alluded to, and you told him, "Here, Proffatt, I am not in the electric business for love, I only went in this because you wanted me to, and if you are going to sell out I want you to take care of me, too," or words to that effect, when was that, just before he went away? A As to date?

Q He seems to have made a good many trips, which trip was this? A That just runs in my mind it was before he went to Texas, if that was his first trip; I don't recall which trip it was.

Q You know whether or not he was material in getting Mr. Huber to buy your stock? A No.

Q What? A No, I don't know that he was.

Q Well, Huber had been an employee of his when he was running the business? A Yes.

Q And Huber was president of the company? A Yes.

Q And if you had had this conversation with him, which you said you thought that he ought not to sell his stock without selling yours, and later Huber and you got together on the stock, and you took Huber's note, did it occur to you that that transaction had any relation to the talk between you and Proffatt? A Well, it didn't have.

Q How do you know it didn't? A Because I recall that I went to see Mr. Huber and sold him my stock.

Q You now do recall that? When and where was that? A Well, I don't recall when and I don't recall where. I may have asked Mr. Huber to come in to see me, but I remember that we had a discussion about it.

Mr. Lane: Mr. McCarter, you asked for that stock certificate. There it is, twenty shares.

Q Did the Second National Bank participate in or bring about the appointment of Judge Shinn as Receiver of the Electric Company? A No.

Q Did they inspire the sequestration proceedings? A No.

Q Nothing to do with them, so far as you know? A No.

Q What information did you receive during his absence of the sequestration proceedings? A I knew of it. There was a man named Thomas, I think, who was a creditor of the Guarantee Electric Company, and he took an assignment, as I recall it now, from the Guarantee Electric Company, and I think at that time we were handling the whole thing for Thomas, and the Guarantee Electric Company, and the whole thing, trying to work them out, then afterwards it went from bad to worse, and Thomas was not able to work anything, and somebody threw them in the hands of a receiver, so naturally I was in touch with the whole thing.

Q Did you represent the company in the receivership proceedings? A I don't think so. No, I am quite sure we didn't.

Q Did you learn whether the receivership was at the suit of a stockholder or creditor? A I may have known at the time. I don't know now.

Q Do you know who Marshall Berkins was? A Yes.

Q Was he a creditor or stockholder? A Berkins was a stockholder, I think he was a director.

Q Now, you remember the afternoon of April 9th when these papers were executed, I presume? A Yes.

Q Do you remember who suggested making the assignment and the party of the second part in the assignment and in the other papers Mr. Schmeidler? A I don't think I recall that.

Q When you said that the paper which Mr. Cochran sent up to you, which is marked S. 24, was the account of the bank against Proffatt and Guarantee Electric Company, do you mean by that that Mr. Proffatt is on that $14,600 note? A No, he had not signed it.

Q When did you first learn that the $15,000 note had been reduced to $12,000? A I don't think I ever knew the exact figures in this account until I got that statement, I just knew it generally as a lot of money that was owing.

Q Why did you speak of that paper as the resume of the account of Proffatt and the Electric Company in the bank? A Well, it was, I merely misspoke, if I misled anybody.

Q Why didn't you take Mr. Proffatt's note or bond or positive agreement to pay the indebtedness of the Electric Company on April 5, 1925—April 9, 1925? A Well, I don't know, there was security there, I didn't see any reason for turning it down.

Q At that time the Electric Company was a thing of the past? A Yes.

Q And the note that the bank held for $14,600, not to speak of the other notes of $5,000 and $500, were absolutely worthless? A As against the corporation itself, yes, practically so.

Q Again I ask you, if it was your object to get Mr. Proffatt's responsibility and assumption of this debt, which he had not before legally assumed, why you didn't take his obligation? A Well, as I said, there was security there, and he was willing to deposit it and there wasn't any reason why we shouldn't take it.

Q You have said that he promised or said at this occasion he would pay the fourteen thousand six hundred, did he say that? A Yes, sir.

Q Look at the statement that Mr. Cochran prepared and sent up to you and see if you can tell us what the words at the bottom, what date is that? A April 1, 1924.

Q Do you know what that referred to? A No, I don't think that is Mr. Cochran's writing.

Q Do you know whose writing it is? A It looks like Judge Thompson's.

Q Do you know from what paper the arrangement or any connection with the proceedings in sequestration was taken from? A I don't know as I took from the papers, that is, it may have been handed to me for all I know.

Q Well, you do remember distinctly having that particular paper before you on the 9th of April, 1925? A Well, I seem to recall having that paper, now I don't say distinctly, I don't know how distinctly I remember it.

Q You wouldn't say as a definite and positive fact that that advertisement that you have produced and which is marked in evidence, was in fact before you on the 9th of April, 1925, would you? A Well, it runs in my recollection that it was there, coupled with the fact that I find it in my files, with just such papers as that Mr. Cochran's memorandum, makes me feel with certainty that it was there, as well as I can state it.

Q What reason had you previous to that time that you were not representing Mr. Proffatt in the matter, to have cut out and preserved previous to that date the newspaper clippings? A I don't know, I may have clipped it that very day out of the Atlantic County Record which carries all the legal advertising, for all I know, that is, if I clipped it.

Walter Hanstein, cross.

Q Did you ask for the bond and mortgage that day or later? A I don't think I did later. I may have asked for it that day.

Q Have you any recollection of having asked for it that day? A No, sir.

(Further testimony adjourned until November 23, 1928, at 10 o'clock A. M.)

FOURTH DAY.

Atlantic City, N. J., November 23, 1928.

Trial of the cause resumed pursuant to adjournment.

Appearances as before noted.

WALTER HANSTEIN, resumed.

Cross examination by Mr. McCarter.

Q Mr. Hanstein, with whom on behalf of the bank did you discuss the particulars as to amounts that should go into this document dated the 9th of April which you prepared and Mr. Proffatt and Schmeidler signed in your office? A Why, I think Mr. Cochran, the cashier, and Mr. Evans, the president.

Q When? A Either that afternoon or the next day, I don't recall.

Q Well, during—in that afternoon during the time that Mr. and Mrs. Proffatt were in your office? A I don't recall exactly, Mr. McCarter.

Q Do you in fact recall having conferred with either of these gentlemen touching those details or are you simple assuming you did? A

No, I think I did. I am rather definite that I did with Mr. Cochran because I have got a statement from him as to the amount due.

Q Yes, but that I think you testified was sent up from the bank? A Either sent up or brought up by Mr. Cochran, whichever it may have been.

Q Now I want to know, to the best of your recollection, when and with whom on behalf of the bank you consulted touching the details as to figures of the agreement, was it before these gentlemen came in? A Oh, no.

Q Did you leave the office while they were there? A No.

Q Then did these gentlemen from the bank come up? A I don't think Mr. Evans did. Mr. Cochran may have.

Q Well, you notice, for instance, the sum of $23,200, where did that figure come from? A Well, I don't recall that figure. May I see the agreement?

Q Certainly. That is a copy of it. A Well, this sum of twenty-three thousand two hundred, as I recall it, was the total of the $8,600 of Mrs. Proffatt's notes and the $14,600 of the Guarantee Electric.

Q No, but I don't suppose as a practicing lawyer, and very busy, as we all know you are, you carried in your head the details that the bank held a note of $14,600, signed by the Electric Company and its officers, and they also held a note of $8,600 signed by Mrs. Proffatt, did you? A No, I didn't.

Q Then how did you get those details? A Mr. Cochran either brought to me or sent to me a memorandum showing the statement of these notes which is introduced in evidence here.

Q Now will you produce that? A That is an exhibit here. I will try to find it.

(Producing Exhibit S. 24.)

Q Now witness hands counsel, your Honor, Exhibit S. 24, which is a memorandum which he had alluded to in his previous evidence. You can't tell us, can you, Mr. Hanstein, when Mr. Cochran sent you that memorandum? A Well, I never had it until that afternoon, I am very certain.

Q I observe the date, April 1, 1924, on it; does that mean anything to you? A Is that the same date you asked about before that I said was written by Judge Thompson? Yes, that was written by Judge Thompson.

Q Judge Thompson? A Yes, that apparently is a repetition of merely the date written on it by Mr. Cochran as to the date from which interest runs.

Q Then Judge Thompson had this memorandum? A Well, he didn't have it that day.

Q Well, when were the words "April 1, 1924," which you say are in Judge Thompson's handwriting, put on that paper? A Certainly after this Proffatt transaction in my office.

Q Do you know why Judge Thompson added to this memorandum these words? A No, sir.

Q Do you know when he did? A After the Proffatt meeting.

Q When? A No, I don't know as to date.

Q Nor you don't know why he did it? A No.

Q Was any explanation given to you, as you can recall, why, according to this agreement, interest was to be included on Mrs. Proffatt's $8,600 from April 1, 1924? A I could probably

tell you if I saw that Exhibit 24 again. That is probably because—

Q Was any explanation given you—I don't want becauses and arguments? A Very likely there was one.

Q That wasn't the due date of her note, was it? A That is my recollection of it.

Q Was it? A That is my recollection of it, yes.

Q The due date of her note? A That is my recollection, that she had paid her interest up to April 1, 1924, and the agreement was to pay interest from that date on.

Q Now, she was not the maker of that note, was she? A Well, she was the discounter of it.

Q You are sure she paid the interest? A Well, I am not sure who paid the interest.

Q Now, Mr. Hanstein, let me suggest that, if you can, you throw off the position of advocate and only testify as to facts that are within your knowledge, and if you don't know, be frank to say so.

Mr. Lane: I object.

The Court: Yes, I think that should be stricken.

Q Do you know whether she paid the interest or not? She was not the maker of the note. A No. Of course, I don't know who paid the interest in the bank.

Q Had you discussed with the bank or anybody for the bank the making of some arrangement of this kind previous to the coming in of the two Proffatts and Mr. Schmeidler? A No, sir.

Q How did you know that Schmeidler would be a representative or a party of the second part satisfactory to the bank? A Well, I had the matter in my hands, and felt very confident the bank would follow our advice in the matter.

Q Neither of the notes was in your hands for collection, were they? A I think we had had the notes in our hands, some of them, at any rate.

Q Then why did you have to have Mr. Cochran's memorandum? A Well, Mrs. Proffatt's were not in our hands.

Q That is—then the $8,600 note was not in your hands? A No, I am quite sure of that.

Q Well, are you sure the $14,600 note was in your hands? A No, not absolutely sure of it.

Q Now, isn't your best memory, looking at that memorandum which you say you received from Mr. Cochran, which gives the details, that neither of them was in your hands? A Well, it may be that none of them were in my hands.

Q I notice that on this memorandum there is a reference to two other notes of forty-two hundred and forty-four hundred by Huber and Emerson, respectively. A Yes. They were the notes to Catherine Proffatt.

Q Yes, that is what the memorandum says. A Yes.

Q What did the $500 on this memorandum mean? A It meant that there was a $500 note of the Guarantee Electric Company in the Second National Bank.

Q You didn't include anything with reference to that in this deal, did you? A I tried to.

Q Tried to? Well, did you? A Eventually, no. Proffatt said that he did not feel that he wanted to take them over.

Q There was a $5,000 note referred to there? A Yes.

Q Same thing? A That was in the same position. He said they were put on after he had left and that the bank should not look to him for it.

Q Then you entered into a negotiation with Mr. Proffatt, endeavoring to get him to do with with reference to all these obligations? A Well, I understood when he came in to get security for the bank for all of those obligations.

Q But you knew that the sequestration was out, didn't you, of course you did? A Had been issued, you mean?

Q Beg pardon? A When you say out, you mean had been issued?

Q Yes, was outstanding. A Yes.

Q And that everything he had was tied up? A Yes.

Q How did you expect him to give security? A I took the mortgage subject to the sequestration proceedings.

Q You proposed to take it subject to the sequestration proceedings? A I did, in fact, take it.

Q I didn't ask you what you did. I asked you how you expected him to give security. A Just in the manner in which he did, subject to the sequestration proceeding.

Q Who suggested this particular mortgage? He had other property, hadn't he? A I don't recall.

Q What? A I don't recall whether I knew whether he had it or not. He must have suggested the collateral. I couldn't pick out his collateral. I am sure of that.

Q Well, you didn't expect him to come in—
A I beg pardon?

Q Well, you didn't expect him to come in? A No.

Q And you hadn't sent for him? A No.

Q You were, so far as he was concerned, it was entirely unexpected, a new subject between you and he? A Yes, so far as this security is concerned.

Q Now had you—Mr. Schmeidler's office, I think, was on the same floor and adjoining your own? A Yes, sir.

Q Had you discussed with him previous to this visit of the Proffatts and he to you the subject of this indebtedness which you were anxious to have Mr. Proffatt secure? A Had I?

Q (Question repeated.) A I may have told him about it. I wouldn't say that I didn't.

Q You see, I am not asking you to argue. I am asking you if you have any recollection. A No, I don't have any present recollection of ever having discussed this thing with Proffatt—with Schmeidler.

Q Then, so far as your present recollection goes, the giving of this security and the use of Mr. Schmeidler as party of the second part, were entirely new subjects brought up for the first time after they came into your office? A Yes, sir.

Q Did you know that—you, of course, knew that Mrs. Proffatt's obligation at the outset was $8,600, didn't you? A Yes.

Q Did you know that she was a half owner of this $50,000 mortgage? A Yes.

Q You knew that mortgage was perfectly good, didn't you? A Yes, I thought it was a good mortgage.

Q Did you explain to her that by carrying out this deal that she was surrendering $25,000 security to take care of eight thousand? A No, sir.

Q She had no counsel present? A No.

Q Did you act as counsel for her? A No.

Q Who suggested the assignment by Mrs. Proffatt of her half interest in the mortgage to her husband? A I don't recall that.

Q Well, did Schmeidler suggest it? A I don't recall, Mr. McCarter.

Q Never mind, if you don't recall, that is all right. Did Proffatt suggest it? A I don't recall who suggested it.

Q Well, have you no memory as to how it came about that, because of the fact, as Mr. Schmeidler has testified, that Mr. Proffatt was somewhat worried and felt that his credit would be hurt in the community where he hoped to resume business, if he did not pay this obligation of the Electric Company, amounting to $14,600, that Mrs. Proffatt was prevailed upon to assign her half in a $50,000 mortgage?

Mr. Lane: I object to the question, rather, point out the question contains an assumption that Mr. Schmeidler testified, that is not quite in accordance with the record.

Mr. McCarter: That is exactly in accordance with the record.

A I don't understand the question, anyway.

Q You heard Mr. Schmeidler's testimony? A Yes.

Q You recall that he said, didn't you, that Mr. Proffatt felt and he felt, as Proffatt's friend, that he ought to pay this $14,600 note, or what-

ever was due on it if he expected to have further credit in this town? A Yes, I recall that.

Q Now, if that were true, how do you—what was the step in the progress of events that brought about including the $8,000 note of Mrs. Proffatt, and including an assignment of her part, of her half interest in a $50,000 mortgage which was perfectly good, before the paper was executed, who suggested that? A Who suggested that assignment?

Q No, her coming into the deal? A Well, she came into the office, you see; I never sent for her, either; so far as suggesting that she turn over her interest in that mortgage to Proffatt, I necessarily would not have permitted her to make an assignment.

Q I did not ask you what you would or would not have done, Mr. Hanstein. I don't want you to keep arguing with me, please. I am asking you to answer my question, if you can. A You are trying to find out from me how it came about that she—

Q Yes. A In other words, who suggested it? Who suggested that she do this?

Q I want the details, so far as they are painted on your mind, of the transaction which led up to the signing of this document, and there has been an effort to undertake to account for Proffatt's doing it; now, the question is, how did Mrs. Proffatt happen to do it? A Well, I don't know why she did it.

Q You don't know? You didn't expect them? A No, I didn't expect the two of them.

Q Had nothing in mind that they were coming in? A No.

Q Came in like a thunderbolt from a clear sky, so far as you are concerned, both of them? A Well, slower.

Q And the result is, before they left, that paper and the other papers were signed? A Yes, sir.

Q And you knew of no inducement, either offered in the office, your office, or even offered in Schmeidler's office, for this being done? A For Mrs. Proffatt doing it?

Q Yes. A Yes, I knew why she did it.

Q I am asking you to tell us that. A No, you haven't. As I understood it all along, you wanted to know who suggested it. I didn't suggest it, and I don't know who suggested it, but I know why she did it.

Q How do you know that? A Because I know the relationship between the Proffatts. She and Mr. Proffatt had been partners in all of his business enterprises.

Q Well, were they, either of them, in business at that time? A Not at that time, I don't think they were.

Q Wasn't she, hadn't she been quite ill? A Yes.

Q Now I want to know if you didn't hear of some inducement that had been offered to her? A No, sir.

Q You supposed, why did you suppose that she was putting up a half interest in a perfectly good $50,000 mortgage to secure the payment of, not only of her own note, or, rather a note upon which she was endorser, which had been discounted in the bank, but also to secure an indebtedness to that bank of an insolvent corporation upon which Mr. Proffatt had at least no legal liability? A I would suppose that she did it because she was just as much interested in his future credit in Atlantic City as he was.

Q You didn't explain to her the consequences of her act, did you? A No, sir.

Q Do I understand that you now adopt the theory of Mr. Schmeidler that a failure on the part of Mr. Proffatt to pay a note presumably of $14,600, which he neither made or endorsed, and from which he never had the slightest benefit, which note was in the bank where it had been discounted by the obligor on the note, and the endorsers, that would affect his credit in this town?

Mr. Lane: I object to that question.

The Court: Sustain the objection.

Q Was that spoken of, that fear or that apprehension spoken of in the interview? A I think it was.

Q Sure? A Yes, sir.

Q Beg pardon? A Yes, sir.

Q Now, I understand you to take the position that Mr. Schmeidler in no way represented the bank? A What?

Q Mr. Schmeidler in no way represented the bank? A That is correct.

Q Whom did he represent? A Proffatt.

Q Proffatt? A Yes, sir.

Q Well, you felt, as counsel for the bank, that you were accomplishing a very good thing when you got this security, didn't you, Mr. Hanstein? You felt satisfied that a good piece of work had been done? A Yes, I felt that I had gotten the best out of the situation I could.

Q Now, you believed that the mortgage was therefore a perfectly valid security for these two claims of the bank, didn't you, in addition to the Thompson & Hanstein claim? A This $50,000 mortgage?

Q Yes, you thought of that? A Yes, I thought it was ample security.

Q Now, if Schmeidler represented Proffatt and not the bank, why did you insert in this same paper these words: "It is understood and agreed that the party of the first part, that is Proffatt, does hereby authorize the party of the second part to sell or dispose of said mortgage at such time as shall appear to be to the party of the second part advisable for the purpose of making the payments aforesaid, and to that end the party of the second part is hereby authorized to do any and all things necessary for the carrying out of the purposes of this agreement and the rendering over to the party of the first part of any surplus remaining after the sale of said mortgage and the payment of the debts aforesaid, and the party of the second part hereby agrees with the party of the first part"—that is Schmeidler agrees with Proffatt—"to completely carry out the terms of this agreement and will hold the mortgage for the securing of the debts above set forth and will, at the time that seems most advisable to him, sell said mortgage and pay the debts aforesaid."

Now, that being the language of the paper which you drew, which you felt was an effective security, if this was Proffatt's man Friday that was holding this security and was to exercise his discretion as to when, where and how it should be foreclosed, if I may so speak, how do you account for that? A Well, it was probably put in because that was their suggestion. I didn't suggest that, I am quite sure of that.

Q Well, do you know of another transaction where the bank or you, on behalf of the bank, has left it to the debtor, or the debtor's right-hand

man, to determine wholly when the debt should be paid or the security foreclosed? A I don't know as I do.

Q Now, in view of that language in that paper, which you yourself drew, you still adhere to the view, Mr. Hanstein, that Schmeidler was not the representative of the bank? A Yes, sir.

Q There are in evidence Exhibits S. 14, S. 17, S. 18 and S. 19, the last three of which are letters from Schmeidler to Proffatt, one dated November 17, 1925: "Dear George: Please get in touch with me as soon as possible." One dated November 10, 1925: "Dear George: Have been trying for some time to get in touch with you regarding the mortgage held by me as I would like to be relieved of the responsibility. Will appreciate if you will get in touch with me," and one dated October 23, 1925: "Dear George: Second National Bank has called me several times regarding the payments that are due them. It is necessary that something regarding the matter be done at once," and so forth. You were aware, were you not, that the bank had been inspiring the letters from Schmeidler to Proffatt with a view of forcing payment? A Well, I don't know that I knew that they had inspired the letters. I knew the bank had been after Schmeidler to do something about it.

Q Did you personally prepare the notice that is attached to the interpleader bill in this case in behalf of the bank previous to the sale of the security? A No, I don't think I did. It bears Judge Thompson's initials as dictating it.

Q Says by Joseph Thompson also? A The initialing.

Q I think it appears that you or your office had the assignment to Schmeidler recorded? A I think we very likely did.

Q Did you take any assignment from Schmeidler? A Not until after the sale.

Q So that, as far as—and the sale was on April 5, 1926, I believe—assuming I am right on that, of course you can't carry the date. A I have a note here, I could probably check it up if you want me to.

Q I wish you would and be sure we are right. You will find the notice of sale will fix the date, probably, Mr. Hanstein. A I think the date of the assignment and the date of the checks will show it.

Q Schmeidler to the Second National Bank of Atlantic City, April 5, 1926? A Whatever date it is.

Q I was right on that. Now, so that, from April 9, 1925, until April 5, 1926, a year short of a few days, this wonderful security that you had or the bank had or professed to have, which was considered effective, was held under the control of the debtor, assuming that Schmeidler alone represented the debtor? A Well, I don't say that Schmeidler alone represented the debtor at all. I think Schmeidler had a duty there.

Q Was Schmeidler paid by the bank for his services? A No.

Q Well, what duty, if Schmeidler was the friend and representative of Proffatt, what duty to the bank would prevail upon you as counsel for the bank to let Schmeidler have control of that security and not even take from him an assignment for the record of it? A I have absolute confidence in Schmeidler's integrity and fairness.

Q Had Schmeidler ever acted in a similar capacity for the bank before? A Not to my knowledge.

Q Was he a depositor in the bank? A I think not.

Q He was not an officer of the bank? A No, sir.

Q Was he a stockholder? A I think not.

Q What was his business at that time? A Well, he was in the real estate business. He was interested in a lot of small corporations around town, automobile finance company and things like that.

Q Was he individually at that time or was he in the companies, through the companies to which you have just alluded, a client of Thompson & Hanstein? A Probably not—I have represented him personally in matters. I don't know whether there was anything personal at that time.

Q I mean at this time, now, April 9, 1925, was Schmeidler a client of Thompson & Hanstein? A Well, if there happened to be any little business affecting him, we would represent him in it.

Q Had you represented him? A Previous to that I had. Now whether at that time I was representing him in something I couldn't say.

Q You took no declaration of no set off out of Mr. and Mrs. Proffatt, did you, or the mortgagor, the owners of the property? A No.

Q I observe that some two weeks passed before the assignment was recorded. Do you know why that was? A No, sir.

Q Beg pardon? A No, I do not.

Q Did you intend to record it when you took it? A Yes, sir.

Q Why wasn't it done? A I don't remember.

Q For two weeks? A I don't remember.

Q You never had in your possession the bond and mortgage, did you? A No, sir.

Q You never had any fire insurance policies? A No, sir.

Q Did you collect any interest on the mortgage previous to December 6, 1926, when the sale took place? A I don't think so.

Q Now, almost a year elapsed and then an attempt was made to sell this mortgage. You were familiar with those proceedings? A Yes, sir.

Q You were at the sale? A Yes, sir.

Q And did you personally draw the notices that Mr. Bishop of your office testified to having mailed and posted? A I don't recall, but they were drawn in our office.

Q You know how it happened that this man, who was, as you say, the alter ego for Mr. Proffatt, on or about—well, a few days before the 5th of April, 1926, deemed that it, the 5th of April, 1926, a year after the transaction, that the 5th of April, 1926, was an advisable time to sell the mortgage? A Because the bank was after him to do something about it.

Q Beg pardon? A Because the bank was after him to do something about it.

Q The bank drew that through you? A Well, I think there are some letters from the bank on it.

Q To Schmeidler? A I think so.

Q And you had also been after him? A Yes. Judge Thompson and I had both been after him.

Q Now you knew, did you not, Mr. Hanstein, personally, that Mr. Proffatt was away from the city in April of 1926? A No, I didn't.

Q You didn't? A At least, I don't think I did. I don't have any present recollection of knowing it.

Q Did you have anything to do with the selection of the address on those notices? A No, sir, I never did know where Mr. Proffatt lived.

Q I didn't ask you whether you knew. A The answer is no.

Q I ask you whether you had anything to do with the selection of the address? A No.

Q Did you have anything to do with the sending of the notice to Mr. Bourgeois? A I think I directed that.

Q You think you directed that? A Directed the doing of it.

Q Had you directed the doing of that before or after the notice had been mailed to Rhode Island Avenue, two addresses there? A Well, I think all the notices were sent out simultaneously.

Q Then you realized, did you, that there was some doubt as to whether the Rhode Island addresses were the genuine addresses? A No. I was not conscious of what address at which Proffatt was being approached. I didn't pay any attention to that feature of it because I didn't know where Proffatt lived, but I did feel that as long as Mr. Bouregois was in it, he certainly should have a notice here, regardless of Proffatt.

Q Then you felt that notice should be sent to Bourgeois out of fairness to Mr. Bourgeois? A Yes.

Q How recently before April, 1926, had you conversed or corresponded with Mr. Bourgeois on the subject? A Well, I have his letter and

I can answer that. March 10th is the date of the letter from Mr. Bourgeois to me.

Q 1926? A Yes, sir; that is one letter. Now whether there was a later one I don't know.

Q You didn't send any notice to the Bankers Trust Company, did you, or direct any notice to be sent? A I don't remember.

Q What? A I don't remember.

Q The mortgage had already, the assignment of that mortgage to the Bankers Trust Company had already been put on record, as appears. Did you examine the records to see whether the owner of the equity in the $50,000 mortgage, I don't mean in the premises covered by the mortgage, but the owner of the equity in the $50,000 mortgage over and above your claims aggregating twenty-three or four thousand dollars, had still possessed that mortgage or had assigned it? A No, never had any search made to find out if Proffatt assigned that mortgage after he had assigned it to Schmeidler.

Q During all this year you had not had possession of the bond and mortgage, had you? A No, sir.

Q Nor the insurance policies? A No, sir.

Q Had you made any effort to acquire them? A I don't think I saw Mr. Proffatt after that for considerably more than a year.

Q Now it appears—you recall the fact, do you not, that by the notice which you have already looked at, attached to the bill of complaint, or the interpleader bill, which you say Judge Thompson wrote, notice was given to the owner of the land mortgaged of the claim that you had under this assignment, you remember that, which is set out as one of the grounds of the interpleader by the mortgagor or

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the owner of the equity of redemption? A Might I see the notice again? I only looked at it before to determine whether I had anything to do with it. What was the question?

Q Do you remember that paper was served? A This paper?

Q Beg pardon? A This paper that you have before you now?

Q Yes. A No doubt it was.

Q Did you hear anything from the—

The Court: What paper is that?

Mr. McCarter: That is the paper dated December 4, 1925, attached to the bill of complaint as being the first notice they had received, that is, the mortgagor had received, your Honor, of the right of the complainant, right of the Second National Bank, December 4, 1925.

Q Did your firm receive any reply either from the Central Corporation, the purchaser of the equity, or the Messrs. Cassman & Gottlieb, their attorneys? A No. Well, no, I take that back. I don't know.

Q You don't know? A No, I don't know. Judge Thompson was apparently handling that end of it.

Q When did you first hear, or anyone on the part of the bank first hear of the fact that the Bankers Trust Company claimed some interest in this mortgage? A Well, of course I don't know when somebody other than the bank may have heard.

Q Beg pardon? A I say I don't know when some one else may have heard it, but—and I don't have any recollection when I first heard it.

Walter Hanstein, re-direct.

Re-direct examination by Mr. Lane.

Q Have you any recollection of having heard of it before the sale of the mortgage under this assignment? A No, sir.

Q On April 6, 1926? A No, sir.

Q Was any notice ever served, to your knowledge, by the Bankers Trust Company on your firm? A No, sir.

Q Or any communication from the Bankers Trust Company that it had any interest in this property? A I never saw or heard of any.

Q I direct your attention to the correspondence which you had with Mr. Bourgeois, this letter of March 10th, S. 5 for identification, and ask you to read that and then tell me whether that refreshes your recollection whether during the course of any of the correspondence that you had with Mr. Bourgeois at that time, either by mail or personally, were there any suggestions given by Mr. Bourgeois that the Bankers Trust Company had any interest in this mortgage?

Mr. McCarter: The letter will speak for itself.

Mr. Lane: I know the letter doesn't mention it, but I want to know whether if you will admit any other communication, any suggestions were made?

Mr. McCarter: How can that letter come any other time?

Mr. Lane: I offer the letter in evidence, S. 5 for identification.

(Letter admitted in evidence and marked Exhibit S. 5.)

Walter Hanstein, re-direct.

Q Now I ask you the question, did Mr. Bourgeois, in the course of his communication with you, at the time you were communicating with him during March, 1926, suggest the Bankers Trust Company had any interest in this mortgage? A No, sir.

Q Do you know that the Court of Equity will control a trustee under an agreement if he does not perform his duty? A Yes, sir.

Mr. McCarter: I object.

Mr. Lane: You have asked him why he had Schmeidler act. I want to know whether he knew that.

Q How long had you known Schmeidler? A Since I was probably three years old.

Q Did you have any knowledge at the time of this transaction in your office which resulted in the assignment of this mortgage to Schmeidler, what the actual interests of Mr. and Mrs. Proffatt were in that mortgage? A I don't understand that.

(Question repeated.)

A You mean when they first came in?

Q No, I want to know at any time, I am not talking about now as to what their interest was as disclosed by the record but what their actual interest was? A Well, I must have known that each was a half owner.

Q So far as the record went? A Yes.

Q Did you know anything beyond that? A No.

Q At the time of this sale do you know whether or not Mr. Bourgeois had a representative present? A Yes, he did have.

Walter Hanstein, re-cross.

Q Mr. Hanstein, will you find the twenty shares of stock, Thompson stock?

(Stock certificate produced.)

Mr. Lane: I offer that stock in evidence. It is identified on page 332 of the record, the stock certificates, I mean.

(Stock certificates admitted in evidence and marked Exhibit S. 26.)

By Mr. McCarter.

Q I think you prepared the assignment that Mrs. Proffatt signed that day in your office, and the same was signed and acknowledged in your office before Miss Barbour, your secretary? A That is correct.

Q I show you a certified copy of it, I understand you to say you didn't know what her interest was, and see if you didn't state in so many words it is a half interest. A I didn't say I didn't know what her interest was.

Q Didn't you say, in response to Vice-Chancellor Lane's question, that you did not know, apart from the expression of the mortgage, that it was to Mr. Proffatt and Mrs. Proffatt, what her real interest was? A I don't think I did.

Q Well, look at the assignment. You now will concede that you must have known at that time that she had a half interest in the mortgage? A Surely, I drew the assignment.

Q I think this is the first time you have produced this certificate number 12 for 20 shares? A No, sir.

Mr. Lane: No, sir; produced last hearing, page 332 of the record.

Thomas Emerson, direct.

Q Has it been in your office ever since you acquired it? A Yes, sir.

THOMAS EMERSON, sworn.

Direct examination by Mr. Lane.

Q Mr. Emerson, where do you live? A 117 South Illinois.

Q What is your business? A Electrical engineer.

Q Were you at one time connected with the Guarantee Electric? A Yes, sir.

Q When? A It is about five or six years ago now, I guess.

Q Do you know Mr. Proffatt? A Yes, sir.

Q Do you know of the obligations of the Guarantee Electric at the Second National Bank? A Yes, sir.

Q There were such obligations? A Yes, sir.

Q Did you at any time have a conversation with Mr. Proffatt with respect to those obligations? A Yes, sir.

Q Can you give me the time and place, as nearly as you can place it? A Well, it was shortly after he came back, I don't know what dates it was, at this time.

Q Do you remember the year? A About three or four years ago.

Q Came back from where? A Beg pardon?

Q Shortly after he came back from where? A Europe, I believe.

Q Where was the conversation? A Somewhere on Atlantic avenue, I couldn't just exactly tell you where, even at this time.

Q In Atlantic City? A Yes, sir.

Q What did Mr. Proffatt say? A The first time he talked to me about it he said that he thought that Hanstein and Thompson were trying to give him a lacing. That was his words, and I told him I didn't believe that, that they were just trying to get things straightened up as well as they could, so he told me to tell them that they had no reason to worry, that they would be taken care of, and that was about all there was to it.

Q Did you have a conversation in which the bank was mentioned, the indebtedness at the bank? A That is what they were discussing, the entire situation, and he said that if they gave him time, he would see that they did not lose anything.

Mr. McCarter: He said what?

A If they gave him time he would see that they did not lose anything.

Q Who? A I imagine—

Mr. McCarter: I object.

Q I want the conversation. A That is as nearly as I can remember, as I told you.

Q Were the persons of whom he was talking identified in the conversation? A The bank; yes, sir; speaking of the bank, didn't mention any particular men in the bank, but speaking of the Second National Bank.

Q And of Thompson and Hanstein? A Yes, sir.

Q Did he make that statement to you more than once? A Every time we discussed it, I

can't tell you just exactly how many more than once.

Q It was more than once? A Yes, sir.

Cross examination by Mr. McCarter.

Q You were one of the gentlemen who, as an officer of the company, Guarantee Electric Company, signed the note for $14,600, aren't you? A Yes, sir.

Q At that time what position did you hold in the Guarantee Electric? A Well, I was superintendent of outside construction, but I was also treasurer of the company, but in name only.

Q You are the Thomas H. Emerson, what position did you say you were outside? A Superintendent, and treasurer, but in name only, so far as the books were concerned. I knew nothing about, I used to countersign the checks, that was all.

Q You are the Thomas H. Emerson who as treasurer countersigned that note? A Yes, sir.

Q That note is in evidence, I believe, and seems to be dated June 16, 1924. When was this talk that you refer to on the streets of Atlantic City? A That was after George came back, I don't know the date.

Q Came back to where? A Came back to Atlantic City.

Q From where? A From Europe, I believe.

Q Do you know when that was? A I don't remember the date, no, I imagine three or four years ago. That is as close as I can remember it.

Q Whereabouts on Atlantic avenue was that talk? A I tell you I don't remember just exactly where, somewheres between here and possibly Michigan avenue on Atlantic.

Q Were you still connected with the Electric Company? A No, I don't believe so.

Q What? A I don't believe so. I think the company had been closed up at that time.

Q Well, you know it, don't you? You know it had been closed up? A So far as I can remember, I would say it was closed up. I am not positive of it, no.

Q And you happened to meet him on the street and had this conversation? A That is it.

Q Are you the same Emerson that bought Mrs. Proffatt's stock and gave her your note for $4,400? A Yes, sir.

Q Which you never paid? A Yes, sir.

Q And Mr. Huber gave another note about the same amount, and they together made the $8,600 note that has been talked of in this suit as a note or obligation of Mrs. Proffatt, isn't it? A Yes, sir.

Q Do you remember meeting Mr. Jeffers and me one evening in May last in Mr. Jeffers' office? A Yes, sir.

Q And endeavoring to refresh your recollection on the subject of the responsibility, moral or otherwise, of Mr. Proffatt, upon this note was being discussed, wasn't it? A Yes, sir.

Q Did you at that time tell us Mr. Proffatt, either individually or in the presence of Mr. Jeffers and me, of this alleged conversation? A I believe I did.

Q You believe you did? A Yes, sir.

Q Which? A I believe I told you just exactly what I told you when you asked the question.

Q One moment, you say you did relate this conversation? A I believe so.

Q One moment. A I am not sure of it, I believe I did, if you asked me the question.

Q Wait a moment, please. You say that you did relate this conversation that you have sworn to as having taken place on that— A I believe so.

Q Will you wait until I get through, please? —as having taken place on Atlantic avenue with Mr. Proffatt shortly after his return that night in Mr. Jeffers' office in the presence of Mr. Jeffers and me? A No, sir; I didn't say anything about meeting George on the avenue at that time, if that is the point you are trying to bring out.

Q No, I am asking you if you now say that at the office of Mr. Jeffers and in the presence of Mr. Jeffers and me you made reference to this alleged talk of Proffatt to you? A No, sir.

Q You did not? A No, sir.

Q Now, why didn't you? A Why, you never asked me about it.

Q Oh, I see.

By Mr. Lane.

Q Was there any agreement or understanding, or how was it that you came to buy this stock of Mrs. Proffatt? A When the company—

Mr. McCarter: I object as immaterial.

Mr. Lane: You asked him about it.

Mr. McCarter: No, I asked him if he was the man who had bought the stock and given the note which he had not paid.

Q What was the understanding, if there was one, with respect to whether you ever was to pay that note? A I was to pay it out of the

earnings of the company, that was the understanding, when I became an officer of the company.

Q And there were no such earnings? A No, sir.

WILLIAM S. COCHRAN, sworn.

Direct examination by Mr. Lane.

Q Mr. Cochran, where do you live? A I live in Northfield now.

Q What is your business? A Vice-president and treasurer of the Northside Trust Company.

Q Were you at one time connected with the Second National Bank in Atlantic City? A I was.

Q Were you at the time of the discount of this $14,600 note that has been referred to? A Yes.

Q The discount of the $15,000 note originally that was discounted on November 2, 1922, are you familiar with that note? A Yes.

Q At that time what connection did you have with the Second National Bank? A Cashier.

Q How long had you been cashier of the bank? A Oh, a number of years before that.

Q Did you know George Proffatt? A I did.

Q How long had you known him? A Probably a period of ten or fifteen years.

Q Had he been a customer of the bank? A He had.

Q What was his business? A Electrical business.

Q What name did he trade under? A The Guarantee Electric Company.

Q How long had he prior to November 2, 1922, been trading under the name of the Guarantee Electric? A I couldn't state exact.

Q I don't mean exactly; approximately? A Several years.

Q Under that name had he had transactions with the bank? A He had.

Q Now, did you know that that business of his was to be incorporated under the name of the Guarantee Electric? A Oh, yes.

Q Who gave you that information? A Why, that undoubtedly came to us through our attorneys, Thompson & Hanstein.

Q Did you have a talk with Mr. Proffatt at or about the time of that incorporation and at or about the time of the discount of this $15,000 note with respect to the business? A Yes, I think I did.

Q Where? A In the bank.

Q What did he say? A Well, I couldn't recall exactly what Mr. Proffatt said, but at about that time Mr. Proffatt was—

Mr. McCarter: One moment. The question is what was said.

Q You don't have to give the exact language; you can give the substance of what was said, your best recollection. A Remembering back to that time, the company having been incorporated, Mr. Proffatt was in there regarding a line of credit, as I can recall, in reference to a note which we were to discount for him or had considered discounting for the Guarantee Electric Company, Incorporated.

Q Go ahead. A Well, that is about all I can recall at that time.

Q What did he say? A That is pretty hard to recall; as I can remember now, there was some conversation about him, that he was out of the company, that there Messrs. Huber and Emerson, he had turned the business over to them and that they were going to conduct it, but he would naturally have an interest in it.

Q Yes, what else was said? A That is about all I can recall at the present time.

Q Did he say anything about how the business was to be conducted thereafter or as to whether the note would be paid?

Mr. McCarter: I don't think you ought to lead the witness.

Mr. Lane: I don't want to lead him. I want to know if he said anything about those subjects, your recollection.

A Well, whether it was just at that time or not I couldn't recall, but I remember Mr. Proffatt saying the Second National Bank would never lose anything through the Guarantee Electric Company.

Mr. McCarter: What is that?

A The Second National Bank would never lose anything through the Guarantee Electric Company.

Q Do you remember when he first said that? A No, I couldn't tell you when he first said it.

Q Do you remember whether he said it more than once? A Well, later on than that, Mr. Proffat had been away, it was some time after that, a long time after that, that the Guarantee Electric Company business had not been satis-

factory to the bank and Mr. Proffatt returned, and I couldn't say now where it was from, whether from the South or where, and he stopped at the bank, and we were talking about Guarantee Electric Company, and at that time the bank was satisfied that their—

Mr. McCarter: One moment.

Q Don't care anything about the bank was satisfied. I want to know what Mr. Proffatt said. A I was trying to recall what led up to the conversation.

Q Never mind what led up. What did Mr. Proffatt say? A As I can recall, Mr. Proffatt said the Second National Bank would never lose anything through the Guarantee Electric Company.

Q That was some time after this first conversation you are talking about? A Oh, yes, that was considerable time after those original notes had been discounted and the loans were made.

Q After the discount of this note November 2, 1922, was Mr. Proffatt in the bank quite often? A I couldn't say that he was.

Cross examination by Mr. McCarter.

Q You were cashier, were you, Mr. Cochran, on or about the 2nd of November, 1922? A I was.

Q And at that time there was discounted in the bank, the Second National, a note of the Guarantee Electric Company, Incorporated, signed by Huber as the president and Emerson as treasurer, and endorsed by them in their respective official position, was it not? A That is

as I recall it. Of course the books would show that.

Q Was that done through you personally or through some other officer of the bank? A That was discounted by the Board.

Q By the Board? A Yes.

Q Did you attend the meeting? A Oh, yes.

Q Was there some hesitation? A I couldn't recall just whether there was any hesitation in 1922 or not about the Board's action.

Q Now, you knew that that note was reduced some, didn't you, while you were there? A Yes, it was.

Q When did you finally leave there? A In 1925; September, 1925.

Q You recall that it had been reduced to less than $14,600 at that time, don't you? A No, I couldn't recall, Mr. McCarter.

Q Now, assuming I have correctly named the date, 1922, November 2nd, as the date of the discount of that original note, assuming that you have spoken of a conversation in which you say later Mr. Proffatt said words to the effect that the Second National would never lose anything through the Guarantee Electric Company, now can you give us about when that conversation was? A No, I couldn't, any more than I know it was at the time that Mr. Proffatt returned, I think he said he had been to Texas or some place South, now what date that was I couldn't tell.

Q Well, about how long, to your recollection, was it after the discount of the note? A Well, I don't know whether this would answer your question, but the only way I could recall it would be from the fact that it was at the time that the Guarantee Electric Company were not carrying a satisfactory account with the bank, and were

not reducing the paper properly, the bank was, the directors were feeling we were going to have trouble in collecting those notes.

Q The obligations, of course, had long been incurred? A Yes.

Q Was it a year or two years? A I couldn't say positively, but I would think it was probably twenty-two—a couple of years after that, after they had originally incorporated the company.

Q You know that after the company was—the business was incorporated while Proffatt was abroad for a year, didn't you? A I didn't know positively; we presumed he was abroad.

Q And you knew that he was also South, whether Texas or elsewhere? A Other than Atlantic City, yes.

Q He wasn't actively attending to the affairs of the Electric Company? A No.

Q So—see if I understand you—upon his return from one of these trips he happened to be in the office and you knew him and you were complaining of the fact that the Guarantee Electric Company was not standing up to its duty as a borrower, as you thought, and the directors thought it should, were not paying enough on renewals, and were not keeping enough on deposit, you said something of the kind you spoke of? A That is right.

Q That is the situation? A Yes, sir.

Q Those notes were renewed from time to time, that note that original indebtedness fifteen thousand was renewed from time to time as you continued it there? A Yes.

Q You never had any endorsement of Mr. Proffatt, had you? A No.

Q Never asked him about it? A No.

Q That is all.

William S. Cochran, re-direct.

By Mr. Lane.

Q Mr. Cochran, in this last conversation which has been referred to by counsel in which Mr. Proffatt said that the bank would never lose anything on the notes, and so forth, what did you say to him which led up to his making that statement? A We were discussing the condition of the Guarantee Electric Company, Incorporated, the unsatisfactory manner in which they were doing business with the Second National Bank, that they had not been living up to their obligations, that we had had trouble with the account.

Mr. McCarter: Now the question is what was said.

Q I am asking you what you said to Proffatt, please confine yourself to that? A That is what I said to Proffatt, about the unsatisfactory way the account was running.

Q What else was said? A As I remember, Mr. Proffatt said, "Well, there is nothing for you to worry about, that the Second National Bank would never lose anything through the Guarantee Electric Company."

Q Did he say why or how—

Mr. McCarter: I object. I don't think counsel should lead. He is now going back in his direct again.

The Court: I will sustain the objection.

Q Will you give me the whole conversation? A How is that?

Q Will you give me the whole conversation, everything that Proffatt said? A I guess that would be impossible to do.

Q Well, as much of it as you can. A I couldn't give you conversation that went on between Mr. Proffatt and myself. That would be impossible. But all I know in the conversation regarding the Guarantee Electric Company, Mr. Proffatt made that remark that the Second National would never lose anything through the Guarantee Electric Company.

Q Was that the first time that he made that remark? A Well, my recollection is that when the notes were originally discounted, Mr. Proffatt at that time mentioned something about that he would be responsible for the Guarantee Electric Company.

Q What did he say, as near as you can recollect, at that time? I know it is taking you back six years, but give us the best of your recollection. A Well, the only way I can recall that conversation and refresh my memory in any way, was the close connection between Proffatt and the Guarantee Electric Company, when he was originally trading as the Guarantee Electric Company, George Proffatt, and then the Guarantee Electric Company, Incorporated, they were so closely allied, one going right into the other, that there was some discussion when the original loan was made, that Mr. Proffatt told us or told me that we would never lose anything through the Guarantee Electric Company, that was his way of expressing it.

By Mr. McCarter.

Q Now you have given us two conversations of what you say he said at that time. I would ask you once again to tell the Vice-Chancellor what you say now that about the time of the discount of the $15,000 note, Mr. Proffatt said?

A At that time Mr. Proffatt said that the Second National Bank would never lose anything through the Guarantee Electric Company.

Q Well, this was shortly after the incorporation? A About the time of the incorporation, yes.

Q And you realized the difference between Mr. Proffatt's position as a director in the incorporated Guarantee Electric Company and his position as an individual trading as Guarantee Electric Company, didn't you, you understood that? A Oh, yes.

Q Now the certificate of incorporation, which is Exhibit B. 6 in this cause, seems to have been filed on the 13th of October, 1922, and if my recollection is correct, and I am using the same date that my friend Vice-Chancellor Lane uses, the original discount was on November 2, 1922, about a month after the incorporation. The Board you say hesitated about the original discount? A I don't think I said that.

Q Didn't you? A No.

Q Then they did not hesitate? A Not to my knowledge. I didn't say they ever hesitated.

Q Now, I don't know whether the Vice-Chancellor heard the remark, but I will ask you again so you may answer it and he will hear it, you didn't ask him to endorse this or any other paper, did you? A No.

Q And your recollection now is that at about the time of the discount, was it before or after the discount had been made that he said the Second National Bank would never lose anything on account of the Guarantee Electric Company? A Whether it was before or after the discount?

Q Yes. A I couldn't say.

Q Couldn't say about that? A No.

Mr. Lane: If the Court please, while I think that the record shows on page 202 your Honor gave me leave to file an amended answer, and suggested an amended pleading, and I suggest the statement I made upon the record at that time be considered as the amended pleading, if that is agreeable to counsel on the other side.

Mr. McCarter: I had supposed, of course, that there would be a formal amendment prepared, which Mr. Lane at that time promised. I did not require any more formal amendment than that. I will ask leave to put in a formal answer to the amendment as now thus offered and sanctioned.

The Court: You may do so.

Mr. McCarter: Denying.

Mr. Lane: I thought, if the Court please, that the minutes of the meeting of the Board of November 1st, Board of the Guarantee Electric Company on November 1st, authorizing the discount of this $15,000 note, were in evidence.

Mr. McCarter: I think they are.

Mr. Lane: They are not marked, Mr. McCarter. I thought they were, too, but they were not marked. For fear they may not be, I offer them now, with a waiver of notice.

(Minutes referred to received in evidence and marked Exhibit S. 27, and waiver marked Exhibit S. 28.)

JOSEPH THOMPSON, sworn.

Direct examination by Mr. Lane.

Q Judge, you are a member of the Bar and have been for how many years? A Fifty.

Q And a member of the firm of Thompson & Hanstein and was such in April of 1925? A I was.

Q You knew Mr. Proffatt? A I did.

Q Known him how many years? A A number of years prior to that; I don't know how long.

Q And had represented him? A The office had represented him in some legal matters.

Q Now, do you remember the day upon which the instruments in this case were signed, that is, April 9th, I think it was, this assignment of the mortgage to Schmeidler was made, I mean do you remember the date or do you remember the occasion? A I remember that there was agreements drawn and signed by Mr. Proffatt and his wife, but the date I do not recall. Personally I had nothing to do with the preparation of those papers.

Q Before that date and after Mr. Proffatt's return from abroad or from wherever he was, did you have a talk with him with respect to his property being tied up, do you remember that? A I recall this, that Mr. Hanstein came in my room with Mr. Proffatt and said that he wanted us, wanted to know if we would represent him in that litigation, and I replied to the effect that I would not discuss the matter unless he agreed to take care of the Second National Bank and Thompson and Hanstein, and he then asked me if he did that whether we would

represent him, and I replied in effect that if he agreed to that or if he did that then that I would discuss the matter, but not until then. That was all that was said. I was very abrupt in what I had to say.

Q Did you ever have any other communication than that that you have any recollection of with respect to this matter? A No, not any that I recall. You mean with Mr. Proffatt?

Q With Mr. Proffatt, yes. A No.

Q I show you S. 24, which is a memorandum with some figures on it, and it has been said that this "April 1/24" is in your handwriting. Do you recognize that as your handwriting? A I think that is my handwriting, yes.

Q Have you any recollection at all as to that paper or any recollection as to how that "April 1/24" got on there, or what it is all about? A Not the slightest.

Cross examination by Mr. McCarter.

Q That is in your handwriting? A That "April" yes, I think, was.

Q Was this conversation that you have recited between Proffatt and yourself in the presence of Mr. Hanstein, on the day that these papers were prepared and signed? A No, it was before, my recollection.

Q Before that? A Yes.

Q How long before? A I couldn't tell you.

Q Did you see any of the parties, that is, Mr. and Mrs. Proffatt or Mr. Schmeidler, on the day that these documents were signed? A Well, I may have seen them in the office.

Q But you had no— A I had no connection with the matter whatever.

George P. Proffatt, direct.

Q Did Proffatt see you later with reference to employing you? A No, nothing more was said.

Q Beg pardon? A There was nothing more said to me by him. I gave him the answer just about as I have testified, and he went out of the office.

Q Mr. Proffatt never came back to ask you again, did he? A I have no recollection of his coming back.

GEORGE P. PROFFATT, recalled.

Direct examination by Mr. Lane.

Q Mr. Proffatt, I show you a letter dated "Fort Worth, Texas, February 25, 1924," and I ask you if it is in your handwriting? Can't you tell without reading the letter whether it is in your handwriting? A Yes, that is my handwriting.

Q I direct your attention to the latter part of this letter which reads: "Tell Huber to be sure and pay off our $1,250 note in full"—I suppose that is, isn't it? A Yes, in full.

Q "In full at the Second. Tell him the reason for it." What $1,250 note had the Second, which I suppose was the Second National? A Yes, that was the Second National.

Q What $1,250 note were you referring to? A $1,250 note?

Q Yes. A I can't recall any note for $1,250.

Q You didn't have any note of $1,250 at the Second, did you, personally? A No, sir.

Q Mr. Huber didn't have any $1,250 note at the Second endorsed by you or in which you were interested, did he?

Mr. McCarter: How does he know?

A I don't know.

Mr. Lane: In which he was interested. Of course he knows.

Q What? A No.

Q The only concern that had a $1,250 note in which Mr. Huber was interested and in which you could be interested or could refer to was the note of the Guarantee Electric, wasn't it?

Mr. McCarter: I object.

The Court: I will permit it.

A He owed Mrs. Proffatt a note, a note maybe that much, something to do with it, $1,240, maybe that was it. I think that was in the Second National, it may have been that.

Q You think it was one of Mrs. Proffatt's or some note to Mrs. Proffatt for $1,250? A Yes, I imagine that was what it was, especially if it was $1,250.

Q Now, Mr. Proffatt, the record in this case shows that the only Huber note in which your wife was interested in the Second was a $5,000 note which by January 24, 1924, had been reduced to $4,200, not $1,250. Couldn't be that note, could it?

Mr. McCarter: I don't think the record in the case shows any such thing that that

was the only note. The records shows there was such a note as counsel has referred to, but that was all. It doesn't appear, as I recall it, and I have read it since I have been down here.

Mr. Lane: The record shows that all of the obligations upon which Mrs. Proffatt had anything to do or was responsible were included in these $8,600, and those notes were pressed, and there is no $1,250 note among them.

Mr. McCarter: I think you are mistaken, Mr. Lane, as to the record showing those two notes which aggregated $8,600, and which were given at the time that she sold her stock were the only notes that ever had been in the bank, discounted or made or in which Mrs. Proffatt was interested. I don't think there is any such evidence. She was having relations with this bank.

The Court: It is impossible for me to tell at the present time.

Mr. McCarter: I would like you to refer to the record. I have read it carefully since I have been down here, and I have no such recollection. It does appear that she had those two notes there undoubtedly, but that there were no other transactions there does not appear. I think Mr. Lane is mistaken.

Q Did you wife have any obligations to your knowledge with the Second Bank—

Mr. McCarter: At any time now.

Mr. Lane: I am not talking about at any time at all. I am talking about the date of this letter.

Q —in February, 1924, except those which were included in the $8,600 which was secured by the agreement of April 9th? A I don't know.

Q You don't know? A No.

Q Whether your wife had any such other obligations or any other obligations. Now do you mean that? A Yes.

Q Did you know in February of 1924 whether she had any other? A I couldn't recall.

Q In February, I mean. A In February, 1924?

Q Yes. Can you recall whether you thought she had any other at that time or knew she had any other at that time? A I can't recall that.

Q You don't recall that? A No.

Q So that you can't tell me at all what this $1,250 note that you refer to here is? A No, I cannot.

Q And the only thing that you can think of that there may be some note which Huber may have given your wife for that amount? A Yes, that is the only thing I can think of.

Q Only thing you can think of? A Yes, sir.

Q Can't imagine any other note? A That is all.

Q Then if there is any such obligation, then you have no idea what it refers to? A You are right.

Q It certainly couldn't refer to a note of the Guarantee Electric Company, $1,250, could it? A No.

Q That is impossible? A That is impossible.

Q Mr. Proffatt, will you tell me why when you were on the stand here the first day, you told this Court that fifty thousand dollars was paid over the counter of the Bankers Trust Com-

pany in cash and put in your wife's bag and taken away?

Mr. McCarter: I don't think that is proper, testimony has been given and closed. He recalls Mr. Proffatt on this subject of this letter which I assume they discovered since. Now after six months can they come back in six, not six months, but three months, come back here and ask him why he gave certain evidence on a certain day? The evidence is there for whatever it is worth.

Mr. Lane: If counsel objects I withdraw the question.

Mr. McCarter: I do object. I don't think it is proper.

Mr. Lane: I ask this letter be marked for identification.

(Letter referred to marked S. 29 for identification.)

Mr. Lane: With the exception of the calling of the bank officials, which we haven't available at this moment, to show what obligations of Mrs. Proffatt were actually extant at the date of the writing of this letter, February 25, 1924, we rest.

Cross examination by Mr. McCarter.

Q Where is your son Pete? A Los Angeles, California.

Q How long has he been there? A Been there since last October.

Q You mean two months ago? A No, October a year.

Q Did you meet Mr. Emerson on the street, Atlantic Avenue, in Atlantic City, some time after

your return from somewhere and have the conversation with him to which he testified this morning? A I met Mr. Emerson on numerous occasions.

Q Will you answer my question? A I did.

Q And had the conversation? A And had a conversation.

Q Had the conversation that he related this morning? A Well, I didn't pay much attention to his conversation.

Q Did you hear what he said you said? A Oh, yes, we talked numerous times, but I don't know anything was particularly said about anything.

Q He says that he met you on Atlantic avenue a short time after your return and that, in course of the conversation, that you said to him that Thompson and Hanstein were giving you a lacing and that you said further they would be taken care of. Did that conversation take place? A There was nothing said in regard to that.

Q Mr. Hanstein says on page 304 of the record that he had a conversation with you with respect to the $3,000 of stock which Hanstein says he held in the company and that it was prior to your going away and then he says the following conversation occurred—listen now and see whether or not you say it did occur: "When I found out that Mr. Proffatt was undertaking to sell his stock and the stock of his wife in the company I got in touch with him and I said, 'Now, here, I am not in the electrical business and I am not interested in the electrical business. Judge and I bought $2,000 worth of stock in your company because you wanted us to do it, and if you are going to sell your stock and get out of this company, I want to get rid of mine

and I want to sell my stock,' and he told me that he wouldn't dispose of his stock without disposing of mine or buying it from me." Did you have that conversation with Mr. Hanstein? A Don't ever remember any conversation like that.

Q On page 312, Mr. Hanstein further says, speaking of interviews between himself and you, "Was there anything said at that time as to why Mr. Proffatt should assume the obligation or assume to guarantee the obligation of the $14,600? A I don't know whether it was said that day or some other day.

"Q Do you remember anything having been said at any time with respect to that? A Yes.

"Q When with reference to this date? A Well, unquestionably, either the day or before that day, certainly before and possibly on that day.

"Q What was said? A Proffatt told me on numerous occasions that he was going to take care of the indebtedness to the Second National Bank of the Guarantee Electric Company."

Did you ever make any such statement as that to Mr. Hanstein? A No, sir.

Q Did Schmeidler represent you or was he your representative in any way on the transactions of April 9, 1925? A He was no representative of mine.

By Mr. Lane.

Q Now, Mr. Proffatt, why was it that you told us some time ago in this case that your wife, $50,000 was handed over the counter of the Bankers Trust Company and that your wife took the $50,000 in cash, put it in the bag and carried it away with her?

Mr. McCarter: Object to the question.

Mr. Lane: I think now the door has been opened. This witness has been recalled for further examination by counsel, and I am testing his credibility.

The Court: For the purpose of testing his credibility I will permit it.

(Question repeated.)

A The only answer I can make to that is that I was confused on the witness stand.

Q You were confused? A Yes. Only answer I can make that I know of.

Q When did you realize your confusion? A Well, I don't know, but I was only confused when I answered, that was all, nervous, I guess.

Q That is the only explanation you have got to make, you were confused, you didn't understand my question, I suppose? You don't know what cash means?

Mr. McCarter: That don't test his credibility.

Q Is that the only explanation you can think of? A That is the only thing I can think of.

Q It wasn't true, was it? A No, I guess not.

Mr. McCarter: I object to that.

The Court: I will permit that.

Q Your wife didn't take any $50,000 in cash from the Bankers Trust Company in her bag and take it with her, did she? A No, sir.

Q Or anything like that? A No, sir.

Q What was said in this conversation with Mr. Emerson? A Tom and I didn't talk about anything only work.

Q Second National Bank obligation was not referred to? A Never a word said about the bank at all, only in regards to work.

Q Thompson and Hanstein's name was not mentioned? A No, I don't believe so, ever anything said about Walter or the Judge at all.

Q None of the indebtedness of the Guarantee Electric Company was mentioned? A No, because that was way afterwards.

Q Just answer my questions. A No.

Q Yes or no? A No.

Q In no talk with Emerson did you ever have any conversation with respect to the indebtedness of the Guarantee Electric Company? A No.

Mr. McCarter: I object to that.

The Court: It has been answered.

Q Not a word about it?

Mr. McCarter: I object to that.

The Court: I will permit it.

A No.

Q Did you have any talk with Mr. Hanstein about the time you were selling your stock in this company? A That I couldn't say. No.

Q You did not? A Not to my knowledge.

Q Did you and he ever talk about that stock which Thompson & Hanstein had in the company? A I can't recall.

Q Well, there may have been some talk? A That I wouldn't say, wouldn't say yes or no. I couldn't recall it.

Q Well, will you say you ever said that Mr. Hanstein said to you that if you, that is, Prof-

fatt, were going to sell your stock and get out of the company, he, Hanstein, wanted to get rid of his?

Mr. McCarter: One moment, your Honor. I don't think that is competent. You see, Mr. Hanstein has mentioned on a particular occasion that a particular conversation occurred between this gentleman and himself and this gentleman has taken the stand and denied that that conversation occurred. I don't think that opens the door. Mr. Hanstein hasn't said any other time, and he can't prove other conversations with Hanstein which Hanstein has not referred to. He contradicted Mr. Hanstein's specific evidence. That does not open the door for cross examining counsel to go into any other conversation he might have had with Mr. Hanstein at any other time. Hanstein isn't a party to this suit. We can't go into it, and he can't.

Mr. Lane: Mr. Hanstein is a party to this suit, by the way; he has an interest in this mortgage.

Mr. McCarter: He isn't a party at all, I beg pardon.

Mr. Lane: He is a party to the suit.

Mr. McCarter: I say he is not a party to the suit.

Mr. Lane: If by no other means he is interested in this assignment of mortgage.

Mr. McCarter: But I say he is not a party to this suit.

Mr. Lane: As a matter of fact, he is an actual party to the suit, Joseph Thompson and Walter Hanstein are defendants in the

cause on the bill of complaint. That is what the bill says.

Mr. McCarter: I beg pardon.

Mr. Lane: Now, there are two answers to counsel's objection; first answer is that I am not confining myself to a conversation, Mr. Hanstein fixed no definite time, no definite place, and I am confining myself to the supposed conversation taking place which Mr. Hanstein talks about on page 304 of the record, but the second answer is that I am entitled to show what other statements this witness may have made, some of the statements he is alleged to have made at the conversation referred to on page 304, to show the probability that Mr. Hanstein's story is true and not this witness'.

The Court: I will permit the question.

(Question repeated.)

A No such conversation like that.

Q Never took place? A No.

Q Or words to that effect? A No.

Q Is that right? A Yes.

Q Now, Mr. Schmeidler was representing you in February of 1924 and while you were away up to the time you returned, wasn't he?

Mr. McCarter: It appears he had a power of attorney.

A Yes, sir, he had a power of attorney.

Mrs. Katherine B. Proffatt, recalled, direct.

KATHERINE B. PROFFATT, recalled.

Direct examination by Mr. McCarter.

Q On page 290, Mr. Schmeidler says, in reply to the question, "Did you go in Caspian avenue, whatever it was? A I sent someone.

"Q Whom did you send? A A man in my office.

"Q Who? A Charles Luckenbill.

"Q When did you send him? A Well, before the time I sent this notice.

"Q How long before? A A number of times, as I recall it."

Did a man named Charles Luckenbill or any man purporting to come from Mr. Schmeidler ever see you at your house on Caspian avenue about this mortgage or otherwise? A No.

Mr. McCarter: So far as I know, that is all we have.

The Court: I understood you wanted some officers of the bank?

Mr. Lane: It is only to prove that one fact. They are trying to get the information. It will only take two or three minutes to put it in when it does come in.

The Court: What information is that?

Mr. Lane: Merely to show that Mr. Huber, that there was no note in the bank made by Huber to Mrs. Proffatt or vice versa upon which the two of them were interested amounting to $1,250 or any such sum on February 25, 1924, or anywhere around that time.

Mr. McCarter: Now, Mr. Lane, if your bank is at work I wish you would also ask

Mr. Giberson if he remembers his agreement to produce that alleged collateral book.

The Court: If you desire I will sit at one-thirty; it is now twelve-thirty.

(Recess taken until 1:30 o'clock P. M.)

AFTERNOON SESSION.

Trial of the cause resumed at 1:30 o'clock P. M.

WILLIAM GIBERSON, recalled.

Direct examination by Mr. Hanstein.

Q Mr. Giberson, do you have the ledger accounts or the ledger cards of the Second National Bank showing the notes in that bank by the Guarantee Electric Company on February 25, 1924? A I do.

Q Do you also have the ledger account showing the notes on which Mrs. Proffatt is either maker or endorser? A I do.

Q At the same date? A Yes, sir.

Q Do you have on either of those cards a note of $1,250? A Due when?

Q I don't state when it is due, but due to the bank at the time of February 25, 1924, I don't mean falling due on that date, but was there owing to the bank on February 25, 1924, a note of $1,250 from any of these people? A I see one March 25, 1924, $1,250.

Q Now let's see what card that is on. A On the Guarantee Electric.

Q Where is that note on the card? A Originally $1,300 note.

William Giberson, recalled, direct.

Q And it fell due—a $1,250 note of the Guarantee Electric Company, to whose order was that made? A To themselves.

Q To the order of themselves in the sum of $1,250 was due to the bank at that time? A March 25, 1924.

The Court: As a matter of fact, it was dated March 14th, was it not?

A That is correct.

(Note card offered, received in evidence and marked Exhibit S. 30.)

Q Now do you have Mrs. Proffatt's card?

(Card produced.)

Q At that time did Mrs. Proffatt have a note in the bank for $1,250? A Not according to our records.

Q This is a complete record of her account at that time? A Yes.

(Note card offered and received in evidence and marked Exhibit S. 31.)

Q Mr. McCarter has asked that you produce here some records with regard to collateral on the Guarantee Electric Company notes, was it, Mr. McCarter?

Mr. McCarter: I wanted his collateral book.

A Mr. McCarter, this is the form we had at that time, nothing but a card and envelope.

William Giberson, recalled, direct.

Q How did you work your card system on this collateral? A Why, we put down the amount of the loan, to whom it was given and the date, and then we listed the collateral underneath.

Q On this card? A On this card.

Q Is this a specimen of those cards? A This is a specimen of those cards.

Q And that is what you used at that time? A Yes, sir.

Mr. Hanstein: I offer one in evidence showing the form and the system.

(Card received in evidence and marked Exhibit S. 32.)

Q What did you do with those cards while the loan was in the bank? A While the loan was in the bank that was filed with the collateral.

Mr. McCarter: Filed what?

A That was on the front of the envelope, we had an envelope with a slot in it and that slipped right in, and that was put away with the collateral.

Q The card showing the collateral was right on the face of the envelope.

Q After the loans were disposed of and out of the bank what did you do with these cards? A We filed them.

Q Do you have an accumulation of cards relating to this period of time? A Quite a few.

Q Have you gone through those cards? A I have.

Q Did you find any card showing any collateral deposited by the Guarantee Electric or

by anyone else for the Guarantee Electric? A I did not.

Cross examination by Mr. McCarter.

Q You spoke of a collateral book in addition to cards on your previous examination. Do you now abandon the book and stick to the cards alone? A No, we have the book now and we don't use the cards.

Q When did you take the book? A We have had the book, I imagine, about two years.

Q Two years? A Yes, sir.

Q How long had the cards been in vogue? A As long as I can remember.

Q What? A As long as I have been there.

Q So your evidence now is that you find nothing in the files of your loans to indicate that there was collateral with this loan? A I haven't found anything.

Q When do your records show this note was paid? A What note is that? Any note?

Q When do your records show that this note which originally started at $15,000 by the Guarantee Electric Company was paid? A My records doesn't show it was paid.

Q Does not? A No.

Q You have no entry made after April 6, 1926? A Pardon me. Mr. McCarter.

Q You have no entry as of or about April 6, 1926, that that note was paid by a sale of security? A Well, according to our bills discounted record, I imagine it would show paid by the purchase of a mortgage or something to that effect.

Q I am not asking you what you imagine. You have no record here that indicates anything about it, then? A No.

Q Suppose it was paid in April, 1926, are you sure that the collateral card such as this sample remaining until 1926 and afterwards, would then be put back in the files? A It would be filed away with the cards that have been discarded, yes, sir, and marked paid such and such a date.

Q Now, does your record of notes that you produced include notes that you had for collection? A No.

Q What? A No, sir.

Q I show you a note dated May 22, 1924, on demand to the order of Katherine Proffatt for $1,246 and signed Huber. Did you ever see that note or was that with your bank for collection? A It is not endorsed. I don't think it was in our bank for collection.

Q You then don't know anything about that note? A No, I don't know a thing about that note.

Q Never heard of it before? A Never saw it.

MRS. KATHERINE B. PROFFATT, recalled.

Direct examination by Mr. McCarter.

Q Mrs. Proffatt, Mr. Proffatt has been shown a letter dated February 25, 1924, in his handwriting, the postscript of which says: "Tell Huber to be sure and pay off our $1,250 note in full at the Second. Tell him the reason for it." I show you a note dated May 22, 1924, on demand, payable at the Second National Bank, to the order of Katherine B. Proffatt, for $1,246.80, signed Huber. Do you remember

Mr. Huber giving you that note? A Yes, I think I do. It was money that I loaned Mr. Huber.

Q Was this the original loan or was this a renewal? A Now I think that has been renewed. I think it was $1,250.

Q $1,250 originally? A I think it was.

Q Was this note paid? A No, I don't think it was paid.

(Note offered in evidence.)

By Mr. Lane.

Q I understand you to say this was the original note? A That was the note that I loaned Mr. Huber some money.

Q Is this the original note or is this a renewal? A I think it has been renewed. I don't think it was $46, I think it was fifty, I think it has been renewed.

Q You think it was $1,250 and then it was reduced to $1,246.80? A Yes, I think that is what it was.

Q Have you any recollection as to how there was a note for $1,250 renewed at $1,246.80? Do you know the details of that, how that came about? A No, I don't remember.

Q Only a difference of $3.20? A What would be the interest on that? Probably he just paid the interest. That wouldn't be right, either, would it?

Q No, trying to find out.

Mr. McCarter: Don't let's guess about it.

A I don't know. Really I don't know.

Mrs. Katherine B. Proffatt, recalled, cross.

Q You brought a suit on this note, did you not? A I think we did.

Q Where were you in February, 1924? A I will have to think. I think I was in Florida, Key West, Florida. Let's see, where were we?

Q Do you remember how the other notes were drawn on which this is supposed to be a renewal? A I don't remember, really I don't.

Q Do you remember they were on demand, the first note was on demand? A No, I don't know.

Q Don't know anything about that? A No, I don't.

Q You don't remember talking with Mr. Huber or having any conversation with him in which it was stated these prior notes had been for such a length of time, two months or three months, now he was going to make them on demand, anything of that kind, remember any of the details of the talk with him? A No, the only talk I ever had with Mr. Huber, he expected a lot of money, and there was, all these loans were just renewed, a little bit paid on, expecting him to get a whole pile of money, that is all I remember about them.

Q Yes, but I direct your attention to the fact that this note which has been offered in evidence, is payable on demand. Now, that isn't usual, to renew notes payable on demand, because they are good until payment. Now, did you have a talk with him about changing the note with a due date to a note on demand or anything of that sort? A No, I don't remember. I don't know.

(Note admitted in evidence and marked Exhibit B. 24.)

George P. Proffatt, recalled, direct.

GEORGE P. PROFFATT, recalled.

Direct examination by Mr. McCarter.

Q Now, Mr. Proffatt, I call your attention to this note that has just been the subject of evidence, marked B. 25. Look at it and see whether you are able to tell whether or not at the time that you wrote the letter to Mr. Emerson, which in the postscript refers to a $1,250 note, you had the note to which you alluded in your possession or at your command. Now see if you understand the question. A No, I don't understand your question.

Q You were trusting to memory, were you? A Yes, I didn't have the note in my possession.

Q Who had the note, as you understood it? A As I understood it, it was in the Second National Bank and was given by Mr. Huber to Mrs. Proffatt.

Q Do you remember the fact that Mrs. Proffatt had some business transactions with Mr. Huber which resulted in Huber giving her a note for $1,250 or $1,246 or something of that kind? A Yes.

Q You remember? A Yes.

Q What note, having now this note before you, are you able to say what note you referred to in the postscript of the letter that was shown to you by Mr. Lane? A The only thing in reference to this note in regards to what I said to Herbert—

Q No, for God's sake, Proffatt, answer my questions.

(Question repeated.)

A This is the note.

George P. Proffatt, recalled, cross.

Q Did you ever say to Mr. Schmeidler after your return in 1925 that you expected to go into business with him, or words to that effect? A I did not.

Cross examination by Mr. Lane.

Q Are you sure this is the note that you had reference to? A To the best of my recollection.

Q No question can be had with respect to that? A Not that I know of.

Q This note is dated three months after your letter, so this can't be the note, can it? A Undoubtedly must be the note, and had it renewed or something.

Q All right, undoubtedly it must be. Do you know anything about it? A I knew that Huber owed Mrs. Proffatt about that amount.

Q Do you know anything about this renewal you have just been talking about and suggested? A No, I didn't know anything about the renewal at that time.

Q Did you ever know that there had been a note renewed? A No, I did not.

Q What was the transaction as you understood it? A I think Mrs. Proffatt advanced, loaned Mr. Huber some money.

Q Do you know anything about it yourself? A No, I don't the exactly amount, no.

Q How did you come to write this letter from Fort Worth, Texas? Was Mrs. Proffatt with you? A Yes, I think Mrs. Proffatt was with me.

Q Do you know? A Yes, Mrs. Proffatt was with me.

Q So that you and Mrs. Proffatt talked about this matter before you sent this letter? A No doubt but what we did.

George P. Proffatt, recalled, cross.

Q But you don't know and never heard of any renewal? A No.

Q Never heard any conversation of any renewing the note which was payable in a certain length of time? A No.

Q And changing it into a note on demand, anything of that kind, never heard any such conversation? A No.

Q Do you know whether Mrs. Proffatt paid Mr. Huber by check or by cash? A No, I couldn't say.

Q You don't know anything about that? A No, sir.

Q Transaction was one wholly between Mrs. Proffatt and Huber? A Yes, sir.

Q And you had no interest in it? A No, sir.

Q And yet you refer to it as "our $1,250 note"? A I guess the word "our" was just put in there, that is all.

TESTIMONY CLOSED.

Exhibit S. 1.

EXHIBIT S. 1.

(Regular form of assignment of mortgage)

Assignment of mortgage Katherine B. Proffatt to George P. Proffatt.

Consideration $1.00 and other good and valuable consideration. For an undivided one-half interest in indenture of mortgage dated September 14th, 1923, made and executed by Robert Heilig, Bruno Garr and Rosa, his wife to George P. Proffatt and Katherine B. Proffatt and recorded September 17th 1923 in Book 274, page 297, in the County Clerk's Office at Mays Landing, N. J., to secure the sum of $50,000.00, conveying premises in the South line of Atlantic Avenue, distant 90.47 feet East from the Easterly line of New York Avenue by 18.7 feet on Atlantic Avenue, and 150 feet in depth, regular; subject to the rights of Clifton C. Shinn, Receiver of the Guaranty Electric Company, Incorporated, under that certain writ of sequestration, issued pursuant to an order made by the Court of Chancery on the twenty-fifty day of February, 1925.

Dated: April 9th, 1925.

Acknowledged April 9th, 1925 before Gladys M. Barbour, Notary.

Recorded County Clerk's Office of Atlantic County on 23rd day of April, 1925 in Book #73 of Assignments of Mortgages, page 105 &c.

Exhibit S. 2.

EXHIBIT S. 2.

(Regular form of assignment of mortgage.)

Assignment of mortgage from George P. Proffatt to Isidor Schmeidler.

Consideration: $1.00 and other good and valuable consideration.

Assigning a certain mortgage dated September 14th, 1923 made and executed by Robert Heilig, Bruno Garr and Rose, his wife, and recorded September 17th, 1923 in the County Clerk's Office at Mays Landing, N. J. in Book 274 &c., page 297, to secure the sum of $50,000.00, conveying premises in the South line of Atlantic Avenue, distant 90.47 feet East from the Easterly line of New York Avenue by 18.7 feet on Atlantic Avenue, and 150 feet in depth, regular; subject to the rights of Clifton C. Shinn, Receiver of the Guaranty Electric Company, Incorporated, under that certain writ of sequestration, issued pursuant to an order made by the Court of Chancery on the twenty-fifth day of February, 1925.

Dated: April 9th, 1925.

Acknowledged: April 9th, 1925 before Gladys M. Barbour, Notary.

Recorded in The Clerk's Office of Atlantic County at Mays Landing, N. J. in Book 73 of Assignments of Mortgages on pages 106 &c.

Exhibit S. 3.

EXHIBIT S. 3.

(Regular form of assignment of mortgage)

Assignment of mortgage from Isador Schmeidler
to
The Second National Bank of Atlantic City, N. J.

Consideration: $26,246.34

Assigning that certain mortgage dated September 14th, 1923 made by Robert Heilig, Bruno Garr and Rose, his wife to George P. Proffatt and Katherine B. Proffatt and recorded September 17th, 1923 in the Atlantic County Clerk's Office at Mays Landing, N. J. in Book 274, page 297, to secure the sum of $50,000; The undivided one-half interest of Katherine B. Proffatt in said mortgage was assigned by her by assignment dated April 9th, 1925, to George P. Proffatt, which assignment was recorded in the Atlantic County Clerk's Office in Book 73, page 105 &c; and which said mortgage was assigned by George P. Proffatt to Isidor Schmeidler by assignment dated April 9th, 1925, which assignment was recorded in the Atlantic County Clerk's Office in Book 73, page 106 &c. Dated: April 5th, 1926.

Acknowledged Apr. 5, 1926 before Gladys M. Barbour, Notary.

Recorded in the Clerk's Office of Atlantic County at Mays Landing, N. J. in Book 80 of Assignments of Mortgages, page 257, on April 5th, 1926.

Exhibit S. 4.

EXHIBIT S. 4.
5/17/28 L

THIS AGREEMENT made this 9th day of April, 1925, between GEORGE P. PROFFATT, party of the first part and ISIDOR SCHMEIDLER, party of the second part, for and in consideration of the sum of one dollar each to the other in hand paid, the receipt whereof is hereby acknowledged,

WITNESSETH, That, Whereas, the said party of the first part has assigned unto the party of the second part that certain mortgage made by Bruno Garr and Rosa, his wife and Robert Heilig to George P. Proffatt and Katherine B. Proffatt dated September 14th, 1923, and recorded September 17, 1923, in Book 274 of Mortgages, page 297 to secure the sum of $50,000. covering premises in the southerly line of Atlantic Avenue distant 90.47 feet east from the east line of New York Avenue being 18.7 feet on Atlantic Avenue and 150 feet in depth, regular, for the purpose of securing unto the Second National Bank of Atlantic City, N. J. the payment of the sum of $23,200., together with interest on $8600. from April 1st, 1924 to date of payment, and also the sum of $2,000. to Joseph Thompson and Walter Hanstein, trading as Thompson & Hanstein;

It is understood and agreed that the said party of the first part does hereby authorize the said party of the second part to sell or dispose of said mortgage at such time as shall appear to be to the party of the second part advisable for the purpose of making the payments aforesaid, and to that end the said party of the second part is hereby authorized to do any and all things necessary for the carrying out of the purposes of this

Exhibit S. 4.

agreement and the rendering over to the party of the first part of any surplus remaining after the sale of said mortgage and the payment of the debts aforesaid.

And the said party of the second part does hereby agree with the party of the first part that he will fully and completely carry out the terms of this agreement and will hold said mortgage for the securing of the debts above set forth and will, at the time that seems most advisable to him, sell said mortgage and pay the debts aforesaid, and will pay over to the party of the first part the surplus remaining after said sale.

In Witness Whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

George P. Proffatt (Seal)
Isidor Schmeidler (Seal)

Signed, sealed and delivered
in the presence of

Gladys M. Barbour

State of New Jersey, }
County of Atlantic. } *ss:*

Be It Remembered that on this ninth day of April, A. D. 1925, before me a Notary Public of N. J. personally appeared George P. Proffatt, who I am satisfied is the person mentioned in and who executed the within agreement, and I having first made known to him the contents thereof, he acknowledged that he signed, sealed and deliv-

Exhibit S. 5.

ered the same as his voluntary act and deed. All of which is hereby certified.

Gladys M. Barbour
Notary Public of New Jersey
My commission expires Jan. 26, 1930

10

EXHIBIT S. 5.

March 10th, 1926.

Walter Hanstein, Esq.,
Law Building,
Atlantic City, N. J.

Dear Sir:—

20

In re: Proffatt-Second National Bank matter.

I am in receipt of a letter from Mr. Proffatt, touching the Second National Bank matter. He advises me that his statement to me is correct, and, among other things, says:

"My statement I made to you is still correct, and cannot be disputed in any way. Mr. Hanstein knows when he said that to you he was only telling the untruth. Here it is again as I have
30 told you before. The Company was formed for $50,000, Mrs. Proffatt $25,000 and Geo. P. Proffatt $25,000, less one share for Hanstein. Mrs. Proffatt sold her shares as follows: 5000 to Geo. Lichenstein, 5000 to Thomas Emerson, 5000 to Luellen Huber, 5000 to Bart A. Bullock, 2000 to Marshall Berkins, 1000 to William F. Ash, 1000 to Walter Hanstein, but he made it out for 2000,—$500 to Frank Shinnen.

Mrs. Proffatt was given notes for all the
40 shares, only $1000 cash she received from Han-

Exhibit S. 5.

stein, and she endorsed the notes and the Bank loaned her the money on them. Every note was paid off to the Bank only two, one for Thomas H. Emerson for $4,400, and one of Luellen Huber for $4,200, making $8,600 in all. When we came back from California, we took Mr. Emerson and Mr. Huber to Mr. Cochran and made a demand note out of the promissory notes with the specific understanding that they were to pay no less than $100 a month on their notes and the minute we left they did not pay a cent on them or not even the interest, so you see how much the Bank cared or whoever had charge.

That left for Geo. Proffatt $24,500. Here is what happened to my shares. Eleven months after the Company was running, I sold $5000 to Thomas H. Emerson on a note of which I still hold, leaving a balance of $19,500 of which I sold to Luellen Huber for $15,000 on notes of which I still hold not paid, so how could I possible receive any of the money of the loan of $14,000.

That loan of $14,000 was made by the Company and I dont think I was in Atlantic City at the time the loan was made, but I have not my records with me, so you can plainly see Mr. Bourgeois, I did not have anything to do with the loan, and as far as the loans going to pay for my shares, Hanstein knows different from that and that I can prove to your entire satisfaction, because here is what happened and Hanstein is the man that knows it.

Mr. Huber wanted to make a loan so he could run the Company as they were doing a good business, so I went to Hanstein and I told him, so he said "George, make him put up security and the Equitable Trust will loan him the money." He put up the $19,500.00 shares and

Exhibit S. 5.

five or six thousand in shares of different other stock and Thomas Emerson put up his 5000 worth of shares that made the $24,500, and I endorsed the note. This note was given on January 10th, 1924, for $14,000 with my endorsement, and was turned over to the Equitable Bank the same day to Huber for $13,500, and when the Company failed, Mr. Schmeidler, who was acting as Power of Attorney for me, drew out of my account at the Equitable Trust Company close on to $7,000 to pay off on the note.

So you see I was out $7,000 and besides I hold notes that the Company owes me for $7500 more, making my loss $14,500 plus my stock of $24,500, so I did not gain anything.

When I came back from California, Mr. Cochran said the boys are not paying so good. I told him I thought they would be all right as I held some of the notes myself, and that was all that was said about it.

That loan of $14,000 was made as I get it, from Huber. They were doing a lot of business and needed payroll from time to time, so I had no more to do with that loan than you did, and Hanstein knows it. I can prove my end of it at any time you let it go to Court.

When I came back, Schmeidler came to me with the proposition, and I told him as I have told you. I think the Bank should get the $8,500, but that was all, and in the meantime, I told you about selling my property at a big profit and I saw Schmeidler and he said he could fix everything if I would sign the agreement. That I did with the specific understanding that they were to squash my case and release my stuff of which they did not do, and when I went to Hanstein, after the agreement was signed three or four

Exhibit S. 5.

times, he got very sore. It was nothing else Mr. Bourgeois but a double cross, and as far as me receiving anything or any part of the $14,000 loan from the Bank, is ridiculous, and no one knows it better than Hanstein."

You will note that Mr. Proffatt's contention is that he signed the agreement upon a distinct promise made to him that his property was to be released from the sequestration, so that he might make immediate sale of it. This, as you know, was not done, and if that is the consideration for the making of the agreement, it, of course, has failed. He states to me in the letter: "I did want to do the right thing and pay $8,600 and $1,000 to Hanstein, but it may be better to let the matter go to trial," and refuses to pay the amount mentioned in the agreement.

In view of his statement, I thought it might be that the matter might be settled for this sum of $9,600. If so, I will advise him, and think I can induce him to pay it and clean the matter up.

Kindly let me hear from you, and oblige,

Yours very truly,

GAB-N.

Exhibit S. 7.

EXHIBIT S. 7.

Exhibit A.

NOTICE OF SALE.

TAKE NOTICE that on Monday, the 5th day of April, 1926, at 10 A. M. at the banking house of The Second National Bank of Atlantic City, N. J., situate on the Northeast corner of Atlantic and New York Avenues, Atlantic City, New Jersey, I will offer at public sale to the highest bidder therefor, in cash, that certain mortgage made by Bruno Garr and Rosa, his wife, and Robert Heilig to George P. Proffatt and Katherine B. Proffatt, dated September 14th, 1923, recorded on September 17th, 1923 in the Clerk's Office of Atlantic County at Mays Landing, New Jersey, in Book 274 of mortgages, page 297, covering premises in the south line of Atlantic Avenue, distant 90.47 feet east from the east line of New York Avenue, being 18.7 feet on Atlantic Avenue by 150 feet in depth, which said mortgage is to secure the sum of $50,000.; an undivided one-half interest in which said mortgage has been assigned by the said Katherine B. Proffatt to George P. Proffatt, and the entire said mortgage has been assigned by the said George P. Proffatt to me.

Said sale will be made to the highest bidder therefor in cash, and the assignment will be delivered at that time. The privilege of rejecting any and all bids is reserved.

ISIDOR SCHMEIDLER.

Exhibit S. 8.

EXHIBIT S. 8.

Exhibit B.

TO GEORGE P. PROFFATT:

TAKE NOTICE that pursuant to that certain agreement between yourself and me bearing date April 8th, 1925, you authorize me to sell or dispose of that certain mortgage therein referred to, covering premises in the southerly line of Atlantic Avenue distant 90.47 feet east from the easterly line of New York Avenue, and being 18.7 feet on Atlantic Avenue by 150 feet in depth, at such time as shall appear to me to be advisable.

Take further notice that I deem the Fifth day of April, 1926, at the hour of 10 o'clock A. M., an advisable time at which to sell said mortgage, and I will at that time and at the banking house of The Second National Bank of Atlantic City, N. J. offer said mortgage at public sale to the highest bidder therefor for cash.

ISIDOR SCHMEIDLER.

Exhibit S. 9.

EXHIBIT S. 9.

Capital Stock
$125,000

Incorporated under the Laws of New Jersey

No. 17 Capital Stock 50 Shares
Full Paid and Non-assessable

GUARANTEE ELECTRIC CO., INC.

This Certifies that Thomas H. Emerson is the owner of 50 Shares of the Capital Stock of this Company transferable on the books of the Company by the holder hereof in person or by Attorney upon surrender of this Certificate.

Witness the Seal of the Company and the signatures of its duly authorized officers this 15th day of Sept. 1923

Shares
$100
Each

L. R. Huber
President

Thomas H Emerson
(Seal) Treasurer

For value Received....hereby sell, assign and transfer unto.....
..... the Shares of the Capital Stock represented by the within Certificate, and do hereby irrevocably constitute and appoint.....
..... Attorney to transfer the said stock on the Books of the within named Company, with full power of substitution in the premises.

Dated Oct 24th 1923

Thomas H Emerson

In Presence of Marie M. Smith

Exhibit S. 10.

Notice: The signature to this assignment must correspond with the name as written upon the face of the certificate, in every particular, without alteration or enlargement or any change whatever.

EXHIBIT S. 10.

Incorporated under the Laws of New Jersey

Capital Stock $125,000

No. 18 Capital Stock 195 Shares Full Paid and Non-assessable

GUARANTEE ELECTRIC CO., INC.

This Certifies that Llewellyn R. Huber is the owner of 195 Shares of the Capital Stock of this Company transferable on the books of the Company by the holder hereof in person or by Attorney upon surrender of this Certificate.

Witness the Seal of the Company and the signatures of its duly authorized officers this 24 day of October 1923

L. R. Huber
President

Shares $100 Each

Thomas H Emerson
(Seal) Treasurer

Exhibit S. 11.

For value Received....hereby sell, assign and transfer unto..... ..... the Shares of the Capital Stock represented by the within Certificate, and do hereby irrevocably constitute and appoint..... ..... Attorney to transfer the said stock on the Books of the within named Company, with full power of substitution in the premises.

Dated.....19....

Llewellyn R. Huber

In Presence of.....

Notice: The signature to this assignment must correspond with the name as written upon the face of the certificate, in every particular, without alteration or enlargement or any change whatever.

EXHIBIT S. 11.

(Original letter)

Capodmonte, Rome, July 31/24.

Dear Walter:

Yes, cable reced. You see it takes a week to get to me from Rome, that is the reason for delay in your cablegram. But I will sail as soon as I can get a boat out. It takes two weeks from Naples to Philia. I may have to go to London as the Boats sail more often. Will cable you the day I sail. It will take a week from here to London. But I will try and get a boat here.

Exhibit S. 12.

I see no reason for a suit by the Second National. But you just keep things going until I arrive. We are getting things together now. Kate is very much improved, and it is a shame to have to bring her back. She will not stay, so we will come together.

Best regards to the Judge and all the rest.

Yours George.

EXHIBIT S. 12.
5/17/28

(Original letter)

Pete give this to Walter.

Dear Walter:

A few lines letting you know I am well and so is the Mrs. I have heard through Pete that there is a lot of talk around. Get this straight, Walter, *I have more man hood in my feet than some people have in their hole body.* I did not run away, and I am not any ingrate. I know *you* and the *Judge* was my friend and which I told you also. I also remember the Bank when I was in need to buy my property. and also Jake Berkins and Walter Jarman, so do not be alarmed I will be in New York around April 10th or 12th, and I will phone you our N Y arrival. This letter to ask you to keep to yourself and Judge.

A good thing to remember, Speak no evil of the absent, for it is unjust. With best kind and personal regards to you and the Judge and Mr. Cochran from the Mrs and I, I beg to remain,

resp. yours

George P. Proffatt

Exhibits S. 13. S. 14.

EXHIBIT S. 13.
5/17/28 L

POST CARD

London W C Sep 13 1 15 AM 1924

W. Cochran
2nd National Bank
Atlantic City, New Jersey
U. S. of America

London, England 10/14/24

Dear Mr. Cochran,

Will be back just as soon as I can get a good boat.

Geo.

EXHIBIT S. 14.
5/17/28

(Original letter.)

November 18, 1925

Dear Isadore:

Your letter recd. this morning. Please call at the house any evening that suits you, and I will be pleased to see you. Katie is not feeling so good and I have been layed up with a cold. Looking to see you.

Yours,

George
222 Caspian Ave.

Exhibit S. 15.

EXHIBIT S. 15.

5/17/28 L

THOMPSON & HANSTEIN
Counsellors at law
Law Building
Atlantic City, N. J.

November 20th, 1925.

Mr. George P. Proffatt,
222 Caspian Avenue,
Atlantic City, N. J.

Dear Sir:

I am directed by the Second National Bank of Atlantic City to call your attention to the over due obligation that they hold against you. There has been no effort on your part to take care of this matter, or to pay any attention to it since the matter was compromized and adjusted months ago.

Unless this matter is taken care of at once, we are authorized to proceed against the security which is held by Mr. Schmeidler. This, by all means, you should avoid. Let us hear from you at once.

Yours truly,

THOMPSON & HANSTEIN

T:H By Joseph Thompson

Exhibit S. 16.

EXHIBIT S. 16.
5/17/28 L

ISIDOR SCHMEIDLER
Real Estate
18-20 Real Estate and Law Building
Atlantic City, N. J.

May 5, 1926

George Proffatt,
222 Caspian Ave.,
Atlantic City, N. J.

Dear George:
I have just received check from the Second National Bank in the amount of $408.85 which represents the final dividend of the Guarantee Electric Co.
In accordance with our agreement, I am, herewith, enclosing a check in the above amount.

Very truly yours,

Isidor Schmeidler
Isidor Schmeidler

WS:CM
Encls.

Exhibits S. 17. S. 18.

EXHIBIT S. 17.
7/17/28

(Copy of letter)

November 17, 1925.

Mr. George Profatt,
222 Caspian Avenue
Atlantic City, N. J.

Dear George:
Please get in touch with me as soon as possible.

Sincerely,

EXHIBIT S. 18.
5/17/28

Copy of letter.

November 10, 1925

Mr. George Proffatt,
324 No. Rhode Island Avenue,
Atlantic City, N. J.

Dear George:
Have been trying for sometime to get in touch with you regarding the mortgage held by me and as I would like to be relieved of the responsibility would appreciate if you would get in touch with me at once so that the matter can be cleaned up.

Sincerely,

Exhibits S. 19. S. 20.

EXHIBIT S. 19.
5/17/28

(Copy of letter.)

October 23rd, 1925.

Mr. George Proffatt,
244 No. Rhode Island Avenue,
Atlantic City, N. J.

Dear George:

The Second National Bank have called me several times regarding the payments that are due them and it is necessary that something regarding this matter be done at once. I do not feel that I should be caused this annoyance and I would appreciate if you would get in touch with me as soon as possible in order to clear the matter up.

Yours truly, *tr*

EXHIBIT S. 20.
5/17/28.

(Copy of letter)

Sept. 4th, 1925.

Mr. George Proffatt,
Freeman Building,
Atlantic City, N. J.

Dear George:

Will you kindly get in touch with me as soon as possible regarding Atlantic Avenue Mortgage as I wish to be relieved of the matter as soon as possible.

With kindest personal regards, I am,

Very truly yours,
Isidor Schmeidler.

Exhibit S. 21.

EXHIBIT S. 21.
5/17/28

(Original note)

$14600. 00/100 Atlantic City, N. J. June 16, 1924.

One (1) months after date we promise to pay to the order of ourselves at The Second National Bank of Atlantic City, N. J. Fourteen thousand six hundred and 00/100 dollars without defalcation or discount, value received.

No. 5862 Due 7/16

Guarantee Elec. Co. Inc.

L. R. Huber President
Thomas H. Emerson Treasurer.

ENDORSED:

GUARANTEE ELECTRIC CO. INC.
L. R. Huber President
Thomas H. Emerson, Treasurer.

(Original)

"BE IT RESOLVED by the Board of Directors of the Guarantee Electric Co., Inc., that the officers of this Company be and hereby are authorized to borrow $15,000.00 for two months from the Second National Bank of Atlantic City on the promissory note of this Company.

BE IT FURTHER RESOLVED that the officers be and hereby are authorized to make any and all necessary renewals of the same."

I, Walter Hanstein, Secretary of the Guarantee Electric Co., Inc., do hereby certify that the foregoing is a true copy of a resolution passed at a meeting of the Board of Directors

Exhibit S. 23.

of said Company held on the first day of November, 1922.

Walter Hanstein
(SEAL) Secretary.

EXHIBIT S. 23.
6/15/28 L

THE SECOND NATIONAL BANK
Atlantic City, N. J.

Mr. Isidor Schmeidler,
18 Law Bldg.
Atlantic City, N. J.

Dear Sir:

You are holding a mortgage formerly owned by George P. Proffatt for the purpose of securing unto the Second National Bank the payment of the sum of $23,200. By the terms of the agreement under which you hold said mortgage you are authorized to sell this mortgage at such time as appears to you to be advisable for the purpose of making the aforesaid payment. In as much as no attention has been paid to this matter by Mr. Proffatt since making the assignment to you, and no effort has been made by him to take care of his indebtedness to us, outside of assigning the mortgage to you, we must respectfully request that you promptly proceed to sell said mortgage and liquidate the indebtedness to us.

Very truly yours,
Second National Bank,
Atlantic City, N. J.
Lewis Evans
President.

Exhibits S. 24. S. 26.

EXHIBIT S. 24.

6/15/28 L

14600. due 7/16/24
2 12
5000 " 7/28/24
2 12
500 4/12/24

20104.24

4200 maker L. R. Huber
4400 " Thos. Emerson
to Katherine B. Proffatt
with int. from 4/1/24
Apl. 1/24

EXHIBIT S. 26.

1/23/28

The right to transfer this stock is subject to the terms of an agreement on file with the Guarantee Electric Co., Inc.

CAPITAL STOCK
$125,000

Incorporated under the laws of New Jersey

Capital Stock

No. 12

Full Paid and Non-Assessable 20 shares

GUARANTEE ELECTRIC CO., INC.

This Certifies that Thompson & Hanstein is the owner of Twenty shares of the Capital Stock of this Company transferable on the books of the Company by the holder hereof in person or by

Exhibit S. 27.

Attorney upon surrender of this Certificate. Witness the Seal of the Company and the signatures of its duly authorized officers this seventeenth day of October, 1922

Thomas H. Emerson, Treasurer — L. R. Huber, President.

SHARES
$100
Each

EXHIBIT S. 27.
1/23/28 L

MINUTES OF A SPECIAL MEETING OF THE BOARD OF DIRECTORS OF GUARANTEE ELECTRIC CO., INC.

A special meeting of the Board of Directors of the Guarantee Electric Co., Inc., was held on the first day of November, 1922, at the registered office of the Company, 13-17 Real Estate and Law Building, Atlantic City, New Jersey, at 4:30 P. M.

This meeting was held pursuant to a waiver of notice signed by all the Directors.

There were present the following:

George P. Proffatt
L. R. Huber
Thomas H. Emerson
Bart A. Bullock
Marshall Burkins
Walter Hanstein
William F. Ash.

Exhibit S. 27.

On motion of Mr. Hanstein the following resolution was put and unanimously carried:

"Be it resolved by the Board of Directors of the Guarantee Electric Co., Inc., that the officers of this Company be and hereby are authorized to borrow $15,000.00 for two months from the Second National Bank of Atlantic City, on the promissory note of this Company.

Be it further resolved that the officers be and hereby are authorized to make any and all necessary renewals of the same."

There being no further business the meeting upon motion adjourned.

Walter Hanstein
Secretary.

Exhibit S. 28.

EXHIBIT S. 28.
11/23/28 L

WAIVER OF NOTICE OF MEETING OF
BOARD OF DIRECTORS
OF
GUARANTEE ELECTRIC CO., INC.

WE, THE UNDERSIGNED, being all the Directors of the Guarantee Electric Co., Inc. do hereby waive notice of the time and place of a special meeting of the Board of Directors, and consent that the first day of November, 1922, be and it hereby is fixed as the time and the registered office of the Company, 13-17 Real Estate and Law Building, Atlantic City, New Jersey, be and it hereby is fixed as the place for holding said meeting.

Dated November 1st, 1922.

I Schmeidler
Geo. P. Proffatt
Thomas H. Emerson
L. R. Huber
Bart. A. Bullock
Walter Hanstein
William F. Ash
Marshall Burkins

Exhibit S. 29.

EXHIBIT S. 29.

11/23/28 L

Ft. Worth, Texas
Feb 25/ 1924

Dear Friend Isadore,

Your letter reced and contents noted. I am at a loss to understand your note stating that I was to have the proceeds of the $13,000. on a checking account I gave all the money to Huber and in return the Co. paid me some back I intended to keep at least 3 or 4 thousand in there at all times. But unfornate I had to draw it out I do not want to offend Mr. Reed in any way nor do I want to offend you. But around about Nov. 15 if you will look at your book the interest is due on 1428. which will to the Equitable also all the other notes out sides of Hubers personal notes. And had they not been in the bank at Second I would have gladly let the Equitable have them. But if you and Mr. Reed wants to hold me down you go to the Second National Bank and get my building loan out safe deposit box and cash it in and dont wait for the interest to come due and Nov. 18.

2

But I do not personally think the Equit is treating me fair after me letting them have all my affairs. But never the less Isadore, I do not want to discust any thing just now. as I dont know what in the Hell to do. Katie I dont think will ever live to see Atlantic City again and I am dam crasey. got 3 doctors with her and it is money money every day. Isadore she is delirous all the time. She asks for you and Judge Thompson and Hanstein and asked about

Exhibit S. 29.

you Mother. Send her a night telegram and put Hanstein and Judge Thompson name in it. Also get Emerson to send one from the Co. so may be that will do her good. Send it to Mrs. George Proffatt, St. Joseph Hospital, Room #56, Forth Worth, Texas. Send it as soon as you receiv this to see if you cant cheer her up. I do hope Isadore your dear Mother is well by now. The doctors do not hold any good news for Katie she was taken there on Sunday the 17th so you see what luck I have just now.

3

But if she pulls out every thing will be O. K. let me know how your Mother is and write soon and dont forget the telegram to Katie.

Yours

George.

P. S. Do want you think best about the Equitable and my building loan shares. I just gave a check out to my Sister for doctor bills on the Equitable for $1,000. And one for $244. so you see that dont leave much balance but will try and not take any more I hope not if so see that they are paid.

George.

Tell Huber to be sure and pay off our $1250. note in full at the Second. Tell him the reason for it.

Exhibit S. 31.

EXHIBIT S. 31.

Sheet No.....

KATHERINE PROFFATT

Address.....

Date Discounted 1922	As Discounter of	Amount	Balance	Due
Nov. 27	Frank Shinnen	500		Feb. 1
	A. G. Lichenstein....	5,000		Dec. 4
	Marshall Buckins ...	1,000		Jan. 15
	Wm. F. Ash	1,000		Jan. 16
	Thos. H. Emerson...	5,000		Feb. 16
	L. R. Huber.....	5,000		Feb. 16
	Bart A. Bullock.....	5,000	22,500	Feb. 16
Dec. 4	A. G. Lichenstein....	4,500	22,000	Jan. 3
Jan. 3	" "	4,200	21,700	Feb. 5
15	Marshall Buckins ...	1,000	21,700	Mar. 15
15	Wm. F. Ash.....	1,000	21,700	Feb. 15
Feb. 5	Frank Shinnen	500	21,700	Mar. 1
13	A. G. Lichenstein....	4,200	21,700	Mar. 5
16	Bart A. Bullock.....	5,000		Mar. 16
16	Thos. H. Emerson...	5,000		Mar. 16
16	L. R. Huber	5,000	21,700	Mar. 16
Mar. 16	Frank Shinnen	450	21,650	Apr. 2
16	Marshall Burkins ...	1,000	21,650	May 15
16	Bart A. Bullock	5,000		Apr. 16
16	L. R. Huber	5,000		Apr. 16
16	Thos. H. Emerson....	5,000	21,650	Apr. 16
19	Wm. F. Ash.....	1,000	21,650	Apr. 16
20	A. G. Lichenstein....	4,200	21,650	May 7
Apr. 2	Frank Shinnen	400	21,600	May 2
16	L. M. Huber.....	4,900		May 16
16	Bart A. Bullock.....	5,000		May 16
16	Thos. H. Emerson....	5,000	21,500	May 16
19	Wm. F. Ash.....	1,000	21,500	May 16
May 2	Frank Shinnen	400		June 4
2	A. G. Lichenstein....	3,700	21,400	June 4
15	Marshall Burkins ...	950	20,950	June 18
16	L. R. Huber.....	4,800		June 18
16	Thos. H. Emerson ...	4,900	20,750	June 18
June 4	Frank Shinnen	350	20,700	July 2

Exhibit S. 31.

Sheet No.....

KATHERINE PROFFATT

Address.....

Date Discounted	As Discounter of	Amount	Balance	Due
June 11	A. B. Lichtenstein...	3,500	19,500	July 5
18	L. R. Huber.....	4,700		July 18
18	Thos. Emerson	4,800	19,300	July 18
July 2	Frank Shinnen	350	19,300	Aug. 2
5	A. Lichtenstein	3,300	19,100	Aug. 2
16	Marshall Burkins ...	930	19,080	Sept. 17
18	L. R. Huber.....	4,600		Aug. 20
18	Thos. H. Emerson....	4,700	18,880	" 20
Aug. 2	Frank Shinnen	300	18,830	Sept. 4
15	A. B. Lichenstein....	3,100	18,630	" 4
20	L. R. Huber.....	4,500		Sept. 20
20	Frances Emerson ...	4,600	18,430	Sept. 20
Sept. 5	Frank Shinnen	250	18,380	Oct. 4
5	A. G. Lichenstein....	2,900	18,180	Oct. 4
17	Marshall Burkins ...	900	18,150	Oct. 17
20	L. R. Huber.....	4,500		" 22
20	Thos. Emerson	4,600	18,150	Oct. 22
Oct. 5	Frank Shinner	225	18,125	Nov. 5
8	A. G. Lichenstein....	2,700	17,925	Nov. 5
24	L. R. Huber.....	4,400		Nov. 22
24	Thos. H. Emerson....	4,600	17,825	Nov. 22
Nov. 7	A. G. Lichenstein....	2,500		Dec. 5
7	Frank Shinnen	200	17,600	Dec. 5
22	Thos. Emerson ...	4,500		Dec. 24
22	L. R. Huber.....	4,300	17,400	Dec. 24
Dec. 5	A. G. Lichtenstein...	2,250		Jan. 7
5	Frank Shinnen	100	11,050	Jan. 7
24	Thos. H. Emerson...	4,500		Jan. 24
24	L. R. Huber.....	4,300	11,050	Jan. 24
Jan. 9	A. G. Lichtenstein...	2,000	16,800	Feb. 5

Exhibits B. 1. B. 2. B. 3.

EXHIBIT B. 1.

Bond bearing date September 14, 1923, made by Robert Heilig and Bruno Garr to George P. Proffatt and Katherine B. Proffatt, in the amount of $50,000., payable at any time within ten years from the date hereof; and it is also provided that the parties of the first part shall also have the privilege of paying off such portions of said mortgage indebtedness as may seem advisable to them. Interest at 6%.

EXHIBIT B. 2.

Mortgage bearing date September 14, 1923, made by Robert Heilig, single, Bruno Garr and Rosa Garr, his wife, to George P. Proffatt and Katharine B. Proffatt, in the amount of $50,000.00, payable at any time within ten years from the date thereof; and it is also provided that the parties of the first part shall also have the privilege of paying off such portions of said mortgage indebtedness as may seem advisable to them, covering property situate in the City of Atlantic City, County of Atlantic and State of New Jersey, more particularly described in said mortgage, which is recorded in the Clerk's Office of Atlantic at May's Landing, N. J., in Book of Mortgages #274, Page #297. Interest at 6%.

EXHIBIT B. 3.

Assignment of Mortgage from George P. Proffatt and Katharine B. Proffatt to Bankers Trust Company of above mortgage, dated December 21, 1925, consideration $50,000.00. Assignment recorded in Book of Assignments of Mortgages #77, Page #362.

No. 2863

Dec 21 1925

George P. Proffatt and
Katharine B. Proffatt

$50000—

BANKERS TRUST COMPANY 55-149

ATLANTIC CITY, N.J. Dec 21 1925 No. 2863

PAY TO THE ORDER OF George P. Proffatt and Katharine B. Proffatt $50000 00/100

BANKERS TRUST CO. $5000 AND 00 CTS 100 DOLLARS

TREASURER'S CHECK

E. Lowell Kramer
TREASURER

George P. Proffatt.
Katharine B. Proffatt.

EXHIBIT B. 4.

372

Exhibit B. 8.

EXHIBIT B. 8.
5/17/28 L

THIS AGREEMENT made the fifteenth (15th) day of September, A. D. 1923,

Between GEORGE P. PROFFATT, of the City of Northfield, County of Atlantic and State of New Jersey, and THOMAS EMERSON, of the City of Atlantic City, County of Atlantic and State of New Jersey,

WITNESSETH: That the said George P. Proffatt agrees to sell and convey to the said Thomas Emerson, on or before the twentieth (20th) day of September, A. D. 1923, Fifty (50) shares of the Capital Stock of the Guarantee Electric Company, a corporation of the State of New Jersey, now owned and held by the said George P. Proffat, and standing in his name on the books of the said corporation, and to make and execute unto the said Thomas Emerson all assignments, transfers and conveyances, necessary to assure to him, his executors, administrators and assigns.

In consideration whereof, and in further consideration of the said George P. Proffatt, signing these Articles, the said Thomas Emerson, for himself, his heirs, executors, assigns and administrators, does covenant, promise and agree to and with the said George P. Proffatt, his heirs and assigns, to pay and satisfy, or cause to be paid and satisfied unto the said George P. Proffatt, his heirs or assigns for the said Fifty (50) shares of stock, the sum of Five thousand dollars ($5000.00) as and for the purchase money of the foregoing stated stock, the same to be payable in the following manner, that is to say:

Exhibit B. 8.

$100.00 Cash to be paid upon the signing of these Articles. Receipt whereof is hereby acknowledged.

4900.00 Cash to be paid on or before September 20th, 1923.

And it is further agreed, by and between the parties hereto that the said George P. Proffatt, shall assign and properly execute and deliver or cause to be properly executed and delivered unto the said Thomas Emerson, a certificate of stock for the shares herein mentioned upon and on the date that the said Thomas Emerson shall pay or cause to be paid the sum of Four thousand nine hundred dollars ($4900.00) as aforesaid.

And it is further agreed by and between the parties hereto that time is to be part and essence of this contract.

In Witness Whereof, the said parties have hereto set their hands and seals this fifteenth day of September, A. D. 1923.

George P. Proffatt (SEAL)
Thos. H. Emerson (SEAL)

Witnesseth:

James J. Quinn.

Exhibit B. 9.

EXHIBIT B. 9.
5/17/28 L

THIS AGREEMENT made the eleventh (11th) day of September, A. D. 1923,

Between GEORGE P. PROFFATT, of the City of Northfield, County of Atlantic and State of New Jersey, and LLEWELLYN R. HUBER, of the City of Atlantic City, County of Atlantic and State of New Jersey,

WITNESSETH: That the said George P. Proffatt agrees to sell and convey to the said Llewellyn R. Huber, on or before the twenty-second day of December, A. D. 1923, One hundred and ninety-five (195) shares of the Capital stock of the Guarantee Electric Company, a corporation of the State of New Jersey, now owned and held by the said George P. Proffatt, and standing in his name on the books of the said corporation, and to make and execute unto the said Llewellyn R. Huber all assignments, transfers and conveyances, necessary to assure to him, his executors, administrators and assigns.

In consideration whereof, and in further consideration of the said George P. Proffatt, signing these Articles, the said Llewellyn R. Huber, for himself, his heirs, executors, assigns and administrators, does covenant, promise and agree to and with the said George P. Proffatt, his heirs and assigns, to pay and satisfy, or cause to be paid and satisfied unto the said George P. Proffatt for the said One hundred and ninety-five (195) shares of Capital stock, the sum of Fifteen thousand dollars ($15,000.00) as and for the purchase money of the foregoing stated stock, the same to be payable in the following manner, that is to say:

Exhibit B. 9.

$100.00	Cash to be paid upon the signing of these Articles. Receipt whereof is hereby acknowledged.
4900.00	Cash to be paid on or before September 20th, 1923
2500.00	Cash to be paid on or before November 1, 1923.
7500.00	The balance to be paid in the manner and form of a note, dated as of the date of signing these Articles, to be paid at the Second National Bank of Atlantic City, New Jersey, on or before December twenty-second (22nd) 1923, the same to be interest bearing at the rate of 6 per centum (6%).

And it is further agreed, by and between the parties hereto, that the said George P. Proffatt shall assign and properly execute and deliver or cause to be properly executed and delivered unto the said Llewellyn R. Huber, a certificate of stock for the shares herein mentioned upon the date that the said Llewellyn R. Huber shall pay or cause to be paid the said note of Seventy-five hundred dollars ($7,500.00), together with the cash payments as mentioned aforesaid.

And it is further agreed by and between the parties hereto that time is to be part and essence of this contract.

In Witness Whereof, the said parties have hereto set their hands and seals this eleventh day of September, A. D. 1923.

George P. Proffatt (SEAL)
Llewellyn R. Huber (SEAL)

Witnessed:
James J. Quinn.

Exhibit B. 10.

EXHIBIT B. 10.

THIS AGREEMENT made this 9th day of April, 1925, between GEORGE P. PROFFATT, party of the first part and ISIDOR SCHMEIDLER, party of the second part, for and in consideration of the sum of one dollar each to the other in hand paid, the receipt whereof is hereby acknowledged,

WITNESSETH, That, Whereas, the said party of the first part has assigned unto the party of the second part that certain mortgage made by Bruno Garr and Rosa, his wife and Robert Heilig to George P. Proffatt and Katherine B. Proffatt dated Sepember 14th, 1923 and recorded September 17, 1923 in Book 274 of Mortgages page 297 to secure the sum of $50,000. covering premises in the southerly line of Atlantic Avenue distant 90.47 feet east from the east line of New York Avenue being 18.7 feet on Atlantic Avenue and 150 feet in depth, regular, for the purpose of securing unto the Second National Bank of Atlantic City, N. J. the payment of the sum of $23,200., together with interest on $8600. from April 1st, 1924 to date of payment, and also the sum of $2000. to Joseph Thompson and Walter Hanstein, trading as Thompson & Hanstein;

It is understood and agreed that the said party of the first part does hereby authorize the said party of the second part to sell or dispose of said mortgage at such time as shall appear to be to the party of the second part advisable for the purpose of making the payments aforesaid, and to that end the said party of the second part is hereby authorized to do any and all things necessary for the carrying out of the purposes of this agreement and the rendering

Exhibit B. 10.

over to the party of the first part of any surplus remaining after the sale of said mortgage and the payment of the debts aforesaid.

And the said party of the second part does hereby agree with the party of the first part that he will fully and completely carry out the terms of this agreement and will hold said mortgage for the securing of the debts above set forth and will, at the time that seems most advisable to him, sell said mortgage and pay the debts aforesaid, and will pay over to the party of the first part the surplus remaining after said sale.

In Witness Whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

George P. Proffatt (SEAL)
Isidor Schmeidler (SEAL)

Signed, sealed and delivered
in the presence of

Gladys M. Barbam

State of New Jersey, }
County of Atlantic. } *ss.*

Be It Remembered that on this ninth day of April, A. D. 1925, before me a Notary Public of N. J. personally appeared George P. Proffatt, who I am satisfied is the person mentioned in and who executed the within agreement, and I having first made known to him the contents thereof, he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed. All of which is hereby certified.

Gladys M. Barbam
Notary Public of New Jersey
My Commission Expires Jan. 26, 1930

EXHIBIT B. 17.

6/15/28 L

ARTICLES OF AGREEMENT made this twenty-first day of December, 1925, by GEORGE P. PROFFATT and KATHARINE B. PROFFATT, his wife, of the City of Atlantic City, County of Atlantic and State of New Jersey, to BANKERS TRUST COMPANY, a banking corporation of the State of New Jersey;

WHEREAS, the Bankers Trust Company, a banking corporation of the State of New Jersey, is about to purchase from George P. Proffatt, and Katharine B. Proffatt, his wife, a certain indenture of mortgage, together with the bond therein described, in the amount of Fifty Thousand Dollars ($50,000.00) and bearing date September 14, 1923, and covering property described as follows:

ALL that certain tract or parcel of land and premises situate lying and being in the City of Atlantic City, County of Atlantic and State of New Jersey, BEGINNING at a point in the Southerly line of Atlantic Avenue, distant ninety and forty-seven hundredths feet Eastwardly from the Easterly line of New York Avenue and extending thence (1) Eastwardly, along the Southerly line of Atlantic Avenue, eighteen and seventeen hundredths feet to a point in a brick party wall; thence (2) Southwardly, parallel with New York Avenue, one hundred and fifty feet to the Northerly line of Central Avenue; thence (3) Westwardly, parallel with Atlantic Avenue, eighteen and seventeen hundredths feet; thence (4) Northwardly, parallel with New York Avenue,

Exhibit B. 17.

one hundred and fifty feet to the Southerly line of Atlantic Avenue and place of beginning.

And Whereas, to induce the said Bankers Trust Company to purchase the said bond and mortgage and as a condition precedent to its purchase of the same, the said Katherine B. Proffatt agrees to execute and deliver to the said Bank her certificate of deposit of the Bankers Trust Company in the amount of Fifty Thousand Dollars ($50,000.00) to guarantee and insure the payment of the said bond and mortgage according to the terms thereof; and

Whereas, the said George P. Proffatt and Katharine B. Proffatt, to further induce the said Bank as aforesaid, and as a further condition precedent, agree to well and sufficiently save, defend and keep harmless and indemnify the said Bankers Trust Company of and from all loss, damage, cost, charges, liability or expenses it may sustain by reason of purchasing the said bond and mortgage;

Now, This Agreement Witnesseth, that for and in consideration of the premises and a further consideration of the sum of One Dollar ($1.00) and other good and valuable consideration, the receipt whereof is hereby acknowledged, we, George P. Proffatt and Katharine B. Proffatt, jointly and severally, hereby agree at all times hereafter that we will well and sufficiently save, defend and keep harmless and indemnify the Bankers Trust Company, a banking corporation of the State of New Jersey, of and from all loss, damage, costs, charges, liability or expense, that it may incur by reason of purchasing from us the above described bond and mortgage and further that I, the said Katharine

Exhibit B. 17.

B. Proffatt, for the consideration aforesaid, do hereby agree to execute and deliver to the said Bankers Trust Company, my certificate of deposit of the Bankers Trust Company in the amount of Fifty Thousand Dollars ($50,000.00) to guarantee and insure the payment of the aforementioned bond and mortgage according to the terms thereof.

In Witness Whereof we have hereunto set our hands and seals this twenty-first day of December, in the year of our Lord one thousand nine hundred and twenty-five.

George P. Proffatt (seal)
Katharine B. Proffatt (seal)

Signed, Sealed and Delivered
in the Presence of
NOTE: Corrections on page 1, line 26, and page 2, line 16 made before signing.
W. Lindley Jeffers.

State of New Jersey, } ss.
County of Atlantic. }

Be It Remembered, that on this 21st day of December, nineteen hundred and twenty-five, before me, a Notary Public of New Jersey, personally appeared George P. Proffatt and Katharine B. Proffatt, who, I am satisfied are the persons mentioned in the foregoing instrument and I having first made known to them the contents thereof they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed. All of which is hereby certified.

W. LINDLEY JEFFERS,
Notary Public of N. J.

Exhibit B. 22.

EXHIBIT B. 22.
6/15/28 L

Joseph Thompson Walter Hanstein

Atlantic City, N. J., December 17th 1923

Guarantee Electric Company,

In Account With
THOMPSON & HANSTEIN

Real Estate and Law Building
Telephones 507 and 342

To fee for professional services, Re: Incorporation of Guarantee Electric Co.	$1000.00
To retainer due from Guarantee Electric Company from November 1st, 1922 to November 1st, 1923	250.00
To retainer due from Guarantee Electric Company from November 1st, 1923 to November 1st, 1924	250.00
	$1500.00

Received payment,

Thompson & Hanstein

Exhibit B. 23.

EXHIBIT B. 23.
6/15/28 L

Joseph Thompson Walter Hanstein

Atlantic City, N. J., December 17th 1923

Guarantee Electric Company,

In Account With
THOMPSON & HANSTEIN

Real Estate and Law Building
Telephones 507 and 342

Fees paid Secretary of State Re: Guarantee Electric Company	$29.00
Paid Broun-Green Company	11.77
" Brooks & Idler	4.65
Fee recording certificate of incorporation	3.50
Filing report	1.00
Paid Telephone call Tuckerton	.20
	$50.12

Received payment,

Thompson & Hanstein

CONCLUSIONS.

IN CHANCERY OF NEW JERSEY.

Between

ELRAE CORPORATION,
Complainant,

and

BANKERS TRUST COMPANY, *et als.*,
Defendants.

On Bill, &c.
Conclusions.

Messrs. Cassman & Gottlieb for Complainant.

Messrs. W. Lindley Jeffers and Robert H. McCarter for Defendants, Bankers Trust Co. and Mrs. Katherine B. Proffatt.

Mr. Merritt Lane for Defendants, Second National Bank and Thompson & Hanstein.

INGERSOLL, *V.-C.*

Where a mortgage is assigned to a third party for the purpose of securing to two creditors the amount due them, and the pledgee is given authority to sell or dispose of said mortgage at such time as shall appear to him advisable for the purpose of making payment of the amount of said debts, and is authorized to do any and all things necessary for the carrying out of said purpose and the rendering over to the pledgor of any surplus remaining after the sale of said mortgage, and the payment of the debts, HELD,

1. That a notice of the time of said sale should be given to the pledgor.

2. That a letter mailed to an improper address (the pledgee knowing of such incorrectness) is insufficient.

3. One of the creditors having purchased said mortgage at a sale duly advertised, but without notice to

the pledgor, for the amount due the two creditors, HELD, that the pledgor or his representative is entitled to redeem said mortgage upon the payment to the purchaser of the amount paid by it, together with interest and such costs as it may have incurred.

The complainant files its bill alleging:

1st. On December 17, 1925, it purchased of the Central Corporation certain premises in Atlantic City, New Jersey, subject to a mortgage then of record in the amount of $50,000.00, made by one Garr, *et ux. et als.* to George P. Proffatt and Katherine B. Proffatt, dated September 14, 1923.

2nd. That on December 4, 1925, the Second National Bank of Atlantic City, New Jersey, and Joseph Thompson and Walter Hanstein, trading as Thompson & Hanstein, notified the Central Corporation that said mortgage had been assigned by the Proffatts to Isidor Schmeidler on the 9th day of April, 1925, for the purpose of securing to the said Second National Bank the sum of $23,200.00, and to Thompson and Hanstein the sum of $2,000.00, and that the said notice was turned over to the complainant by the Central Corporation.

3rd. That on March 19, 1926, the Bankers Trust Company of Atlantic City, New Jersey, served notice upon the attorneys of the complainant that said mortgage had been assigned on the 21st day of December, 1925, to said Bankers Trust Company, and demanded of the complainant that it pay the interest due on March 14, 1926, in the sum of $1,500.00.

4th. That on April 6, 1926, said Thompson and Hanstein as attorneys for the Second Na-

tional Bank, served notice on the attorneys of the complainant that the Second National Bank was the owner of the mortgage before mentioned.

Complainant prays for permission to pay the said sum of $1,500.00 into this court.

The Second National Bank files its statement setting forth the indebtedness by the Proffatts to the Second National Bank and the assignment to Schmeidler, and that the said Schmeidler, on the 5th day of April, 1926, which was the time deemed by him as most advisable, and pursuant to due notice, offered said mortgage at public sale and sold the same, and said mortgage was on that day bought by the said Second National Bank and it was by the said Schmeidler duly assigned to it, and the Second National Bank therefore claims to be the owner of the said mortgage and entitled to the interest due.

The Bankers Trust Company also claimed the ownership of the said mortgage, and that it was entitled to the interest due thereon.

On the 6th day of August, 1926, the interlocutory decree decreeing the complainant to be released was entered.

The brief of defendants, Second National Bank and Thompson and Hanstein states, "The legal question which the Court expressed and desires to have covered by briefs of the litigants was substantially to the effect that if the Second National Bank and Thompson and Hanstein were made whole as to their claims, would the Second National Bank be entitled to hold the same as against the Bankers Trust Company?"

After the hearing, the Second National Bank made a proffer substantially to this effect. An answer was made thereto by the solicitor that

"We deem the proposition you submit as no offer of settlement whatever, as it has always been our view that no one can seriously entertain the idea that you, in any event, could retain the full amount of the mortgage." These letters are not, of course, a part of the record, but were filed with the court.

In its brief, the Bankers Trust Company conceded at the outset that the claim of the Bankers Trust Company is no better and rises no higher than that of Mr. and Mrs. Proffatt, their assigns, and so far as the issues herein are concerned, they may be determined exactly as if the controversy were between the Second National Bank and Mr. and Mrs. Proffatt.

For a number of years, Proffatt and his wife were doing business in Atlantic City under the name of Guarantee Electric Company. On October 13, 1922, the Guarantee Electric Company was incorporated and capital stock to the amount of $25,000.00 was issued to each of the Proffatts. Both before and after the incorporation, the banking business of the Guarantee Electric Company was conducted at the Second National Bank. After the incorporation, the Proffatts disposed of the greater part, if not all, of the stock issued to them.

On November 1, 1922, the Guarantee Electric Company, by its directors (Proffatt being one) authorized the borrowing from the Second National Bank the sum of $15,000.00. A note was discounted and the proceeds thereof placed to the credit of the company. This note was renewed from time to time and payments made thereon, so that it was reduced to the sum of $12,000.00. Two other notes had been discounted, and on March 25, 1924, they amounted to $1,500.00 and

$1,250.00 respectively. On that day, these three notes were consolidated, making an indebtedness of $14,750.00, and $150.00 was paid on account and a new note of $14,600.00 was given. On July 16, 1924, this note was protested.

At a time when Proffatt was out of the State, the corporation being found insolvent, Judge C. C. Shinn was appointed Receiver. A Writ of Sequestration was issued on February 5, 1925, upon proceedings instituted by him, whereby all Proffatts' real estate and certain personalty was sequestered.

Mrs. Proffatt sold certain of her stock to one Emerson and one Huber and received a note for the consideration from each of them, which notes were discounted at the Second National Bank. At the time of the assignment hereinafter mentioned, there was due upon one note the sum of $4,200.00 and upon the other note the sum of $4,400.00, or a total of $8,600.00.

The firm of Thompson and Hanstein incorporated said company and held twenty shares of the capital stock, which they obtained from Mrs. Proffatt as follows: They charged $1,000.00 for the incorporation fee and other charges, which amount was paid by the company to Mrs. Proffatt, and she assigned the stock to them to cover that amount, at par. They also paid her $1,000.00 in cash and received additional stock to that amount.

It is admitted that Thompson and Hanstein were and are the solicitors of the Second National Bank, and that they were the solicitors of the Guarantee Electric Company, and had to some extent represented Proffatt.

Sometime prior to April 9th, and after Proffatt's return, he, Proffatt, asked if the firm

would represent him in the sequestration proceedings, and Judge Thompson replied "that he would not discuss the matter unless he agreed to take care of the Second National Bank and Thompson and Hanstein." Proffatt then asked if he did that, would they represent him, and the answer was that if he agreed to that, or if he did that, then Judge Thompson would discuss the matter, and not until then, and that since that time, Judge Thompson had had no further communication in respect to the matter.

During Proffatt's absence, one Isidor Schmeidler had a power of attorney from him, by reason of which he transacted certain business for Proffatt. After Proffatt's return, he met Schmeidler in his, Schmeidler's office, and arranged for an assignment to him of the mortgage in question. Proffatt insists that the reason for this action was that if he could have certain property released from the effect of the Writ of Sequestration, he could sell the same at a very advantageous figure and would be in funds, and that Schmeidler agreed that he could have same released. Schmeidler testifies that Proffatt desired to arrange for the securing to the Second National Bank of the sums above mentioned, and to Thompson and Hanstein of the value of the stock, which had become worthless.

It is unnecessary to determine whether this was the consideration for the agreement and the assignment of the mortgage thereafter made. The fact that the party pledgor actually executed and delivered the assignment of mortgage, so far as affecting the transaction is concerned, prevents him from setting up the lack of consideration. *Perkins* v. *Trinity Realty Company,* 69 N. J. Eq. 723, affirmed by a per curiam opinion,

71 N. J. Eq. 304, *Krouse* v. *Palmer,* 89 N. J. Eq. 220.

The Court of Errors and Appeals has stated the law to be:

> "a valid mortgage may be given, and the debt need not have been one due from the mortgagor. One owning property, either personal or real, may pledge it for the payment of a debt of another person. There need not be proven, and there need not exist, any consideration between the mortgagor and the mortgagee. The consideration need not move to the mortgagor, and the debt to secure which the mortgage is given may be the debt of another. Perkins *v.* Trinity Realty Co., 69 N. J. Eq. 725, 726; affirmed 71 *Ibid.* 304; Krouse *v.* Palmer, 89 *Ibid.* 220." Federal Beneficial Association *v.* Eastern Land Co., 96 N. J. Eq. 628, at page 630.

After the interview above referred to, the Proffatts and Schmeidler went into the office of Thompson and Hanstein (it adjoining that of Schmeidler's) and there met Mr. Hanstein, of the firm. After some discussion of the subject, and after obtaining from the bank the figures above indicated, the following papers were prepared and executed:

a. Assignment by Mrs. Proffatt to Proffatt of her one-half interest in said mortgage.

b. Assignment by Proffatt of said mortgage to Schmeidler.

c. Agreement between Proffatt and Schmeidler, as follows:

> "This Agreement made this 9th day of April, 1925, between George P. Proffatt, party of the first part and Isidor Schmeidler, party of the second part, for and in consideration of the sum of one dollar each to

the other in hand paid, the receipt whereof is hereby acknowledged,

WITNESSETH, That, Whereas, the said party of the first part has assigned unto the party of the second part that certain mortgage made by Bruno Garr and Rose, his wife and Robert Heilig to George P. Proffatt and Katherine B. Proffatt dated September 14th, 1923 and recorded September 17, 1923 in Book 274 of Mortgages, page 297 to secure the sum of $50,000. covering premises in the southerly line of Atlantic Avenue distant 90.47 feet east from the east line of New York Avenue being 18.7 feet on Atlantic Avenue and 150 feet in depth, regular, for the purpose of securing unto the Second National Bank of Atlantic City, N. J. the payment of the sum of $23,200., together with interest on $8,600. from April 1st, 1924 to date of payment, and also the sum of $2,000. to Joseph Thompson and Walter Hanstein, trading as Thompson & Hanstein;

It is understood and agreed that the said party of the first part does hereby authorize the said party of the second part to sell or dispose of said mortgage at such time as shall appear to be to the party of the second part advisable for the purpose of making the payments aforesaid, and to that end the said party of the second part is hereby authorized to do any and all things necessary for the carrying out of the purposes of this agreement and the rendering over to the party of the first part of any surplus remaining after the sale of said mortgage and the payment of the debts aforesaid.

And the said party of the second part does hereby agree with the party of the first part that he will fully and completely carry out the terms of this agreement and will hold said mortgage for the securing of the debts above set forth and will, at the time that seems most advisable to him, sell said mort-

gage and pay the debts aforesaid, and will pay over to the party of the first part the surplus remaining after said sale.

In Witness Whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

GEORGE P. PROFFATT (Seal)
ISIDOR SCHMEIDLER (Seal)

Signed, sealed and delivered
in the presence of
Gladys M. Barbour

State of New Jersey }
County of Atlantic } *ss.*

Be It Remembered that on this ninth day of April A. D. 1925, before me a Notary Public of N. J. personally appeared George P. Proffatt, who I am satisfied is the person mentioned in and who executed the within agreement, and I having first made known to him the contents thereof, he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed. All of which is hereby certified.

Gladys M. Barbour
Notary Public of New Jersey
My commission expires Jan. 26, 1930."

d. Agreement between Proffatt and Schmeidler that Proffatt should receive such dividends as should be paid to the Second National Bank by the Receiver of the insolvent corporation.

Later, the Second National Bank assigned its claim against said insolvent corporation, and Schmeidler mailed to Proffatt a check for the amount received by him therefor, which check was destroyed by Proffatt.

On December 4, 1925, Judge Thompson wrote to the Central Corporation, then owner of the mortgaged premises, the following letter:

THOMPSON & HANSTEIN
Counsellors at Law
Law Building
Atlantic City, N. J.

December 4th, 1925

Central Corporation,
Harry Cassman, Pres.
Law Building,
Atlantic City, N. J.

Dear Sir:—

The Central Corporation is the owner of a piece of property on the South side of Atlantic Avenue, 90.47 feet East of the East line of New York Avenue, being 18.17 feet on Atlantic Avenue and 150 feet in depth. The property is subject to a first mortgage of $50,000.00 made originally to George P. Proffatt and Catherine B. Proffatt, and Catherine B. Proffatt assigned her interest in said mortgage to George P. Proffatt, and George P. Proffatt, under date of April 3, 1925, assigned the mortgage to Isidor Schmeidler. This was for the purpose of securing through this assignment the Second National Bank of Atlantic City in the sum of $23.200 and Thompson & Hanstein in the sum of $2,000.00.

This letter is written for the purpose of giving notice to the Central Corporation that the Second National Bank and Thompson & Hanstein have the interest as above stated in said mortgage.

Respectfully yours,

THOMPSON & HANSTEIN

By Joseph Thompson

T:H

On December 17, 1925, the mortgaged premises were conveyed to the complainant.

On March 18, 1926, the treasurer of the Bankers Trust Company wrote a letter to Cassman & Gottlieb, representing the Central Corporation, as follows:

BANKERS TRUST COMPANY
Atlantic City, N. J.

March 18, 1926.

Messrs. Cassman & Gottlieb,
Real Estate & Law Bldg.,
Atlantic City, N. J.

Gentlemen:

We are informed that you represent the owners of land and premises known as 1428 Atlantic Avenue, against which we hold mortgage $50,000.00 Robert Heilig and Bruno Garr, et ux. dated September 14, 1923 payable at any time within ten years from the date thereof, assigned to us by George P. Proffatt, et ux.

We are enclosing bill for six months interest to March 14, 1926 and would appreciate if you would place same in the hands of the present owners.

Very truly yours,

E. FORREST CRAMER
Treasurer.

Schmeidler had collected no interest, and sometime in March, 1926, caused to be prepared a notice, as follows:

"TO GEORGE P. PROFFATT:

TAKE NOTICE that pursuant to that certain agreement between yourself and me bearing date April 8th, 1925, you authorize me to sell or dispose of that certain mortgage therein

referred to, covering premises in the southerly line of Atlantic Avenue, distant 90.47 feet east from the easterly line of New York Avenue, and being 18.7 feet on Atlantic Avenue by 150 feet in depth, at such time as shall appear to me to be advisable.

Take further notice that I deem the Fifth day of April, 1926, at the hour of 10 o'clock A. M., an advisable time at which to sell said mortgage, and I will at that time and at the banking house of The Second National Bank of Atlantic City, N. J., offer said mortgage at public sale to the highest bidder therefor for cash.

Isidor Schmeidler."

On March 30th, notice of such proposed sale was posted in five places in Atlantic City, and on the following day a notice was mailed addressed to Mr. Proffatt at 324 North Rhode Island avenue. Mr. Bishop, of Thompson and Hanstein's office, inquired of Mr. Bourgeois, of Bourgeois & Coulomb, for the address of Mr. Proffatt, and was advised that although Mr. Bourgeois did not know Proffatt's address, he thought he was somewhere in the South and would shortly return. Bourgeois later notified Messrs. Thompson and Hanstein that he was not authorized to accept service of such notice.

Proffatt never lived at the address to which either notice was sent and did not receive the same, and was actually without the city of Atlantic City and did not return until about April 23rd, when he and his wife returned from Florida, having had no knowledge of the sale or of said notice until after that time.

There can be no question but that Schmeidler had had information that Proffatt's address was on Caspian avenue, having written to him both

before and after the sale to an address on Caspian avenue.

It is a well-settled rule of the common law that the pledgee, upon default, may sell at public auction the chattel pledged, without judicial process and decree of foreclosure upon giving the debtor reasonable notice to redeem. Jones Pledges and Collateral Securities, Section 603. Parties may, however, by contract, make it the duty of the pledgee to sell the property within a specified time, *Ibid* 606. The notice of his intention to sell and of the time and place of sale is always necessary for the making of a binding sale of the property pledged, unless by agreement of the parties such notice has been expressly or impliedly waived.

Again, if the debt secured is not one which becomes due at a fixed time, there may be no default upon the occurrence of which a sale of the pledge can be made until the pledgee makes demand of payment or gives notice of the occurrence of the event which constitutes a default; or it may be that the event upon which a default occurs is one peculiarly within the knowledge of the pledgee; or it may be that such event is one which it is his option to declare. In such cases, of course, there is no default until the pledgee makes demand of payment, or gives notice of the default.

In the case *sub judice,* it was agreed that the said party of the first part, the pledgor "does hereby authorize the said party of the second part, the pledgee, to sell or dispose of said mortgage at such time as shall appear to be to the party of the second part (pledgee) advisable for the purpose of making the payments aforesaid, (amount due the creditors named), and to that

end, the said party of the second part is hereby authorized to do any and all things necessary for the carrying out of the purposes of this agreement and the rendering over to the party of the first part of any surplus remaining after the sale of said mortgage and the payment of the debts aforesaid. And the said party of the second part (pledgee) does hereby agree with the party of the first part that he will fully and completely carry out the terms of this agreement and will hold said mortgage for the securing of the debts above set forth, and will, at the time that seems most advisable to him, sell said mortgage and pay the debts aforesaid, and will pay over to the party of the first part the surplus remaining after said sale."

It has been held that in cases where the debt secured is not payable at a fixed time, a demand of payment, or that the pledge securing the debt be redeemed should be made before the creditor can properly dispose of the pledged property, and that if the debtor be absent or cannot be found, judicial proceedings should be had to bar his right of redemption. *Ibid* 608, and citing *Garlick* v. *James,* 12 Johns. (N. Y.) 146. Also, that where the provision is that the pledgee may sell in case the securities depreciate in their market value, the pledgor is entitled to notice to redeem. A sale without notice in such case will not pass the pledgor's right of redemption. As regards notice of sale, there is no distinction between the pledge for a debt due present and one for a debt due upon time. Personal notice to the pledgor to redeem and of the intended sale must be given, as well as in the one case as in the other, in order to authorize a sale by the act of the party. The right of redemption incident

to every pledge would be valueless, if the creditor could in the absence of any agreement dispensing with notice of sale, sell the property pledged without demand of payment and without notice of the time and place of sale. *Ibid* 610.

There was no notice given by the pledgee to the pledgor, although an attempt was made to do so. A letter mailed to the pledgor was not mailed to his last known address, nor to any other address of his. Mr. Schmeidler testifies that although he inquired of Mr. Proffatt's son, a man of about twenty-eight years, where he could find his father, he did not tell him, the son, of the intended sale.

The notice of the sale provided for the sale at the banking house of the Second National Bank of Atlantic City, and is in the following words:

"NOTICE OF SALE.

TAKE NOTICE that on Monday, the 5th day of April, 1926, at 10 A. M. at the banking house of The Second National Bank of Atlantic City, N. J., situate on the Northeast corner of Atlantic and New York Avenues, Atlantic City, New Jersey, I will offer at public sale to the highest bidder therefor, in cash, that certain mortgage made by Bruno Garr and Rosa, his wife, and Robert Heilig to George P. Proffatt and Katherine B. Proffatt, dated September 14th, 1923, recorded on September 17th, 1923 in the Clerk's Office of Atlantic County at Mays Landing, New Jersey, in Book 274 of mortgages, page 297, covering premises in the south line of Atlantic Avenue, distant 90.47 feet east from the east line of New York Avenue, being 18.7 feet on Atlantic Avenue by 150 feet in depth, which said mortgage is to secure the sum of $50,000.00, and undivided one-half interest on which said mortgage has been assigned by the said Kather-

ine B. Proffatt to George P. Proffatt, and the entire said mortgage has been assigned by the said George P. Proffatt to me.

Said sale will be made to the highest bidder therefor in cash, and the assignment will be delivered at that time. The privilege of rejecting any and all bids is reserved.

ISIDOR SCHMEIDLER."

At the sale, the cashier of The Second National Bank and Mr. Hanstein were present, and the mortgage was sold to The Second National Bank for the sum of $26,246.34, the amount due the bank—$24,246.34, and the amount due Thompson and Hanstein—$2,000.00.

Pledges and Collateral Securities. Jones, Second Edition, page 684.

637. A pledgee who purchases the pledge at a public sale is not chargeable with a conversion of it. Such a sale is ineffectual to change the title to the property which remains vested in the pledgor as it was before the sale; but that is the only result. (Bryan *v.* Baldwin, 7 Lans. (N. Y.) 174, affirmed, 52 N. Y. 232; Canfield *v.* Minneapolis Agricultural & Mechanical Asso., 14 Fed. Rep. 801; Minneapolis Asso. *v.* Canfield, 121 U. S. 295, 7 S. C. Rep. 887, modifying decree; Leighton *v.* Burkham, 7 Ohio C. C. 487; Glidden *v.* Mechanic's Nat. Bank, 53 Ohio St. 588, 600, 42 N. E. Rep. 995.)

The sale is not void but voidable at the election of the defendant. The debtor is at liberty to ratify the sale, and should he do so, it would be valid for all purposes. The ratification would make it lawful and relieve it from any imputation of being tortious as to the debtor. The pledgee's title to the property would thereby become perfect, and the debtor would be entitled

to credit upon his debt for the net proceeds of the sale. But if the debtor does not do this, but elects to treat the purchase by the pledgee as illegal, the sale thereupon is void, and the parties are remitted to their rights as they existed before any sale was made or attempted. The debtor is liable upon his debt, and the creditor still holds the property in pledge. (Per Grover, *J.*, in Bryan *v.* Baldwin, 52 N. Y. 232, affirming 7 Lans. 174.

637-a. The reasons for this rule against purchase by the pledgee are clearly stated by Mr. Justice Williams, delivering the opinion of the supreme court of Ohio, in a recent case. "The rule results from the nature of the contract between the parties. Under a contract of pledge, the right of the pledgee to retain possession of the property continues until the debt or engagement for the security of which it was pledged has been discharged by payment or performance, or a tender, and demand for its return; and his obligation is to keep the article pledged, with due care, and restore it to the pledgor upon the performance of his agreement. On the other hand, in the absence of any stipulation to the contrary, it is the duty of the debtor to seek the creditor at the proper place and pay the debt, or tender its payment, before he is entitled to receive back the pledge. These obligations of the parties are reciprocal, and neither can require performance by the other without himself being able and ready to perform on his part; so that, the possession of the pledgee being lawful as long as he retains the actual control and custody of the pledge, with the ability to perform his obligation by restoring it, he is not in default, until a demand, accom-

panied by a tender of the debt, is made. If he then refuse or fail to restore the pledge, he may be charged with its value. The action for its recovery, though treated as one for conversion, is in reality founded on the breach of the contract, and hence, the creditor is entitled to recoup his debt. Until the breach occurs, no right of action accrues in favor of the pledgor; suffering the debt to run unsatisfied after maturity does not destroy the pledgee's lien, or the pledgor's right to redeem." (Glidden *v.* Mechanics' Nat. Bank, 53 Ohio St. 588, 600; 42 N. E. Rep. 995; citing Whelan *v.* Kinsley, 26 Ohio St. 131; Jones on Pledges, Par. 543, 566, 571.

Although the bill of interpleader was filed to ascertain to whom the interest falling due upon the assigned mortgage should be paid, the determination of that question, of course, involves the ownership of the mortgage.

I am convinced that the sale of the mortgage to the Second National Bank must be set aside upon the payment to it of the sum of $23,200.00, with interest on $6,000.00 from April 1, 1924, and on the balance from April 5, 1926 to date of payment, and to Thompson and Hanstein of the sum of $2,000.00, and of any expenses which the said bank has been obliged to incur.

Should solicitors be unable to agree upon the amount due the Second National Bank, I will either hear testimony or refer the matter for an accounting.

Determined December 27, 1929.

FINAL DECREE.

IN CHANCERY OF NEW JERSEY.

Between	
ELRAE CORPORATION, *Complainant,*	*On Bill, &c.*
and	*Final Decree.*
BANKERS TRUST COMPANY, *et al.,* *Defendants.*	

The above-entitled cause coming on to be heard before the Chancellor in the presence of W. Lindley Jeffers, Esq., and Robert H. McCarter, Esq., of counsel with Bankers Trust Company, and George P. Proffatt and Katherine B. Proffatt, and Merritt Lane, of counsel with the defendants, The Second National Bank of Atlantic City, N. J. and Thompson & Hanstein, upon the statements, amendments thereto, counter-claims, answers to counter-claims and all of the pleadings and amended and supplemental pleadings herein of the defendants, Bankers Trust Company, The Second National Bank of Atlantic City, N. J., and Thompson & Hanstein, and it appearing to the Court that the complainant, by the Interlocutory Decree herein made on the 6th day of August, 1926, has been relieved from the further prosecution of the cause, and that there has been paid into the Court of Chancery the sum of $13,500 as interest upon said mortgage, and that said bond and mortgage is in the possession of the Bankers Trust Company, of Atlantic City, New Jersey;

Final Decree.

And it further appearing that George P. Proffatt and Katherine B. Proffatt, while not parties to the record, have appeared in this proceeding as witnesses and have participated in the trial of the cause, assisting the Bankers Trust Company, and that this Court has jurisdiction in this cause to determine not only the rights of the parties to the record, but likewise the rights of George P. Proffatt and Katherine B. Proffatt, if any, and the evidence offered by the respective parties and the arguments of counsel having been considered;

It Is, on this 7th day of July, 1930, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, Ordered, Adjudged and Decreed and the said Chancellor doth, by virtue of the power and authority of this court, hereby Ordered, Adjudged and Decree.

1. That the agreement made on the 9th day of April, 1925, between George P. Proffatt and Isidor Schmeidler and the assignment made by George P. Proffatt to Isidor Schmeidler of the bond and mortgage referred to in the pleadings herein, which mortgage was made by Bruno Garr and Rosa, his wife and Robert Heilig to George P. Proffatt and Katherine B. Proffatt, dated September 14, 1923, and recorded on September 17, 1923, in the office of the Clerk of Atlantic County in Book 274 of mortgages page 297, which assignment was recorded in the office of the Clerk of Atlantic County in Book of Assignments No. 73 page 106, were and are valid for the purposes for which they were given, *i. e.* to secure the payment to The Second National Bank of Atlantic City, N. J., of the sum of $23,200 with interest on $8,600 from April 1, 1924, and on the balance from April 5, 1926, to

the date of payment; and to Thompson & Hanstein the sum of $2,000 with interest from April 9, 1925, and that such instruments were not obtained by fraud or misrepresentation and that neither the said George P. Proffatt, Katherine B. Proffatt or the Bankers Trust Company has the right to have said instruments set aside or annulled in any manner whatsoever and the prayer for such relief is denied.

2. That Bankers Trust Company took its assignment dated December 21, 1925, and recorded in the office of the Clerk of Atlantic County on December 22, 1925, in Liber page with full knowledge of the rights of the said Isidor Schmeidler as trustee and of the Second National Bank of Atlantic City, N. J. and of Thompson & Hanstein, and that the right of the said Bankers Trust Company rises no higher than those of the said George P. Proffatt and Katherine B. Proffatt and that its rights and the rights of the said George P. Proffatt and Katherine B. Proffatt are subject to the rights of the said Isidor Schmeidler as trustee and The Second National Bank of Atlantic City N. J. and Thompson & Hanstein under the agreement and assignment made between the said George P. Proffatt and Isidor Schmeidler.

3. That the sale made by the said Isidor Schmeidler of the said bond and mortgage under the power of sale contained in the agreement made by the said George P. Proffatt and the said Isidor Schmeidler, at which sale the said bond and mortgage was purchased by The Second National Bank of Atlantic City, N. J. is voidable at the election of the Bankers Trust Company, as the successor of the rights and in-

terests of the said George P. Proffatt and Katharine B. Proffatt, but upon equitable conditions.

4. That said sale and purchase, as aforesaid, be set aside if the said Bankers Trust Company pay to the Second National Bank of Atlantic City, N. J., the sum of $23,200 with interest on $8,600 from April 1, 1924, and on the balance from April 5, 1926, to the date of payment, and to Thompson & Hanstein the sum of $2,000 with interest from April 9, 1925, and the taxed costs of the said Second National Bank of Atlantic City, N. J., and of Thompson & Hanstein, which said payment shall be made within 30 days from the date hereof.

5. That if such sum be paid as aforesaid by the said Bankers Trust Company, the said Bankers Trust Company shall be paid the moneys on deposit with the Clerk in Chancery representing the interest paid on said mortgage, and shall thereafter hold said bond and mortgage free, clear and discharged of any lien or interest of the said Isidor Schmeidler, The Second National Bank of Atlantic City, N. J., or Thompson & Hanstein.

6. That if said payment be not made within the time aforesaid, then The Second National Bank of Atlantic City, N. J., shall hold said bond and mortgage free, clear and discharged of any claims of the said Bankers Trust Company, George P. Proffatt and Katherine B. Proffatt, and the said Bankers Trust Company shall deliver to the said The Second National Bank of Atlantic City, N. J., the said bond and mortgage, together with an assignment of said bond and mortgage to The Second National Bank of Atlantic City, N. J., and there shall be paid to the said The Second National Bank of Atlantic

Final Decree.

City, N. J., the moneys now on deposit with the Clerk in Chancery, being the interest upon said mortgage.

EDWIN ROBERT WALKER,
C.

Respectfully advised,

ROBERT H. INGERSOLL,
V.-C.

NOTICE OF APPEAL.

IN CHANCERY OF NEW JERSEY.

Between ELRAE CORPORATION, *Complainant,* *and* BANKERS TRUST COMPANY, SECOND NATIONAL BANK OF ATLANTIC CITY, NEW JERSEY, JOSEPH THOMPSON and WALTER HANSTEIN, trading as Thompson & Hanstein, *Defendants.*	*On Bill, etc.* *Notice of Appeal.*

Bankers Trust Company, one of the defendants in the above-entitled cause, hereby appeals to the Court of Errors and Appeals in the last resort in all causes, from so much of the final decree of the Chancellor, on the advice of Hon. Robert H. Ingersoll, Vice-Chancellor, entered in the above stated cause on the 7th day of July, 1930, as adjudges and decides that the Court has jurisdiction in this cause to determine the rights of George P. Proffatt and Katherine B. Proffatt; and as adjudges that the agreement made on the 9th day of April, 1925, between George P. Proffatt and Isidor Schmeidler, and the assignment made by George P. Proffatt to Isidor Schmeidelr of the bond and mortgage referred to in the pleadings herein, which mortgage was made by Bruno Garr and Rosa, his wife and Robert Heilig to George P. Proffatt and Katherine B. Proffatt, dated September 14,

1923, and recorded on September 17, 1923, in the office of the Clerk of Atlantic County, in book 274 of mortgages, page 297, which assignment was recorded in the office of the Clerk of Atlantic County in Book of Assignments No. 73, page 106, were and are valid for the purpose of securing the payment to the said Second National Bank of Atlantic City, New Jersey, of the sum of $23,200.00, with interest on $8,600.00 from April 1, 1924, and on the balance from April 5, 1926, to the date of payment; and to Thompson and Hanstein the sum of $2,000.00, with interest from April 9, 1925, and that such assignment and instruments were not obtained by fraud or misrepresentation, and that neither the said George P. Proffatt, Katherine B. Proffatt nor the Bankers Trust Company has the right to have said instruments set aside or annulled in any manner whatsoever, and the prayer for such relief is denied; and also from such part of said decree as adjudges that the rights of the Bankers Trust Company and of George P. Proffatt and Katherine B. Proffatt, his wife, are subject to the rights of Isidor Schmeidler as trustee and the Second National Bank of Atlantic City, New Jersey, and Thompson and Hanstein under the agreement and assignment made between the said George P. Proffatt and Isidor Schmeidler; and from such part of said decree as adjudges that the sale made by the said Isidor Schmeidler of the said bond and mortgage under the power of sale contained in the agreement between said George P. Proffatt and Isidor Schmeidler, at which sale the said bond and mortgage was purchased by the Second National Bank of Atlantic City, New Jersey, is voidable at the election of the Bankers Trust

Company only upon equitable conditions; and as adjudges that said sale and purchase, as aforesaid, be set aside if the said Bankers Trust Company pay to the Second National Bank of Atlantic City, N. J., the sum of $23,200 with interest on $8,600 from April 1, 1924, and on the balance from April 5, 1926, to the date of payment, and to Thompson & Hanstein the sum of $2,000 with interest from April 9, 1925, and the taxed costs of the said Second National Bank of Atlantic City, N. J., and of Thompson & Hanstein, which said payment shall be made within 30 days from the date of said decree; and as requires the payment by the said Bankers Trust Company of the sums hereinabove mentioned with interest and costs as a precondition to the collection by the Bankers Trust Company of the sums on deposit with the Clerk of the Court of Chancery, representing the interest on said mortgage, and as limits the right to hold said bond and mortgage free and clear and discharged of any lien or interest of the said Isidor Schmeidler, the Second National Bank of Atlantic City, N. J., or Thompson & Hanstein upon the payment of the said sums of money; and as directs that if said payment be not made within the time aforesaid, then The Second National Bank of Atlantic City, N. J., shall hold said bond and mortgage free, clear and discharged of any claims of the said Bankers Trust Company, George P. Proffatt and Katherine B. Proffatt, and the said Bankers Trust Company shall deliver to the said The Second National Bank of Atlantic City, N. J., the said bond and mortgage, together with an assignment of said bond and mortgage to The Second National Bank of Atlantic City, N. J., and there

shall be paid to the said The Second National Bank of Atlantic City, N. J., the moneys now on deposit with the Clerk in Chancery, being the interest upon said mortgage.

W. LINDLEY JEFFERS,
Solicitor for and of Counsel with Defendant,
Bankers Trust Company.

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

W. LINDLEY JEFFERS,
Of Counsel with Defendant,
Bankers Trust Company.

PETITION OF APPEAL.

Filed August 12, 1930.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between BANKERS TRUST COMPANY, *Appellant,* *and* THE SECOND NATIONAL BANK OF ATLANTIC CITY, N. J., and THOMPSON & HANSTEIN, *Respondents.*	*On Appeal from the Court of Chancery.* *Petition of Appeal.*

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

The petition of Bankers Trust Company, the appellant in the above stated cause, respectfully shows that your petitioner finds itself aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of New Jersey, bearing date the 7th of July, 1930, in a cause wherein Elrae Corporation was complainant and Bankers Trust Company and others were defendants in this respect, to wit: That the said decree adjudges that George P. Proffatt and Katherine B. Proffatt, his wife, while not parties to the record, had appeared in the proceeding as witnesses, participated in the trial of the cause, assisting the Bankers Trust Company, and that the Court of Chancery had jurisdiction in this cause to

determine not only the rights of the parties to the record but likewise the rights of George P. Proffatt and Katherine B. Proffatt, if any, in said bond and mortgage; and to so much of said decree as adjudges that the agreement made on the 9th day of April, 1925, between George P. Proffatt and Isidor Schmeidler and the assignment made by George P. Proffatt to Isidor Schmeidler of the bond and mortgage referred to in the pleadings of said cause, which mortgage was made by Bruno Garr and Rosa, his wife, and Robert Heilig, to George P. Proffatt and Katherine B. Proffatt, dated September 14, 1923, and recorded on September 17, 1923, in the office of the Clerk in Atlantic County in Book 274 of Mortgages, page 297, which assignment was recorded in the office of the Clerk of Atlantic County in Book of Assignments No. 73, page 106, were and are valid for the purposes for which they were given, *i. e.*, to secure the payment to The Second National Bank of Atlantic City, N. J., of the sum of $23,200 with interest on $8,600 from April 1, 1924, and on the balance from April 5, 1926, to the date of payment; and to Thompson & Hanstein the sum of $2,000 with interest from April 9, 1925, and that such instruments were not obtained by fraud or misrepresentation, and that neither the said George P. Proffatt, Katherine B. Proffatt or the Bankers Trust Company has a right to have said instruments set aside or annulled in any manner whatsoever, and the prayer for such relief is denied; and as holds that the rights of the said Bankers Trust Company and of the said George P. Proffatt and Katherine B. Proffatt in said mortgage are subject to the rights of the said Isidor Schmeidler as trustee and

Petition of Appeal.

The Second National Bank of Atlantic City, N. J., and Thompson & Hanstein under the agreement and assignment made between the said George P. Proffatt and Isidor Schmeidler; and as holds that the sale made by the said Isidor Schmeidler of the said bond and mortgage under the power of sale contained in the agreement made by the said George P. Proffatt and the said Isidor Schmeidler, at which sale the said bond and mortgage were purchased by The Second National Bank of Atlantic City, N. J., is voidable at the election of the Bankers Trust Company, but only upon equitable conditions; and as directs that the sale and purchase of said bond and mortgage be set aside if the said Bankers Trust Company pay to The Second National Bank of Atlantic City, N. J., the sum of $23,200, with interest on $8,600 from April 1, 1924, and on the balance from April 5, 1926, to the date of payment, and to Thompson & Hanstein the sum of $2,000 with interest from April 9, 1925, and the taxed costs of said The Second National Bank of Atlantic City, N. J., and of Thompson & Hanstein, which said payment shall be made within 30 days from the date of said decree; and as limits the right of the Bankers Trust Company to be paid the moneys on deposit with the Clerk in Chancery representing the interest paid on said mortgage upon condition of the payment by the said Bankers Trust Company of the said sums of money last above referred to; and as also adjudged that the said Bankers Trust Company shall only hold the said bond and mortgage free, clear and discharged of any lien or interest of the said Isidor Schmeidler, The Second National Bank of Atlantic City, N. J., or Thomp-

son & Hanstein, upon the payment of said sums of money as aforesaid; and as directs that if said payment be not made within 30 days from the date of the signing of said decree then the said The Second National Bank of Atlantic City, N. J., shall hold said bond and mortgage free, clear and discharged of any claim of the said Bankers Trust Company, George P. Proffatt and Katherine B. Proffatt, and that said Bankers Trust Company shall deliver to the Second National Bank of Atlantic City, N. J., the said bond and mortgage, together with an assignment thereof to The Second National Bank of Atlantic City, N. J., and there shall then be paid to The Second National Bank of Atlantic City, N. J., the moneys now on deposit with the Clerk in Chancery, being interest upon said mortgage.

And your petitioner humbly appeals from those parts of the decree of the Chancellor which adjudges as aforesaid upon the ground that the same are erroneous for that said George P. Proffatt and Katherine B. Proffatt should not have been held to be parties to the said suit, nor should their rights and interests, if any, in the said bond and mortgage have been attempted to be ascertained and adjudged by said decree; and that the agreement made on the 9th of April, 1925, hereinabove particularly referred to, should not have been held valid to secure the payment to The Second National Bank of Atlantic City, N. J., of the sums in said decree mentioned or any part thereof or in any event upon the payment of not more than the sum of $12,000, nor should any interest other than the interest on $8,600 from April 1, 1924, have been adjudged to be paid, nor should the sum of $2,-

000 with interest from April 9, 1925, have been adjudged to be paid to Thompson & Hanstein; and that no equitable conditions should have been imposed upon the said Bankers Trust Company in adjudging that the sale of said bond and mortgage should be vacated and set aside, nor should the Bankers Trust Company have been adjudged to pay the sums of money in the fourth paragraph of said decree specified within 30 days from the date of said decree as a condition precedent to the setting aside of the sale of said bond and mortgage, and that said sale should have been set aside without the imposition of any conditions, and in no event upon the condition that more than $12,000 be paid by Bankers Trust Company with interest on $8,600 from April 1, 1924, and no further interest should have been required to be paid and no payment of any amount to Thompson & Hanstein, either for principal or interest, should have been exacted, and that no limitation upon the right of the Bankers Trust Company to hold said bond and mortgage free, clear and discharged of any lien or interest therein of the said Isidor Schmeidler, The Second National Bank of Atlantic City, N. J., or Thompson & Hanstein, before it should receive the interest on said mortgage which has been deposited with the Clerk in Chancery, nor should the Court of Chancery have held that in the absence of such payment within 30 days from the date of said decree, The Second National Bank of Atlantic City, N. J., shall thereafter hold the said mortgage free, clear and discharged of any claims the Bankers Trust Company, George P. Proffatt and Katherine B. Proffatt, his wife, nor should the Bankers Trust Company be decreed

to deliver to The Second National Bank of Atlantic City, N. J., an assignment of said bond and mortgage duly executed.

Your petitioner therefore prays that the said decree of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden. And that your petitioner may have such relief in the premises as to this Honorable Court should seem meet.

W. LINDLEY JEFFERS,
Solicitor of and of Counsel with Appellant.

ROBERT H. McCARTER,
Of Counsel.

Service acknowledged August 14, 1930.

THOMPSON & HANSTEIN,
Of Counsel with Respondents.

New Jersey Court of Errors and Appeals.

BANKERS TRUST COMPANY, Appellant, AND THE SECOND NATIONAL BANK OF ATLANTIC CITY, N. J., and THOMPSON & HANSTEIN, Respondents.	On Bill, &c. On Appeal from the Court of Chancery.

BRIEF FOR APPELLANT.

This is an appeal from a decree in an interpleader suit, advised by Vice Chancellor Ingersoll.

The bill of complaint was filed by Elrae Corporation, setting up that it had purchased a piece of property in Atlantic City, which was subject to a mortgage of $50,000 made by the former owners to George P. Proffatt and Katherine B. Proffatt, his wife, dated September 14, 1923; that on December 4, 1925, the Second National Bank of Atlantic City and Thompson & Hanstein, lawyers of that City, respondents herein, had served notice on the former owner of the equity that the said mortgage had been assigned by Mr. and Mrs. Proffatt to one Schmeidler, under date of April 9, 1925, and that the purpose of said assignment was to secure the said Bank in the sum of $23,200, and Thompson & Hanstein in the sum of $2,000, and that the former owner had turned that notice over to the complainant. That on March 19, 1926, Bankers Trust Company, appellant herein, had

New Jersey State Library

served a notice on the attorneys of the complainant that they were the owners of the above mentioned mortgage, by assignment from Mr. and Mrs. Proffatt, dated December 21, 1925, and that the Bankers Trust Company had demanded of the complainant the payment of interest due on the said mortgage.

Copies of each of said notices were attached to the bill (pp. 6 and 8).

The bill further alleged that on April 6, 1926, Thompson & Hanstein as attorneys for the Second National Bank, had served notice on the attorneys of the complainant to the effect that the Second National Bank was the owner of the said mortgage. Copy of this notice was attached to the bill (p. 7).

The bill further stated that the complainant was unable to say which of the two claimants was the rightful owner, and asked that they be compelled to interplead.

A decree of interpleader was duly entered and the Second National Bank, on
filed its statement of claim to the mortgage (p. 15), setting up that on or about the 9th of April, 1925, Mr. Proffatt being then indebted to the Second National Bank of Atlantic City in the sum of $23,200, together with interest on $8,600 from April 1, 1924, to the date of payment, and also being indebted to Thompson & Hanstein in the sum of $2,000, and being at that time the owner of the mortgage in question (his wife having assigned her half interest therein to him) did assign said mortgage unto Schmeidler by assignment recorded April 25, 1925. That on the 9th of April, 1925, Proffatt entered into an agreement with Schmeidler by which Proffatt authorized Schmeidler to sell and dispose of the mortgage at such time as would appear advisable to Schmeidler for the purpose of making payments aforesaid, and on the same day, the Bank had transferred to Schmeidler so much of its claim against the Guarantee Electric Company, Inc.

(then in the hands of a Receiver) as was represented by a note of that company held by the Bank in the sum of $14,600, and that on the 9th of April, Schmeidler and Proffatt had made another agreement under the terms of which Schmeidler undertook to collect the dividend upon said claim and pay it to Proffatt, and that on the 5th of April, 1926,

> "which was the time deemed by the said Isadore Schmeidler most advisable, and pursuant to *due notice.*

Schmeidler had offered the mortgage at public sale, and sold it to the Second National Bank, to which the said Schmeidler had duly assigned it.

It will be observed that this document relies wholly upon the alleged title of the Bank derived from the sale of the mortgage, and hence the failure of Thompson & Hanstein to answer the bill.

On the Bankers Trust Company filed its answer and counterclaim (p. 10) in which it claimed to be a *bona fide* holder of the mortgage for the full consideration of $50,000, and further showed in the counterclaim in opposition to the claim of the Second National Bank and of Thompson & Hanstein, that during the month of March, 1925, and prior thereto, Proffatt had been absent from the State of New Jersey, and during his absence a proceeding in Chancery had been instituted against the Guarantee Electric Company, and a Receiver appointed thereof, who had instituted proceedings in Chancery for the purpose of fastening liability for the debts of the said Guarantee Electric Company upon Proffatt; and to that end had caused to be issued an order of sequestration against all the property of Proffatt, included in which was land situated in Northfield, New Jersey, and the mortgage of $50,000 above referred to. That upon Proffatt's return to Atlantic

City, about the first of April, 1925, he had had an opportunity to sell the said Northfield property, provided it could be disposed of at once, and that about that time Schmeidler had proposed to Proffatt to make some provision for securing the Second National Bank for an indebtedness of the Guarantee Electric Company, and that while negotiations continued, Proffatt agreed, if Schmeidler could secure the release from the sequestration proceedings of the Northfield property so that he could sell it, he, Proffatt, would be willing to guarantee the indebtedness of the Guarantee Company to the Second National Bank; whereupon Schmeidler promised Proffatt that if he would execute an assignment of the $50,000 mortgage and such other papers as were deemed necessary, Schmeidler would guarantee that the Northfield property would be released from the sequestration. That the assignment of the said mortgage was thereupon made by Proffatt, in reliance upon said assurance of Schmeidler, who later utterly failed to secure the release. That prior to the alleged sale of the mortgage by Schmeidler to the Second National Bank, it had been assigned by Proffatt to the Bankers Trust Company. That Schmeidler gave no notice either to Proffatt or the Bankers Trust Company of any intention upon his part to expose the mortgage to sale. That the negotiations leading up to the assignment by Proffatt to Schmeidler of the mortgage had been prompted by the Second National Bank, with the intent to fasten upon the said mortgage a liability for the payment of the indebtedness to the bank of the Guarantee Electric Company, for the payment of which debt Proffatt was in no way obligated, and that Schmeidler had colluded with the Second National Bank throughout the entire proceedings, including the failure to give notice as aforesaid. The prayer was that the Second National Bank may be decreed to have no right, title or interest in the mortgage.

After the filing of this answer and counter-claim of the Bankers Trust Company, the Second National Bank on
filed a supplemental statement of claim (p. 18) in which it denied that Bankers Trust Company was a *bona fide* holder of the mortgage in question, and alleging that it had taken the mortgage with either actual or constructive knowledge of the prior assignment thereof to Schmeidler, denying that Schmeidler had made a promise to release the Northfield property, and claiming that the assignment of the mortgage to Schmeidler had been for a good and valuable consideration as well as the later assignment to the Bank; that

> "the sale of the mortgage by the said Isadore Schmidler was held after notice thereof had been given to the attorney of the said George P. Proffatt."

Laches on the part of the Bankers Trust Company is set up, and the claim of ownership of the mortgage reiterated. During the progress of the case, and on an amendment and further supplement to the statement of the Second National Bank in answer to the allegations of the Bankers Trust Company, was filed (p. 20) to which allusion will later be made.

The case came on for hearing on May 17, 1928, before Vice Chancellor Ingersoll, the record showing (p. 28) that the appearances were, for the defendant, Bankers Trust Company, Messrs. McCarter and Jeffers, and for the Second National Bank, Thompson & Hanstein and Merritt Lane. After some discussion, the Vice Chancellor decided that the Bankers Trust Company should first offer proof in support of its claim of ownership in the mortgage.

An examination of the record will disclose (p. 28) that the assignment of the mortgage to the

New Jersey State Library

Bankers Trust Company by Proffatt was offered, and the check of the Trust Company to the order of the Proffatts for $50,000 followed, and after the contention by counsel for the Second National Bank that this check was in no way tied up to the assignment, an officer of the Trust Company was called by the Bankers Trust Company, who testified specifically that the check had been given by the Bankers Trust Company in payment for the assignment of the mortgage, and that the Trust Company had in fact bought the mortgage. The Trust Company then called Mr. Proffatt (p. 42) and proved by him the facts and circumstances already outlined herein in connection with the making of the original assignment to Schmeidler, and the terms and conditions under which that assignment had been made; the fact that Schmeidler had failed to make good on his agreement to release the Northfield property, and Proffatt's repudiation to Schmeidler of the whole transaction on that account. Not a word was said, or a question put to Proffatt on his direct examination on behalf of the Trust Company touching the subsequent transfer to the Bankers Trust Company of the mortgage. On cross examination (p. 58) Mr. Lane showed Proffat the $50,000 check that had passed from the Bankers Trust Company to Proffatt and his wife for the mortgage, with a view of pursuing that line of inquiry. Objection (p. 58) was made that this was not cross examination, but the Court permitted it to be pursued against the objections of Mr. McCarter. Reference will be made to this later.

The record of the sequestration proceedings was offered in evidence (p. 45), and it is uncontradicted in the case that at the time that the order of sequestration was made, Mr. Proffatt was in Florida, where he had been since May 1924 (p. 94); that having learned of that order through the newspapers, Proffatt immediately returned to Atlantic

City, and sought to employ Judge Thompson, of Thompson & Hanstein, in connection with the sequestration proceedings. Judge Thompson thus describes what occurred at that time (p. 317, l. 34):

> "I recall this, that Mr. Hanstein came in my room with Mr. Proffatt and said he wanted us, wanted to know if we would represent him in that litigation, and I replied to the effect that I would not discuss the matter unless he agreed to take care of the Second National Bank and Thompson and Hanstein, and he then asked me if he did that whether we would represent him, and I replied in effect that if he agreed to that or if he did that, then that I would discuss the matter, but not until then. That was all that was said. I was very abrupt in what I had to say."

This was all that occurred and Thompson & Hanstein were not employed by Proffatt. Messrs. Bourgeois and Richards were employed (p. 66).

Shortly thereafter, it is undisputed in the evidence, that Schmeidler, whose office in Atlantic City adjoins that of Thompson & Hanstein, and who had formerly been a business associate of Proffatt, met Proffatt on the street, and undoubtedly a conversation ensued between them with reference to a note for $14,600 of the Guarantee Electric Company that lay in the Second National Bank as well as a note for $8,600, that was endorsed by Mrs. Proffatt. The former note, whose history we shall trace, was the result of dealings that lasted from November 2, 1922, when the Guarantee Electric Company had discounted in the Second National Bank its note for $15,000, which was endorsed by Messrs. Huber and Emerson, two officers of the Guarantee Company. Proffatt did not sign or endorse this note, his only connection with it being that on November 1, 1922 (p. 364), he attended a meeting of the directors of the Elec-

tric Company and voted for a resolution passed by the Board to authorize the company to borrow the money. He was not present when the note was discounted and the proceeds placed to the credit of the Guarantee Electric Company, and he had no legal responsibility whatever for the payment thereof.

For several years anterior to the 13th of October, 1922, Mr. Proffatt, with the active assistance of his wife, had carried on the business of selling electric appliances in Atlantic City, under the trade name of Guarantee Electric Company. On October 13, 1922, the business was incorporated with a paid in capital stock of $50,000, one-half of which went to Mr. Proffatt, and the other half to his wife. The legal features of the corporation were attended to by Thompson & Hanstein, and practically all of the stock of both of the Proffatts was almost immediately sold by them to persons who thereafter became the active managers of the business, Mr. Proffatt for a while remaining a director, and at a meeting held November 1, 1922 a resolution—drawn by Mr. Hanstein—was passed by the board authorizing the Guarantee Electric Company, Inc. to borrow $15,000 of the Second National Bank. Pursuant to that resolution, the Second National Bank (p. 141) discounted the note of the corporation, signed by its President and Treasurer (but not signed or endorsed by Proffatt), for $15,000, crediting it on the same day with the proceeds thereof, less discount, or $14,845. As shown by the evidence of Mr. Giberson, the note teller of the bank (p. 142), the corporation on the 2nd of January, 1923, paid $1,000 on account of this note, and (p. 142), it was renewed for $14,000, and that later further payments were made upon that note, or renewals thereof, between April 16, 1923, and February 27, 1924 (pp. 142 and 143) in small amounts aggre-

gating $3,000, thereby reducing the original indebtedness from $15,000 to $12,000.

Meantime, and on August 1, 1923 (p. 183), an additional note of the corporation for $2,000 was discounted, which by subsequent payments was reduced to $1,500, and (p. 185) a further additional note for $1,500 was discounted on November 14, 1923, upon which payments aggregating $250, were made, reducing the amount due on the latter to $1,250, whereupon (p. 199) the three notes for $12,000, $1,500, and $1,250, were consolidated into one note for $14,750. On the 25th of March, 1924, $150 was paid thereon, leaving the consolidated note at $14,600. On the 16th of July, 1924, this note was protested and remained unpaid until the sale of the mortgage hereinafter referred to.

It is claimed by the Second National Bank, that either before or after the original discount of the $15,000 note was made, the bank received the verbal assurance of Proffatt that he would stand behind the company if the discount were made, and an endeavor to prove this in the cross-examination of Proffatt, completely failed. Mr. Cochran, at that time the Cashier of the Second National Bank, testified on pages 307-316 and therefore gives the only evidence the Record presents of any responsibility—legal or moral—that Proffatt assumed with the Bank that had discounted the note for the company, having 2 of its directors indorse the note (p. 361). The whole of Cochran's evidence should be read. There was never a more flimsy basis on which to predicate a liability of an individual for the payment of a note, discounted by a corporation, the proceeds of which it received. If the testimony be read it will be seen that Mr. Cochran "thinks" he had a talk with Proffatt at the time the note was discounted (p. 308), altho' he is not sure. On page 309, he says he *thinks* there was some conversation to the effect that he

(Proffatt) was out of the Company which had been turned over to Messrs. Huber and Emerson to whom the Proffatt stock had been sold, but that he (Proffatt) would naturally have an interest in it, and that is about all he (Cochran) can remember. Being hard pressed by counsel Cochran finally says he "thinks" Proffatt said that the Bank would never lose anything through the Guarantee Electric Company, altho' he frankly admits he does not know whether that remark was made before or after the discount of the note (pp. 309 and 315). The inevitable conclusion is from reading the evidence that the conversation—whatever it was—occurred long after the discount and at a time: "that the company were not carrying a satisfactory account with the bank and were not reducing the paper properly" (Cochran, pp. 311-312).

The note for $8,600 had been given to Mrs. Proffatt by Huber and Emerson when they purchased her stock in the Guarantee Electric Company, and this note was undoubtedly discounted by her in the Second National Bank. Mr. Proffatt was in no way holden for that note.

It is not pretended that either Mr. or Mrs. Proffatt had any personal responsibility for the claim of Thompson & Hanstein for $2,000, that consisting of $1,000 paid by them for ten shares of stock of the Guarantee Electric Co. and $1,000 for legal services rendered to that company in organizing it (pp. 253 and 265, Hanstein's Evidence, yet the Second National Bank in its first statement of claim in this action (p. 15) asserts

> "1. on or about the 9th day of April, 1925, George P. Proffatt *being then indebted to the Second National Bank of Atlantic City. New Jersey, in the sum of $23,200, together with the interest on $8,600.00 from April 1, 1924, to date of payment, and also being indebted to Joseph Thompson and Walter Hanstein* trading as Thompson & Hanstein in the sum of $2,000" assigned the mortgage, etc.

Now it was with regard to these notes held by the Second National Bank that Schmeidler and Proffatt talked, shortly after Proffatt's return to Atlantic City, and it was that conversation that led up to the pledge of the mortgage for $50,000.

Proffatt and Schmeidler in their evidence disagree as to the purport of this conversation, Proffatt claiming (p. 48) that Schmeidler, apparently acting on behalf of the Bank brought up the subject of Proffatt's moral responsibility to the Bank for the Guarantee Company's note, and urged him in some way to protect the bank, whereupon Proffatt stated he had a good offer for the sale of the Northfield property, then covered by the writ of sequestration, and that if Schmeidler would procure the release of that property from the lien of the writ, so Proffatt could sell it, Proffatt would pledge the mortgage in question to the Bank as security for the payment of this note. Schmeidler, on the other hand, says (p. 205) that he, Schmeidler, felt, and said to Proffatt that if Proffatt intended to resume business in Atlantic City, he should clear up this note.

We will not at this time undertake to reconcile or discuss this conflict in evidence. Suffice it to say that for reasons hereinafter stated, we believe that Schmeidler's contention is absolutely untenable.

It is undoubted that as a result of this interview between Schmeidler and Proffatt, a meeting took place in Schmeidler's office between him and Mr. and Mrs. Proffatt which was later followed by a meeting of the three with Mr. Hanstein in the latter's office, where the papers were executed which form the basis of the claim of the Second National Bank in this case. The first of these was an assignment by Mrs. Proffatt to her husband (Ex. S-1, p. 341), for "one dollar and other good and valuable consideration," of her one-half interest in the

$50,000. mortgage above referred to. This assignment, although dated and acknowledged the 9th of April, was not recorded until the 23rd of that month. The next document was an assignment by Proffatt (Ex. S-2, p. 342), for "one dollar, and other valuable consideration," of the whole mortgage to Schmeidler. This is dated and acknowledged the 9th of April and recorded on the 23rd of the month at Mays Landing. On the same day, and at the same time, Proffatt and Schmeidler joined in signing an important document (Ex. B-10, p. 51), reading as follows:

> "THIS AGREEMENT made this 9th day of April, 1925, between GEORGE P. PROFFATT, party of the first part and ISIDOR SCHMEIDLER, party of the second part, for and in consideration of the sum of one dollar each to the other in hand paid the receipt whereof is hereby acknowledged,
>
> WITNESSETH, That, Whereas, the said party of the first part has assigned unto the party of the second part that certain mortgage made by Bruno Garr and Rosa, his wife and Robert Heilig to George P. Proffatt and Katherine B. Proffatt dated September 14th, 1923 and recorded September 17, 1923 in Book 274 of Mortgages page 297 to secure the sum of $50,000. covering premises in the southerly line of Atlantic Avenue distant 90.47 feet east from the east line of New York Avenue being 18.7 feet on Atlantic Avenue and 150 feet in depth, regular, for the purpose of securing unto the Second National Bank of Atlantic City, N. J. the payment of the sum of $23,200., together with interest on $8600. from April 1st, 1924 to date of payment, and also the sum of $2000. to Joseph Thompson and Walter Hanstein, trading as Thompson & Hanstein;
>
> It is understood and agreed that the said party of the first part does hereby authorize the said party of the second part to sell or dispose of said mortgage at such time as shall appear

to be to the party of the second part advisable for the purpose of making the payments aforesaid, and to that end the said party of the second part is hereby authorized to do any and all things necessary for the carrying out of the purposes of this agreement and the rendering over to the party of the first part of any surplus remaining after the sale of said mortgage and the payment of the debts aforesaid.

And the said party of the second part does hereby agree with the party of the first part that he will fully and completely carry out the terms of this agreement and will hold said mortgage for the securing of the debts above set forth and will, at the time that seems most advisable to him, sell said mortgage and pay the debts aforesaid, and will pay over to the party of the first part the surplus remaining after said sale.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals the day and year first above written.

Signed, sealed and delivered in the presence of
GLADYS M. BARBAM

GEORGE P. PROFFATT (SEAL)
ISIDOR SCHMEIDLER (SEAL)"

From this paper it was evident that the full assignment by Proffatt of the mortgage to the bank was in fact intended to be only a pledge, and hence we can understand why the bond and mortgage, the insurance policy and other documents in connection therewith were not delivered to Schmeidler, but were retained by Proffatt (p. 297).

After the execution of the respective assignments and the agreement of pledge, whereby the mortgage was stated to be security for

"the payment of the sum of $23,200., together with interest on $8600. from April 1st, 1924, to date of payment * * *"

a further paper was drawn and signed, of which the following is a copy (Ex. D-11, p. 53):

> "Whereas, Isidor Schmeidler has received an assignment from the Second National Bank of Atlantic City, N. J. of a claim of $14,600., which the said Second National Bank had against the Guarantee Electric Co. Inc.
>
> Now, therefore, this agreement made this 9th day of April, 1925 between Isidor Schmeidler party of the first part, and George P. Proffatt, party of the second part, for and in consideration of the sum of one dollar each to the other in hand paid, the receipt whereof is hereby acknowledged;
>
> Witnesseth, That the said party of the second part does hereby agree that he will file a claim for the said sum of $14,600. with the Receiver of the Guarantee Electric Co., Inc. and collect the dividend paid upon the same and upon receipt of said dividend will pay the same over to George P. Proffatt.
>
> In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.
>
> Signed, sealed and delivered in the presence of
>
> Isidor Schmeidler (seal)
> George P. Proffatt (seal)"

Again there is a discrepancy between Schmeidler and Proffatt with reference to the origin of this paper. Schmeidler claims that he himself suggested, in view of the fact that Proffatt was now securing the bank for the said indebtedness of the corporation, that he should have an assignment of the bank's claim for a dividend of the Receiver on account of its claim. Proffatt, on the other hand, contends that Schmeidler himself suggested the execution of this paper out of fairness to Proffatt under the circumstances. We do not deem it essential to discuss which of the two stories is the more

likely. Later the bank executed an assignment of its claim for a dividend to Schmeidler (Ex. S. 22, p. 210) and (p. 118) Schmeidler sent to Proffatt a letter, dated May 5, 1926, enclosing a check for $408.25 by way of dividend, which Proffatt tore up (p. 118) on the theory that he had previously rescinded the whole matter with Schmeidler, because of Schmeidler's failure to have procured a release of the Northfield property from the writ of sequestration (p. 129).

It must be remembered that the bank took no personal note or other obligation of Proffatt, and it concededly had previously received or possessed none such. All that it had was the note of the corporation, on which Proffatt's name in no way appeared, and which was long overdue. By the terms of the agreement of pledge, no specific time is named when the pledge shall become due, or be foreclosed, the sole provision being that Proffatt authorized Schmeidler

> "to sell or dispose of said mortgage at such time as shall appear to be to the party of the second part (Schmeidler) advisable for the purpose of making the payment aforesaid * * *".

Schmeidler on his part agreed to

> "hold said mortgage for the securing of the debts above set forth, and will at the time that seems most advisable to him sell said mortgage and pay the debts aforesaid, and will pay over to the party of the first part the surplus remaining after said sale."

Nothing seems to have further transpired between the parties with reference to this matter until on September 4, 1925, Schmeidler wrote Proffatt (Ex. S-20, p. 360) requesting that he get in touch with him as soon as possible "regarding the Atlantic Avenue mortgage, as I wish to be relieved of the matter as soon as possible." This letter was addressed to the "Freeman Building".

On October 23rd he again writes a letter (S-19). On November 10th he again writes (S-18), and on November 17th he again writes (S-17). For some unexplained reason these two letters were addressed to different numbers on Rhode Island Avenue. Copies of these two letters were, with two others, shown to Proffatt (p. 133) and he hurriedly replied he *thinks* he received them all. On November 18th Proffatt writes Schmeidler suggesting an interview at the house, having previously (pp. 54, 56) verbally repudiated liability under the contract. They did not meet as proposed in this letter, and on November 20th, 1925, Judge Thompson writes Proffatt, on behalf of the bank dunning him for the payment of

> "the overdue obligation Second National Bank holds against you."

At the time of writing that letter, Judge Thompson obviously misunderstood the situation and supposed that the bank did hold Proffatt's obligation instead of there being a mere pledge of a mortgage.

On December 4, 1925, Judge Thompson, for the firm, wrote to the Central Corporation, owning the equity in the property, a letter, copy of which is attached to the bill of interpleader (p. 6), notifying it of the assignment by the Proffatts above referred to, and stating that

> "This was done for the purpose of securing through this assignment, the Second National Bank of Atlantic City in the sum of $23,200. and Thompson & Hanstein in the sum of $2,000."

and adding that his object in writing was for the purpose of giving notice to the Central Corporation that the Second National Bank and Thompson & Hanstein have the interest as above stated in the mortgage.

On December 17, 1925, the mortgaged premises were sold to Elrae Corporation, the complainant in the interpleader suit, and on December 21, 1925, Mr. and Mrs. Proffatt joined in a transfer of the mortgage to the Bankers Trust Company (Ex. B-3, p. 371), delivering with an assignment thereof the original bond and mortgage and other papers in connection with the loan (p. 57).

On March 18, 1926, Mr. Cramer, Treasurer of the Bankers Trust Company, writes a letter (copy attached to the bill of complaint, p. 8) to Cassman & Gottlieb, attorneys of the owner of the equity, informing them of their interest in the mortgage. Mr. Cassman was apparently President of the Central Corporation. Mr. Cramer also enclosed a bill for six months' interest. Although Schmeidler had held an assignment of this mortgage since April 9, 1925, he had collected no interest, and six months' interest had in the meantime been paid to Proffatt (p. 56).

At some unknown time on or before March 30, 1926, Schmeidler signed a document (Ex. S-8, p. 351) reading as follows:

> "To George P. Proffatt:
>
> Take notice that pursuant to that certain agreement betweeen yourself and me bearing date April 8th, 1925, you authorize me to sell or dispose of that certain mortgage therein referred to, covering premises in the southerly line of Atlantic Avenue distant 90.47 feet east from the easterly line of New York Avenue, and being 18.7 feet on Atlantic Avenue by 150 feet in depth, at such time as shall appear to me to be advisable.
>
> Take further notice that *I deem the Fifth day of April, 1926, at the hour of 10 o'clock A. M., an advisable time at which to sell said mortgage,* and I will at that time and at the banking house of The Second National Bank of Atlantic City, N. J., offer said mortgage at public sale to the highest bidder therefor for cash.
>
> Isidor Schmeidler."

After so doing, and on the 30th of March, 1926, Mr. Bishop, a Clerk in the office of Thompson & Hanstein, posted a notice of a proposed sale, signed by Schmeidler, in five places in Atlantic City, designated on page 78 of the evidence. On March 31 (*ibid.*) he mailed a notice to Mr. Proffatt at 324 North Rhode Island Avenue, Atlantic City. On the same day (p. 79) he inquired of Mr. George A. Bourgeois for the address of Mr. Proffatt, and was advised that Bourgeois did not know the address; that he thought Proffatt was somewhere in the South, and would return to Atlantic City within a few days. Mr. Bishop the day before had left a similar copy of the notice with Mr. Bourgeois' secretary. There was no possible reason for ~~Bishop~~'s knowing Proffatt's address, but, as we shall see, Schmeidler did know it.

Bourgeois

On April 5, 1928, Mr. Bourgeois wrote to Thompson & Hanstein a letter, copied on page 81, referring to the fact that the notice had been left at his office, and saying:

> "This is to notify you that I do not represent George P. Proffatt in the above matter, and am not authorized to accept service for him of such notice, and don't know where he is, and have not been able to communicate with him."

It is not disputed that on April 5th, the day of the proposed sale, Mr. Proffatt was not in Atlantic City, returning about the 23rd of April, 1926, from Florida, and having had no knowledge whatever of the proposed or attempted sale (p. 72), hearing of it casually after his return. It is further uncontradicted in the case that Mr. and Mrs. Proffatt did not then live, or never had lived on Rhode Island Avenue. They resided at the time on Caspian Avenue. Mrs. Proffatt says (p. 153) that in 1925 they lived in a house on North Vermont Avenue, remaining there until October of that year, when they

moved to 222 Caspian Avenue, where they lived until April, 1926, at which time they moved to the Rio Grande Hotel, where they still live. She says (p. 154) that Schmeidler had been twice to their house on Caspian Avenue. Schmeidler does not deny this, and he cannot, and does not dispute that he knew they lived on Caspian Avenue, or that on May 16, 1926, about a month after the sale (p. 247), he wrote a letter to Proffatt addressed at the Caspian Avenue address, enclosing the check for the dividend, and he admits (p. 247) he doesn't know why the notice of the proposed sale of the pledged mortgage was not sent to Caspian Avenue.

He claims he even went so far as to send his clerk, Lockenville, to Caspian Avenue to see if Proffatt, who he knew had been away, had come back, about a week before the sale, and while the visit of Lockenville is denied by Mrs. Proffatt (p. 330), the statement of Schmeidler that he sent Lockenville there to find out whether Proffatt was still away, convicts Schmeidler of knowing that they lived on Caspian Avenue, and this confirms Proffatt's statement (p. 127) that Schmeidler knew he lived there, and (p. 137) that he never received any mail at Rhode Island Avenue. The letter from Schmeidler that Proffatt unreservedly admits receiving (p. 116), is Exhibit S-15 (p. 357), *and is addressed to Caspian Avenue,* and not to Rhode Island Avenue. On page 227, Schmeidler concedes he was told that Proffatt lived on Caspian Avenue, and on November 17, 1925, he wrote him another letter addressed to Caspian Avenue, and (p. 227) he gave no reason why he directed the notice of sale to be sent to Rhode Island Avenue. On page 243 he said that he had heard Proffatt was away. The question is, why after the lapse of a year he did not wait for the "few days" after when Bourgeois' letter stated Proffatt was expected to return, before taking action.

The importance of this deliberate mismailing of the notice of the sale of this gilt edged $50,000. mortgage and failure to apprise Proffatt of the fact that after a year Schmeidler had now determined, as he was required to determine, that the time had arrived when it seemed "most advisable to him" to sell the mortgage, cannot be exaggerated, and so the notice that they claim was sent to Rhode Island Avenue said:

> "Take further notice that I deem the Fifth day of April 1926, at the hour of 10 o'clock A. M. an advisable time at which to sell said mortgage, and I will at that time and at the banking house of The Second National Bank of Atlantic City, N. J. offer said mortgage at public sale to the highest bidder therefor for cash."

Not only did the agreement of pledge fail to authorize a sale without notice, but the fact that no sale was authorized until the pledgee, Schmeilder, should deem it wise—there being no specified time in which the indebtedness would accrue—expressly required the giving of notice to Proffatt, so that he could protect himself and prevent a sacrifice of the mortgage that was worth more than double the full amount attempted to be secured by the pledge.

Notice to the pledgor of a proposed sale of a pledged article is absolutely necessary. *Morris Company* v. *Lewis,* 12 N. J. Equity 329; *Milliken* v. *Dehon,* 2 N. Y. 373; *France* v. *Clark,* 22 Chancery Division 833; *Guinzburg* v. *Downs Co.* (Mass.), 43 N. E. Reporter 195.

If, owing to absence, or for other reason, it is impossible to bring notice to the pledgor of the proposed sale of the pledged article, then formal suit must be commenced, of which the pledgor, of course, would be apprised. *Stearns* v. *Mars,* 4 Denio 227.

In *Strong* v. *National Bank,* 45 N. Y. 718, Judge Rapallo says:

> "the proposition that the inability of a pledgee or lienor to make a demand and give notice of the time and place of same, entitles him to sell without such demand or notice, and without judicial proceedings, is not sustained by the authorities"

citing several authorities, including *Story on Bailments,* Sections 309 and 310. See also *Jones on Collaterial Pledges,* 3rd Edition, Section 610. See also *Conyngham's Appeal,* 57 Pennsylvania State 474.

The fact that notice was left at the office of Mr. Bourgeois in no way overcomes this difficulty. The moment such notice came to Mr. Bourgeois' attention, he at once, as we have seen, disavowed any responsibility or representation in the premises, and expressed his entire ignorance of the then whereabouts of Mr. Proffatt. In *Jones on Collateral Pledges,* on page 737, Section 612, we find:

> "If notice be given to an agent who has no authority to act in the matter for the owner, the notice is without effect."

There is not a suggestion that Mr. Bourgeois had any authority to represent Proffatt in this important matter to determine whether or not, in the first place, he was responsible, and the pledge was a legal ~~place~~ pledge, and second, whether to raise the money and thereby save the large equity. While Proffatt was away a good deal, yet it appears he was coming back and forth (p. 213). A year had elapsed since the pledge had been made, and the Corporation's debt had been due since July 10, 1924. Why was it necessary to proceed in five days at a time they knew that Proffatt was away from home? Why not at least make an effort at his residence to find out when he would return, or

where he was to be found. The sending of notice to Bourgeois was only out of professional conformity (p. 296). It was not designed as a specific notice to Proffatt. Mr. Hanstein expressly so swears (*ibid*).

Mr. Hanstein, who superintended the giving of the notices and the proceedings of the sale of the pledge, on page 296, at line 28, says:

> "I was not conscious of what address at which Proffatt was being approached. I didn't pay any attention to that feature of it because I didn't know where Proffatt lived, but I did feel that as long as Mr. Bourgeois was in it, he certainly should have a notice here, regardless of Proffatt.
>
> Q. Then you felt that notice should be sent to Bourgeois out of fairness to Mr. Bourgeois? A. Yes."

Notwithstanding this—and surely Thompson & Hanstein cannot profess ignorance of these fundamental legal principles the sale proceeded on the 5th of April at the designated place, and Messrs. Cochran and Hanstein were in attendance on behalf of the Second National Bank, Schmeidler put up the mortgage (p. 248), and the bank bid $26,246.34, and gave its check to Schmeidler for that amount. He deposited that check in his own account and gave back to the bank a check for $24,246.34 and to Thompson & Hanstein for $2,000 (p. 249). On the same day (and after the sale) Schmeidler assigned the mortgage to the bank (Ex. S-3, p. 343), and from that time to the present, the bank has claimed to be the absolute owner of the mortgage free from any attack or right of redemption or otherwise. The distinction between the bank's claims before and after the sale, is plainly marked in the notice already referred to of Judge Thompson, attached to the bill of interpleader (p. 6), and dated December 4, 1925, in

which the interest of the bank is simply as creditor to the extent of $23,200 in addition to the claim of Thompson & Hanstein. After the sale, the same attorneys write to Cassman & Gottlieb the notice, also attached to the bill (p. 7),

> "that the Second National Bank of Atlantic City is the *owner* of the mortgage."

The statement of the Second National Bank, filed in the case under the rules, asserting their claim in the interpleader suit, after setting out the pledge of the mortgage and the other proceedings in connection therewith, in the fifth paragraph states (p. 17):

> "subsequently, and on the 5th day of April 1926, which was the time deemed by the said Isidor Schmeidler most advisable, *and pursuant* to due notice, the said Isidor Schmeidler offered said mortgage at public sale and sold the same and the said mortgage was on that date bought in by the Second National Bank, and was by the said Isidor Schmeidler duly assigned to it.
>
> Wherefore the said The Second National Bank of Atlantic City, N. J. claims that it is the owner of said mortgage and entitled to the interest due thereon."

What is the result? The answer to this inquiry seems to require a consideration of, first, the position of Thompson & Hanstein and, second, that of the bank.

I.

Thompson & Hanstein have been paid.

The decree however requires that they be paid again. The sale conducted under their supervision resulted in sufficient proceeds to pay them off. What standing thereafter have they in the matter? Can they say that out of sympathy for the bank that paid them off under, if you will, a mistaken idea as to the legality of the proceedings, they have paid back the bank and are still entitled to be considered? We think not. With great deference to these gentlemen, we feel that in this case they want to eat their cake and still have it. As described by Mr. Hanstein (pp. 253, 267) the origin of their claim for the $2,000 is that they incorporated the corporation, charging them a fee of $1,000 therefor, and at the urgent request of Mr. Proffatt, invested $1,000 in the stock of the company. In return for their claim against the company, they accepted ten shares from Mrs. Proffatt, and purchased ten additional shares from her. Of course, in none of these matters did Mr. Proffatt have any connection or concern whatever. Hanstein claims (p. 256) that after he had made this investment, and just before Proffatt went away, he protested against Proffatt's selling the stock without either buying his or relieving him of their investment. After Proffatt had gone, Thompson & Hanstein sold the stock to Huber (pp. 149, 271, 272) for some cash and a note, holding on to the stock as collateral for the note, which was never paid. It would seem that that proceeding rather relieved Proffatt of any moral responsibility in the premises if any ever existed which we deny. We also produced the unexplained receipted bill of Thompson & Hanstein to the company for the $1,000, and other items indicating that

they were paid in cash (Ex. D-22, 383), and Mr. Hanstein was utterly unable to reconcile that receipt with his recollection of the facts. In this situation there is not a very strong equity in favor of the survival of the Thompson & Hanstein claim to the time of the pledge; but notwithstanding all this, for them to persist and the Court below to hold that they still have a standing and are entitled again to be paid the amount of their claim, notwithstanding the fact that Schmeidler, from the proceeds of sale, has already paid them, is preposterous. Whatever rights Thompson & Hanstein acquired by virtue of the pledge, it is, of course, the law, as stated by the Court of Errors in *Security Trust Company* v. *Edwards,* 90 N. J. Law 558, "as between the pledgor and the pledgee, the pledgor is still the general owner. The pledgee has a special property only, and *upon payment of the debt,* this is extinguished."

So the Supreme Court in *Donnell* v. *Wyckoff,* 49 N. J. Law 48, said:

> "By the contract of bailment, the property is delivered to the pledgee as security for *payment of the debt.*"

Schmeidler received from the bank after the sale, enough money to pay off Thompson & Hanstein, and he did so. Could it for a moment be contended that if Proffatt or the Receiver of the corporation, or anyone else, paid Thompson & Hanstein their claim, they would still be entitled to hold their rights under this pledge? The bank saw fit to bid enough at the sale to reimburse themselves and to pay Thompson & Hanstein. They did pay them, and that ends the interest of Thompson & Hanstein in the pledge.

II.

The position of the Second National Bank.

Attention has already been directed to the fact that the bank does not claim in its pleadings as creditor under the pledge, but as owner under the sale (p. 117). In fact, it appears (p. 334) by the evidence of the Discount Clerk of the Second National Bank, that the discount record of the bank shows that the debt to the bank was paid by the purchase of the mortgage.

It is well settled that a sale by a pledgee, without the observance of the legal requirements, amounts to a conversion of the articles pledged, and subjects the pledgee to an action therefor. *Dimock* v. *The United States National Bank,* 55 N. J. Law 296; *Meisel* v. *Merchants Bank,* 85 *Id.* 253. *Jones on Pledges,* Section 610:

> "A sale of the pledge can only be made after reasonable notice to the pledgor of the time and place of sale, unless such notice has been waived by agreement. A sale without such notice, constitutes a conversion. The reasons assigned for the rule are that the pledgor should have an opportunity to attend the sale and see that it is fairly conducted, that he may exert himself in procuring buyers and thus enhance the price, and that he has the right to redeem the pledge at any moment before the sale is actually made, and should be afforded an opportunity to exercise this right."

If, therefore, Schmeidler had bought in the property at the sale, he would have been guilty of conversion and liable to an action of trover therefor. The bank which purchased at the sale is in no better position, and by claiming to own the property thus purchased, is itself guilty of conversion.

In *38 Cyc* page 3023, we find:

> "The appropriation to one's use of property purchased at an invalid public sale is a conversion, even if the purchase was made in good faith, and * * * one who takes possession of and claims rights in a chattel through a purchase or other means, from a person who had no power from the owner so to dispose of it, is guilty of a conversion of the chattel, and liable in trover for the value thereof * * *. It is well established by numerous authorities that it constitutes a conversion to receive the property from one who has no right to part with it and dispose of it, and thereafter to use, sell or exercise dominion over it, whether with knowledge of the owner's rights with respect to such property or in good faith without any notice whatever of the rights of the owner."

There is no dispute among the authorities as to this point, the only difference being whether or not before one sues, a purchaser under such circumstances, must, in a common law action, before bringing his action, show a demand and refusal. *Ledbetter* v. *Embree,* 40 N. E. Reporter 928. *Jumiske* v. *Andrews,* 92 N. W. Reporter 470; *Kelogg* v. *Olsen,* 24 *Id.* 364; *Millspaugh* v. *Mitchell,* 8 Barb. 333; *Edmunds* v. *Hill,* 133 Mass. 445.

The decree below determined that while the sale was irregular and therefore voidable, that the Bankers Trust Company, as a condition to the assertion of its claim to the mortgage, should pay to the Second National Bank, $23,200 with interest on $8,600 thereof from April 1, 1924, and on the balance thereof from April 5, 1926; and should also pay Thompson & Hanstein the sum of $2,000 with interest from April 9, 1925, besides the taxed costs of the Second National Bank and of Thompson & Hanstein. The authorities cited by the Vice Chancellor in his conclusions (p.399) are confined

to a situation where the pledgee buys in the property. Of course, that was not here done. Schmeidler was the pledgee. He offered the property for sale, and by well settled principles of law, which forbids a man being both seller and purchaser, he could not bid in the pledge at the sale. This principle, however, of course, has no application here because the purchaser was the Second National Bank.

The precise legal question is whether under the circumstances of this case, the sale of the pledged mortgage having been irregular and illegal, the assignee of Proffatt, which, of course, stands in no better position than he would have stood, must make any tender to the Second National Bank as a condition of its right to claim the mortgage.

There is abundance of authority to the effect that a debtor, or one who has had the benefit of borrowed money, cannot take advantage of illegal or irregular proceedings in selling or otherwise foreclosing the security, without tendering the amount of his indebtedness, upon the well settled principle that it is inequitable that one should have enjoyed the benefit of money secured by a mortgage, and avail himself of an illegality in the foreclosure proceedings without at least making his creditor whole. The underlying thought is the equitable maxim that he who seeks equity must do it.

Now we must bear in mind that the sole relation of Mr. Proffatt and of his assignee, the Bankers Trust Company, to the transaction is that of pledgor. The debt was never Proffatt's debt, and the Second National Bank never had his obligation. Neither did Proffatt in any way benefit by the original loan. He never received a dollar's benefit in

the matter, and were it not for the fact that the transaction was executed by the actual assignment under seal of the mortgage to Schmeidler, the Bankers Trust Company could undoubtedly have set up the want of consideration for Proffatt's entering into the pledge. A past indebtedness is ordinarily no consideration for a pledge.

In *Jones on Pledges,* Section 360A, we find:

> "Whatever may be the law in the case of a transfer of chattels in payment of a pre-existing debt, when the debt is thereby discharged, we think that by the weight of authority a pledging of chattels as security for a pre-existing debt, when there is no present consideration whatever for the pledge, does not constitute the pledgee a holder of value." Citing an abundance of early American and English authorities.

While this is true, yet the fact that the ~~parties~~ pledgor actually executed and delivered the assignment of the mortgage, we think so far as affecting the transaction is concerned, prevents him from setting up the lack of consideration, under the doctrine of *Perkins v. Trinity Realty Company,* 69 N. J. Equity 723; affirmed 71 *Id.* 304. *Krouse* v. *Palmer,* 89 N. J. Equity 220.

This doctrine, which because of the executed assignment prevents the assignor from setting up a lack of consideration, does not, however, mean or in any way indicate that Mr. Proffatt ever had a dollar's benefit in the matter. He assumed no personal obligation with reference to it. He simply pledged the mortgage, and thereby applied the mortgage for a particular purpose in a particular way, and if it was not dealt with in that way, there being no obligation on his part to pay the debt either arising from positive agreement or from having had the benefit thereof, the bank has no equity to claim that his assignee should tender the amount

of the indebtedness before it is permitted to recover the mortgage.

The idea that a third person, other than the debtor, could pledge his property to secure the debtor's debt, is something of an innovation in the law of pledges. Lord Holt in the great case of *Coggs* v. *Bernard* first made a systematic statement of the general law of bailment, and defined a pledge to be that sort of bailment

> "when goods or chattels are delivered to another as a pawn to be a security to him for money borrowed of him by the *bailor.*"

So Sir William Jones in his book on bailments defined it to be

> "a bailment of goods by a debtor to his creditor to be kept until the debt be discharged."

The definition has, however, properly been enlarged to include a pledge delivered by a debtor, *or someone for him* to a creditor, as security for the payment of a debt on the fulfillment of an obligation. In 1 Pomeroy's Equity Jurisprudence, 4th Edition, Section 386, where the discussion is as to the application in cases of this kind of the equitable maxim that he who asks equity must do equity, we find:

> "If we analyze this general formula, we shall obtain a more accurate notion of the real scope and effect of the principle. In the first place, the rule only applies where a party is appealing as *actor* to a court of equity in order to obtain some equitable relief; that is, either some relief equitable in its essential nature, as an injunction or a cancellation, or equitable because it may come within the power of the court to administer by virtue of its concurrent jurisdiction, as an accounting, or a pecuniary recovery; and it is necessarily assumed that the party would, but for the operation of the rule, be entitled to all the relief which he demands.

> Unless the party were otherwise so entitled, there would plainly be no occasion for invoking the rule. With respect to the terms which may be imposed upon the party as a condition to his obtaining the relief in accordance with the rule,—that is, the 'equity' which he must do,—it is undoubtedly true, as said by Vice-Chancellor Wigram, that the court obtains no authority from this principle to impose any arbitrary conditions not warranted by the settled doctrines of equity jurisprudence; the court cannot deprive a plaintiff of his full equitable rights, under the pretense of awarding to the defendant something to which *he* has no equitable right, something which equity jurisprudence does not recognize. The principle only requires the plaintiff to do 'equity.' According to its true meaning, therefore, the terms imposed upon the plaintiff, as the condition of his obtaining the relief must consist of the awarding or securing to the defendant something to which he is justly entitled by the principles and doctrines of equity, although not perhaps by those of the common law,—something over which he has a distinctively equitable right. In many cases, this right or relief thus secured to or obtained by the defendant, under the operation of the rule, might be recovered by him, if he as plaintiff, the parties being reversed, had instituted a suit in equity for that purpose. But this is not indispensable, nor is it even alway possible. The rule may apply, and under its operation an equitable right may be secured or an equitable relief awarded to the defendant which could not be obtained by him in any other manner,—that is, which a court of equity, in conformity with its settled methods, either would not, or even *could* not, have secured or conferred or awarded by its decree in a suit brought for that purpose by him as the plaintiff."

Now it will be observed in the first place, that the Bankers Trust Company *did not seek this Court,* but was brought *here,* and as against its co-

defendant, the Second National Bank, is asserting *not an equitable,* but a purely *legal claim,* one that would have justified an action either of trover or of replevin. Again, as shown by the quotation from Pomeroy, the maxim is nothing more than a right in a defendant in an equity suit to insist that the complainant, before being accorded any equitable relief, shall

> "admit and provide for all the equitable rights, claims and demands justly belonging to the adverse party and growing out of or necessarily involved in the subject matter of the controversy" (*supra*).

The maxim does not justify the assertion by the defendant of every possible claim, by setoff, counterclaim or otherwise to which he may think he is entitled. The Court of Chancery in *Bourgeois* v. *Risley Real Estate Co.,* 82 N. J. Equity 211, and the Court of Errors in *Reeves* v. *White,* 84 N. J. Equity 661, quote with approval the language of Professor Pomeroy that:

> "The Court of Equity refuses to give to the plaintiff what the law would give him if the Courts of common law had jurisdiction to enforce, without imposing upon him conditions which the Court considers he ought to comply with although the subject of the condition should be one which the Court would not otherwise enforce."

Professor Pomeroy adds:

> "In this narrow and particular sense the principle becomes a universal rule governing the courts of equity in administering all kinds of equitable relief, in any controversy where its application may be necessary to work out complete justice."

Vice Chancellor Wigram in *Hanson* v. *Keating,* 4 Hare 1, adverting to this maxim, and giving it its proper limitations, says:

> "I know of no case which cannot be explained upon this or analogous reasoning; and my opinion is that the Court can never lawfully impose merely arbitrary conditions upon a plaintiff only because he stands in that position upon the record. It can only require him to give the defendant *that which by the law of the Court,* independently of the mere position of the party on the record, is the right of the defendant in respect to the subject of the suit. A party, in short, does not give up any of his rights *or submit those rights to arbitrary disposition of the Court.* He submits only to give the defendant his rights in respect to the subject matter of the suit on condition of the plaintiff obtaining his own."

There is undoubtedly a line of cases that hold that a *debtor* who gives a mortgage to secure his indebtedness cannot successfully claim the mortgage upon an imperfect or illegal foreclosure, without tendering to his creditor the amount of his indebtedness. In such cases, the creditor or purchaser of a property has a right to demand, before the Court of Equity will upset the imperfect proceedings, that the debtor who has had the benefit of the debt or enjoyed the proceeds thereof, should pay off his debt. In such cases, the purchaser at the foreclosure sale has presumably bid enough to pay the debt off by acquiring title to the property, and he obviously is asserting a right that equitably belongs to him when he demands that the *debtor*—he who has had the benefit of the debt and was obligated to pay it—should, before depriving him of the value of the property thus purchased, make good his obligation and pay his debt. The principle is well expressed in *Puckhaber* v. *Henry* (Cal.), 93 Pacific Reporter 114, 116, where the

Court held that notwithstanding the fact that the debt for which a security had been given was outlawed, the debtor could not get rid of the mortgage given to secure the sum, without paying the debt. The Court said:

> "Although the lien of a mortgage is 'extinguished' by the barring of the debt by the statute of limitations, the mortgagor of real property cannot, without paying his debt, quit his title against the mortgagee * * *. It is the general rule enunciated by Courts of last resort that a pledgee *cannot recover possession of the pledged property without paying his debt* although the debt be barred by the statute of limitations * * *."

Now in this case, the Bankers Trust Co., assignee of Proffatt, has a right to assert that the obligation of the Guarantee Electric Corporation to the bank was never "Proffatt's debt." All that he ever bound himself with reference to it, was to pledge the mortgage, without ever having had a dollar's advantage therefrom. His position is like that of the party in the leading case of *Manternach* v. *Studt,* 240 Illinois 464, cited by Pomeroy in Section 386 of his Equity Jurisprudence (4th Ed.), in support of this very idea. There an administrator of an estate, in order to pay debts of the decedent, took proceedings for the sale of the land of an infant heir. The proceedings were imperfect and unsuccessful as to the infant, and upon his becoming of age, he disaffirmed the transaction and took proceedings to recover his inherited share. The Court held he was not bound to pay the debt, saying:

> "If a complainant asks a court to grant to him equitable relief, the maxim that 'he who seeks equity must do equity' requires the complainant to recognize and admit the equitable rights and claims of his adversary growing out of the same subject matter. A court of equity will

not give equitable relief unless the complainant concedes corresponding equitable rights of the defendant, but a court cannot deny to a complainant his rights unless he will do something to which the defendant is not justly entitled by the principles of equity. In this case the appellee takes title to the undivided one-fourth of the lot by descent from his father, and is entitled to disregard the proceeding and sale, which were void for want of jurisdiction. So far as his title is concerned, a court of law would recognize and enforce his right as fully and freely as a court of equity; the infirmity of title being apparent on the face of the record, which showed service for the minors on the principal creditor. *An heir might be prevented from questioning sale without restoring what he had received under it, but in this case the appellee did not receive anything.* The doctrines applicable to the facts of this case are: That the rule *caveat emptor* applies to the sale; that *the debts of the estate* of Peter Manternach were not liens on the lot, and the doctrine of subrogation has no application; and that, where the title of a purchaser at an administrator's sale fails for want of jurisdiction, he is not entitled, in equity, to be subrogated to the claims of creditors paid by the purchase money. *Burr* v. *Bloemer,* 174 Ill. 638, 51 N. E. 821; *Bishop* v. *O'Connor,* 69 Ill. 431; *Borders* v. *Hodgers,* 154 Ill. 498, 39 N. E. 597; *Heppe* v. *Szczepanski,* 209 Ill. 88, 70 N. E. 737, 101 Am. St. Rep. 221."

See also *Burr* v. *Bloemer,* 51 N. E. Reporter 821. The position of the Assignee of Proffatt is analogous to that of an owner of property who by *certiorari,* and previous to the enactment of the statutes requiring a tender of the taxes actually due, applies to set aside a tax sale of his property on the ground of some defect in the proceedings. *Waterman* v. *Shrewsbury,* 83 N. J. Law 286. On a judicial sale, the doctrine of *caveat emptor* applies, and purchasers buy only the debtor's estate. *Brady* v. *Car-*

teret, 67 N. J. Equity 641. Thus in *Kahler* v. *Kelsey,* 136 N. W. Reporter 54, the plaintiff was the mortgagor who had had the benefit of the debt. The same thing is true of *Levy* v. *Stoeffla,* 127 Pacific Reporter 725. The Court in that case following the rule laid down by the Supreme Court of the United States in the same litigation, showed that a purchaser of mortgaged property who brought suit to quiet title in himself, was only entitled to judgment on condition that he pay the mortgage debt. This was upon the express ground, as stated in the opinion, that by the assertion of any other rule, the purchaser would get much more than he bargained for and enabled to take advantage of his own wrong. See *Howell* v. *Levitt,* 95 New York 617; *Rush* v. *First National Bank of Kansas City,* 71 Federal Reporter 102.

We believe, without exception, all the cases that have required a pledgor who seeks to recover the property sold at an irregular or illegal sale, to tender the amount of the indebtedness, are cases where the pledgor has also been the debtor, or one who claims under him, and has, therefore had the benefit of the debt.

Proffatt never received the money, or had the benefit thereof, and of course, therefore, the cases referred to in support of its view by the Court below, have no application to him.

In *Bruschke* v. *Wright* (Ill.), 46 N. E. Reporter 813, 817, the Court permitted subrogation because, as it says in its opinion:

> "It would not be equitable to restore her (the mortgagor) the property, and at the same time to allow her to retain the consideration money which she received for the land. The amount should have been returned, or the land ordered sold to satisfy the same as a condition upon which the sale should be cancelled."

In this aspect there is, of course, a difference in the positions of Mr. and Mrs. Proffatt. The latter is a debtor to the bank by having discounted there a note she received as consideration for the sale of her stock in the Electric Corporation. This note amounted to $8,600, and that sum and debt was included in the $23,200, the total sum agreed to be secured by the pledge. Were it not for the entire lack of good faith, in the Bank, it might be that a tender of the $8,600 with interest from April 1, 1924, would be equitable.

Again, this maxim is applicable only to a plaintiff who is actor in the suit.

The Bankers Trust Company is a defendant in the interpleader suit. It was brought into this litigation and thereby compelled to assert its claim to the mortgage which otherwise it could have done, as we have seen, by trover or conversion. Its position as such is not that of a complainant in equity compelled by the maxim to do equity. This was expressly decided in the case of *Hunter* v. *Suderski,* 171 Ill. App. 529.

In all of the cases in this state where the doctrine has been applied, it has been against a complainant actor in the case. *Minzesheimer* v. *Doolittle,* 60 N. J. Equity 398; *Munn* v. *Americana Co.,* 83 *Id.* 309; *Prindeville* v. *Johnson,* 93 *Id.* 425; *Newbeck* v. *Newbeck,* 94 *Id.* 167.

III.

The Second National Bank moreover did not, in conducting the sale, act in good faith, and can not therefore avail itself of the rule relied on by the Court below.

There is the undoubted rule that a purchaser at a foreclosure sale who has acted in entire good faith and innocently became the purchaser, will, because of such good faith be subrogated as against the debtor, to the mortgage, but the rule always requires that his position shall be one of absolute innocence and good faith.

Thus in 2 *Jones on Mortgages,* 8th Edition, Section 1112, we find:

> "The general rule is that a *bona fide* purchaser under a void foreclosure sale is subrogated to the interest of the mortgagee, and may himself foreclose the mortgage."

Citing in support of this view, *Davis* v. *Gaines,* 104 U. S. 386; *Brobst* v. *Brock,* 10 Wallace 519.

In *Davis* v. *Gaines,* the opinion on page 405, after stating the rule, says:

> "No case is cited by counsel for appellee where the court refused to give *a purchaser in good faith* the benefit of this rule. The authorities relied on by him (Sugden on Vendors, c. 16, p. 483; 3 Atk. 387) apply only to purchases in bad faith. * * * What we decide on this branch of the case is this: when the purchase money paid by a purchaser in good faith, of real estate of a decedent ordered to be sold by a Probate Court, has been applied to the extinguishment of a mortgage executed by the decedent upon the property sold, and constituting a valid incumbrance thereon, and it turns out that the sale is irregular or void, the

> purchaser cannot be ousted of his possession upon a bill in equity filed by the heir or devisee, without a repayment or tender of the purchase money so paid and applied."

In a word, there were two elements—first the complainant was the heir of the decedent, and was in the shoes of his ancestor who had enjoyed the proceeds of the loan, and secondly, there was special emphasis upon the good faith of the purchaser at the sale.

In *Brewer* v. *Nash* (Rhode Island), 17 Atl. Reporter 857, the effort to upset the sale was by the mortgagor debtor, and the Court was careful to point out that the purchaser at the irregular foreclosure proceedings:

> "having bid off the estate *in good faith* on the invitation of the mortgagee to do so, when, supposing his bid to have been effectual to invest him with the equitable or executory title, he pays the amount of his bid, and the same is applied to the mortgage debt, he has a most persuasive equity to be subrogated to at least the rights of the mortgagee who invited his confidence."

In *V Pomeroy's Equity Jurisprudence,* the right to such subrogation is confined entirely to

> "persons who attempt in *good faith* to purchase property at a void judicial sale, and whose purchase money is used to satisfy valid claims against the property * * * are held subrogated to the rights of the parties *receiving the money.*"

The whole subject was intelligently considered in *Stouffer* v. *Harlen,* Kansas Supreme Court, 74 Pacific Reporter 610, and special emphasis is laid upon the element of good faith in situations of this kind.

In *Heppe* v. *Szczepanski* (Ill.), 70 N. E. Reporter 737, we find a conspicuous example of the necessity

of entire good faith on the part of the purchaser and innocency of the rights of the parties who were by mistake omitted from the foreclosure proceedings, and because of such knowledge they were held not to be entitled to assert the doctrine.

Now in the case at bar, not only was Proffatt not a debtor, nor has he ever had the benefit of the proceeds of the debt, but *the bank cannot claim the vantage ground of good faith.* If the transaction be looked at, the conclusion is inevitable that Schmeidler throughout the proceeding acted for the bank. His effort to claim that he acted for Proffatt in the matter is not only expressly denied by Proffatt (p. 128) but is too ridiculous to be seriously entertained. When the deal was put through, the bank's attorneys, without compensation from either Proffatt or Schmeidler, drew the papers and closed the matter. Schmeidler was never paid a dollar for his services, and never asked Proffatt to pay him. There is no doubt that the bank was, both before and after the 9th of April, 1925, most anxious about its claim. Its officers, as well as its attorneys had written to Proffatt, while he and his wife were abroad. Its attorneys dunned Proffatt after the pledge was made, and it is most ridiculous to suppose that the bank's able attorneys in working out a scheme by which the bank, as well as themselves, would be protected for an indebtedness aggregating over $23,000, would have so drawn the papers as to make the pledge incapable of being foreclosed until the representative of the pledgor should deem it wise.

We contend that it is perfectly plain that the object that Schmeidler and the Second National Bank had in interposing Schmeidler as the nominal pledgee was two-fold—first, to keep from the records the assignment to the bank, and, secondly, to enable the bank to buy in at a sale of the pledge in

recognition of the well settled rule that a pledgee cannot be both purchaser and seller (*Bryan* v. *Baldwin,* 52 N. Y. 232; *Jones on Pledges,* Section 625); and when the time arrived at which Schmeidler "deemed" it wise to sell the pledge, the bank's attorneys superintended the proceedings. They drew the paper by which Schmeidler expressed his conclusion that the time had come to sell. They drew the notices that were set up in five public places. Their clerk posted the notices, and at Schmeidler's suggestion mis-mailed the notice to Rhode Island Avenue. All this was done at a time that Proffatt, to the knowledge of both Schmeidler and Hanstein, was out of town. If the parties had conspired to put the transaction through, whereby an equity of over $25,000 in a perfectly good mortgage would be lost by Proffatt, they could not have adopted a slicker scheme to accomplish it. Knowing his residence was on Caspian Avenue, they deliberately refrained from sending it there, and never even inquired of Mr. Proffatt's son Peter, a business man then living in Atlantic City (p. 248) or of Mrs. Proffatt, who was at home, where Mr. Proffatt was, or how he could be reached. They satisfied themselves with leaving a notice at Mr. Bourgeois' office, who at once, as we have seen, disavowed any responsibility and did not know where Proffatt was. They then had Schmeidler go through the motions, in the office of the bank, of selling the mortgage and claimed to have acquired full ownership thereof, setting up not only that in their statement of claim (p. 15), but the further fact in their supplemental statement of claim (p. 18), that the sale in April 1926 was "pursuant to due notice" filed after the statement of claim of the Bankers Trust Company setting up that "the sale of the mortgage by the said Isidor Schmeidler was held after notice thereof had been given to the attorney of the said George P. Proffatt" knowing full well

that such pretended notice was ineffectual and illegal. How, under such circumstances can the bank truthfully claim to have been a *bona fide* purchaser of the mortgage, innocent of the rights of Proffatt? Schmeidler concedes, and so does Hanstein, that Schmeidler's activities in deeming it wise to order a sale, and to initiate the proceedings resulting in the actual sale, were prompted by the bank.

Mr. Hanstein whose zeal as attorney for the Second National Bank made him a most zealous witness on its, as well as on his own behalf, although claiming (p. 290) that Schmeidler did not in the transaction represent the Bank, concedes on page 292, line 30, that the Bank had been after Schmeidler to do something about the matter, and on page 293 at line 27, he adds:

> "Well, I don't say that Schmeidler alone represented the debtor at all. I think Schmeidler had a duty there."

He shows that Schmeidler had never acted in a similar capacity for the Bank before (*Ibid*), and that he was not either a depositor, officer or stockholder thereof (p. 294). He concedes (p. 280) that the particulars as to the amounts that went into the agreement of pledge were given him by the officers of the bank (pp. 280, 281). He admits (p. 286) that he may have discussed with Schmeidler the advisability of making some arrangement of the kind before the Proffatts visited his office. On page 291, he is quite unable to explain how, if Schmeidler simply represented the Proffatts in the transaction, that he as counsel for the Bank was content that the agreement of pledge should leave it entirely to Schmeidler, who had no connection with the bank whatever, as to when foreclosure of the pledge should take place.

Schmeidler's cross examination should be read in full. He concedes at the bottom of page 220,

that he cannot recall who suggested the interview between Mr. and Mrs. Proffatt and himself in his office preceding that in Hanstein's office. On page 221, he cannot recall what was the subject of discussion in his office. He doesn't recall how it happened that the assignment was made to him. (p. 222, line 38). He cannot recall whether Thompson & Hanstein knew that the interview in his office was to take place (p. 223, line 40). He cannot recall whether the claim of Thompson & Hanstein was against the Electric Company or against Proffatt (p. 225, line 30), or who mentioned Mrs. Proffatt's note (*Ibid*) (p. 226, line 10), Indeed he cannot remember whether he knew of the fact that Mrs. Proffatt was indebted to the bank. He admits he had to do with the sending of the notices of the proposed sale (p. 227, line 20), and claims (p. 228, line 10) that when he wrote to Proffatt under date of November 10, 1925,

> "Have been trying for some time to get in touch with you regarding the mortgage held by me * * * Would appreciate if you will get in touch with me at once so the matter can be cleaned up."

he represented himself, although he had probably been spoken to by the bank before writing that. He claims (pp. 229, 230) that Proffatt from the recesses of his memory was able to give to Hanstein all the details as to date, amount, description and place of record of the mortgage referred to in the assignment. Again, on page 234 at line 38, he cannot recall who suggested that he should be the party of the second part in the assignment, or why he was chosen, and claims it did not seem strange to him that he should have been designated as judge of the time when foreclosure of the pledge should take place, if he was simply the big brother of Proffatt. He cannot explain how the failure of Proffatt to secure the claim of Thompson & Hanstein for $2,000 against the Electric Company,

and for which Proffatt was in no way responsible, should have affected Proffatt's credit (p. 239). He cannot explain (p. 240) why, if it was a desire on Proffatt's part to restore his credit, that would have been accomplished by a pledge of the mortgage for only a part of the indebtedness to the Second National Bank. He cannot recall (p. 242, line 1) whether anything was said either in his own office or that of Mr. Hanstein as to why the assignment was not made direct to the Bank, and (pp. 243 and 244) while claiming he was only acting as the friend of Proffatt throughout the entire transaction, including the sale, he is utterly unable to explain why as such friend he deemed it advisable to sell the mortgage after a year, in April 1926, although he knew Proffatt was away from town, and that Rhode Island Avenue was not his address.

The proceedings leading up to the sale were certainly for the benefit of the bank. The bank cannot blindly turn over to Schmeidler the details of conducting the proceedings resulting in the sale, and escape the responsibility for its being illegally conducted, by putting on horse blinders and simply saying they assumed that Schmeidler acted correctly. Their attorneys conducted the proceedings and attended to the legal formalities, and the bank cannot escape or be ignorant of the illegality of the proceedings for which both Schmeidler and the bank's attorneys are responsible. The only conclusion possible from the situation is that the bank, and particularly Schmeidler, felt here was a chance to acquire a $50,000 mortgage for a claim of about half that amount. Proffatt was away. By sending the notice to the wrong address, it would not reach him, and they would take their chance of maintaining the sale should Proffatt, upon learning of it, *have the nerve, the money and a lawyer who would assert the claim against their influential attorneys.*

It was a good gamble. If it worked, the bank would be $25,000 ahead of the game. If it did not work, it would at least claim to hold the mortgage for the actual indebtedness. It was heads the bank won, and tails Proffatt lost. Now it is just that kind of a position that is not *bona fide*. It is that kind of an attitude that prevents the bank from claiming subrogation. It is that sort of conduct that leaves the bank in a Court of Equity in the position of having become the purchaser, by proceedings that are illegal, of pledged property, subject to a claim thereto by the owner thereof, but disentitled to ask for, or receive from a Court of Equity the special favor of insisting, under the circumstances, that the owner shall not assert his legal right without the extension of equitable grace to the wrong doer.

To say that Schmeidler was the representative of Proffatt and not of the bank in the transaction is ridiculous. No officer of the Second National Bank so testified. The President sent a memorandum of the amount due the bank to Mr. Hanstein, while he, on its behalf as well as on behalf of the firm, was preparing the papers (p. 281). Not a cent was paid by Proffatt to Schmeidler for his considerable efforts throughout the matter. Schmeidler's mere denial that he represented the bank cannot overcome the facts and circumstances. Both the bank and the firm of lawyers were most anxious about their worthless claims against the Electric Company, and had been corresponding with Proffatt touching the same while he was in Europe. To suppose that they were knowingly united in a plan that put the whole situation under the control of Proffatt's friend, leaving it to his discretion when, if ever, he should conclude the time had arrived to order a sale of the mortgage, is ridiculous, and Schmeidler's conduct in purposely misdirecting the notice of the sale is clearly incon-

sistent with his alleged friendship with Proffatt. At any rate, in his conduct he was at arm's length from Proffatt and the Bankers Trust Company. The assignment to the latter of the mortgage had been on record for nearly a year. No effort was made either by him, or by Thompson & Hanstein to examine the records to see if any later assignment had been made of the mortgage after that to Schmeidler, and yet concededly the assignment was a mere pledge, and Schmeidler, the assignee, undertook to be responsible to the Proffatts for any surplus. Schmeidler, plainly and purposely in his management of the sale of the pledged mortgage, acted illegally, and as we claim, fraudulently, and the bank which adopts his conduct and seeks to avail itself of the results thereof, cannot at the same time do this and escape the legal features of the transaction, and relegate the Bankers Trust Company, as Assignee of Proffatt, as its brief seeks to do, to a recovery against Schmeidler for his alleged breach of trust.

Nicholson v. *Janeway,* 16 N. J. Eq. 285;
Tuttle v. *Harris,* (E & A), 92 Atl. Rep. 596.

IV.

In any event the Court below erred in fixing the amount that should be paid by the Bankers Trust Company as a precondition of its right to the mortgage.

The provisions of the decree in this respect are that:

> "4. That said sale and purchase, as aforesaid, bet set aside if the said Bankers Trust Company pay to the Second National Bank of Atlantic City, N. J., the sum of $23,200. with

> interest on $8,600. from April 1, 1924, and on the balance from April 5, 1926, to the date of payment, and to Thompson & Hanstein the sum of $2,000. with interest from April 9, 1925, and the taxed costs of the said Second National Bank of Atlantic City, N. J., and of Thompson & Hanstein, which said payment shall be made within 30 days from the date hereof."

It will be remembered that at the time the assignment was signed by the Proffatts, Mr. Hanstein had received a statement from the Second National Bank (Ex. S-24, p. 363) showing the indebtedness of the original note $14,600 and the two other claims of $5,000 and $500 respectively (pp. 259, 260). Proffatt objected (p. 284) to including the claims of $5,000 and $500 in the pledge, and assumed, without any explanations having been made, that the $14,600 represented the original loan of $15,000.

We will now proceed to show that this was an error and that it included a large sum that had subsequently been borrowed by the Guarantee Electric Company of the bank while Proffatt was in Europe and for which no one ever claimed that Proffatt had the slightest responsibility.

By the terms of the agreement entered into on the ninth day of April, 1925, between George P. Proffatt and Isador Schmeidler, it is recited that the mortgage in question was assigned for the purpose of securing unto the Second National Bank of Atlantic City, N. J., the payment of the sum of Twenty-three Thousand Two Hundred Dollars ($23,200.00) (pp. 51 and 344). This said sum is made up of Mrs. Proffatt's two notes, one in the amount of Forty-four Hundred Dollars ($4,400.00), and the other in the amount of Forty-two Hundred Dollars ($4,200.00), aggregating Eighty-six Hundred Dollars ($8,600.00) (p. 154), and the Guarantee Electric Company's note in the amount of

Fourteen Thousand Six Hundred Dollars ($14,600.00), all of which notes were held by the Second National Bank of Atlantic City, N. J. (p. 55).

The following is a history of the Fourteen Thousand Six Hundred Dollars ($14,600.00) note:

> On November 2, 1922, the Second National Bank discounted the note of the Guarantee Electric Company, bearing that date and in the amount of Fifteen Thousand Dollars ($15,000.00) (p. 194). On March 25, 1924, this note had been reduced to Twelve Thousand Dollars ($12,000.00) (p. 194).
>
> On August 1, 1923, said Bank discounted another note of said Company in the amount of Two Thousand Dollars ($2,000.00), and on March 25, 1924, this note had been reduced to Fifteen Hundred Dollars ($1,500.00) (p. 199).
>
> On November 14, 1923, said Bank discounted another note of said Company in the amount of Fifteen Hundred Dollars ($1,500.00), and on March 25, 1924, this note had been reduced to Twelve Hundred Fifty Dollars ($1,250.00) (p. 199).

On March 25, 1924, these three notes, namely, Twelve Thousand Dollars ($12,000.00), Fifteen Hundred Dollars ($1,500.00) and Twelve Hundred Fifty Dollars ($1,250.00), were combined, making a total amount due by the Guarantee Electric Company to the Second National Bank of Fourteen Thousand Seven Hundred Fifty Dollars ($14,750.00), on account of which the Company paid One Hundred Fifty Dollars ($150.00) in cash and gave its note in the amount of Fourteen Thousand Six Hundred Dollars ($14,600.00) for the balance (pp. 143-4). The Bank combined these notes on its own volition and without Mr. Proffatt's knowledge thereof.

It is quite important to keep in mind the fact that the Fifteen Thousand Dollar ($15,000.00) note had been reduced to Twelve Thousand Dollars ($12,000.00), for the reason that counsel for the Bank in endeavoring to establish Proffatt's liability for the Fourteen Thousand Six Hundred Dollar ($14,600.00) note, attempted to establish his liability for the Fifteen Thousand Dollar ($15,000.00) note by showing on pages 89 and 90 that Proffatt attended a special meeting of the Board of Directors held November 1, 1922, for the purpose of passing a resolution authorizing the Guarantee Electric Company to borrow said sum of Fifteen Thousand Dollars ($15,000.00) from the Second National Bank and further undertook to show on page 90 that Proffatt had gone to said bank and had arranged for said loan, and on page 93 undertook to show that it was Mr. Proffatt's attitude that he wanted to take care of the Fifteen Thousand Dollar ($15,000.00) note.

Assuming but not admitting that Proffatt thereby became liable for the payment of the Fifteen Thousand Dollar ($15,000.00) note, the most he would be obliged to pay would be the balance thereof, or Twelve Thousand Dollars ($12,000.00), and not that amount augmented by the two notes of Fifteen Hundred Dollars ($1,500.00) and Twelve Hundred Fifty Dollars ($1,250.00), less the payment of One Hundred Fifty Dollars ($150.00), which notes were added without his consent or knowledge.

Proffatt did not know that the Fifteen Thousand Dollar ($15,000.00) note had been reduced to Twelve Thousand Dollars ($12,000.00), and then combined with the other two notes. On the contrary, Hanstein led him to believe that the Fourteen Thousand Six Hundred Dollar ($14,600.00) note was the balance due on account of the Fifteen Thousand Dollar ($15,000.00) note (p. 262).

Proffatt, according to Hanstein's testimony on pages 259-60-62, distinguished between loans made by the Guarantee Electric Company from the Second National Bank, while he was active in the Company and those made by the Company when he was inactive.

In the latter category, he placed the two notes of Five Thousand Dollars ($5,000.00) and Five Hundred Dollars ($500.00), and for that reason, according to Hanstein's testimony, declined to pay the same, to which Hanstein replied he felt there was a certain amount of equity (pp. 259-60).

The said notes of Five Thousand Dollars ($5,000.00) and Five Hundred Dollars ($500.00) were also notes of the Guarantee Electric Company, which it had discounted at the Second National Bank and were unpaid. The Five Thousand Dollar ($5,000.00) note was originally in the amount of Fifty-six Hundred Dollars ($5,600.00), and was discounted July 20, 1923 (p. 201). The Five Hundred Dollar ($500.00) note was discounted April 12, 1924 (p. 202).

Attention is here called to the fact that as above stated, the notes of Fifteen Hundred Dollars ($1,500.00) and Twelve Hundred Fifty Dollars ($1,250.00) which were combined with the Twelve Thousand Dollar ($12,000.00) note (being the balance of the Fifteen Thousand Dollar ($15,000.00) note), were originally in the amounts of Two Thousand Dollars ($2,000.00) and Fifteen Hundred Dollars ($1,500.00), respectively, and were discounted August 1, 1923, and November 14, 1923, respectively (p. 199). Both of these notes were, therefore, discounted subsequent to the time the Five Thousand Dollar ($5,000.00) note (originally Fifty-six Hundred Dollars ($5,600.00), which Proffatt refused to pay, was discounted; in one instance almost two weeks thereafter, and in the other instance almost four months thereafter. Accord-

ingly, Proffatt would have placed these two notes in the same category as the Five Thousand Dollar ($5,000.00) note, if he had been fully advised of the facts concerning the Fourteen Thousand Six Hundred Dollar ($14,600.00) note.

It, therefore, naturally follows that had Mr. Proffatt been apprised of the fact that the Fourteen Thousand Six Hundred Dollar ($14,600.00) note was not in reality the balance due on account of the Fifteen Thousand Dollar ($15,000.00) note, but was composed of the Twelve Thousand Dollar ($12,000.00) balance thereof, and two other notes, both of which were discounted subsequent to the time of the discounting of the note for Five Thousand Dollars ($5,000.00), to which he objected, on the ground that the indebtedness was incurred after he became inactive in the Company, he most certainly would have interposed the same objections to these notes, and would have refused to guarantee the payment thereof.

It is, therefore, most respectfully submitted that in no event should the Court have found that more than Eighty-six Hundred Dollars ($8,600.00), the amount of Mrs. Proffatt's two notes with interest thereon, and Twelve Thousand Dollars ($12,000.00), the balance of the Fifteen Thousand Dollar ($15,000.00) note, should be paid to the Second National Bank of Atlantic City, N. J. Of course, the mere statement in the agreement of April 9, 1925, that the indebtedness to the bank was $23,000 cannot prevent either Proffatt or the Bankers Trust Company from showing that that sum is erroneous as between the bank and themselves. The real consideration of any paper may always be shown.

It is further recited in the above mentioned agreement between Proffatt and Schmeidler that the said mortgage was so assigned to secure the payment of the sum of Two Thousand Dollars

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($2,000.00) to Thompson & Hanstein. This sum represented the par value of twenty shares of capital stock of the Guarantee Electric Company, ten shares of which Thompson & Hanstein purchased for One Thousand Dollars ($1,000.00) in cash and the other ten shares they received in payment of their bill of One Thousand Dollars ($1,000.00) for services in incorporating the Company (p. 253).

Proffatt, according to Hanstein's testimony, on page 256, was willing to secure the payment of that said sum of Two Thousand Dollars ($2,000.00), because he had told him that he, Proffatt, would not dispose of his stock without disposing or buying the said stock of Thompson & Hanstein.

Even though it be conceded that such a promise was made by Proffatt, nevertheless, he was relieved from one-half of the liability thereof because Thompson & Hanstein, over a year after receiving said stock in payment of their fee, submitted a bill of One Thousand Dollars ($1,000.00), for the same services for which the stock was given, which bill was paid by the Guarantee Electric Company (pp. 268-9-270).

The Company was incorporated October, 1922 (p. 271). Thompson & Hanstein received their twenty shares dated October 12, 1922, on October 17, 1922 (p. 269), as evidenced by their written acknowledgment of their receipt thereof on the stock certificate book.

Fourteen months thereafter, to wit, on December 17, 1923 (pp. 268-270), they submitted a bill to the Guarantee Electric Company in the amount of Fifteen Hundred Dollars ($1,500.00), One Thousand Dollars ($1,000.00) of which was for services rendered in connection with the incorporation of the Guarantee Electric Company, which bill was duly receipted, as paid. Hanstein's only explanation of the fact that they had been paid twice for the same services was that probably he had ante-

dated the receipt of the stock. He did not, however, explain why October 17, 1922, was selected as the date for the acknowledgment thereof. It is submitted that if an arbitrary date were selected the natural thing to do would have been to have selected October 12, 1922, the date corresponding with the date the stock was issued. Proffatt had neither before nor at the time of the assignment of the mortgage been apprised of the fact that Thompson & Hanstein had been paid twice for their services.

In addition to the fact that Thompson & Hanstein were paid twice, once in cash and once by the delivery of ten shares of stock for the same services rendered in incorporating the Guarantee Electric Company, they sold, or as Hanstein puts it, pages 271-2, agreed to sell their twenty shares of stock to Huber for Two Thousand Dollars ($2,000.00), and accepted his note therefor (p. 272-3). This fact was likewise withheld from Proffatt at the time of the assignment of the said mortgage to Schmeidler.

It is further respectfully submitted that Thompson & Hanstein by disposing or even attempting to dispose of said stock to Huber, thereby relieved Proffatt from any passive original responsibility he may have made pertaining to the purchase or disposition thereof, even though such an agreement was made.

As in the case of the Fourteen Thousand Six Hundred Dollar ($14,600.00) note, there was such a misrepresentation or withholding from Proffatt of facts, which, if disclosed to him, would have resulted in his refusal to have guaranteed the payment of the said sum of Two Thousand Dollars ($2,000.00), as would warrant the Court, in relieving him from the payment thereof to Thompson & Hanstein.

Of course, the foregoing is on the assumption that our previous argument with reference to the fact that Thompson & Hanstein have been paid, and therefore cannot again recover, is not tenable.

The Charge of Interest.

The decree requires that the Bankers Trust Company pay interest on $8,600 from April 1, 1924, and on the balance of $23,200 from April 5, 1926, and on the $2,000 payable to Thompson & Hanstein from April 9, 1925. This in any event is erroneous except so far as the interest on the $8,600 is concerned. The provisions of the agreement of pledge are (p. 51, line 35):

> "for the purpose of securing unto the Second National Bank of Atlantic City, N. J., the payment of the sum of $23,200, together with interest on $8600, from April 1, 1924, to date of payment, and also the sum of $2,000. to Joseph Thompson and Walter Hanstein, trading as Thompson & Hanstein."

This is the only basis of Proffatt's responsibility in the premises, and his and his wife's mortgage was not pledged for anything more. How, therefore, can they or their assignee be compelled to pay more than the agreement of pledge itself requires as a condition of redemption? The interest alone will amount to nearly six thousand dollars.

V.

The decree erroneously determines (p. 403) that the Court "has jurisdiction in this cause to determine not only the rights of the parties to the record, but likewise the rights of George P. Proffatt and Katherine B. Proffatt, if any".

These persons were not parties to the record and have made no claim in the suit to be interested in the mortgage. How, therefore, could the Court below attempt to adjudicate upon their rights? It is well settled that decrees cannot be entered against persons not parties to the record. *Armstrong* v. *Armstrong,* 19 N. J. Equity 357, 360; *In re Martin,* 86 N. J. Equity 269; *Collins* v. *Kiederling,* 87 N. J. Equity 15. At no time during the progress of the case from beginning to end, was any effort made to amend the pleadings so that either of the Proffatts should be made parties thereto.

In *Mundy* v. *Vail,* 34 N. J. Law 418, Chief Justice Beasley, speaking for the Court of Errors said:

> "In the present instance, the deed of trust in question, as it regards the parties to it, was not by any one called in question; the defendants to this chancery suit did not ask for any adjudication upon their rights, and when, consequently, the court undertook to decide and conclude such rights, such act was clearly *coram non judice,* and was consequently void."

See also *Jones* v. *Davenport,* 45 N. J. Equity 77; *Littlefield* v. *Goodnough,* 123 U. S. 549.

See also *Rumford Works* v. *Hygienic Co.,* 148

Federal 862, affirmed 215 U. S. 156, where the Court held:

> "I have found no case which goes to the length of saying that one who merely contributes to the defense of a suit is bound as a privy by the result thereof. Such a contribution might well be made from charitable or other good and sufficient reasons. The rule invoked is only applicable to cases where by agreement a joint defense is made or a principal defends his agent, or a licensor his licensee, or other like relations contractual or representative exist. As said by Hawley, *J.* in *Theller* v. *Hershey* (C. C.) 89 Fed. 575:
>
> > 'The law is well settled that parties and privies include all who are directly interested in the subject matter, and who had the right to make defense, control the proceedings, examine and cross examine witnesses, and appeal from the judgment.' "

To the same effect is *Lundy* v. *Larson,* 78 N. J. Equity 237.

The contention reiterated in the brief for the Second National Bank that the Proffatts were the real parties in interest, and that Mr. McCarter was retained by them is absolutely unsupported by the evidence.

It is true that Mrs. Proffatt, who was induced, without the aid of counsel, to assign her half interest in a good mortgage for $50,000 to secure both her own indebtedness of $8,600, and another indebtedness for which she was in no way even claimed to be responsible, soon repented of her action, and employed counsel to protect her rights, and those rights have not yet been asserted.

VI.

The Court below properly made no allowance for counsel fees, and improperly allowed the Second National Bank and Thompson & Hanstein their costs.

Each of the two defendants only partially succeeded in the Court below. The Bankers Trust Company failed in its claim that the pledge had been conditioned upon Schmeidler's agreement to secure a release of the Northfield property from sequestration proceedings. A large part of the evidence of Mr. and Mrs. Proffartt and of Mr. Hart was directed by the Bankers Trust Company to that claim. On the other hand, a considerable portion of the evidence of Mr. Hanstein and of Mr. Schmeidler was likewise directed thereto. The Second National Bank also contended throughout, that no notice of the sale of the pledge was necessary, and so contends in its brief in this Court. It further contended that it had acquired a perfect title under the sale, and was the absolute owner of the mortgage, and was free from any claim for redemption. It so claims in its cross petition of appeal (p. 5, line 30) and in its brief in this Court. On the other hand, the Bankers Trust Company has always claimed that the failure to give notice vitiated the sale and entitled it to have it set aside. The Second National Bank also failed in the claim vigorously asserted below, and as vigorously insisted upon here, that the Bankers Trust Company had been guilty of such wicked conduct as to disentitle it to any relief, and took the pains to draw up the third supplemental statement of claim in support thereof. In this it failed. There was, therefore, a drawn battle. Each side partially succeeded.

Each side partially failed. Under such circumstances, it is improper to award costs.

In *Diocese* v. *Toman,* 70 Atlantic Reporter 881, Chancellor Walker reviewed the whole subject, and held "where the complainant and defendant are each successful on one or more substantial issues, neither is entitled to costs as against the other." To the same effect see *Fairchild* v. *Hunt,* 14 N. J. Equity 357; *Coddington* v. *Idell,* 30 N. J. Equity 540.

While it is true that section 84 of the Chancery Act, which has been in existence since 1815, makes the award of costs discretionary, yet, as held by this Court in *Folkman* v. *Meyers,* 93 N. J. Equity 215, the discretion referred to in that statute

> "appears to be almost, if not quite uniformly exercised by the denial of costs when each party has succeeded in part in substantial issues. And the denial of taxed costs necessarily includes the denial of any allowance as counsel fee."

With reference to counsel fees, this is a matter entirely of statute. Section 91 of the Chancery Act authorizes the Court to make allowance by way of counsel fee.

> "to the party or parties obtaining the order or decree."

Neither side is in that position. An examination of the decree manifests that it was not entered on the motion of either side, but is the work of the Vice Chancellor himself.

VII.

There is no foundation for the contention of the Second National Bank that the suit should be dismissed because of the alleged bad faith in its conduct by the Bankers Trust Company.

The Second National Bank contends in its brief in this Court, that because the Bankers Trust Company, one of the defendants in the bill of interpleader in which it was stated that the Trust Company claimed to own the mortgage in question; in the fourth paragraph of its answer to the bill (p. 10), admitted the allegations of paragraph 4 of the bill of complaint to the effect that it claimed to be the owner of the mortgage in question, by assignment, and had demanded the payment of interest, adding

> "It is a bona fide holder of said mortgage for the full consideration of $50,000,"

has fraudulently conducted the suit, and is not entitled to any relief whatever. And this claim is asserted in spite of the fact that without any further accent upon that matter, it filed its counterclaim, consisting of thirteen paragraphs (p. 11) in which it set up the claim that the Proffatts had been induced to enter into the agreement of pledge by the promise on Schmeidler's part to secure a release from the sequestration proceedings of the Northfield property, belonging to Proffatt and for which he had a purchaser; that Schmeidler had failed to secure such release and that Proffatt had thereupon rescinded the contract, and that therefor the assignment to Schmeidler failed; that the assignment of the mortgage to the Bankers Trust Company had been on record for months previous

to the attempted sale of the mortgage, and no notice thereof had been given either to Proffatt or Schmeidler, and that the assignment by the Proffatts to Schmeidler was the result of a scheme on the part of the Second National Bank to secure a debt to the Bank not from Proffatt, but from strangers, and that Schmeidler had colluded with the Second National Bank throughout the entire proceeding, including the sale of the mortgage, the giving of the notices, and in failing in the giving of notice of the sale, and praying that the title of the Bankers Trust Company in and to said mortgage may be confirmed, and that the Second National Bank may be adjudged to have no interest therein whatever. The attitude of the Bankers Trust Company is manifested in the counterclaim, and is based upon the theory that the undoubted assignment by Proffatt to it of the mortgage, put it in a position to attack the claim of the Second National Bank thereto, both because the consideration for the prior assignment to it had failed, and because of the fraudulent conduct of the Bank and Schmeidler in connection with the alleged sale of the mortgage.

The Second National Bank previous to the filing of the answer and counterclaim of the Bankers Trust Company had filed its first statement of claim (p. 15). It alleges an indebtedness on the part of Proffatt of $23,200, together with interest on $8,600 to the Bank, and to Thompson & Hanstein of $2,000; the former ownership by Proffatt and his wife of the mortgage in question, the assignment of the one-half interest therein of Mrs. Proffatt to her husband, and the assignment by her husband to Schmeidler; the accompanying agreement authorizing the sale of the mortgage at a time appearing advisable to Schmeidler; an offer to produce the agreement and that

> "Subsequently, and on the 5th day of April 1926, which was the time deemed by the said

> Isidor Schmeidler most advisable, and pursuant to due notice, the said Isidor Schmeidler offered said mortgage at public sale, and sold the same, and the said mortgage was on that date bought in by the said Second National Bank and was by the said Isidor Schmeidler duly assigned to it, wherefore, the said The Second National Bank of Atlantic City, N. J. claims that it is the owner of said mortgage and entitled to the interest due thereon."

It will be observed that one of the principal issues raised by the counterclaim and denied by the first statement of claim of the Second National Bank, was the question of notice having been given to Proffatt or the Bankers Trust Company of the proposed sale of the pledge.

The Second National Bank then filed its supplemental statement of claim "answering the allegations filed by the Bankers Trust Company, defendant" in which it denied any knowledge of the alleged fraud in connection with the original assignment to Schmeidler and the inducements leading thereto, and in the third paragraph states

> "The sale of the mortgage by the said Isidor Schmeidler was held after notice thereof had been given to the Attorney of the said George P. Proffatt."

At the times of filing these two statements of claim, our adversaries evidently entertained the view, which is undoubtedly the law, that notice of the time and place of sale was, under the circumstances of this case, absolutely essential, and to meet the claim in the answer of the Bankers Trust Company that no notice had been given to either of the Proffatts, the Second National Bank fell back upon the notice to Mr. Bourgeois. The case, though at issue from some time early in 1926, was not tried until May, 1928.

The situation at the inception of the hearing was that the two banks each claimed ownership of the mortgage, and the question was raised at the threshhold of the hearing, as to which of the contestants should first offer evidence in support of its claim and the ruling was that the Bankers Trust Company should proceed with its evidence. An examination of the record will disclose that the assignment by the Proffatts to the Bankers Trust Company was offered, and the check of the Trust Company for $50,000 to the order of the Proffatts and after the contention by counsel for the Second National Bank that the check was in no way tied up to the assignment, Mr. Cramer, an officer of the Trust Company was called in its behalf and testfied specifically that the check was given by the Bankers Trust Company in payment for the assignment of the mortgage, and that the Trust Company had in fact bought the mortgage. No one even suggests that there was anything untrue about this testimony. The Bankers Trust Company then called Mr. Proffatt, and proved by him the facts and circumstances, as already outlined, in connection with the making of the original assignment to Schmeidler, and the terms and conditions under which that assignment was made; the fact that Schmeidler had failed to make good on his agreement to release the Northfield property, and Proffatt's repudiation to Schmeidler of the whole transaction on that account together with the fact that he recieved no notice of, and was entirely ignorant that the sale was to take place. Not a word was said by Proffatt on his direct examination touching the transfer to the Bankers Trust Company. When (p. 58) Mr. Lane showed Proffatt the $50,000 check that had passed from the Bankers Trust Company to Proffatt and his wife for the mortgage, with a view of pursuing that line, objection was interposed by Mr. McCarter because it was not cross

examination, and a reading of the cross examination of Proffatt along that line, in which it is claimed that he purjured himself as to the payment of cash, will show that constant objection was made because of the claim that it was not cross examination. We contend that the Bankers Trust Company is not responsible, or cannot be blamed for the obvious misstatements made by Proffatt upon this subject, all of which was elicited upon his cross examination upon a subject about which he had not on his direct evidence been interrogated, and for which he was not offered as a witness.

In the third statement of claim presented by the Second National Bank (p. 20), pursuant to leave, in support of the idea of the alleged fraudulent attitude of the Bankers Trust Company, it is claimed that the Bankers Trust Company:

> "caused the said George P. Proffatt to be sworn before the Court as a witness, and thereupon and after having been sworn, the said George Proffatt, under oath, said that he received the said $50,000 represented by said check from said Bankers Trust Company, in cash, and that he had turned it over in cash to the said Katherine B. Proffatt in the presence of the officers of the said Bankers Trust Company, and testified, under oath, that the said $50,000 in cash was put by the said Katherine B. Proffatt in her pocketbook and carried away from the said Bankers Trust Company by her; that said testimony was false to the knowledge of the said Bankers Trust Company, and to the knowledge of the said George P. Proffatt, and the said George P. Proffatt so falsely testified in pursuance of the conspiracy and agreement between the parties aforesaid (meaning the Proffatts and the Bankers Trust Company) to have it appear that the said Bankers Trust Company was in fact a *bona fide* holder of said mortgage for value. * * *"

There is not the slighest foundation either in the proofs or as a matter of fact for this contention. Mrs. Proffatt was called as a witness for the Bankers Trust Company and produced all of the documents that accompanied the transfer to the Bankers Trust Company. They are printed in the record, particularly Exhibit B-17 on pages 379 *et seq.*, and on their face show that the transaction was an assignment to the Bankers Trust Company and payment therefor by a check of $50,000, which was returned to the Bankers Trust Company, and a certificate of deposit for like amount in the name of the Proffatts substituted therefor. It has always been admitted that before the Bankers Trust Company purchased this mortgage, its President, Senator Richards, had been fully apprised by Proffatt of his claim with reference to the invalidity of the previous assignment to Schmeidler and of the sale to the Second National Bank. That assignment was, however, of record, and proper caution on the part of the Bankers Trust Company required that it should protect itself in its purchase against the claim of Schmeidler or the Second National Bank by reason of that assignment, and so quite properly the agreement, B-17, was later entered into, by which it was arranged that the certificate of deposit should be left with the Bankers Trust Company as security to abide the result of the necessary litigation between it and the Second National Bank, over their respective claims to the mortgage, and to protect the Bankers Trust Company, the Proffatts signed Exhibit B-17. In order, however, at the same time to protect the Proffatts, the second certificate of deposit was contemporaneously with the execution of Exhibit B-17, given to the Proffatts, whereby after the ultimate decision of the legal question involved, their rights in the event of the success of the claim of the Bankers Trust Company to be the absolute owner of the

$50,000 was made plain. Counsel for the Second National Bank contends that this was all farcical and fraudulent. There is not a word to support this claim. The mortgage was a gilt edged mortgage for $50,000. It carried interest at six percent. It was a good investment. The Bankers Trust Company was willing to take it, but there was a question, frankly disclosed to it, about the title thereto. The Bankers Trust Company was advised that the attack upon the claim of the Second National Bank by virtue of the Schmeidler assignment and the later sale to the Bank was not valid, and so it agreed to buy the mortgage and did buy it, but in order to protect itself against this claim, arranged to hold the purchase money until the termination of a suit to settle the matter. In a word, the Proffatts sold the mortgage to the Bankers Trust Company and indemnified the Bankers Trust Company against the validity of the claim of the Second National Bank, by leaving the consideration for the sale with it as security against the claim of the Second National Bank. That claim was either invalid because of the failure of the condition on which the assignment to Schmeidler was originally made, or because of the irregularity in the proceedings in connection with the sale. The Second National Bank claimed, as it now claims, to be the absolute owner of the whole mortgage. If that claim were established, then the Bankers Trust Company would lose nothing by its transaction. If, on the other hand, the Second National Bank should fail in that claim, but still succeed in asserting a claim for a part of the mortgage, the Bankers Trust Company would be secure. Where there is any fraud in such a transaction, we fail to see, and the assertion in the answer of the Bankers Trust Company that it was a *bona fide* holder for value of the mortgage, instead of being fraudulently false, was absolutely true. Its

answer nowhere asserts that it was a *bona fide* purchaser for value *without notice.* It, of course, knew of the claim of the Second National Bank, but was advised that such claim was invalid, as it now contends, and certainly the statement of the position in its answer cannot put the Bankers Trust Company and its President and other officials, including its counsel, Mr. Jeffers, who conducted this proceeding and filed the answer, in the category of knaves. The assignment to Schmeidler was on record months before the Bankers Trust Company took its assignment, and, of course, the latter was chargeable thereby with the fact of such assignment, and the claim arising thereunder, and it was impossible for it to do anything by which it could legally or properly claim, in its acquisition of that mortgage, to be free of or not bound by the legal rights, whatever they were, of Schmeidler under the previous assignment.

The third statement of claim of the Second National Bank further alleges:

> "that the said Bankers Trust Company caused to be called as a witness in said cause, to support its allegations, the said Katherine B. Proffatt and said Katherine B. Proffatt was sworn, and after being sworn did testify under oath that the said Bankers Trust Company did in fact purchase said mortgage, whereas in truth and fact she knew that the form which the transaction took of a purchase of said mortgage was merely for the purpose of attempting to place the said Bankers Trust Company in a position of a bona fide purchaser for value so that the said George P. Proffatt and Katherine B. Proffatt could avoid the effect of the assignment of the said mortgage to the said Schmeidler, as above set forth. Only. when it became apparent that investigation would disclose the certificate of deposit, agreements, etc., which were made between the parties at the time the assignment of the mortgage was made to said bank, did the said

Bankers Trust Company cause said instruments to be produced to the Court. But, notwithstanding the existence of said instruments, the said Katherine B. Proffatt did knowingly falsely say, under oath, that she could obtain the $50,000. from the said Bankers Trust Company at any time and that she did not want the money, and the said Katherine B. Proffatt did knowingly, falsely testify that she did not know that she was not going to get anything out of the transaction until the mortgage was paid. The testimony of the said Katherine B. Proffatt, to the effect that the mortgage was purchased by the bank and that she could have had the money whenever she wanted to take it, was false to her knowledge and to the knowledge of the Bankers Trust Company and of the said George P. Proffatt, and was given for the purpose of inducing the Court to believe that the transaction was a purchase when in fact it was not, so that the said George P. Proffatt and Katherine B. Proffatt could avoid the effect of the assignment made to the said Schmeidler, as hereinbefore set forth."

There is not the slightest foundation for this contention and the express attack therein made upon the integrity of Senator Richards and the counsel and other officers of the Bankers Trust Company. Nor is it true that Mrs. Proffatt in any way perjured herself or knowingly testified incorrectly with reference to the transaction. Her testimony shows that she went to the office of Mr. Jeffers to prepare Exhibit B-17, and that she signed it. She is not a lawyer, and has, of course, little familiarity with legal documents; but she seems, from her evidence, to have had a very intelligent understanding of the nature and effect of the transaction. The quotations from her evidence in the brief of our adversaries plainly shows this. For example (p. 167), she was asked:

"Q. You signed this paper; now what was said that led you to sign this paper, B-17?

Read it and see what it is about. What was said? A. Well, the only thing was said in this agreement, if any trouble or losses came up we would be responsible for it, wouldn't make any trouble for the bank." * * *

"Q. Now, can you remember what was said between you and Mr. Cramer or between your husband and Mr. Cramer when you were present, which led you to go to Mr. Jeffers' office? A. You see I can't recall that.

Q. Can't you recall any of it? A. I can recall about him saying that they were going to purchase the mortgage off of me." * * *

"In Mr. Jeffers' office we made that arrangement.

Q. What was said? A. That if any trouble should come up from the selling of this mortgage that I would stand for it, and I said yes." * * *

"Q. What was said about it? A. Well, they asked if we can draw an agreement that if any trouble came up over this mortgage if I would stand responsible, and I said yes, and that is how the agreement was drawn up.

Q. Did they say anything about as to why they wanted such an agreement? A. No.

Q. Nothing of that kind was said? A. No.

Q. Was anything said at Mr. Jeffers' office—by the way, were you present at Mr. Jeffers' office while this agreement was being drawn? A. No, that was the only understanding that I had, all that I knew was just to protect them."

"Under the terms of that agreement you knew that the Bankers Trust Company had the right to hold that $50,000 certificate of deposit, didn't you? A. I don't think I did, no.

Q. You don't think you did? A. No, I don't think I did.

Q. Although you read this agreement before you signed it? A. Yes, sir.

Q. And you have never made any demand since 1925 to get any part of this $50,000. have you? A. I couldn't because the courts had tied up the interest of it.

Q. You haven't made any attempt, have you? A. No, I can't.

Q. What was said in Mr. —— can you tell me when it was that this agreement that you signed was first mentioned? A. That one there, you mean?

Q. Yes. A. Why, when we went in and sold the mortgage.

"Q. Was it all paid for, I mean was it all drawn, was the agreement all drawn when you went to Mr. Jeffers' office? A. No, it was drawn up while we were there.

Q. Was anything said, anything at that time as to the purpose of this agreement? A. No, just that I would be responsible if any trouble.

Q. Who was present at that time? A. Mr. Jeffers and I.

Q. Who else? A. That was all.

Q. That was all? A. I think so, I think was just Mr. Jeffers and I.

Q. Wasn't your husband there? A. I don't think he was there that day.

Q. Where was he? A. I don't know.

Q. Well, he had gone to the bank with you, hadn't he? A. Yes, he went to the bank with me."

These excerpts from Mrs. Proffatt's testimony indicate her realization of the true facts with reference to the transaction, namely that by the document, Exhibit B-17, the Bankers Trust Company was securing itself against liability under the Schmeidler assignment.

In support of the absurd and outrageous contention of our adversaries, they rely on the case of *Gluck* v. *Rynda Development Company,* 99 New Jersey Equity 788, and *Clickner* v. *Clickner,* 95 N. J. Equity 479. In the latter case, Vice Chancellor Buchanan held that:

> "Where a suitor in equity has been guilty of false or misleading testimony and conduct in the prosecution and hearing of his cause, his suit will be dismissed irrespective of whether or not he might otherwise be entitled to relief."

Mr. Proffatt is not only not a nominal, but is not a real party to the controversy. He so states specifically in his evidence that he only is there as a witness. It is not true, as the briefs allege, that Mr. McCarter was his counsel, and no one so testifies. On the contrary, the proof is that the only one of the Proffatts to whom Mr. McCarter bore any professional relation, was Mrs. Proffatt (pp. 119 and 161). The doctrine of *Clickner* v. *Clickner* only applies to a suitor, and we confidently believe that the Court, after analyzing the situation, will hardly put the officers and attorney of the Bankers Trust Company in the position of the thief and the fraudulent wrong doer that Vice Chancellor Berry so vigorously stigmatized in the *Gluck* case.

Stress is made in the brief of respondent that some other unnamed officers of the Bankers Trust Company were not called. Mr. Cramer (p. 35) testifies that he had charge of the transaction between the Bankers Trust Company and the Proffatts, the only other persons who were concerned being the directors who authorized the purchase. On page 14 of the brief for the Second National Bank it is said:

> "Cramer attempted to convey the impression from what he did say that nothing had been received except the bond and mortgage, and that the transaction represented an out and out purchase by Bankers Trust Company of the bond and mortgage."

An examination of Mr. Cramer's evidence will demonstrate that there is no basis whatever for this contention. He answered every question frankly, and counsel's efforts to wander into fields of exploration were quickly suppressed by the Court's ruling that such questions were not proper cross examination. Equally unfounded is the statement on page 12 of the brief to the effect that it developed in the case that the suit was being prose-

cuted by the Proffatts and not by the Bankers Trust Company. Not a suggestion of proof supports that statement.

It does not appear that Senator Richards, the President of the Bank had any knowledge whatever of the transaction, beyond that obtained by him as counsel at one time for Proffatt in the sequestration proceedings, and, of course, he was powerless to testify concerning facts, knowledge of which was derived in that way. Mr. Proffatt frankly admitted (p. 55) his employment of Senator Richards.

The rule that the Second National Bank here seeks to invoke is, based wholly upon the clean hands doctrine, and applies to a party occupying the position of complainant, or *actor* in the cause invoking equitable relief. Thus, in *Pomeroy's Equity Jurisprudence,* 4th Edition, Section 397, speaking of the maxim, the author says:

> "It says that whenever a party who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him *in limine* * * *"

The case of *Hunter* v. *Suderski,* 171 Ill. Appeal 529, is directly in point here. That case, as we have seen, held the maxim that the persons seeking relief in equity must do so with clean hands, does not apply where the parties are brought in on interpleader and on decree for one of the parties, the other appeals. The opinion says:

> "Numerous cases are cited upon the well known proposition that persons seeking relief in a Court of equity must do so with clean hands. In the present case, however, the principle is not applicable. Both the appellant and the

> appellee were brought into Court by the complainant and now it claims title to the fund brought into court as against each other."

In this case, it was claimed that one of the defendants in the interpleader suit had, by false evidence, endeavored to support his claim, and on that account it was contended he should not be, because of the maxim, accorded any relief.

The Court declined to take that view.

The fact is that the position of the Second National Bank in its pleadings and proof, is far more subject to criticism of this character than is that of the Bankers Trust Company. In its statement of claim which it filed (p. 15) it specifically stated that "Proffatt was *indebted*" to the bank in the sum of $23,200 and to Thompson & Hanstein in the sum of $2,000, and to secure that indebtedness the pledge was made. Again, in the same statement of claim (p. 16) it sets out its right to the entire $50,000 mortgage by virtue of the sale by Schmeidler to it of the mortgage, claiming that the mortgage had been assigned to Schmeidler, and entirely ignoring the accompanying agreement of pledge made contemporaneously with it. Again, on page 17, it alleges the giving of due notice, and after the fact that no notice had been given to either Proffatt or the Trust Company, was set up in the counterclaim of the Bankers Trust Company, the Second National Bank responded with its supplemental statement of claim (p. 18) in which it relies upon the fact that the sale by Schmeidler of the mortgage to it "was held after notice thereof had been given to the attorney of the said George P. Proffatt." In its brief in this Court it now contends that no notice is necessary.

There is no foundation for the contention that the Trust Company should be afforded no relief,

and the Vice Chancellor who saw all the witnesses and watched the progress of the development of the case, correctly declined, after vigorous argument, to take the view of Mr. Lane in this regard.

For the foregoing reasons, it is, on behalf of the Bankers Trust Company, therefore, strenuously urged, first, that the title of it to the mortgage in question should be confirmed without the imposition of any condition whatever; second, in any event the utmost limit of payment as a condition to its right to said mortgage should be $12,000 plus $8,600, with interest in accordance with the agreement of pledge (p. 344) on the $8,600 from April 1, 1924, to date of payment, and that no costs or counsel fee should be allowed to the Second National Bank or Thompson & Hanstein.

Respectfully submitted,

W. Lindley Jeffers,
Robert H. McCarter,
Solicitors for and of Counsel with Appellant.

October Term, 1930.

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Notice of Appeal.

(Filed September 18, 1930.)

In Chancery of New Jersey

Between

ELRAE CORPORATION,
Complainant,

and

BANKERS TRUST COMPANY, *et als.*,
Defendants.

On Bill, &c.
Notice of Appeal.

The defendant, The Second National Bank of Atlantic City, N. J., hereby appeals from those portions of the final decree made in this court, in the above stated cause on the 7th day of July, 1930, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, upon the advice of his Honor, Robert H. Ingersoll, Vice Chancellor, enumerated as follows:

1. That portion of the decree which adjudicates that the sale made by the said Isidor Schmeidler of the bond and mortgage referred to in the decree under the power of sale contained in the agreement made by the said George P. Proffatt and the said Isidor Schmeidler, at which sale the said bond and mortgage was purchased by The Second National Bank of Atlantic City, N. J., is voidable at the election of the Bankers Trust Company as the successor of the rights and interests of the said George P. Proffatt and Katharine B. Proffatt;

2. That portion of the said decree which orders that the said sale and purchase be set aside if the said Bankers Trust Company elect to perform certain acts mentioned in the decree;

3. That portion of the said decree which orders that, if the said Bankers Trust Company shall perform certain acts mentioned in the decree the said Bankers Trust Company shall be paid the money on deposit with the Clerk in Chancery representing the interest paid on said mortgage, and shall thereafter hold said bond and mortgage free, clear and discharged of any lien or interest of the said Isidor Schmeidler, The Second National Bank of Atlantic City, N. J., or Thompson & Hanstein;

4. That portion of the decree which fails to adjudge the said The Second National Bank of Atlantic City, N. J., the true and lawful holder of said bond and mortgage free of any claim or interest of the Bankers Trust Company, George P. Proffatt and Katharine B. Proffatt or any or either of them;

5. That portion of the decree which fails to order that the Bankers Trust Company deliver to The Second National Bank of Atlantic City, N. J. without any conditions the said bond and mortgage, together with an assignment of said bond and mortgage to The Second National Bank of Atlantic City, N. J.;

6. That portion of the decree which fails to order that The Second National Bank of Atlantic City, N. J., be paid without any conditions whatever the moneys now on deposit with the Clerk in Chancery, being the interest upon said mortgage;

7. That portion of the said decree which fails to allow to The Second National Bank of Atlantic

City, N. J., and Thompson & Hanstein proper counsel fees and the fees and expenses of The Second National Bank of Atlantic City, N. J., incurred both in this litigation and in the proceedings incident to the sale and purchase of said bond and mortgage; to the Court of Errors and Appeals in the last resort in all causes.

Dated: September 18th, 1930.

THOMPSON & HANSTEIN,
Solicitors of Appellant.

MERRITT LANE,
Of Counsel.

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

MERRITT LANE,
Of Counsel with Appellant.

A true copy

FERD GARRETSON,
Clerk.

Petition of Appeal.

(Filed September 20, 1930.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

ELRAE CORPORATION,
Complainant,

and

BANKERS TRUST COMPANY, *et als.*,
Defendants,

and

THE SECOND NATIONAL BANK OF ATLANTIC CITY, N. J.,
Defendant-Appellant.

On Appeal from Court of Chancery.

On Appeal of The Second National Bank of Atlantic City, N. J.

Petition of Appeal.

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

The humble petition of The Second National Bank of Atlantic City, N. J., appellant in the above stated cause, respectfully shows that your petitioner finds itself aggrieved by a final decree made in the Court of Chancery of New Jersey by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, upon the advice of the Hon. Robert H. Ingersoll, Vice Chancellor, bearing date the 7th day of July, 1930, wherein Elrae Corporation was complainant and Bankers Trust Company, *et als.*, were defendants in this respect, to wit; that the said decree orders, adjudges and decrees that the sale made by the said Isidor

Schmeidler of the said bond and mortgage under the power of sale contained in the agreement made by the said George P. Proffatt and the said Isidor Schmeidler, at which sale the said bond and mortgage was purchased by The Second National Bank of Atlantic City, N. J., is voidable at the election of the Bankers Trust Company as the successor of the rights and interests of the said George P. Proffatt and Katherine B. Proffatt;

And in this respect, to wit, that the said decree orders, adjudges and decrees that the said sale and purchase as aforesaid, be set aside if the said Bankers Trust Company perform certain acts mentioned in the decree;

And in this respect, to wit, that the said decree orders, adjudges and decrees that if such conditions be complied with by the said Bankers Trust Company that the said Bankers Trust Company shall be paid the moneys on deposit with the Clerk in Chancery representing the interest paid on said mortgage, and shall thereafter hold said bond and mortgage free, clear and discharged of any lien or interest of the said Isidor Schmeidler, The Second National Bank of Atlantic City, N. J., or Thompson & Hanstein;

And in this respect, to wit, that the said decree fails to order, adjudge and decree that the sale made by the said Isidor Schmeidler of the said bond and mortgage under the power of sale heretofore referred to was a valid sale and that the said The Second National Bank of Atlantic City, N. J., took said bond and mortgage and has and always has been since the purchase by it of said bond and mortgage the lawful owner thereof free of any right or interest of the Bankers Trust Company or the said George P. Proffatt or the said Katherine B. Proffatt;

And in this respect, to wit, that the said decree fails to order, adjudge and decree that the Bankers Trust Company and George P. Proffatt and Katherine B. Proffatt, and each of them, are barred by reason of inequitable conduct upon their part from any relief upon equitable considerations;

And in this respect, to wit, that the said decree fails to order, adjudge and decree that the Bankers Trust Company shall deliver to The Second National Bank of Atlantic City, N. J., without any conditions the bond and mortgage together with an assignment of said bond and mortgage to The Second National Bank of Atlantic City, N. J., and that there shall be paid to the said The Second National Bank of Atlantic City, N. J., without any conditions, the moneys now on deposit with the Clerk in Chancery, being the interest upon said mortgage;

And in this respect, to wit, that the said decree fails to order, adjudge and decree that proper counsel fees be paid to the said The Second National Bank of Atlantic City, N. J., and Thompson & Hanstein;

And, if, as matter of fact, the said Bankers Trust Company be entitled to the relief granted to it by the said decree, then in this respect, to wit, that the said decree does not include as a part of the moneys which shall be paid by the said Bankers Trust Company as a condition for said equitable relief, counsel fees of The Second National Bank of Atlantic City, N. J., and Thompson & Hanstein and the expenses of the said The Second National Bank of Atlantic City, N. J., in reference to the sale and purchase by it of the said bond and mortgage and in the defense of this litigation.

And your petitioner humbly appeals from those portions of the said decree of the Chancellor which decree as aforesaid, upon the ground that the same are erroneous for that, by reason of the inequitable conduct of the said Bankers Trust Company and the said George P. Proffatt and Katherine B. Proffatt both before and during the trial of the said cause appearing in the record, the said Bankers Trust Company and the said George P. Proffatt and Katherine B. Proffatt are barred from any equitable relief whatsoever, and for the reason that the sale of the said bond and mortgage made by the said trustee should be sustained because:

(a) There was no necessity for notice of the said sale.

(b) Because proper notice of said sale was given.

(c) Because the Bankers Trust Company, George P. Proffatt and Katherine B. Proffatt cannot take advantage of any supposed lack of notice, being barred by their inequitable conduct and also by laches and by conduct which amounted to a waiver, and by conduct which amounted to an election not to rely upon the lack of notice, and by conduct which showed that if no notice was received it was due to the fault of the said Bankers Trust Company, George P. Proffatt and Katherine B. Proffatt.

(d) Because The Second National Bank of Atlantic City, N. J., was not bound by any act of the said Isidor Schmeidler in the sale of said bond and mortgage, the said Schmeidler being the trustee and agent for the said George P. Proffatt, Katherine B. Proffatt and the Bankers Trust Company.

And for that the said decree should have ordered, adjudged and decreed that the Bankers Trust Company should deliver to The Second National Bank of Atlantic City, N. J., the said bond and mortgage, together with assignment of said bond and mortgage to The Second National Bank of Atlantic City, N. J., without any conditions, the money now on deposit with the Clerk in Chancery, being the interest upon said mortgage.

And for that the said decree should have ordered, adjudged and decreed that counsel fees should be paid by the said Bankers Trust Company, George P. Proffatt and Katherine B. Proffatt to the said The Second National Bank of Atlantic City, N. J., and Thompson & Hanstein.

And for that if the said Bankers Trust Company be entitled to any relief, there should be paid by the said Bankers Trust Company, George P. Proffatt and Katherine B. Proffatt, to the said The Second National Bank of Atlantic City, N. J., all of its expenses incurred in and about the sale of the said bond and mortgage and in and about the litigation.

Your petitioner therefore prays that the said decree of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden, and that the record be remitted to the Court of Chancery with directions to enter a decree as prayed for by your petitioner; and that your petitioner may have such other relief in the premises as to this Honorable Court shall seem meet.

THOMPSON & HANSTEIN,
Solicitors of Appellant.

MERRITT LANE,
Of Counsel with Appellant.

New Jersey Court of Errors and Appeals

ELRAE CORPORATION, Complainant, *and* BANKERS TRUST COMPANY, Respondent, *and* THE SECOND NATIONAL BANK, of Atlantic City, N. J., Appellant.	On Bill, &c. On Appeal from the Court of Chancery. Sat below Ingersoll, V. C. Appeal of Second National Bank.

(Italics, etc., ours, except where otherwise noted.)

BRIEF FOR APPELLANT.

Statement of the Record.

The bill was interpleader. Garr and wife made a mortgage to George P. Proffatt and Katherine B. Proffatt, who is his wife, to secure the payment of $50,000. The owner of the property filed the bill alleging that Second National Bank, Joseph Thompson and Walter Hanstein, partners as Thompson & Hanstein (lawyers) and Bankers Trust Company claimed interests in the mortgage and the interest due thereon (p. 1). Bankers Trust Company filed an answer and counterclaim (p. 10). Second National Bank filed a statement of claim (p. 15) and a supplemental statement (p. 18). There is printed in the State of Case (which was prepared by the solicitors of Bankers Trust Company, appellant) what purports to be an amend-

ment and supplement to statement of Second National Bank (p. 20). This statement was never filed. Leave to file it was granted by the Court (pp. 180, 182) and leave to Bankers Trust Company to answer it (p. 203). At an adjourned hearing it was agreed that the statement made upon the record at the time leave was granted to file an amended or supplemental pleading (pp. 180, 181) should be considered as that pleading (p. 316). Why the proposed pleading, not in fact filed, is printed we do not know. The conclusions of the Court are found at page 384, upon which the final decree was entered (p. 402) from certain portions of which Bankers Trust Company appealed (Notice of Appeal, p. 407; Petition of Appeal, p. 411) and thereafter Second National Bank followed suit (Notice of Appeal, Supplemental State of Case, p. 1; Petition of Appeal, p. 4).

Statement of the Case.

On April 9, 1925, Katherine B. Proffatt assigned to George P. Proffatt, her husband, her interest in the mortgage dated September 24, 1923, to secure the payment of $50,000 before this assignment held by George P. Proffatt and Katherine B. Proffatt jointly. On the same date, George P. Proffatt assigned the mortgage to Isidor Schmeidler. Both assignments were recorded on April 23, 1925 (pp. 341, 342; Exhibits S-1, S-2). On the same day, April 9, 1925, an agreement was made between George P. Proffatt and Isidor Schmeidler (Exhibit S-4, p. 345) reciting the assignment by Proffatt to Schmeidler and stating that the purpose of the assignment was to secure "unto the Second National Bank of Atlantic City, N. J., the payment of the sum of $23,200, together with interest on $8,600 from April 1, 1924, to date of

payment, and also the sum of $2,000 to Joseph Thompson and Walter Hanstein, trading as Thompson & Hanstein." The agreement then proceeded (p. 344):

> "It is understood and agreed that the said party of the first part (Proffatt) *does hereby authorize the said party of the second part (Schmeidler) to sell or dispose of said mortgage at such time as shall appear to be to the party of the second part advisable for the purpose of making the payments aforesaid, and to that end the said party of the second part is hereby authorized to do any and all things necessary for the carrying out of the purposes of this agreement* and the rendering over to the party of the first part of any surplus remaining after the sale of said mortgage and the payment of the debts aforesaid.
>
> And the said party of the second part does hereby agree with the party of the first part that he will fully and completely carry out the terms of this agreement and will hold said mortgage for the securing of the debts above set forth and will, *at the time that seems most advisable to him, sell said mortgage and pay the debts aforesaid,* and will pay over to the party of the first part the surplus remaining after said sale."

On April 5, 1926, pursuant to notice (Exhibits S-7 and S-8, pp. 351, 350) (which notice George P. Proffatt claimed never came to his attention), Schmeidler sold the bond and mortgage to Second National Bank for $26,246.34, which was sufficient to liquidate the claims of Second National Bank and Thompson & Hanstein. On April 5, 1926 Schmeidler made an assignment to Second National Bank of the bond and mortgage which assignment was recorded on the same date. Second National Bank, as the purchaser of the mortgage, paid the purchase price of $26,246.34 to Schmeidler and he, out of that purchase price, paid

Second National Bank and Thompson & Hanstein the amounts due them respectively.

On December 21, 1925, eight months after the assignment to Schmeidler, George P. Proffat and Katherine B. Proffatt assigned the bond and mortgage to Bankers Trust Company. The assignment recited a consideration of $50,000. It was recorded about the day of its date (Exhibit B-3, p. 371). The assignment was taken by Bankers Trust Company with full knowledge of the prior assignments made in April, 1925 by Katherine B. Proffatt to George P. Proffatt and by George P. Proffatt to Isidor Schmeidler and of the agreement between George P. Proffatt and Isidor Schmeidler under which the latter assignment was made.

Notwithstanding the fact that, in its answer and counterclaim, page 10, Bankers Trust Company "4. * * * says that it is a *bona fide* holder of said mortgage *for the full consideration of $50,000*" and that it attempted, by the production of a check made by Bankers Trust Company to George P. Proffatt and Katherine B. Proffatt for $50,000, endorsed by George P. Proffatt and Katherine B. Proffatt, without other endorsements, perforated marked "paid, 2-19-25" (not having been drawn until December 21, 1925, what the explanation of the perforation indicating payment as on February 19, 1925 is does not appear), to prove that $50,000 had, in fact, been paid by Bankers Trust Company to George P. Proffatt and Katherine B. Proffatt, officials of Bankers Trust Company, called by Bankers Trust Company, so testifying (pp. 29, 30, 31, at which point counsel for Bankers Trust Company makes the same statement, pp. 33, 34, 35) and George P. Proffatt, called as a witness for Bankers Trust Company, testifying (pp. 57, 58) that the $50,000 was received by him from Bankers Trust Com-

pany in cash and was by him turned over to Mrs. Proffatt in cash (p. 58) and that Mrs. Proffatt put it in her pocket book (p. 120) and that they left the bank together and that he thought Mrs. Proffatt kept the money in her pocket book at his home (p. 121) and that he had not seen it again, **it finally developed that there was no truth whatever in the claim that Bankers Trust Company had paid $50,000 for this mortgage or any other sum and that most of this testimony was false.**

George P. Proffatt, almost immediately after having made the assignment to, and the agreement with, Schmeidler for the protection of Second National Bank and Thompson & Hanstein went to Mr. Bourgeois and Senator Richards, Senator Richards being the President of Bankers Trust Company, and told them the entire story, showing them the agreement (pp. 66, 67), and it is apparent that the *plan was thought up by somebody of putting Bankers Trust Company in the position of a bona fide purchaser of this bond and mortgage.*

It developed that, instead of Mrs. Proffatt taking the $50,000 in cash as the proceeds of the check (Ex. B. 4, p. 372) (and again we call attention to the fact that this check, although dated December 21, 1925, is perforated as paid 2-19-25) she and her husband endorsed the check and handed it back to the Bank and received from the bank a so-called certificate of deposit (B. 18) certifying that "Katherine B. Proffatt has deposited in this Bank $50,000 *payable to the order of the Bankers Trust Company* on the return of this certificate properly endorsed" (pp. 168, 170).

Note that this certificate is not payable to Katherine B. Proffatt but to Bankers Trust Company. She immediately (if she ever had it) handed this certificate back to the Bank and received another

certificate (p. 168, Ex. B. 16) which certified that "Katherine B. Proffatt has deposited with this bank for safe keeping the following described property, namely: certificate of deposit number 133, $50,000, dated December 21, 1925, payable to the Bankers Trust Company, to be delivered upon the order of the depositor or her legal representatives or attorneys on the return of this certificate." Note that this so-called certificate means precisely *nothing.* It is the one Mrs. Proffatt says she put in her safe deposit box (pp. 158, 159). It means nothing because she could only get, upon the production of it—a certificate of deposit payable not to herself but *"to the Bankers Trust Company"* (p. 168).

On the same day, and as a part of the same transaction, an agreement was made between George P. Proffatt and Katherine B. Proffatt and Bankers Trust Company (Ex. B. 17). That agreement (p. 379) recites that Bankers Trust Company is about to purchase the mortgage from George P. Proffatt and Katherine B. Proffatt and, to induce Bankers Trust Company to make the "purchase" Katherine B. Proffatt had agreed to execute and deliver her certificate of deposit "of the Bankers Trust Company in the amount of Fifty thousand dollars ($50,000.00) *to guarantee and insure the payment of the said bond and mortgage according to the terms thereof;"* and to further induce the Bank "and as a further *condition precedent,* agree to well and sufficiently save, defend and keep harmless and indemnify the said Bankers Trust Company of and from all loss, damage, cost, charges, liability or expenses it may sustain by reason of purchasing the said bond and mortgage;".

After making these recitations *George P. Proffatt and Katherine B. Proffatt* then jointly and severally agree (p. 380):

> "that we will well and sufficiently save, defend and keep harmless and indemnify the Bankers Trust Company, a banking corporation of the State of New Jersey, of and from all loss, damage, costs, charges, liability or expense, that it may incur by reason of purchasing from us the above described bond and mortgage and further that I, the said Katherine B. Proffatt, for the consideration aforesaid, do hereby agree to execute and deliver to the said Bankers Trust Company, my certificate of deposit of the Bankers Trust Company in the amount of Fifty thousand dollars ($50,000.00) to guarantee and insure the payment of the aforementioned bond and mortgage according to the terms thereof."

Yet in the answer and counterclaim of Bankers Trust Company the allegation had been made "that it is a *bona fide* holder of said mortgage *for the full consideration of $50,000*" (p. 10) and it had attempted to prove that it had, in fact, *paid* $50,000 for this bond and mortgage and was a *bona fide* holder thereof.

The moment this proof was adduced Second National Bank moved to amend or supplement its pleadings to charge that the allegation in the answer and counterclaim of Bankers Trust Company asserting that it was the bona fide holder of the mortgage for the full consideration of $50,000 was an attempt to impose upon the Court and that the transaction which took place between the Proffatts and the Trust Company was a mere subterfuge for the purpose of putting Bankers Trust Company in a position where, upon the surface, it could assert a claim of bona fide purchaser when, in fact, it knew that it was in no such position, and that Bankers Trust Company had attempted to impose upon the Court by perjured testimony and, that, because of these facts, *it was entitled to no relief whatever in equity.* Permission was granted and such an amended and sup-

plemental pleading (such a pleading was not really necessary for the Court itself, under the circumstances, would take judicial knowledge of the fraud) was considered as having been filed (pp. 180, 181, 316).

It was finally conceded by counsel for Bankers Trust Company that the *claim of Bankers Trust Company could rise no higher than that of the Proffatts* and it appeared in the case that Mr. McCarter (ostensibly counsel for Bankers Trust Company) was retained by and represented the Proffatts (pp. 119, 161), and in the court below briefs were filed signed by "W. Lindley Jeffers and Robert H. McCarter, counsel for the Bankers Trust Company *and Mrs. Katherine B. Proffatt.*"

The position taken by Bankers Trust Company at the trial was:

1. That the assignments by means of which Schmeidler secured the mortgage April 9, 1925, and the agreement between Proffatt and Schmeidler made upon the same day were obtained by fraud.

2. That the sale of the bond and mortgage by Schmeidler was without notice to Proffatt and therefore void.

3. That, assuming the assignment to, and agreement with, Schmeidler to be free from fraud, then, notwithstanding the fact that the sale made by Schmeidler to Second National Bank was void, nevertheless, Second National Bank having paid $26,246.34 to Schmeidler as the purchase price on the void sale and Schmeidler having paid the Second National Bank and Thompson & Hanstein, out of this $26,246.34, the amounts of the claims secured by the assignment of the mortgage to Schmeidler, there was no longer any indebtedness of Second National Bank and Thomp-

son & Hanstein, their claims being liquidated and the Proffatts were entitled to the mortgage.

The position of Second National Bank and Thompson & Hanstein was:

1. That neither Bankers Trust Company nor the Proffatts were entitled to any relief whatever because of their fraud and perjury and attempt to impose upon the Court.

2. Upon the matter of notice of the sale.

(a) That there was no necessity for notice because of the terms of the agreement of April 9th, 1925 (Exhibit S-4, p. 344).

(b) That, if notice was required and was not given, the sale was neither void nor voidable, the only remedy of the Proffatts being an action against Schmeidler because Schmeidler was their agent.

(c) That the conduct of Schmeidler, Second National Bank and Thompson & Hanstein was open and fair, and any notice required was sent and that, if the Proffatts and Bankers Trust Company received no notice, it was their own fault and the result of their own inequitable conduct.

The Court in its conclusions ignored the charge of perjury and fraud against Bankers Trust Company.

It held that the assignment, which vested title to the bond and mortgage in Schmeidler and the agreement between Proffatt and Schmeidler were not obtained by fraud and were valid to secure the indebtedness of Second National Bank and Thompson & Hanstein. It held that there was defect in the sending of the notice of sale and that, *for that reason,* the sale was *voidable* and that Bankers Trust Company, standing in the

shoes of the Proffatts, might *elect to void the sale upon payment to Thompson & Hanstein and Second National Bank of the amount secured by the assignment to Schmeidler and the agreement between Proffatt and Schmeidler.*

The decree entered upon these conclusions adjudged that Bankers Trust Company might have the bond and mortgage free of the claims of Second National Bank and Thompson & Hanstein if it paid to Second National Bank $23,200 with interest on $8,600 from April 1, 1924, and on the balance from April 5, 1926, to the date of payment, and to Thompson & Hanstein the sum of $2,000 with interest from April 9, 1925. Notwithstanding their fraud, perjury and inequitable conduct Bankers Trust Company and the Proffatts were granted *equitable relief.*

The decree did not require Bankers Trust Company, as a condition for this equitable relief, to pay the proper counsel fees and expenses of Second National Bank.

The decree also adjudged that George P. Proffatt and Katherine B. Proffatt, while not parties to the record, had participated in the proceedings and in the trial in such a manner as that they were bound by the proceedings, and that their rights might be adjudicated.

Bankers Trust Company appealed in effect from so much of the decree as declined to set aside the sale to Second National Bank so that Bankers Trust Company might have the bond and mortgage free of any claim of Second National Bank and Thompson & Hanstein without paying anything to them.

Bankers Trust Company and the Proffatts were not satisfied with the decree made which was more equitable to them than the circumstances permitted, we submit, but insisted and now insist that they should take the bond and mortgage without

repaying to Second National Bank and Thompson & Hanstein the amounts as security for which the Court has held the assignment of mortgage was given on April 9, 1925, to Schmeidler.

After the appeal was taken by Bankers Trust Company Second National Bank appealed and now relies upon the matters which it urged below heretofore mentioned in this brief (p. 9) and further urges that

3. If Bankers Trust Company and the Proffatts are entitled to be relieved as to the sale they are only entitled to be relieved upon equitable terms and among those equitable terms is an obligation to pay to Second National Bank and Thompson & Hanstein their costs, counsel fees and expenses. This is particularly so in view of the inequitable position taken by Bankers Trust Company and the Proffatts during the progress of the case.

I.

Neither Bankers Trust Company nor the Proffatts were entitled to any relief whatever because of their fraud and perjury and attempt to impose upon the Court.

Bankers Trust Company and the Proffatts have been granted relief by the court below notwithstanding the fact that both participated in fraudulently attempting to create a situation in which Bankers Trust Company could claim to be a *bona fide* purchaser of the bond and mortgage to the end that the assignment and agreement by which Schmeidler obtained title to the bond and mortgage for the purpose of securing Second National Bank and Thompson & Hanstein might be the better attacked and also attempted to deceive the Court, during the progress of the cause, by perjured testimony.

The answer of Bankers Trust Company alleges, paragraph 4 (p. 10)—"It admits the allegations contained in paragraph 4, and says that it is a *bona fide holder of said mortgage for the full consideration of $50,000.*"

Paragraph 10 of the counterclaim alleges: "*That prior to the alleged sale of said mortgage by the said Schmeidler, said mortgage had been assigned by said Proffatt to defendant, Bankers Trust Company*" (p. 13).

To support the claim that Bankers Trust Company was a *bona fide* holder of the mortgage for the full consideration of $50,000, the Proffatts (for it developed in the case that the suit was being prosecuted by the Proffatts and not by Bankers Trust Company) offered in evidence the assignment by George P. Proffatt and Katherine B. Proffatt to Bankers Trust Company, dated December 21, 1925, and a check dated December 21, 1925, of the Bankers Trust Company to the order of George P. Proffatt and Katherine B. Proffatt for $50,000 endorsed by George P. Proffatt and Katherine B. Proffatt (pp. 26, 29, Ex. B-4, p. 372).

We again direct attention to the fact that this check is dated December 21, 1925, but, for some reason or other, seems to have been marked "paid 2-19-25".

The Secretary and Treasurer of Bankers Trust Company was produced to identify the endorsement (p. 29). He did so and the check was received in evidence (p. 32), although the Court stated that there was nothing at that time to show that the check was delivered for the assignment.

An attempt was made by Bankers Trust Company to prove that the $50,000 check was delivered for the assignment by producing a ledger sheet of the bank to show a debit entry of $50,000 "*increasing our mortgages by $50,000*" (p. 32).

After this examination counsel for Bankers Trust Company, at page 33, said:

> "If your Honor is of the view that there has not been an identification of the check with the assignment of the mortgage, being the same day, the same parties, the amount of the mortgage, I would say that we have sent for a gentleman who knows it, was with the bank at the time, will be here in two or three minutes, and we will have to ask your indulgence long enough to have him come. In the meantime this witness can be further cross-examined."

He then called Cramer, who was connected with Bankers Trust Company at the time of the transaction and who said that he was familiar with it, who testified, page 35:

> "Q. What was the check for $50,000, what was the consideration of the check of $50,000 to which I have just alluded? A. We *bought* a mortgage, the $50,000 mortgage, I think it was.
>
> Q. Just look at the mortgage. A. From Katherine Proffatt and George Proffatt.
>
> Q. Witness is shown bond mortgage and assignment already in evidence as exhibits Bankers Trust Company 1, 2 and 3, and identifies that as being the mortgage? A. We *bought* this mortgage, the Bankers Trust Company did, rather.
>
> Q. And that check was given? A. *In payment thereof, yes, sir.*"

In the cross-examination of Shinn (p. 30), Secretary and Treasurer of Bankers Trust Co., and of Cramer, who handled the transaction for Bankers Trust Company (pp. 35, 42), counsel for Second National Bank attempted to elicit information as to whether Bankers Trust Company, at the time it issued its check for $50,000, received *anything* in exchange for the $50,000 *check* except the bond and mortgage. The attempt was vigorously

resisted. Cramer attempted to convey the impression, from what he *did say,* that *nothing* had been received except the bond and mortgage and that the transaction represented an out and out purchase by Bankers Trust Company of the bond and mortgage.

George P. Proffatt was then called *by Bankers Trust Company* and testified (p. 57) that, so far as he knew, he *was not interested in any wise in the litigation* and that he had *sold* the mortgage to Bankers Trust Company (p. 57) and (p 58):

> "Q. I show you a check to your order for $50,000, which appears to be endorsed by both of you, yourself and your wife, and marked 'paid 2/19/25', without any deposit in any bank, however; did you receive that money in cash?
>
> Mr. McCarter: I don't think that is cross-examination.
>
> Mr. Lane: I think I can show the interest of this witness, if the Court please.
>
> The Court: I will permit it.
>
> A. Did I receive the money in cash?
>
> Q. *Yes.* A. *Yes, sir.*
>
> Q. What did you do with it? A. *Turned it over to Mrs. Proffatt.*
>
> Q. *What did she do with it?* A. *I don't know.*
>
> Q. *Haven't the slightest idea what happened to that $50,000?* A. *No, sir.*
>
> Q. *Don't know where it is now?* A. *No, sir.*
>
> Q. *And you never spent it?* A. *No, sir.*
>
> Q. *So far as you know, Mrs. Proffatt has it somewhere?* A. *Yes, sir.*
>
> Q. *$50,000 in cash?* A. *That I don't know. I turned it over to Mrs. Proffatt.*
>
> Q. *You don't know whether she put it in a bank account or whether she still has it in cash or anything about it?* A. *No, sir.*
>
> Q. *Haven't the least idea?* A. *No.*
>
> Q. *The last you saw of that $50,000 was when you were in that bank; isn't it?* A. *That is right.*

Q. The last thing you saw of that $50,000 in cash was in that bank; is that right? A. That is right.

Q. On that day? A. Yes, sir.

Q. On that day you turned it over in the presence of the banking officials to Mrs. Proffatt; is that right? A. That is right.

Q. In cash? A. That is right.

Q. In their presence? A. Yes, sir.

Q. You don't know a thing of what happened to it after that? A. No, sir.

Q. *Is Mrs. Proffatt here?* A. *Yes, sir.*

Q. *In court?* A. *Yes, sir.*''

He then said (p. 66) that he had informed Mr. Bourgeois, his counsel, and Mr. Richards (who was president of Bankers Trust Company, and who had charge of the purchase of the mortgage by the Bank) in April, 1925, some months before the Bank took over the mortgage, of the fact *that he had transferred the mortgage by assignment to Schmeidler* and he also said that he had shown Mr. Bourgeois and Mr. Richards all of the papers, including the agreement between himself and Schmeidler (Ex. S-4, p. 344).

It was at once apparent that the bank, having knowledge of the previous assignment to Schmeidler for the protection of Second National Bank and Thompson & Hanstein, was charged with notice and that its claim in its answer and counterclaim that it was ''a *bona fide*'' holder of the mortgage was not supported by the facts. The word ''*bona fide*'' implies ''without notice''.

Reference to the cases collected in Words and Phrases, 1st Series, vol. 1, p. 825, under the title ''Bona fide purchaser'' will indicate that the term ''bona fide purchaser'' means a purchaser in good faith, *without notice* and for a valuable consideration.

And see Words and Phrases, 2nd Series, p. 470, ''The expression 'bona fide purchasers' is to

be understood as the equivalent of purchasers without notice", and "the essential elements that make a bona fide purchaser are a *valuable consideration, the absence of notice,* and the *presence of good faith*".

By alleging in its answer that it was a *bona fide* purchaser of the mortgage Bankers Trust Company deliberately alleged what it knew to be, at the time the allegation was made, a falsehood.

Proffatt and Bankers Trust Company still persisted that the Bankers Trust Company was a holder *"for the full consideration of $50,000"*.

Proffatt further testified (p. 119):

> "Q. To get back to this time when you were in the Bankers Trust Company and this $50,000 transaction took place, was that $50,000 that you referred to this morning in cash passed over the counter? A. It was handed to Mrs. Proffatt and I.
>
> Q. By whom? A. That I couldn't say, but it was handed, whether it was Mr. Cramer, I think it was Mr. Cramer, the man, if I ain't mistaken, at the bank.
>
> Q. And what part of the bank were you in at that time? A. I think we were in the back office.
>
> Q. So that it was handed over the table? A. Yes, sir.
>
> Q. Do you remember the kind of bills they were? A. Couldn't recall that.
>
> Q. Do you remember how large a package it made? A. Couldn't recall that.
>
> Q. Do you remember whether there were any bills larger than a thousand dollar bill? A. That I couldn't recall. I remember it was just handed over.
>
> Q. Have you in your mind's eye what fifty thousand dollars would look like in thousand dollars bills, fifty one-thousand-dollar bills? A. No, I couldn't say.
>
> Q. What did Mrs. Proffatt do with it? A. That I don't know.

Q. Well, you were right there, as I understand it? A. Yes, I gave it to Mrs. Proffatt.

Q. It was handed to you first and then you turned it over to Mrs. Proffatt, then what next happened to it? A. I think Mrs. Proffatt put it in her pocketbook.

Q. *Did you see her put it in her pocketbook?* A. *Yes, sir.*

Q. And then what kind of a pocketbook was it? A. That I couldn't state, she carries so many, liable to have one pocketbook one day and another another day. I couldn't say the color or size.

Q. I am familiar with that, depends upon the shade of the dress sometimes? A. Yes.

Q. And you and she left the bank together? A. Yes, sir.

Q. And then where did you go, home? A. That I don't know, whether we stopped on the road. I guess we went home, I don't know.

Q. And you have never seen that, you didn't see that fifty thousand dollars that night? A. I couldn't recall. No, I don't think so.

Q. And you never saw the fifty thousand dollars again? A. No.

Q. And Mrs. Proffatt didn't tell you where she was going to put this fifty thousand dollars in cash that she was carrying around? A. No.

Q. Have you a safe home? A. Safe? No, sir.

Q. You and she didn't stop at any bank and put it anywhere? A. No.

Q. There is no place to keep it in your home? A. Oh, yes, we can keep it in our home, keep it like we do any other money, I guess.

Q. Where would you keep fifty thousand dollars in cash in your home? A. In Mrs. Proffatt's pocketbook.

Q. Fifty thousand dollars in cash? A. Yes.

Q. You think you would keep it in your home in a pocketbook, is that right? A. Yes."

The hearing was adjourned from May 17th to June 15th.

On June 15th the first witness called by the Proffatts and Bankers Trust Company was Mrs. Proffatt. Her story of the transaction involving the "sale" of the bond and mortgage to Bankers Trust Company is found on page 157. She said:

> "Q. I call your attention to the fact that there is in evidence in this case an assignment of the same bond and mortgage by Mr. Proffatt and yourself to the Bankers Trust Company, dated December 21, 1925, that is a few days before Christmas in 1925.
>
> Q. Now will you please tell us all that you know with reference to that assignment of that mortgage to the Bankers Trust Company? A. Well, Mr. Proffatt came home, I was growling at Mr. Proffatt because I signed my half over and he came home one night and he says, "Come on, Katie, *we are going to sell the mortgage*", he says, "*and I will see that you get yours.*" And we go to the Bankers Trust Company and I was speaking to Mr. Cramer and he *bought the mortgage off me.*
>
> Q. I show you paper, check already marked in the case Exhibit B-4, 5/12, being a treasurer's check on the Bankers Trust Company to the order of George P. Proffatt and Katherine B. Proffatt, and see that it purports to have been endorsed by both your husband and yourself. Is that your endorsement? A. That is mine, yes.
>
> Q. And your husband's endorsement as well? A. Yes.
>
> Q. Now, after that was endorsed, what next occurred? A. Well, I got a certificate of deposit.
>
> Q. In the bank? A. Bankers Trust Company, yes.
>
> Q. For how much? A. $50,000.
>
> Q. And what did you do with that certificate of deposit? A. I put it in a safe deposit box.

Q. I show you a document, look at it and see if that is the document that you say you put in the safe deposit box? A. Yes, sir.

(Paper offered, received in evidence and marked Exhibit B-16)'' (p. 168).

''Q. When did you get that out of the safe deposit box? A. The certificate?
Q. That paper? A. This morning.

* * * * * *

Q. Now, Mrs. Proffatt, you say you put the certificate of deposit in the safe deposit vault, that is the paper you put in the safe deposit vault, is it? A. That is the one, yes.
Q. What became of the *actual certificate of deposit?* A. That is at the bank.
Q. Back with the Bankers Trust Company? A. Yes. They have that there.
Q. Was there any agreement entered into between you and the Bankers Trust Company at the time you left the certificate of deposit there? A. Yes, we had an agreement.
Q. I show you a document bearing date the 21st day of December, 1925, between George P. Proffatt and Katherine B. Proffatt, of the first part, and the Bankers Trust Company of the second part, purporting to be signed by your husband and yourself in the presence of Mr. Jeffers; is that the document you refer to? A. Yes.

(Agreement offered, received in evidence and marked Exhibit B-17)'' (p. 379).

On cross-examination, she stated, in effect, that her husband's story as to the transaction was absolutely false (pp. 160-161). She testified (p. 162):

''Q. Then do I understand that—by the way, how long before you went to the Bankers Trust Company was it that your husband first spoke to you about going to the Bankers Trust Company? A. Why, I guess it was

about six months, seven months, around that time, I don't know exactly.

Q. Six months before you went to the Bankers Trust Company? A. *To sell the mortgage.*

Q. He told you what? A. He said, 'We will *sell* the mortgage', he said he is going to *sell* the mortgage.

Q. *Six months before you went?* A. *Yes.*

Q. That was six months before you went? A. Yes, before we went to the Bankers Trust.

Q. Tell you why he didn't go to the Bankers Trust Company then? A. No.

By Mr. McCarter:

Q. Is this the certificate of deposit that you received that day, Mrs. Proffatt? A. Yes.

(Certificate offered, received in evidence and marked Exhibit B-18)'' (p. 169).

''By Mr. Lane:

Q. Well, was anything said by your husband during this six months period before you actually went to the Bankers Trust, as to going to the Bankers Trust? A. No.

Q. Now, then, just tell us everything that was said which led to your going physically to the Bankers Trust Company? A. Arguments between my husband and I that led to it.

Q. I know, but you went to the Bankers Trust Company on December 21st. Now, how did you happen to go to the Bankers Trust Company at that time, what did your husband say to you? A. My husband says, 'Come on, we will go to the Bankers Trust Company *and sell the mortgage.*' That was all that was said.

Q. Those were the only words were used? A. That was all.''

She said on page 165:

''Q. Now this certificate of deposit, or, rather, not a certificate of deposit, a certifi-

cate by the Bankers Trust Company—it is a certificate of deposit, it is a certificate of deposit of a certificate of deposit, Exhibit B-16, you say you took that away from the Bankers Trust Company? A. Yes.

Q. Where did you put it? A. In my safe deposit box.

Q. Where? A. Marine Trust Company.

Q. How long did it stay there? A. Until today.

Q. And this agreement, B-17, did you have a copy of that agreement also? A. No.

Q. You never had a copy of that? A. No, Mr. Jeffers had it.

Q. That remained with the bank? A. Mr. Jeffers.

Q. Or Mr. Jeffers, who was the bank, and the certificate of deposit payable to your order also remained with the bank? A. Yes.

Q. What was said—you signed, you and your husband both signed this agreement, B-17? What was said between you and any officer of the bank leading up to your signing those papers? A. All Mr. Cramer said, that *they were willing to buy the mortgage,* and Mr. Proffatt says, 'I will sign it over to you', and Mr. Proffatt did.

Q. Yes, I know, and then what was said, a person assigns a mortgage usually, or sells a piece of property, they usually take the money? You didn't take the money. Now, what was said that led up to it?

Mr. McCarter: She took the check.

Mr. Lane: Yes, I know she took the check and endorsed it.

A. I took the check and endorsed it.

Q. Right then and there? A. *He says, 'Do you want the money?' I said, 'No, I will leave it right here.'*

Q. What else was said? A. That was all that was said.

Q. Wasn't something else said? A. Not that I know of.

Q. There is an agreement there which you signed which leaves this certificate of deposit

as collateral for the bank. What was said that led up to that?

Mr. McCarter: No use getting excited. We are not deaf.

Mr. Lane: No, I have your same fault.

A. Wasn't anything said but that Mr. Proffatt was going to sign the mortgage over to me and then I says, *the bank said they would buy it.* What else did you want to know?

Q. I want to know how you came to leave the fifty thousand dollars with the bank under an agreement which the bank, permitted the bank to hold that fifty thousand dollars as collateral for the payment of the mortgage, what was said that led to that? A. *Well, I don't remember what was said.*

Q. You signed this paper; now what was said that led you to sign this paper, B-17? Read it and see what it is about. What was said? A. Well, the only thing was said in this agreement, if any trouble or losses came up we would be responsible for it, wouldn't make any trouble for the bank.

Q. That is exactly what I want to get at, what was said that led to all that, what was said about it? A. I don't remember what was said about it.

Q. You don't remember what was said about that? A. No.

Q. All that you can remember as to what was said was that the bank said they would *buy* the mortgage? A. Yes.

Q. But you can't remember any of the other details? A. No, I don't remember.

Q. As a matter of fact, from the sale of this mortgage you haven't gotten any cash now, one cent, have you? A. What is that?

(Question repeated.)

A. No.

Q. *Not even the interest on the certificate of deposit?* A. *No.*"

The documents were read in evidence (p. 168, etc.). She continued to testify as to how she came

to execute the agreement, Exhibit B-17 (p. 379), at *Mr. Jeffers' office* (pp. 170-171). She said (p. 171):

"Q. Now, can you remember what was said between you and Mr. Cramer or between your husband and Mr. Cramer when you were present, which led you to go to Mr. Jeffers' office? A. You see I can't recall that.

Q. Can't you recall any of it? A. I can't recall about him saying that they were going *to purchase the mortgage off of me.*

Q. Yes, I know, but was anything said that would indicate why it was that, if they were *purchasing* the mortgage, they did not give you the money? A. *I could have had the money but I didn't want it.*

Q. It was because you didn't want the money? A. *No, I just told them to hold the money there for me.*

Q. You know that you left the money there under an agreement that it was to be responsible for the debt, didn't you? You knew that you were not going to get anything out of this transaction at all until this mortgage was paid, didn't you? A. No.

Q. Well, did you read this agreement? A. Yes.

Q. *You know that the bank is entitled to the $50,000 if the bank does not collect on the mortgage?*

Mr. McCarter: I object. The agreement will speak for itself.

Mr. Lane: I am asking her her own knowledge

Q. *Do you know that?* A. *Yes.*

Q. How did that come about? A. I don't know what to answer on that.

Q. Did anybody say to you that it would be better for you to have the bank in the position of bona fide purchaser for value of that mortgage? A. No.

Q. Was there anything of that kind said at all? A. No.

Q. Well, what was said? A. *The only thing was said that they were going to buy the mortgage,* as I told you.

Q. *Nothing with respect to the bank's being put in a position of a bona fide purchaser was said, nothing of that kind?* A. *Not at the bank, no.*

Q. Anywhere? A. In Mr. Jeffers' office we made that arrangement.

Q. What was said? A. *That if any trouble should come up from the selling of this mortgage that I would stand for it, and I said yes.*

Q. Well, then, if you were not to get the money until the mortgage was paid, why was it that the mortgage was transferred at that time at all, why didn't you continue to hold it?

Mr. McCarter: She didn't say she wasn't to get the money on this until the mortgage was paid.

Mr. Lane: She did at one time.

Mr. McCarter: I haven't heard it. I object.

The Court: I sustain the objection.

Q. When were you to get the $50,000? A. A. When I turned the mortgage over.

Q. When were you to get the $50,000 from the bank after you had given the $50,000 to the bank to insure it against any loss on the mortgage? A. *Any time I wanted it.*

Q. *You thought that you could have gotten it at any time?* A. *Yes, I could have got it.*

Q. Under this agreement? A. *I suppose so.*"

She said (p. 174):

"Q. Under the terms of that agreement you knew that the Bankers Trust Company had the right to hold that $50,000 certificate of deposit, didn't you? A. *I don't think I did, no.*

Q. You don't think you did? A. No, I don't think I did.

Q. Although you read this agreement before you signed it? A. Yes, sir.

Q. And you have never made any demand since 1925 to get any part of this $50,000, have you? A. I couldn't because the courts had tied up the interest of it.

Q. You haven't made any attempt, have you? A. No, I can't.

Q. What was said in Mr.—can you tell me when it was that this agreement that you signed was first mentioned? A. That one there, you mean?

Q. Yes. A. *Why, when we went in and sold the mortgage.*

Q. What was said about it? A. Well, they asked if we can draw an agreement that if any trouble come up over this mortgage, *if I would stand responsible, and I said yes, and that is how the agreement was drawn up.*

Q. Did they say anything about as to why they wanted such an agreement? A. No.

Q. Nothing of that kind said? A. No.

Q. Was anything said at Mr. Jeffers' office —by the way, were you present at Mr. Jeffers' office while this agreement was being drawn? A. No, that was the only understanding that I had, all that I knew was just to protect them.

Q. Was it all paid for, I mean was it all drawn, was the agreement all drawn when you went to Mr. Jeffers' office? A. No, it was drawn up while we were there.

Q. Was anything said, anything at that time as to the purpose of this agreement? A. *No, just that I would be responsible if any trouble.*

Q. Who was present at that time? A. Mr. Jeffers and I.

Q. Who else? A. That was all.

Q. That was all? A. I think so, I think was just Mr. Jeffers and I.

Q. Wasn't your husband there? A. I don't think he was there that day.

Q. Where was he? A. I don't know.

Q. Well, he had gone to the bank with you, hadn't he? A. Yes, he went to the bank with me.

Q. Then where did he go before you went over to Mr. Jeffers' office? A. I just don't know. I don't know where he went.

Q. But he wasn't there? A. No.

Q. Do you know when he signed the agreement? A. He signed it, he must have went there after me, because after we came out of the bank Mr. Proffatt went some place, he had some place to go, and I went over to Mr. Jeffers' office and I was in Mr. Jeffers' office a while and ready to come out when Mr. Proffatt came.

Q. You don't think Mr. Proffat was there and signed this agreement at the same time you signed it? A. No, I don't think he was."

We have quoted the testimony of Mrs. Proffatt in some detail because it appears therefrom that, while she declined to perjure herself to the extent that her husband had, she *still* attempted to induce the Court to believe that the transaction with Bankers Trust Company was, in fact, a *purchase* by that bank of the mortgage. She used that expression several times. She was *driven* to the production of the so-called certificates of deposit and the agreement, because it became apparent, during the examination of her husband at the previous hearing, *at which time she sat by and heard her husband deliberately perjure himself without objection* (p. 59), that those papers would be unearthed but *she did not tell the whole truth.* On the contrary, she still attempted to induce the Court to believe, in the face of the papers, that the *transaction was one of purchase and sale* and that Bankers Trust Company had become a *purchaser* of the mortgage, and she went so far as to say that she could have taken the $50,000, in money if she had so desired, but that she did not desire to take it. From the testimony a few pages later it clearly appears that she could *not* have taken the money at *any* time and that

Bankers Trust Company insisted, as a "condition precedent" for the so-called *purchase* of the mortgage, that it be secured by the leaving of the $50,000 in the bank and by the agreement, B-17 (p. 359) the effect of which agreement was that Bankers Trust Company *had no real interest whatever in this bond and mortgage but that the real interest remained in the Proffatts.*

The best that can be said for this witness is that she did not perjure herself to the extent that her husband had. That she perjured herself is clear from her own testimony. The irresistible inference from her testimony, especially when taken in connection with all of the testimony surrounding this transaction, *is that the Proffatts deliberately went through the form of transferring this mortgage to Bankers Trust Company so that Bankers Trust Company might appear as a bona fide purchaser and, by so appearing, secure greater rights than the Proffatts themselves would have.* No other object can be thought of for the transaction.

It cannot be overlooked that, from a time in April of 1925, Mr. Richards, who was the President of the bank, was counsel for the Proffatts and had *complete knowledge of the transaction as a result of which Proffatt had assigned the mortgage to Schmeidler for the protection of Second National Bank and Thompson and Hanstein.* What motive other than to create Bankers Trust Company as a *bona fide* holder could there have been for the transaction by which Bankers Trust Company secured the legal title to this bond and mortgage?

If there *was* any other motive, it was within the knowledge of Mr. Jeffers, or of some responsible official of the bank who had charge of the transaction. Neither Mr. Jeffers nor any official of the bank, who had charge of the transaction, is called.

The Proffatts content themselves by calling officials of the bank, Shinn and Cramer, *who did not have charge of the transaction.*

The failure of the Proffatts to call witnesses within their control, who, if the purpose of the transaction was wholly innocent, could explain it is itself evidence that the obvious inference as to the purpose is correct.

22 Corpus Juris, title "Evidence" sec. 24, page 81 states the rule:

> "In the administration of justice it is often wise to place the burden of producing evidence on the party best able to sustain it, and ambiguity, concealment, or evasion react with peculiar force on a pleader who asserts a fact and fails to produce the evidence, which if his assertion were true, would be in his possession. Hence it is very generally held that where the party who has not the general burden of proof possesses positive and complete knowledge concerning the existence of facts which the party having that burden is called upon to negative, or where for any reason the evidence to prove a fact is chiefly, if not entirely, within his control, the burden rests on him to produce the evidence, although he is obliged to go no further than necessity requires."

Corpus Juris also states, title "Evidence", page 115, sec. 55:

> "Where it is apparent that a party has the power to produce evidence of a more explicit, direct and satisfactory character than that which he does introduce and relies on, it may be presumed that if the more satisfactory evidence had been given it would have been detrimental to him and would have laid open deficiencies in, and objections to, his case which the more obscure and uncertain evidence did not disclose."

Section 56:

> "Failure of a party to call an available witness possessing peculiar knowledge concerning facts essential to a party's case, direct or rebutting, or to examine such witness as to the facts covered by his special knowledge, especially if the witness would naturally be favorable to the party's contention, relying instead upon the evidence of witnesses less familiar with the matter, gives rise to an inference that the testimony of such uninterrogated witness would not sustain the contention of the party."

In *United States, ex rel. Vajtauer* v. *Comr. of Immigration,* 273 U. S. 102, 71 L. Ed. 560, at page 565, Mr. Justice Stone, delivering the opinion for the Supreme Court of the United States, said:

> " 'Conduct which forms a basis for inference is evidence. Silence is often evidence of the most persuasive character'. United States *ex rel.* Bilokumsky *v.* Tod, 263 U. S. 149, 153, 154, 68 L. Ed. 221, 223, 224, 44 Sup. Ct. Rep. 54. Appellant as a witness was called upon to testify whether he was the author of the pamphlet and the Chicago speech, facts within his knowledge. If the author, he was in a position to challenge or explain away if possible any unfavorable inference which might be drawn from the passages read into the record. His silence without explanation other than that he would not testify until the entire evidence was presented, was in itself evidence that he was the author. In addition, it fortified the inferences drawn from the pamphlet and speech by the immigration authorities."

In *United States Ex Rel. Bilokumsky* v. *Tod,* 263 U. S. 149, 150, 68 L. Ed. at p. 224, Mr. Justice Brandeis, delivering the opinion for the Supreme Court of the United States said:

> "Conduct which forms a basis for inference is evidence. Silence is often evidence of the most persuasive character."

In *Runkle* v. *Burnham,* 153 U. S. 217, 38 L. Ed. 694, Mr. Justice Fuller delivering the opinion of the Supreme Court of the United States said (at p. 697):

> "If the new power of attorney was sent and revoked the one relied on here, Runkle or his attorney could have dispelled all doubt by offering it in evidence, or by testifying as to its contents, their silence must necessarily make against them on the question of revocation. Mansfield, J., in Roe *v.* Harvey, 4 Burr. 2487. The doctrine that the production of weaker evidence, when stronger might have been produced, lays the producer open to the suspicion that the stronger evidence would have been to his prejudice was expressly adopted in the case of Clifton v. United States, 45 U. S. 4 How. 242."

In *Kirby* v. *Tallmadge,* 160 U. S. 379, 40 L. Ed. 463, at p. 465, Mr. Justice Brown, delivering the opinion for the Supreme Court of the United States, said:

> "While he avers in his answer, and Miller admits, the payment of $3,000 in cash, defendants introduced no testimony whatever in support of their case, but relied solely upon their answers. As they had it in their power to explain the suspicious circumstances connected with the transaction, we regard their failure to do so as a proper subject of comment. 'All evidence', said Lord Mansfield in Blatch *v.* Archer, Cowp. 63, 65, 'is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other side to have contradicted.' It would certainly have been much more satisfactory if the defendants, who must have been acquainted with all the

> facts and circumstances attending this somewhat singular transaction, had gone upon the stand and given their version of the facts. McDonough *v.* O'Niel, 113 Mass. 92; Com. *v.* Webster, 5 Cush. 295, 316, 52 Am. Dec. 711. It is said by Mr. Starkie, in his work on Evidence (Vol. 1, p. 54): 'The conduct of the party in omitting to produce that evidence in elucidation of the subject-matter in dispute which is within his power and which rests peculiarly within his own knowledge, frequently affords occasion for presumptions against him, since it raises strong suspicion that such evidence, if adduced, would operate to his prejudice.''

In pursuance of the fraudulent plan, the answer and counterclaim was filed by Bankers Trust Company, in which it was alleged that Bankers Trust Company was a *bona fide* holder of the mortgage for the *full consideration of $50,000,* and, when the case was opened to the Court, counsel for Bankers Trust Company opened it upon the theory, and so represented to the Court, that Bankers Trust Company had a *real* interest in the matter as a *bona fide holder for value of the mortgage.* It subsequently appeared that the *real* parties in interest were the Proffatts, and that counsel, who tried the case, had been retained by the Proffatts (pp. 119, 160-161).

Immediately upon the facts being developed, a motion was made to amend the pleadings of Second National Bank and to rely upon the principle of law which we are now discussing (p. 180), and permission was granted (p. 182). At the last hearing it was agreed that no formal amendment be filed, but that the statement of counsel be considered as the amendment (p. 316).

Upon this statement of facts no relief should have been accorded in the Court below of any nature either to Bankers Trust Company or to the Proffatts.

The last case upon the subject is *Pfender* vs. *Pfender,* decided by Vice-Chancellor Berry, 7 N. J. Adv. Rep., p. 142, and affirmed by this Court upon the Vice-Chancellor's opinion, 105 N. J. E. 247. In that case there was a decree for divorce affirmed by this Court. Upon re-hearing in the Court below, after affirmance, the Court set aside the decree. The headnote expresses what is contained in the opinion:

> "1. Conscious deception of a court of equity by a petitioner in his suit for a divorce, by the giving of false testimony, the concealment of material facts pertinent to the issue and prejudicial to the suitor's cause, or by active or passive conduct creating a false impression favorable to that cause, is unconscionable conduct which will preclude relief notwithstanding that otherwise the suitor would have been entitled to a decree.
>
> 2. Upon proof of such deception submitted after decree *nisi,* and before final decree, the court will set aside the decree *nisi* and dismiss the petition.
>
> 3. He who comes into equity for relief must not only enter with clean hands, but must keep them clean after his entry and until final decree."

The Court relied upon *Clickner* v. *Clickner,* 95 N. J. Eq. 479; *Newark Cleaning & Dye Works* v. *Gross,* 6 N. J. Adv. Repts. 598 (V. C. Backes); *Gluck* v. *Rynda Development Company,* 99 N. J. Eq. 788, affirmed 100 N. J. Eq. 554.

In the case at bar, we not only have the perjury committed in open court and the false impression which was attempted to be created by Bankers Trust Co. and both the Proffatts, but we have *the attempt to place Bankers Trust Company in the position of a bona fide holder for value of the bond and mortgage for the purposes of the case.*

Under the law, it is immaterial whether the Proffatts, had they honestly come before the Court, would have been entitled to relief, and it is immaterial whether it would have added to their case to create Bankers Trust Company *as a bona fide* holder for value. It is sufficient to bring the rule into play that they *thought* that the making of Bankers Trust Company a *bona fide* holder for value was an important element.

In *Harton* v. *McKee,* 73 Federal 556, in a case in equity for specific performance in which the plaintiff, for the purpose of the case, had changed the dates of certain letters, the Court said:

> "It is unnecessary to determine here as to whether or not these changes were fraudulent to the extent contended for by the defendants, but certainly, if the changes were fraudulent in the way which has been indicated above, for the purpose of making a case for complainants, no court of equity would grant the complainants any relief. They must come into a court of equity with clean hands; and if they come *with papers forged for the purpose of making a case* certainly they would have no standing in court."

And this irrespective of whether, assuming the letters to be as of the original dates, the complainants would have had a case.

In the case at bar Bankers Trust Co. and the Proffatts came into court with a "forged" case and "forged" documents for the check for $50,000 (Ex. B. 4, p. 372) was no better than a forgery.

In *Little* v. *Cunningham,* (Mo.) 92 S. W. 734, in a case in which a bill for an injunction enjoining the defendants maintaining a call bell and private telephone connection with the main line of an unincorporated voluntary association owning a small telephone line for mutual convenience in Knox County, the Court held that complain-

ants were entitled to relief. Before decree complainants removed the offending telephone without authority from anyone. Notwithstanding this, the Court granted the decree which would give the right to the complainants to do the thing which they had in fact done. Appeal was taken. The Appellate Court, notwithstanding the fact that, upon the case as made, the complainants were entitled to the relief which they asked in their bill, reversed the decree and dissolved the injunction because of the conduct of the complainants in removing the telephone before decree. The Court said:

> "One of the ancient and familiar maxims of equity jurisprudence is that 'He who comes into equity must come with clean hands.' The maxim has been otherwise stated, 'Who does inequity shall not have equity.' They must come with clean hands, with a conscionable regard for the rights of others, ready to do equity on their part, and seeking only equity at the hands of the court. McVey *v.* Brendel, 144 Pa. 234-249, 22 Atl. 912, 13 L. R. A. 377, 27 Am. St. Rep. 625. And in discussing the salutary principle, it is said: 'Generally, when a party seeking the intervention of equity has been attempting to secure his ends by means resembling those which he seeks to enjoin he will be denied relief. 11 Am. Eng. Encyc. of Law, 163. * * * The principles of equity identical with the principles of justice and truth as they are, are applied by a court of conscience on the status of the case and the parties as they are revealed at the time the relief is administered by decree, rather than at the date of the institution of the suit, inasmuch as by virtue of these wholesome principles arise the conditions which are imposed by the court 'as the price of the decree it gives', and if unfavorable circumstances have arisen, by the wrongful conduct of the parties during the pendency of the suit, the court will take such circumstances into account at

> the final reckoning. * * * It is palpable that the defendants in error, by their unwarranted intrusion in cutting the wire and thus cutting the plaintiffs in error from the main telephone line during the pendency of the suit, and thus assuming to themselves without warrant authority to acquire by force of arms the relief which they had prayed the court by their bill to grant, placed themselves as much beyond the pale of conscionable conduct as had plaintiffs in error by their acts complained of in the bill."

In *Commonwealth* v. *Filiatreau,* Court of Appeals of Ky., 170 S. W. 1182, the Court said:

> "The maxim 'He who comes into equity must come with clean hands' imposes alike upon him who defends and upon him who prosecutes a suit in equity; and its requirements are not satisfied by a fulfillment of the literal language of its demand. *Be his hands spotless as they may, he does not merit the protection of the chancellor who fails to make a full and free disclosure of all facts relating to his claim.* The maxim is broad enough to demand that he who prays from the chancellor protection, as well as he who seeks affirmative aid, must openly and frankly, without reservation or evasion, yield to the chancellor that full measure of confidence and truth which is prerequisite to the assertion and exercise of chancery powers and the lack of which must necessarily repel him from a forum whose very foundation is mutual confidence and good faith."

Did Bankers Trust Co. and the Proffatts, when they came into court, by the answer and counterclaim of Bankers Trust Company, and when they started about proving their case *"make a full and free disclosure of all facts relating to his claim"?*

In *Berrin* v. *Dux Oil and Gas Co.,* Supreme Court of Oklahoma, 166 Pac. 199, the Court, upon

the doctrine of unclean hands, citing *Michigan Pipe Co.* v. *Fremont,* 111 Fed. 284; *Deweese* v. *Reinhard,* 165 U. S. 386, 41 L. Ed. 757, Eaton Equity, 74, Pomeroy *Equity Jurisprudence,* sec. 398; *Angle* v. *Chicago, etc. R. R. Co.,* 151 U. S. 1, 38 L. Ed. 55, held, an application having been made by the complainants for a temporary injunction making the false allegation that it was in possession of the premises and upon these allegations, which were untrue, complainant having obtained the processes of the Court to enable it to retain possession, that the complainant was entitled to no relief in a court of equity, the Court saying: "We say that plaintiff has not come into equity with clean hands and has not done equity and is not entitled to any relief" and the Court reversed the judgment below which had awarded the injunction.

In *Clickner* v. *Clickner,* 95 N. J. E. 479, there was a suit for the annulment of a marriage based upon the concealment by the wife of the fact of pregnancy by another man. The petition of the husband set forth that the wife had not disclosed to the husband the fact of her previous intercourse *or* the fact of pregnancy. The wife's story was that she had disclosed the fact of previous intercourse *and* the fact of pregnancy. The Vice-Chancellor found that she had disclosed previous intercourse but not the fact of pregnancy.

The Vice-Chancellor referred to the fact that the petitioner in his petition had stated that she had not disclosed the fact of previous intercourse and said (at p. 483):

> "This attempt to deceive the court was obviously made in the belief that it was necessary or advisable in making out his right to a decree, and for the purpose of endeavoring to obtain such decree. It seems to me therefore that denial of relief to petitioner might

> well be rested upon that ground, somewhat akin to the ordinary application of the equitable principles which require a suitor for equitable relief to do equity and to come into court with clean hands."

And Vice-Chancellor Berry in *Gluck* v. *Rynda Development Company,* 99 N. J. Eq., p. 788, at p. 797, considered the many cases on the subject. He cited and quoted from *Bentley* v. *Tibbals,* 223 Fed. Rep. 247; 21 Corp. Jr. 182; *Deweese* v. *Reinhard,* 165 U. S. 386 (41 L. Ed. 757); Eaton Eq. 74; Pom. Eq. Jur. 398; *Primeau* v. *Granfield,* 193 Fed. Rep. 911, 913 (56 L. Ed. 1267); *Houtz* v. *Hellman,* 228 Mo. 655, 671; 128 S. W. Rep. 1001; *Commonwealth* v. *Filiatreau,* 161 Ky. 434, 170 S. W. Rep. 1182; *Bearin* v. *Dux Oil Co.,* 166 Pac. Rep. 199; *Michigan Pipe Co.* v. *Freemont,* 111 Fed. Rep. 284; *Little* v. *Cunningham,* 92 S. W. Rep. (Mo. Appeals) 734; *Harton* v. *McKee,* 73 Fed. Rep. 556; *Collins* v. *Blanton,* 2 Wils. C. B. 347; 95 Reprint 850; *Latham* v. *Northern Pacific Realty Co.,* 45 Fed. 721; *Stetson* v. *Cook,* 39 Mich. 750; 21 C. J. 186; *Cutler* v. *Tuttle,* 19 N. J. Eq. 549; *Johns* v. *Norris,* 22 N. J. Eq. 102; *Watson* v. *Murray,* 23 N. J. Eq. 257; *Ellicott* v. *Chamberlain,* 38 N. J. Eq. 604; *Winans* v. *Graves,* 43 N. J. Eq. 263; *Brook* v. *Cooper,* 50 N. J. Eq. 761; *Hildebrand* v. *Willig,* 64 N. J. Eq. 249; *Vulcan Detinning Co.* v. *American Can Co.,* 70 N. J. Eq. 588; *Pendleton* v. *Gondolf,* 85 N. J. Eq. 308; *Prindeville* v. *Johnson,* 93 N. J. Eq. 425; *Neubeck* v. *Neubeck,* 94 N. J. Eq. 167, and *Clickner* v. *Clickner,* 95 N. J. 479. Prefacing his remarks by what the cases hold, he said at page 796:

> "The complainants have sought relief in a court of equity. A court of equity is a court of conscience. The conscience of the applicant for relief in this court is always open to the scrutiny of the chancellor. One of the most

> wholesome and beneficent principles of a court of equity finds voice in the maxim that 'he who comes into equity must come with clean hands', and this maxim means that, *not only must one seeking equitable relief enter the portals of this court with clean hands, but he must keep them clean after his entry and until the final determination of the issue.*"

He cited *Clickner* v. *Clickner,* 95 N. J. Eq. 479, with approval.

The *Gluck* case was affirmed by this Court upon Vice-Chancellor Berry's opinion, 100 N. J. Eq. 554.

The general rule is stated in *21 Corpus Juris* title "Equity", sec. 163, at p. 182 and, with reference to the maxim that he who comes into equity must come with clean hands, the author says:

> "This maxim expresses rather a principle of inaction than one of action. It means that equity refuses to lend its aid in any manner to one seeking its active interposition, who has been guilty of unlawful or inequitable conduct in the matter with relation to which he seeks relief."

And in section 165 (p. 184), it is stated:

> "Any wilful act in regard to the matter in litigation, which would be condemned and pronounced wrongful by honest and fair-minded men will be sufficient to make the hands of the applicant unclean."

And Pomeroy says, sec. 397, 4th Edition:

> "On the other hand, the maxim now under consideration, he who comes into equity must come with clean hands, is much more efficient and restrictive in its operation. It assumes that the suitor asking the aid of a court of equity has himself been guilty of conduct in violation of the fundamental conceptions of

> equity *jurisprudence,* and therefore refuses him all recognition and relief with reference to the subject-matter or transaction in question. It says that whenever a party, who, *as actor,* seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him *in limine;* the court will refuse to interfere on his behalf, to acknowledge his right, or afford him any remedy."

In *Prindiville* v. *Johnson & Higgins,* 93 N. J. Eq. 425, this Court said:

> "It is the maxim of equity that a court of conscience will not even listen to a suitor who comes into that tribunal with unclean hands, and this doctrine is applicable whenever it appears that the litigant seeks to be relieved of the consequence of a fraud in which he has been an active participant. The courts of this state have steadfastly refused to lend their aid to a wrongdoer either by the enforcement of an illegal contract or by relieving the wrongdoer from the obligations thereof; and this they do, not out of regard for the defendant in the action, but because of their unwillingness to use the powers which were granted to them for the furtherance of lawful ends in aiding schemes which are in their nature venal, or for the purpose of relieving parties from the liabilities which such schemes create."

And this Court cited, with approval, *Watson* v. *Murray,* 23 N. J. Eq. 257; *Todd* v. *Rafferty,* 30 N. J. Eq. 260; *Minzesheimer* v. *Doolittle,* 60 N. J. Eq. 394; *Gregory* ads. *Wilson,* 36 N. J. L. 315; *Hope* v. *Linden Park Asso.,* 58 N. J. L. 627; *Wyckoff* v. *Weaver,* 66 N. J. L. 648.

In *Pendleton* v. *Gondolf,* 85 N. J. Eq., at p. 308, Vice-Chancellor Leaming said (p. 317):

"In Vulcan Detinning Co. *v.* American Can Co., 70 N. J. Eq. 588, this court denied relief to complainant because of the unclean hands of the parties from whom complainant acquired its rights to the secret process which it sought this court to protect. The opinion filed says: 'It is not alone fraud or illegality which will prevent a suitor from entering a court of equity. Any really unconscientious conduct connected with the controversy to which he is a party will repel him from the forum whose very foundation is good conscience. Pom. Eq. Jr., sec. 404.' This case was reversed in our Court of Errors and Appeals (72 N. J. E. 387) for the reason that the latter court determined that complainant had no actual knowledge of unconscionable conduct of its vendor, hence, while complainant's legal rights might be affected by the knowledge of its agent, complainant's conscience could not be so affected and complainant could not, in consequence, be properly charged with unclean hands within the meaning of the equitable maxim. But no other criticism was made of the application of the equitable maxim by the lower court. These decisions are all necessarily based upon the assumption that a denial of equitable relief to a participant in wrongdoing forms a part of the recognized public policy of this state as best conserving public interests; it follows that to aid a participant in wrongdoing in the recovery of the property which he has disposed of in the attempted execution of his wrongful purposes on any theory that such course might best conserve public interests becomes impossible without a complete reversal of our defined policy as disclosed in the cases above cited."

And with reference to conduct in the suit itself the rule is stated in 21 *Corpus Juris,* title "Equity", p. 186, sec. 169, as follows:

"One may be barred from relief by misconduct with reference to the suit itself. Thus

equity may refuse to protect one who fails to make a full and free disclosure of all the facts relating to his case. And it has been held that, irrespective of the doctrine of *res adjudicata,* equity will not aid one who has sought the same relief in separate actions on grounds so inconsistent as to evince a lack of candor and clean hands."

II.

Upon the Matter of Notice of the Sale.

A. There was no necessity for notice because of the terms of the agreement of April 9th, 1925 (Exhibit S-4, p. 344).

Conceding that, where property is pledged for the payment of a debt, notice to the pledgor of a contemplated sale is required, to protect the pledgor's *equitable* rights, the contract or agreement between the parties may otherwise provide. *Atlantic National Bank* v. *Korrick,* 43 A. L. R. 1184 and note, and in *Jones on Collateral Securities,* Section 611, it is stated:

> "A waiver of the common law rule of notice *is generally made when the parties agree upon a special power of sale*; for under such a power it is usual either to waive notice of sale altogether, or else to provide for a special notice. *Such notice is waived by giving the pledgee the option to sell at private sale.* Under authority given a pledgee to sell at public or private sale, *at his option, he may sell without notice in the usual manner of selling such property in the market.*"

In *McDowell* v. *Chicago Steel Works,* 124 Ill. 491, 7 Amer. St. Reps. 381, at page 384, the Illinois Court said:

> "At common law, where property is pledged to secure a debt, the right to sell for de-

> fault in payment *is conferred by the law, and hence the sale must be made subject to the conditions imposed by the law, that is to say, after making demand and giving notice.* But where the pledge is accompanied by *a special contract as to sale upon non-payment of the debt*, the right to sell is conferred, not by the law, *but by the contract itself*, and hence must be exercised in the mode specified by the parties in their agreements. *As such contract embodies the intentions of the parties, its silence as to notice justifies the inference that the power to sell without notice was intended to be conferred.*"

See also:

> *Jeanes Appeal,* 116 Pa. St. 573, 11 Atl. 862, 2 Amer. St. Reps. 624;
> *Williams* v. *United States Trust Company,* 133 N. Y. 660, 31 N. E. 29;
> *McDougall* v. *Hazelton,* 88 Fed. 217;
> *Robinson* v. *Hurley,* 11 Iowa 410, 79 Am. Dec. 497N;
> *In re: Mertons, et als.* (Circuit Court of Appeals, Second Circuit), 144 Fed. 819.

It is true that, in all of these cases save the first, there was an *express* provision in the agreement waiving notice.

There was no such express provision in *McDowell* v. *Chicago Steel Works,* 124 Ill. 491, 7 Amer. St. Reps. 381, the power of sale there being to sell "at public or private sale *at his discretion*".

The reason why the courts hold that no notice is required is not because notice is *expressly* waived, but because the parties, having provided for a special power of sale, the right to sell *is conferred not by the law, but by the contract itself.* It is *presumed* that the contract provides for *all* the formalities to be observed in making the sale, and, if notice is not required by the con-

tract, it is presumed no notice is intended, or, as *Jones on Collateral Securities*, Section 611-a, states it:

> "If authorized to sell at public or private sale, 'the inference is that he may sell at public sale without giving notice, the contract saying nothing about notice'."

And that the matter depends upon the terms of the contract is indicated by the decision of this Court in *Dimick* v. *United States National Bank*, 55 N. J. L. 296, at page 300:

> "The power of the plaintiff to sell the securities before the four months named in the note had expired, depends upon the construction and effect of the second paragraph of the contract."

We turn now to the agreement executed April 9, 1925, between George P. Proffatt and Schmeidler, (Ex. S. 4, p. 344) and we find the following provision:

> "It is understood and agreed that the said party of the first part does hereby authorize the said party of the second part *to sell or dispose of said mortgage at such time as shall appear to be to the party of the second part advisable for the purpose of making the payments aforesaid, and to that end the said party of the second part is hereby authorized to do any and all things necessary for the carrying out of the purposes of this agreement* and the rendering over to the party of the first part on any surplus remaining after the sale of said mortgage and the payment of the debts aforesaid."

And Schmeidler then agreed with Proffatt:

> "that he will fully and completely carry out the terms of this agreement and will hold said mortgage for the securing of the debts above set forth and will, *at the time that seems most*

> *advisable to him, sell said mortgage and pay the debts aforesaid, and will pay over to the party of the first part the surplus remaining after said sale.''*

There could not be any wider grant of power to sell. It is wholly uncircumscribed. It permits Schmeidler to sell at public *or* private sale, or, to use the language of the agreement, ''dispose of such mortgage'' at *any* time that he sees fit *without restriction as to method of sale or disposal,* the obligation only being placed upon him that the sale shall be for the purpose of raising the monies to pay the debts and that he render the surplus to Proffatt.

The effect of this agreement was to constitute Schmeidler the *agent of Proffatt* so far as the sale was concerned, *vested with as broad powers as Proffatt himself would have if he were acting himself.* It placed Schmeidler in the position of a trustee bound, of course, to act in good faith, but bound no further.

In *Atlantic National Bank* v. *Korrick,* 43 A. L. R. 1184, the Court said:

> ''That there existed between the parties a trust relation, and that pledgee in exercising the power of sale owed a duty to the defendants to act in good faith, cannot be questioned.''

In view of the wide grant of power to sell there was no obligation under the law that Schmeidler give notice.

And, if he did not give notice when he should have given it as matter of good faith, then it may be that he violated his trust duty toward Proffatt and made himself responsible *in equity* to Proffatt for whatever loss may have been occasioned to Proffatt by reason of his action in bad faith *but* the validity of the sale as such is in no wise affected.

B. If notice was required and was not given, the sale was neither void nor voidable, the only remedy of the Proffatts being an action against Schmeidler because Schmeidler was their agent.

The Court below treated the transaction of April 9, 1925, as if it were a *pledge* of the bond and mortgage to secure the payment of the debts. It was not technically a pledge.

The instrument of transfer did not assign the mortgage to Second National Bank. It assigned the mortgage to Schmeidler, who was *not* the agent of Second National Bank or of Thompson & Hanstein. The testimony of Schmeidler and Hanstein is to the effect that he was *not* the agent either of Thompson & Hanstein or of the bank (Schmeidler, pp. 214, 216); (Hanstein, pp. 290, 291). Schmeidler was the friend of the Proffatts (pp. 203, 215, 114, 115, 43); he had been in business with Proffatt (pp. 204, 210, 215, 75, 76); he had acted for Proffatt under a power of attorney (pp. 212, 220, 43); he had not acted for the bank (p. 214); he had no relations with the bank (p. 214); he acted for Proffatt and as his agent (pp. 217, 221, 226, 244); he was the man in whom Proffatt had confidence and, when Proffatt determined to make the assignment to secure the bank and Thompson & Hanstein, Schmeidler was picked out to act as a trustee by Proffatt (pp. 235, 236), charged, by the terms of the instrument, with certain duties towards Thompson & Hanstein and Second National Bank and charged with certain duties, both by the terms of the instrument and by the law, to the Proffatts, but in no sense was he the agent of Second National Bank or of Thompson & Hanstein, and, not being their agent, they could not be held responsible for what he may have done in violation of any duty which he owed, either under contract or under the law, to

the Proffatts. Responsibility for those acts rests upon the Proffatts, for whom he acted as agent.

The real right of the Proffatts, under the form that this transaction took, *was to call upon Schmeidler, their agent and their trustee, to account for his acts,* and that is a right resting *in equity.*

The assignment of the mortgage made to Schmeidler was *absolute* (p. 342). The agreement of April 9, 1925, upon which any rights of the Proffatts must rest, was a separate document *and a document of trust* (p. 344).

Many cases were cited by Bankers Trust Company below to the effect that a pledgee who sells without notice is guilty of conversion. These cases have no application because Second National Bank was not the pledgee of the bond and mortgage. The Court below treated the transaction as if the bond and mortgage had been pledged with Second National Bank. The transaction was not that of pledge, but of trust.

The Proffatts having vested Schmeidler with apparent authority to sell this mortgage, the purchaser, i. e., Second National Bank, took a good title even if Schmeidler violated his duty in not giving proper notice.

In 38 Cyc., page 2024, title "Trover and Conversion", section D1, it is stated:

> "If, however, the person from whom defendant obtained the property had possession of it under circumstances known or assented to by the owner, that justified an inference of apparent authority to make the disposition complained of, trover will not lie."

In *Jones on Collateral Pledges,* Section 47, it is stated:

> "Title of bona fide purchaser.—A pledgor in possession can give a good title to a bona

fide purchaser. If pledged property which has been redelivered to the pledgor for a special purpose be sold by him, in violation of the agreement under which possession was redelivered to him, the purchaser having acted in good faith could maintain his title against the pledgee. Thus the fact that the pledgor of a horse obtained possession for a special purpose, such as to drive for a few miles, to visit a relative, upon the promise to return it in a day or two, and while upon the visit traded this horse for another, does not enable the pledgee to recover the horse from the purchaser.

The decisions in these cases rest upon the general principle that one who voluntarily allows personalty to pass into the possession of another, conferring upon him at the same time all the indicia of ownership, is bound by the fraudulent acts of the latter, and cannot reclaim the property in the hands of an innocent purchaser for value without notice.''

It is not sugested in 21 Ruling Case Law, Title ''Pledges'', Section 52, where the effect of an invalid sale is considered, that a purchaser does not obtain title or that he is liable for a conversion.

The Proffatts having placed the absolute title to the mortgage in Schmeidler and having expressly given him authority to dispose of it, if we assume that notice was required and not given, Second National Bank took absolute title, and no relief can properly be granted against it because of any violation by Schmeidler of the rights of the Proffatts, it *not* being the pledgee, *unless the testimony shows that Second National Bank was in some conspiracy, in which event the right of the Proffatts against Second National Bank would not be for conversion or trover but in equity to subject the property which it had acquired to the claims of the Proffatts as against Schmeidler.* There was no evidence of any such conspiracy.

C. The conduct of Schmeidler, Second National Bank and Thompson & Hanstein was open and fair, and any notice required was given and, if the Proffatts and Bankers Trust Company received no notice, it was their own fault and the result of their own inequitable conduct.

The assignment to Schmeidler was made April 9, 1925. After making the assignment to Schmeidler and the agreement with respect to the bond and mortgage, Proffatt made no attempt to liquidate the obligations. Second National Bank, in the Fall of 1925, became insistent that the matter be cleaned up as did Thompson & Hanstein; Thompson & Hanstein communicated with Schmeidler, pressing him to do something to clean the matter up (p. 295); Schmeidler communicated with Proffatt, as did Thompson & Hanstein; on September 4, 1925, Schmeidler wrote Proffatt, addressing him at the Freeman Building, Atlantic City, asking him, Proffatt, to get in touch with him, Schmeidler, as soon as possible as he wished to be relieved of the matter as soon as possible (Ex. S-20, p. 360); on October 23, 1925, Schmeidler wrote Proffatt, addressing him at 244 No. Rhode Island Avenue, that Second National Bank had called upon him "regarding the payments that are due them and it is necessary that something regarding this matter be done at once" (Ex. S-19, p. 360); on November 10, 1925, Schmeidler wrote Proffatt at 324 No. Rhode Island Avenue, Atlantic City (Ex. S-16, p. 359), that he had been trying to get in touch with Proffatt for some time and that he would like to be relieved of the responsibility, and would appreciate it if Proffatt "would get in touch with me at once so that the matter can be cleaned up"; on November 17, 1925, Schmeidler wrote Proffatt at 222 Caspian Avenue (Ex. S-17, p. 359) asking Proffatt to please get in touch with him as soon as possible; on Novem-

ber 20, 1925, Thompson & Hanstein wrote Proffatt at 222 Caspian Avenue, stating that they had been directed by Second National Bank to call his attention to the overdue obligation held against him and that unless the matter "is taken care of at once, we are authorized to proceed against the security which is held by Mr. Schmeidler" (p. 357). Proffatt ignored all of these communications. Proffatt says that he remained friendly with Schmeidler (p. 115). Copies of the letters above mentioned are shown to Proffatt (p. 133), and he admits that he received them. (Note that one was addressed 324 No. Rhode Island Avenue and one 244 No. Rhode Island Avenue, the addresses to which the notices of sale were sent.) He replied to none of them except the one dated November 17, 1925 (Ex. S-14, p. 359). To this one he replied by the letter of November 18, 1925 (Ex. S-14, p. 356), asking Schmeidler to call at the house. He says Schmeidler never came (p. 134).

Proffatt made no attempt whatever to pay off the obligations, and finally Schmeidler determined to sell the mortgage, and a notice of the time and place fixed for the sale was posted in five public places in Atlantic City (p. 78; Ex. S-7, p. 350).

A notice (Ex. S-8, p. 351) was sent to Proffatt, addressed to him at 324 Rhode Island Avenue, and another addressed to him at 244 North Rhode Island Avenue (p. 79).

Proffatt said that: in March or April, 1926 (p. 56), he never received notice of sale; he was in Florida (pp. 72, 73); he did not know that the bond and mortgage had been sold until he returned about the 23rd or 25th of April, 1926.

Schmeidler testified (pp. 226, 227) that: he had been told that Proffatt lived on Rhode Island Avenue, and he had been also told that he lived on Caspian Avenue; he did not recall giving the Rhode Island Avenue address to Thompson &

Hanstein, Thompson & Hanstein having sent out the notice of sale (pp. 227, 228); he had sent a man to the Caspian Avenue address and found that Proffatt was not living there (pp. 245, 246).

Mr. Hanstein said that the notice of sale was prepared in his office (pp. 292, 293, 295); he had no knowledge that Proffatt was out of town (p. 295); he did not know where Proffatt lived (p. 296).

On March 10, 1926, Thompson & Hanstein had received the letter S. 5 from Mr. Bourgeois (p. 346), representing Mr. Proffatt, in which letter Mr. Bourgeois had questioned the validity of the assignment to Schmeidler. Mr. Hanstein, believing that Mr. Bourgeois represented Proffatt, directed a notice of sale to be served on *him* (pp. 296, 297). Such notice *was* served on Mr. Bourgeois and likewise inquiry was made of Mr. Bourgeois as to the address of Proffatt and the reply was that Mr. Bourgeois *did not know* (pp. 78, 79, 80).

Although the bond and mortgage had been assigned to Bankers Trust Company on December 21, 1925, by Proffatt, Mr. Hanstein had no knowledge of the assignment until after the sale of April 6, 1926, and *Bankers Trust Company gave no notice, either to Second National Bank or Schmeidler or Thompson & Hanstein, that it had any interest in the mortgage* (p. 299). Mr. Bourgeois, although he knew all about the assignment to Bankers Trust Company at the time he was negotiating with Mr. Hanstein in March, 1926 and writing him a letter on the subject of *settlement,* did not intimate that the mortgage had been assigned to Bankers Trust Company (p. 299).

On April 5, 1926, the day fixed for the sale, Mr. Bourgeois sent a notice to Schmeidler notifying him that "This is to notify you that I do not represent George P. Proffatt in the above matter,

and am not authorized to accept service for him of such notice, *and don't know where he is and have not been able to communicate with him''* (p. 81). It is conceded that Mr. Bourgeois was counsel for Proffatt, and, while it may be that, technically, he was not authorized to accept service for Proffatt, he had been his counsel in the transaction *after April of 1925,* a few days after Proffatt had executed the assignment to Schmeidler and Bourgeois continued to be his counsel certainly as late as March 10, 1926, when he wrote the letter Ex. S. 5, p. 346, offering a settlement.

Schmeidler, Second National Bank and Thompson & Hanstein can hardly be charged with bad faith when they sent notices to addresses to which other letters had been sent and received nor because they did not get a letter address when Proffatt's own counsel stated on April 5, 1926 that he did not know where Proffatt was and that he had not been able to communicate with him (p. 81).

Throughout the case there was a suggestion of bad faith, made by Bankers Trust Company, on the part of Thompson & Hanstein, Second National Bank and Schmeidler because of the way in which notice of sale was sent out. Bad faith is rebutted, beyond the possibility of question, when it appears that, not only were notices publicly posted and sent to addresses to which letters had been sent, but notice was given to the person who had appeared as counsel for Proffatt. The mere fact that there was an omission to send a notice to another address to which letters had been sent, *i. e.,* 222 Caspian Avenue is, under the circumstances of this case, no evidence whatever of bad faith.

Second National Bank, Thompson & Hanstein and Schmeidler acted openly and fairly.

Proffatt said that he had never lived at either of the North Rhode Island Avenue addresses (pp. 127, 138) but he received letters addressed to each

of the addresses in November, 1925. He said that he had lived on Caspian Avenue (p. 138) but he was wholly indefinite as to dates and there is no proof that the Caspian Avenue address was his at the time notice was given of the sale in April, 1926. His own counsel said he did not know where he was or how to find him. Yet the court below impliedly held that his address was on Caspian Avenue and that Schmeidler knew it (pp. 395, 396). *There is no proof that a notice addressed to him at Caspian Avenue would have reached him.* Mrs. Proffatt says that they lived on Caspian Avenue until May, 1926, when they took the Rio Grande Hotel (p. 153) but it is obvious they were not at Caspian Avenue when, from January 13, 1926 to April 23, 1926, they were somewhere out of town (p. 138) and their own counsel could not locate them, as he says.

How can the Proffatts complain of lack of notice when they had so concealed their whereabouts as that their own counsel did not know where they were and had not been able to communicate with them? *How can the Proffatts complain of lack of notice when they come into court asserting that not they but Bankers Trust Company owned the mortgage at the time of the sale?*

Let us look now at the conduct of Proffatt. He conceded that he had received the letter written by Thompson & Hanstein November 20, 1925 (Ex. S-15, p. 357), by which he was warned that unless the matter was taken care of at once proceedings would be taken against the security held by Schmeidler. He did not answer this letter (p. 116). Following hard upon the heels of its receipt we find him assigning the mortgage to Bankers Trust Company, the date of the assignment being December 21, 1925. Upon the theory of Proffatt, Bankers Trust Company then became owner of the bond and mortgage, and *it* would be entitled to notice, not Proffatt.

Bankers Trust Company, at the time it took its assignment, knew of the previous assignment to Schmeidler and all of the circumstances. The agreement which gave Schmeidler the power to sell at a time and place to be fixed by him *had been shown to its president as early as April, 1925.* It refrained from giving any notice to Schmeidler, Thompson & Hanstein and Second National Bank of any interest it might have. Why?

Proffatt testified that he had made up his mind to repudiate the assignment made to Schmeidler a few days after he had signed the papers (p. 59), and he said that he had seen Mr. Bourgeois and Mr. Richards shortly thereafter (pp. 59, 67), and had shown them the agreement and had been advised by them that he had been foolish (pp. 67, 68) and had made up his mind to repudiate (p. 63). But no suggestion was made that notice be given to Schmeidler, Second National Bank or Thompson & Hanstein of repudiation, and no notice was given (p. 67).

Proffatt said that he orally repudiated to Schmeidler (pp. 54, 56). This is denied by Schmeidler (p. 209).

In the light of the conduct of Proffatt and of Bankers Trust Company, no reliance whatever can be placed upon this statement of Proffatt that he orally repudiated. See his attempted explanation of his perjury at page 326. He was advised by counsel and it would have been too easy a matter to have written a letter making his position clear for him to now say that he "orally" repudiated.

After the sale, and on May 5, 1926 (Ex. S-16, p. 358), Schmeidler sent Proffatt a check for the final dividends on the liquidation of the Guarantee Electric Co. of $408.85. This check Proffatt was entitled to under an assignment made by Second National Bank of its claim against that company

as a part of the transaction by which Schmeidler obtained the bond and mortgage in April, 1925 (Ex. S-22, p. 210). The letter enclosing this check was never answered. The check was never sent back. Proffatt said he destroyed it (p. 118). Why did he not return it and repudiate the transaction?

Notice of the sale was acquired by Proffatt certainly as early as April 23, 1926 (pp. 73, 74, 75), and yet neither he nor Bankers Trust Company made any affirmative move until Bankers Trust Company filed its answer and counterclaim in this cause, the file mark of which is missing from the record (p. 10). It was actually filed ..... (p .....).

The conduct of Bankers Trust Company and the Proffatts indicates that they did not intend to rely upon lack of notice to Proffatt in any attack on the regularity of the proceedings by which Second National Bank acquired title to the bond and mortgage at the sale but that they did intend to rely upon the theory that Bankers Trust Company was in the position of an innocent purchaser for value without notice.

They deliberately acted in such a way as to lull Thompson & Hanstein and Second National Bank, who were secured by the assignment to Schmeidler, into a feeling of security. Bankers Trust Company knew the interest of Thompson & Hanstein and Second National Bank and all about the assignment to Schmeidler and the agreement between Proffatt and Schmeidler. Neither Schmeidler, Second National Bank nor Thompson & Hanstein knew anything about the assignment of December 21, 1925 to Bankers Trust Company. Bankers Trust Company and the Proffatts knew that Thompson & Hanstein, Second National Bank and Schmeidler were ignorant of any of these transactions and, as late as March 10, 1926, coun-

sel for *Proffatt* wrote Thompson & Hanstein proposing a settlement, *not on behalf of Bankers Trust Company,* which was supposed to own the mortgage, if the transaction of December 21, 1925 was bona fide, *but on behalf of the Proffatts and the interest of Bankers Trust Company at that time was not disclosed.*

Can it possibly be denied, under the circumstances that if, in fact, notice was not acquired by the Proffatts or by Bankers Trust Company, which if interested, stood in the shoes of the Proffatts, it was because of the grossly inequitable conduct of Bankers Trust Company and the Proffatts and due wholly to their own fault?

POINT III.

If Bankers Trust Company and the Proffatts are entitled to be relieved as to the sale they are only entitled to be relieved upon equitable terms and among those equitable terms is an obligation to pay to Second National Bank and Thompson & Hanstein their costs, counsel fees and expenses. This is particularly so in view of the inequitable position taken by Bankers Trust Company and the Proffatts during the progress of the case.

The Court below held that Bankers Trust Company and the Proffatts were entitled to be relieved against the sale only upon equitable terms and required Bankers Trust Company to pay to Second National Bank the sum of $23,200 with interest on $8,600 from April 1, 1924, and on the balance from April 5, 1926, and to Thompson & Hanstein the sum of $2,000 with interest from April 9, 1925, and the taxed costs of Second National Bank and Thompson & Hanstein. Although the Court was requested to require Bankers Trust Company and the Proffatts to pay the expenses

incident to the sale and counsel fees of Second National Bank and Thompson & Hanstein, the Court declined to include this in the decree.

The result is that Second National Bank and Thompson & Hanstein, although they have prevailed upon the issue as to the validity of the assignment to Schmeidler and the agreement securing them, that assignment and agreement having been attacked for fraud, and although Bankers Trust Company and the Proffatts have only succeeded in having the sale by Schmeidler to Second National Bank set aside upon equitable terms, because of a lack of proper notice of sale as the Court below held, Second National Bank and Thompson & Hanstein must bear all of their expenses of the litigation, including counsel fees and payment for copies of the record and all of the expenses of the sale.

Had Bankers Trust Company and the Proffatts confined their attack to the issue upon which they were successful the testimony could not well have exceeded a limit of twenty-five pages.

Instead we have testimony and exhibits of upwards of 300 pages.

And Bankers Trust Company and the Proffatts, by injecting the false issue of *bona fide* purchaser on the part of Bankers Trust Company, put the burden upon Second National Bank and Thompson & Hanstein to answer that which they should never have been required to answer.

To meet *this* issue, which Bankers Trust Company and the Proffatts knew when it was injected could not be sustained if the true facts came out, Second National Bank and Thompson & Hanstein were put to great effort and, as the record will show, an intensive effort was made by Bankers Trust Company and the Proffatts to prevent Second National Bank and Thompson & Hanstein getting the real facts into the record (See the testimony, pp. 31 to 34, pp. 36 to 42, p. 57).

Because the perjury of George P. Proffatt as to the alleged payment of $50,000. in cash by Bankers Trust Company to Mrs. Proffatt and as to Mrs. Proffatt putting the money in her pocket book and carrying it away with her and because of the testimony of the officials of the bank to the effect that the bank *paid* $50,000. for the bond and mortgage, Second National Bank and Thompson & Hanstein were put under the obligation of subpoenaing all of the records of the bank and it was not until this occurred that the real facts were developed.

Equity requires in this case, if Bankers Trust Company and the Proffatts are entitled to any relief whatever, that Second National Bank and Thompson & Hanstein should be made whole and they are not made whole unless they are allowed their counsel fees and expenses.

Second National Bank and Thompson & Hanstein offered, prior to the decision of the cause in the Court below, to accept the amounts for which the assignments to Schmeidler was given as security, *together with their costs and expenses including counsel fees,* contingent upon the offer being accepted before the decision of the cause and wholly without prejudice and not because Second National Bank and Thompson & Hanstein thought that they had to do so but because they wanted to do so, which offer was promptly rejected (pp. 386, 387).

Bankers Trust Company and the Proffatts have taken the position from the beginning that they are entitled to the bond and mortgage without making any payment to Second National Bank and Thompson & Hanstein and they were dissatisfied with the decree which gave them *equitable* consideration, to which we submit they were not entitled, and came to this Court.

Conclusion.

It is respectfully submitted:

1. That the decree be reversed and the record remitted to the Court of Chancery with directions to enter a decree adjudging that Second National Bank is the true and lawful owner of the said bond and mortgage free of any claim or interest of Bankers Trust Company or the Proffatts and that the interest moneys which have accrued upon the bond and mortgage be directed to be paid to Second National Bank or, if this Court should determine that the Court below is basically correct, then

2. That Bankers Trust Company be compelled to pay, in addition to the amounts directed by the decree below, as a condition for the equitable relief granted to it, the counsel fees and expenses of Second National Bank and Thompson & Hanstein.

Respectfully submitted,

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(5470)

New Jersey Court of Errors and Appeals

Between

ELRAE CORPORATION,
Complainant,

and

BANKERS TRUST COMPANY,
Respondent-Appellant,

and

THE SECOND NATIONAL BANK OF ATLANTIC CITY, N. J.,
Respondent-Appellant.

On Appeals from Court of Chancery.

Sat Below: Ingersoll, V. C. On Appeals of Both Parties.

(Italics, etc., ours, except where otherwise noted.)

REPLY BRIEF TO BRIEF OF APPELLANT BANKERS TRUST COMPANY.

Preliminary.

We have stated the case in our original brief (p. 2). On page 5 of its brief, Bankers Trust Company states that the amendment and further supplement to the statement of The Second National Bank (p. 20) was filed during the course of the proceedings. We have pointed out (p. 1 of our original brief) that *that* purported amendment and supplement was never filed. The original is now in our possession unfiled. Although leave to file it was granted (pp. 180, 182), it was subsequently *agreed* that the statement made on pages 180 and 181 of the record should be considered as the amended or supplemental pleading (p. 316).

At the time of the preparation of our original brief we did not know why Bankers Trust Company had printed this amended and supplemental pleading, not a part of the record.

The purpose is now disclosed (p. 67 of the brief of Bankers Trust Company).

The greater part of the statement of the case of Bankers Trust Company is taken up with a history of what occurred prior to the execution of the instruments between the Proffatts and Schmeidler on April 9, 1925, those instruments being:

1. An assignment by Katherine B. Proffatt of all her interest in the mortgage in question to George P. Proffatt (Ex. S-1, p. 341).

2. An assignment of the mortgage from George P. Proffatt to Isidor Schmeidler (Ex. S-2, p. 342).

These assignments are absolute in form.

3. An agreement between George P. Proffatt and Isidor Schmeidler which, after reciting the absolute assignment, reads (Ex. S-4, p. 344; Ex. B-10, p. 51):

> "for the purpose of securing unto the Second National Bank of Atlantic City, N. J., the payment of the sum of $23,000 together with interest on $8,600 from April 1st, 1924 to date of payment, and also the sum of $2,000 to Joseph Thompson and Walter Hanstein, trading as Thompson & Hanstein;
>
> It is understood and agreed that the said party of the first part (Proffatt) *does hereby authorize the said party of the second part* (Schmeidler) *to sell or dispose of said mortgage at such time as shall appear to be to the party of the second part advisable for the purpose of making the payments aforesaid, and to that end the said party of the second part is hereby authorized to do any and all things necessary for the carrying out*

of the purposes of this agreement and the rendering over to the party of the first part of any surplus remaining after the sale of said mortgage and the payment of the debts aforesaid.

And the said party of the second part does hereby agree with the party of the first part that he will fully and completely carry out the terms of this agreement and will hold said mortgage for the securing of the debts above set forth and will, *at the time that seems most advisable to him, sell said mortgage and pay the debts aforesaid,* and will pay over to the party of the first part the surplus remaining after said sale."

4. An agreement between Schmeidler and George P. Proffatt which reads as follows (Ex. B-11, p. 53):

"Whereas, Isadore Schmiedler has received an assignment from the Second National Bank of Atlantic City, New Jersey, of a claim of $14,600, which the said Second National Bank had against the Guarantee Electric Company, Incorporated;

'Now, therefore, this agreement made this 9th of April, 1925, between Isadore Schmiedler, party of the first part, and George P. Proffatt, party of the second part, for and in consideration of the sum of a dollar each to the other in hand paid, the receipt whereof is hereby acknowledged, witnesseth:

'Party of the second part does hereby agree that he will file claim for said sum of $14,600 with the Receiver of the Guarantee Electric Company, Inc., and collect the dividend paid upon the same, and upon receipt of said dividend will pay the same over to George P. Proffatt'."

In the court below Bankers Trust Company insisted that these instruments were obtained by fraud and were without consideration. The charge of fraud utterly failed.

In the attempt to prove fraud Bankers Trust Company produced the confessed perjuror, George P. Proffatt (p. 42). Upon objections to the testimony of George P. Proffatt as to what had been said to him by Schmeidler, which alleged statements of Schmeidler were sought to be made the basis for a charge of false representation, upon the ground that any such alleged statements were not binding upon the Second National Bank or Thompson & Hanstein, Schmiedler being the attorney-in-fact for the Proffatts, counsel for Bankers Trust Company stated that he would connect up Second National Bank and Thompson & Hanstein (p. 46). He failed to do so.

Assuming, however, that any representations made by Schmiedler *would* be binding upon Second National Bank and Thompson & Hanstein, the court below, to have found fraud, would have been obliged to base its decision upon the testimony of George P. Proffatt, a *confessed perjuror,* and that of his wife, Katherine B. Proffatt, of whom we said on page 26 of our original brief, and now repeat—"while she declined to perjure herself to the extent that her husband had, she still attempted to induce the court to believe that the transaction with Bankers Trust Company was, in fact, a *purchase* by that bank of the mortgage, * * *" which was not the fact.

As against the testimony of George P. Proffatt and his wife, Katherine B. Proffatt, both of whom have an interest and George P. Proffatt being a confessed perjuror, and Katherine B. Proffatt being, as we submit, little better, there is the testimony of Schmiedler, who, prior to the execution of the agreements of April 9, 1925, had acted as attorney in fact for Proffatt and who had no interest in the transaction, and the testimony of

Joseph Thompson and Walter Hanstein, and that of William S. Cochran, former Cashier of the Second National Bank, who was associated at the time of the trial with another bank, and the testimony of Thomas Emerson, who had nothing to gain or lose.

If the court below could have been induced to believe the testimony of George P. Proffatt and Katherine B. Proffatt in preference to that of the other witnesses mentioned, in the face of the rule that fraud is never presumed but must be proven by clear and cogent proof, Bankers Trust Company would still be faced with the rule that a subsequent transferee, with notice (and it is *now* conceded that Bankers Trust Company took with notice) cannot have set aside a prior transfer alleged to have been secured from the common transferor by fraud.

The situation in the case at bar upon this phase of the case is like that present in *Cochran Timber Company* v. *Fisher,* 190 Michigan 475; 4 American Law Reports 9, and the decision in that case clearly established the proposition of law just set forth.

Additional authorities to the same effect are:

Graham v. *LaCrosse &c. Railway Company,* 102 U. S. 148; 26 Law Ed. 106; and

Whitney v. *Kelly,* 94 Cal. 146, 29 Pac. 624, 15 L. R. A. 813.

Only by treating George P. Proffatt and Katherine B. Proffatt as the real parties to this suit and as the persons claimed to be entitled to the mortgage or to the benefit thereof can the issue of fraud be injected and yet Bankers Trust Company, in the face of the active participation of the Proffatts in the trial and of the fact that the

brief filed by Mr. McCarter in the Court below was entitled—*"Brief for Bankers Trust Company and Mrs. Katherine B. Proffatt"*, and was signed "W. Lindley Jeffers and Robert H. McCarter, *counsel for Bankers Trust Company and Mrs. Katherine B. Proffatt"* and of the fact that Bankers Trust Company concedes that its rights can rise no higher than those of the Proffatts, argues, (Point 5 of its brief, p. 55), that the Court erroneously held that it had jurisdiction "to determine not only the rights of the parties to the record, but likewise the rights of George P. Proffatt and Katherine B. Proffatt, if any".

Notwithstanding reference to statements of George P. Proffatt and Katherine B. Proffatt in the statement of the case for Bankers Trust Company, which are supposed to present an issue of fraud, Bankers Trust Company does not, in any one of its points, rely upon the fact that the agreements of April 9, 1925, were obtained from the Proffatts by fraud.

And, so, with respect to the alleged lack of consideration.

There was, in fact, full consideration for the agreements and the Court below pointed out that it was immaterial whether the assignors, George P. Proffatt and Katherine B. Proffatt, were originally liable upon the indebtedness and obligations the payment of which was intended to be secured by the agreements. The assignors were bound by the executed assignments. *Perkins* v. *Trinity Realty Company,* 69 N. J. E. 723, affirmed 71 N. J. E. 304; *Krouse* v. *Palmer,* 89 N. J. E. 220 (p. 389 of the State of Case).

We will have more to say upon the matter of the consideration for these agreements when we come to discuss Point 4 of the brief of Bankers Trust Company, under which the charge is made, in effect, that George P. Proffatt was misled by

Thompson & Hanstein as to his liability upon the original indebtedness and obligations, Bankers Trust Company again relying solely upon the testimony of George P. Proffatt, who, confessedly, perjured himself.

Under the circumstances, we do not propose to follow Bankers Trust Company in its consideration of the evidence from pages 1 to 23 of its brief. To do so would require us to repeat it and annotate it to point out its inaccuracies, which we think is wholly unnecessary.

We proceed therefore to a consideration of the points made by Bankers Trust Company.

I.

Answer to point that Thompson & Hanstein have been paid.

The theory of Bankers Trust Company under this point seems to be that, because, as a result of its purchase at the sale of the mortgage which sale the Court below set aside, on terms, Second National Bank paid to Schmeidler, the attorney in fact for Proffatt and the trustee under the agreement, an amount sufficient to pay the amounts due to itself and to Thompson & Hanstein and Schmeidler gave checks to Second National Bank and Thompson & Hanstein, the respective sums due were paid and Bankers Trust Company says (p. 24 of its brief)—"Can they (Thompson & Hanstein) say that out of sympathy for the bank that paid them off under, if you will, a mistaken idea as to the legality of the proceedings, they have paid back the bank and are still entitled to be considered? We think not. With great deference to these gentlemen, we feel that in this case they want to eat their cake and still have it."

In other words, Bankers Trust Company charges that Thompson & Hanstein propose to retain the moneys paid them by Schmeidler out of moneys received from Second National Bank as a result of the sale set aside by the Court below on terms and also propose to collect another payment.

This is no concern of Bankers Trust Company or of the Proffatts. The Court below held that Bankers Trust Company and the Proffatts were entitled to have the sale set aside *upon equitable terms.* Equity required that the parties be put back in the same position as they had been in before the sale. That position was that Schmeidler held the mortgage as trustee for the benefit of Thompson & Hanstein to the extent of $2,000 and Second National Bank to the extent of $23,200 with interest in accordance with the terms of the agreement of April 9, 1925, between George P. Proffatt and Schmeidler (Ex. S-4, p. 344). Equity then required that Bankers Trust Company be permitted to redeem if it desired. The amount, *in the aggregate,* which Bankers Trust Company was directed to pay by the decree to redeem was the correct amount. If Thompson & Hanstein had already been paid by funds equitably belonging to Second National Bank and Thompson & Hanstein had not repaid Second National Bank it was the business of Second National Bank to have the decree so framed as that the entire amount of the redemption money should have been directed to be paid to it. But that was the concern of Second National Bank. It was in no wise the concern of Bankers Trust Company or of the Proffatts.

Bankers Trust Company (p. 24 of its brief) attempts to go into the validity of the claim of Thompson & Hanstein, and to go behind the agreement of April 9, 1925. *By the agreement of April 9, 1925,* which the Court below declined to hold

was obtained by fraud, *the parties liquidated their rights* (Ex. S-4, p. 344).

Bankers Trust Company is entirely mistaken with respect to the circumstances which gave rise to the indebtedness to Thompson & Hanstein for $2,000. The facts are: Thompson & Hanstein incorporated the Guarantee Electric Company (p. 253); they charged $1,000 for services; that bill was paid by the issuance of ten shares of stock to Thompson & Hanstein; Thompson & Hanstein purchased from Mrs. Proffatt another ten shares of stock and paid her $1,000 therefor; the bill of Thompson & Hanstein was paid by the corporation giving Mrs. Proffatt the $1,000 and Mrs. Proffatt giving Thompson & Hanstein ten shares of her stock in payment therefore (pp. 267, 268); Thompson & Hanstein were induced to take this stock by Proffatt (p. 256); Proffatt told Thompson & Hanstein that he would not dispose of his stock without buying the stock of Thompson & Hanstein (p. 256); Proffatt did dispose of his stock; on April 9, 1925, repeating what he had said on several previous occasions, Proffatt stated that he wanted to take care of Thompson & Hanstein and the Second National Bank; as a result of this desire of Proffatt, the agreement of April 9, 1925, provided for the payment of the $2,000 to Thompson & Hanstein.

Now, it is said (p. 24 of the brief of Bankers Trust Company) that Thompson & Hanstein had already been paid $1,000 and, as proof thereof, the receipted bill of Thompson & Hanstein (Ex. B-22, p. 382) is pointed to, and it is said that there is no explanation of that bill, which is dated December 17, 1923, addressed to the Guarantee Electric Company, and which includes a fee of $1,000 for incorporating the Guarantee Electric Company, and bears the signature of Thompson & Hanstein under the words "Received payment". This

transaction was back in 1923 and it is true that, when Mr. Hanstein was asked about this bill (pp. 268, 269), he had no recollection of it and was uncertain about it. He *was* certain, however, that he never had received payment of any $1,000 from the Guarantee Electric Company on this account and the explanation of the bill is quite simple. Guarantee Electric Company had issued ten shares of stock in payment of this bill and it had to have some record in its files. Unquestionably this bill was prepared for the purpose of showing the consideration for the issuance of the stock. Had Thompson & Hanstein actually been paid $1,000 by Guarantee Electric Company, Bankers Trust Company could easily have proven it. All the books and checks of the Guarantee Electric Company were in the possession of Mr. Shinn, the receiver, who testified in the case (p. 29). If those books and checks had shown a payment of $1,000 to Thompson & Hanstein on account of this bill it would have been quite simple for Bankers Trust Company to have produced the proof. They show no such thing. Bankers Trust Company says, on pp. 24, 25 of its brief, that the bills, Ex. B-22, p. 382, and Ex. B-23, p. 383 indicate—"that they were paid in cash." They do *not* so indicate. There is nothing on the face of the bills to indicate how they were paid. The only proof in the case is that they were paid, as Mr. Hanstein testified, by the issuance to Thompson & Hanstein of ten shares of stock of Mrs. Proffatt, Mrs. Proffatt having assumed the obligation of the company to Thompson & Hanstein (pp. 253, 264, 265, 266, 267, 268).

On April 9, 1925, Proffatt and Mrs. Proffatt both understood the transaction. Proffatt had been connected with the Guarantee Electric Company and he would have known, if it were the fact, that Thompson & Hanstein had been paid

$1,000 by that company. The very fact that, on April 9, 1925, Proffatt made the agreement under the terms of which Thompson & Hanstein were to be paid $2,000, which includes this $1,000, indicates that Thompson & Hanstein had not been paid the $1,000.

An attempt is also made by Bankers Trust Company (pp. 24 and 25 of the brief), to show that, on April 9, 1925, Thompson & Hanstein were not entitled to this $2,000 because they had "sold the stock to Huber (pp. 149, 271, 272) for some cash and a note, holding on to the stock as collateral for the note, which was never paid."

Bankers Trust Company is entirely mistaken when it states that the Huber transaction involved the payment to Thompson & Hanstein by Huber of "some cash". Reference to page 149 of the state of the case, to which point we are directed by Bankers Trust Company, indicates that, when Huber stated that he purchased certain stock for some cash and a note, he was referring to stock which he had purchased from Proffatt—

> "Q. What did you give, note or cash, to *Mr. Proffatt* for that stock? A. Why, I gave him some cash and note to Mr. Proffatt. Bought some from Mr. Proffatt and some from Mrs. Proffatt."

He then testified with respect to the transaction with Thompson & Hanstein and he said that he gave them *a note* for $2,000. The Huber transaction is explained by Mr. Hanstein at pages 272, 273. In the early part of 1924, Thompson and Hanstein agreed to sell the stock to Huber for $2,000. It was not a sale but an agreement to sell. A note of Huber for $2,000 was taken by Thompson & Hanstein and the stock was to be delivered upon the payment of the note (pp. 272, 273). The note was never paid (Hanstein, pp.

273, 274; Huber, p. 150). The transaction was dropped and, on April 9, 1925, Thompson and Hanstein were the owners of the stock. The stock certificates always had remained in the possession of Thompson & Hanstein, and were produced by Mr. Hanstein (Ex. S-26, p. 301). The note of Huber not having been paid, the agreement to sell fell, and on April 9, 1925, Thompson & Hanstein were the owners of the stock, and their ownership has never been questioned by Huber.

Again, we repeat that it is quite immaterial whether Proffatt or Mrs. Proffatt were either legally or morally bound to pay this $2,000. The agreement of April 9, 1925, having been executed and made effective by an actual assignment of the mortgage, the basis of the supposed obligations is immaterial except for the purpose of showing fraud, and we repeat that, if the Court is to find fraud, it must do so solely upon the testimony of the confessed perjuror, Proffatt.

Perkins v. *Trinity Realty Company,* 69 N. J. E. 723, affirmed 71 N. J. E. 304;
Krouse v. *Palmer,* 89 N. J. E. 220.

II.

The position of the Second National Bank.

From page 26 to page 37 Bankers Trust Company attempts to demonstrate that while, if the sale made by Schmeidler to Second National Bank be set aside, Second National Bank will have nothing, nevertheless Second National Bank has been paid, apparently with its own money, expended for something which it now cannot hold because the sale was voidable.

If a strict pledge were here involved, which is not the fact, and if the sale were illegal in such a

way as that it could not pass title and would constitute conversion, which it is not, Proffatt (and, therefore, Bankers Trust Company, which stands in his shoes) could not recover either in conversion, trover or in any other form of action *without tendering the amount secured by the pledge.*

Some of the Courts have held that, under such circumstances, a tender is not necessary *before suit is brought. Austin* v. *Vanderbilt,* (48 Oregon 206), 10 Ann. Cases 1123, see note 1125.

Massachusetts holds to the contrary, *Cumnock* v. *Newburyport Savings Institution,* 142 Mass. 342, 7 N. E. 869; *Jarvis* v. *Rogers,* 13 Mass. 105, 15 Mass. 389; *Hancock* v. *Franklin Insurance Co.,* 114 Mass. 155; *Hathaway* v. *Fall River National Bank,* 131 Mass. 14.

But *all* of the Courts hold that, in an action of trover or conversion, the pledgee who is the *only* person who can be sued in trover or conversion and who, in this instance, would be Schmiedler, can *offset the amount of the debt secured* so that, in practical effect, there is no distinction whatever. In any event, the pledgee gets the benefit of the amount of the debt secured. 21 R. C. L. section 39, title "Pledge".

The English authorities are to the effect that there must be a tender "before action", 21 R. C. L., title "Pledge" sec. 39.

In *Meisel* v. *Merchants National Bank,* 85 N. J. L. 253 at p. 255, this Court said:

> "In our view the plaintiff's failure to keep his tender good precludes recovery in this action of replevin. Let us assume that the certificate was wrongfully retained by the bank. *Leaving out of view the equitable remedy,* the plaintiff's remedy at law was either action in the nature of replevin for the recovery of the certificate itself, or an action for conversion seeking damages for its detention. The plaintiff chose replevin. *Now the*

> *pledgor or his assignee is not entitled to recover the property itself by an action of replevin or other possessory action without making and keeping good a tender of the debt. 31 Cyc. 856.''*

And see *Donald* v. *Suckling,* L. R. 1 Q. B. 585, 620; 21 English Ruling Cases 301 where the rule is stated:

> ''A pledgee under an ordinary contract of pledge is entitled, after default, to sell the goods; and although in the meantime he transfers the possession to another, he does not annul the contract; and *the pawnor is not entitled, without tender of the sum for which the goods were originally pawned, to recover the possession from the person to whom it has been transferred.''*

In Jones on Collateral Securities it is stated that ''in an action against the pledgee for a conversion of the pledge he may recoup or offset the debt secured'' and *Stearns* vs. *Marsh* (4 Denio 227), 47 Amer. Dec. 248; *Jamison & Co.'s Estate,* 163 Pa. St. 143, 29 Atl. 1001; *Fletcher* v. *Harmon,* 78 Maine 465, 7 Atl., 271, and *Feige* v. *Burt,* 118 Mich. 243, 77 U. S. 928, 74 Amer. St. Rep. 390, are cited as authorities.

And there is no divergence in the authorities.

But Bankers Trust Company seeks to avoid the effect of the rule by intimating that there is a distinction between the duty of a pledgor, who has pledged the property for his own debt, and the duty of a pledgor, who has pledged the property for the debt of another.

Not a single case is cited to support any such distinction.

Bankers Trust Company contents itself by saying (p. 36 of its brief): ''We *believe* without exception all the cases that have required a pledgor who seeks to recover the property sold at an irreg-

ular or illegal sale, to tender the amount of the indebtedness, are cases where the pledgor has also been the debtor or one who claims under him, and has, therefore, had the benefit of the debt."

No case making any such distinction is cited. The situation must have been presented upon numerous occasions. No one has yet had the hardihood to assert or to intimate the supposed distinction.

The language of the cases is *not* that, before there can be recovery the debtor must pay *his* debt, or that, in an action for trover or conversion, the pledgee is entitled to offset *the debt of the pledgor*. On the contrary, the language of all the cases is that there must be tender of, or there may be offset, "*the amount of the debt secured by the pledge.*"

And Jones on Collateral Securities says, section 354:

> "One who pledges property for the obligation of another *cannot withdraw the property pledged otherwise than as a pledgor for himself might* * * *."

Bankers Trust Company intimates that: like Thompson & Hanstein, Second National Bank has been paid and therefore is out of the case; therefore the debts secured by the pledge have been liquidated; therefore there is nothing for the Proffatts to tender; Second National Bank in its capacity as purchaser, cannot require tender of the amount paid by it because it purchased at an irregular sale. If this is not permitting the Proffatts to have their cake and eat it too, to use the language of Bankers Trust Company on page 24 of its brief, we do not know what very well could be.

If the sale were so irregular as that Second National Bank did not get title, which we deny, then

Second National Bank is entitled to have the purchase money restored to it and Schmiedler is entitled to have restored to him by Second National Bank and Thompson & Hanstein, the creditors secured, the amounts which he (Schmeidler) paid to them. And we would be back in the position of Schmeidler holding the mortgage as trustee for the purposes of the trust.

This was not a judicial sale and no rule of *caveat emptor* applies. It was a sale conducted by Schmeidler, *as trustee for Proffatt,* under power of sale conferred by *Proffatt,* and whatever he did he did *as the agent of Proffatt,* and, we submit, to argue that, because Schmeidler, trustee under the agreement, breached some duty resting upon him *toward Proffatt,* Proffatt can get back the property, with which Schmeidler dealt, from the person who purchased it without securing the person who purchased for the amount which it actually advanced, which amount was used by the trustee, Schmeidler, *for the benefit of Proffatt,* is absurd.

Bankers Trust Company argues that the debts were not the debts of Proffatt (p. 36 of its brief). If true, what of it? His property was pledged for the payment of the debts and would have to remain under the pledge until withdrawn in precisely the same way that it could be withdrawn if the pledge was for his own debt.

Jones on Collateral Securities, sec. 354.

But it is not accurate to say that the Proffatts received no benefit from this pledge and that they were not liable for the debts. As to $8,600 it is conceded that Mrs. Proffatt was liable upon notes made by her. The balance was made up of indebtedness of Guarantee Electric Company to Second National Bank, the loans having been obtained under such circumstances and upon such representations of Proffatt to the officials of the

bank as that it might well be claimed that he was legally liable (p. 308, *et sequi*). At any rate he was morally liable and he recognized his moral obligation by giving the pledge.

There is no analogy between the situation present in this case and that present in *Manternach* v. *Studt,* 240 Ill. 464, 88 N. E. 1000, mentioned by Bankers Trust Company on page 34 of its brief. In *that* case the attempt had been to take the infant's property by legal proceedings which were void, the Court having no jurisdiction and the infant not being liable in any wise.

The other cases mentioned in the brief of Bankers Trust Company are equally without point here. They all deal with situations where neither the person owning the property *nor the property* was in any wise liable except as an attempt was made to make him or it liable by *void* judicial proceedings, or cases like *Levy* v. *Stofello,* 127 Pacific Rep. 725, 14 Arizona 262, where it was held that the mortgage debt must be tendered.

There is no defect here in the original pledge. By the original pledge, Proffatt subjected the mortgage to the payment of the debt.

It is suggested (p. 37 of the brief of Bankers Trust Company) that, because Bankers Trust Company is a defendant in an interpleader suit, it is not obliged to do equity by paying the amount of money necessary to redeem the pledge. It is quite immaterial whether Bankers Trust Company is a defendant in an interpleader suit. *The legal title to this mortgage is in Second National Bank.* It was assigned by Proffatt to Schmeidler and by Schmeidler to Second National Bank, and the assignment to Schmeidler was recorded before the assignment to Bankers Trust Company, which Trust Company not only took with both construc-

tive and actual notice but *never advanced any monies whatever to obtain the mortgage* and actually throughout these proceedings represented Proffatt, the assignor, not itself. And it is conceded that Bankers Trust Company stands in the shoes of Proffatt.

Second National Bank did not need the aid of a court. Unless its assignment was set aside, *it was the owner of the mortgage. Bankers Trust Company was the attacking party, and the party who sought relief.*

It was not *really* the attacking party. It was and is acting for Proffatt, who actually made the assignment to Schmeidler which resulted in the assignment to Second National Bank after which assignment to Schmeidler he ostensibly assigned to Bankers Trust Company.

Bankers Trust Company had to be the moving party. If it were entitled, under the circumstances of this case, to maintain trover and conversion, it would have been obliged to make a tender.

Now Bankers Trust Company says (p. 37 of its brief) that, because Bankers Trust Company is a defendant in an interpleader suit, the substantial position of the parties is to be ignored.

III.

Answer to point that Second National Bank did not, in conducting the sale, act in good faith and cannot, therefore, avail itself of the rule relied on by the Court below.

Bankers Trust Company (p. 38 of its brief) admits the general rule that a purchaser (in this case Second National Bank) at a foreclosure sale, who has acted in entire good faith and innocently be-

came the purchaser, will, because of such good faith, be subrogated, as against the debtor, to the mortgage, and it cites cases from other jurisdictions.

The matter is settled in this State.

> *Shepard* v. *Barrett,* 84 N. J. E. 408;
> *Wimpfheimer* v. *Prudential,* 56 N. J. E. 585.

Bankers Trust Company seeks to avoid the effect of this rule by alleging that Second National Bank did not act *bona fide.* It charges that there was a deliberate purpose on the part of Schmeidler to avoid giving notice of the contemplated sale to Proffatt. This is based upon the fact that notice of sale was sent to Proffatt to a wrong address. It is charged that Schmeidler from the very beginning, that is to say, when he took the assignment of April 9, 1925, acted for Second National Bank.

Many assumptions are made (p. 40 of the brief) without any evidence to support them. Schmeidler and Walter Hanstein expressly deny that Schmeidler acted for the bank. Prior to the agreements of April 9, 1925, Schmeidler had been the attorney in fact *for Proffatt.* He was Proffatt's friend, not the Bank's. He was Proffatt's trustee under the agreement (Ex. S-4, p. 344), not the Bank's. The only testimony upon which a claim can be made that Schmeidler acted for the bank is that of Proffatt, the self-confessed perjuror.

We have considered the conduct of Schmeidler and Second National Bank and Thompson & Hanstein as to this sale (p. 48 of our original brief) and we have argued that they acted fairly, and, if the Proffatts and Bankers Trust Company received no notice, it was their own fault and the result of their own inequitable conduct. To at-

tempt in detail to follow Bankers Trust Company in its statement with respect to the charges of bad faith would be only to repeat what we have already said.

There are certain statements, however, which we do not desire to pass unnoticed.

On page 44 of its brief, Bankers Trust Company says:

> "The bank can not blindly turn over to Schmeidler the details of conducting the proceedings resulting in the sale, and escape the responsibility for its being illegally conducted, by putting on horse blinders and simply saying they assumed that Schmeidler acted correctly. * * * The only conclusion possible from the situation is that the bank, and particularly Schmeidler, felt here was a chance to acquire a $50,000 mortgage for a claim of about half that amount. Proffatt was away. By sending the notice to the wrong address, it would not reach him, and they would take their chance of maintaining the sale should Proffatt, upon learning of it, *have the nerve, the money and a lawyer who would assert the claim against their influential attorneys.*" (Italics theirs.)

There is not one word of testimony upon which this far-fetched claim, which amounts to a gratuitous insult, is made, nor are there any circumstances present which would give rise to any suspicion that it has any basis in fact.

In the first place, had there been any intent to prevent notice reaching Proffatt, assuming now that he was entitled to notice under the agreement, *no notice certainly would have been sent to Mr. Bourgeois*, who, up to that time, had acted as his attorney and who *actually had a clerk present at the sale.* It is quite true that Mr. Bourgeois, upon receiving the notice, stated that he no longer represented Proffatt, but the correspondence

shows that he *represented Proffatt up to almost the date of the sale,* and certainly, when the notice was sent, neither Schmeidler nor Thompson & Hanstein knew that Mr. Bourgeois did not represent Proffatt. *They certainly assumed that Mr. Bourgeois knew where he was.*

Had there been any intent to defraud anybody, *that* notice would not have been sent.

It is quite true that the evidence shows that Proffatt did not live at the address to which the notice was sent. Schmeidler said that he was informed that Proffatt lived at the Rhode Island Avenue address and not at the Caspian Avenue address and he had mailed letters to him at the Rhode Island address (pp. 226, 227, 242, 243, 245, 246, 247; Exhibits S-18 and S-19, pp. 359-360). His general credit is not shaken and there is no reason to doubt his word.

Not only was this notice sent to Proffatt and notice given to Mr. Bourgeois, but the sale was advertised in at least five different public places in Atlantic City. There was no concealment.

But, assuming that there *was* some irregularity on Schmeidler's part, is the Second National Bank, the purchaser, affected with responsibility for that irregularity? Bankers Trust Company says that the initiation of the proceeding which resulted in the sale was prompted by the bank. The bank was one of the creditors secured by this pledge. It was within its right to stir the activities of Schmeidler. It was not the pledgee. It was not the person trusted by Proffatt to protect his rights. It called upon Schmeidler to perform *his* duties under the trust agreement. Schmeidler had written Proffatt several times calling his attention to the demand of the bank, with no response (S-18, S-19, S-20, pp. 359, 360).

Second National Bank was not, as Bankers Trust Company was, seeking equity.

As we have indicated, the Proffatts were the actual parties seeking equity and who we submit would not be granted that equity, if the Court conceived that they were entitled to any equity, until they did equity.

On page 45 of its brief Bankers Trust Company says: "Schmeidler's conduct in *purposely* misdirecting the notice of the sale is clearly inconsistent * * *."

There is not one word of proof in the case that there was any purpose on the part of Schmeidler to misdirect the notice.

We do not desire to add any more to what we had to say upon this subject, pages 48 and 55 of our original brief.

IV.

Answer to Bankers Trust Company's contention that "in any event, the Court below erred in fixing the amount that should be paid by the Bankers Trust Company as a pre-condition of its right to the mortgage."

From page 46 to page 51 of its brief Bankers Trust Company again attempts to go behind the agreement of April 9, 1925 (Ex. S-4, p. 344), which fixed the amounts secured at $23,200, with interest on $8,600 from April 1, 1924, to date of payment to Second National Bank and to show that, *if Proffatt had been advised of the true conditions,* he would not have agreed to pledge the mortgage for this $23,200.

It is conceded that this amount of money was due to the bank upon the obligations of Guarantee Electric Company, but it is said that Proffatt *thought* that there was not included in this amount anything more than the balance due on the claim originally represented by the note for $15,000 and

the notes of Katherine B. Proffatt aggregating $8,600.

The contention of Bankers Trust Company is that Proffatt intended only to secure the balance due on the $15,000 note, which was originally discounted November 2, 1922, and which had, on March 25, 1924, been reduced to $12,000, and that, had he known that there was included in the $14,600, which forms a part of the $23,200 for the payment of which he pledged the mortgage, not only this balance on the $15,000 note but also the balance of $1,500 due on a $2,000 note discounted August 1, 1923, which, on March 25, 1924, had been reduced to $1,500, and the balance due on a $1,500 note, discounted November 14, 1923, which, on March 24, 1924, had been reduced to $1,250, the sum of all of which balances amounting to $14,750 on March 25, 1924, was further reduced by a payment of $150, which net aggregate balance was represented by a new note made on March 25, 1924, for $14,600, he would not have agreed that this new note should be secured by the agreement of April 9, 1925.

One difficulty with the argument of Bankers Trust Company is that there is not a scintilla of evidence to support it. It is mere surmize. *Even Proffatt did not testify with respect to it.*

The contention of Bankers Trust Company is entirely based upon the statement of Mr. Hanstein that Proffatt declined to secure a balance due of $5,000 and the balance due of $500 on two other notes, as stated on Exhibit S-24, page 363, giving as one of his reasons that Second National Bank had loaned the money to the company long after he was gone and that he did not think "they ought to hold me for that" (p. 259). The claim of Bankers Trust Company is that the two notes, one for $2,000 and the other for $1,500, the balances due on which were included in the $14,600,

also represented moneys loaned by the bank to the company after Proffatt had ceased his connection with the company and that, had Proffatt known the facts, he would likewise have declined to secure these balances. But it is clear from the testimony of Mr. Hanstein that the bank started out with a demand that Proffatt secure not only the $14,600 but also the $5,000 and the $500 and that the taking by the bank of security for the $14,600, leaving out the $5,000 and the $500 notes, was a matter of compromise.

How Bankers Trust Company can argue that, had Proffatt known that, included in the $14,600, was not only the balance due on the $15,000 note but also the balances due on the $2,000 and $1,500 notes, he would have declined to permit those balances to be included, because he would not agree to assume the $5,000 and the $500 note, when Proffatt himself says that *there was no conversation whatever with respect to the $5,000 note or the $500 note and the distinction, which Mr. Hanstein says was talked about, was never mentioned* (pp. 111, 112, 113), does not clearly appear.

We repeat that there is no testimony from Proffatt himself to the effect that he had been in any wise deceived.

The inferences are not of sufficient strength to avoid the effect of the written agreement by which Proffatt agreed to secure payment to the bank of the $23,200.

Bankers Trust Company (pp. 50 to 53 of its brief) attempts to go behind the written agreement and go into the consideration of the $2,000 secured to Thompson & Hanstein by Proffatt by the agreement of April 9, 1925.

We have already considered this (p. 9 *et sequi* of this brief), and do not desire to repeat what we there said. One statement, however, should be

noted. On page 53 of its brief Bankers Trust Company says: "In addition to the fact that Thompson & Hanstein were paid twice, once in cash and once by the delivery of ten shares of stock for the same services * * *." There is not one scintilla of evidence that Thompson & Hanstein were paid twice, or that Thompson & Hanstein ever received one cent in cash in payment of their bill of $1,000 for incorporating Guarantee Electric Company.

We have already stated that, if Thompson & Hanstein had received any payment *in cash,* the books of the company were available and could have been produced. Mr. Hanstein denied that any such payment was made. Bankers Trust Company's argument is based *solely* upon the fact that a bill, receipted by Thompson & Hanstein (Ex. B-22, p. 382) which does not show how payment was made, was in evidence. The fact is that payment was made by Mrs. Proffatt assuming the obligation of Guarantee Electric Company, and by Guarantee Electric Company paying *her* the $1,000 and by her, instead of paying the $1,000 to Thompson & Hanstein, giving Thompson & Hanstein ten shares of stock (pp. 253, 254, 264, 265, 266, 267, 268). Undoubtedly this receipted bill was given by Thompson & Hanstein for the purposes of the record of Guarantee Electric Company, possibly for income tax purposes.

The mere fact that Mr. Hanstein cannot remember the details did not supply proof that Thompson & Hanstein had received $1,000 when Mr. Hanstein denied it and when the books of the company, although available, were not produced to prove it.

The Charge of Interest.

On page 54 of its brief Bankers Trust Company insists that the decree is erroneous in allowing interest on $8,600 from April 1, 1924, and

on the balance of the $23,200 from April 5, 1926, and on the $2,000 payable to Thompson & Hanstein from April 9, 1925.

There is no question about the interest on the $8,600 from April 1st, 1924.

The agreement of April 9, 1925 (Ex. S-4, p. 344) provided that the mortgage should be sold to raise and pay the sums secured and that Schmeidler, the trustee, should pay "the debts aforesaid", at the time that seemed most advisable to him. The time which seemed most advisable to Schmeidler, in whom Proffatt placed the discretion, was April 5, 1926, and on that date he sold the mortgage and on that date Second National Bank paid the consideration price. If the debt to Second National Bank was not due before that date it become due on that date, for it was the date fixed by the trustee for payment. It was entirely equitable, therefore for the Court to require, as a condition of voiding this sale, that Bankers Trust Company should pay interest on the balance of the $23,200 from April 5, 1926.

The Court conceived, as a term for obtaining the equitable relief which was accorded to it, that Bankers Trust Co. should pay interest upon the $2,000 secured to be paid to Thompson & Hanstein from the date of the agreement of April 9, 1925, at the time the mortgage was pledged.

True it is that the pledge does not, with respect to this sum, specifically provide for the payment of interest. But the general rule is that interest runs upon an indebtedness and the indebtedness existed on April 9, 1925. Whether as a strict matter of law Thompson & Hanstein could have enforced a claim for interest from the date of the agreement, April 9, 1925, does not determine the question for, in *this* case, Bankers Trust Company, acting for the Proffatts, *is asking equitable relief.*

The Court below did not hold the sale of the mortgage void. It held it *voidable,* and, as a condition for the voiding of the sale, it required the payment of interest to Thompson & Hanstein on the $2,000 from April 9, 1925, the date of the agreement, and the matter of interest is usually one of equity.

Agnew Co. v. *Bd. of Education,* 83 N. J. Eq. 49, affirmed 83 N. J. Eq. 336.

If this Court should conceive that it is not equitable that Thompson & Hanstein should have interest on the $2,000 from April 9, 1925, the date of the agreement, then, we submit, that, unquestionably, interest would be due upon this $2,000 from April 5, 1926, the date of the sale and the date selected by Schmeidler, trustee, as the date for the payment of the obligation, and interest, of course, runs from the date payment is due. The difference would be a matter of approximately $120, which is inconsequential.

V.

Answer to Bankers Trust Company's contention that "the decree erroneously determines that the Court 'has jurisdiction in this cause to determine not only the rights of the parties to the record, but likewise the rights of George P. Proffatt and Katherine B. Proffatt if any'."

To determine this matter requires a consideration of the position of the Bankers Trust Company and the Proffatts in this case and the manner in which the case has been conducted.

We have considered the position of Bankers Trust Company in our original brief under Point

I, p. 11, *et seq.* Succinctly, the position is this: Bankers Trust Company had no interest in the controversy; while it attempted to induce the Court to believe that it had purchased the mortgage, the facts as developed, showed that, in no sense of the word, had it "purchased" the mortgage, and that it always retained the consideration price which it stated that it had paid, *i. e.*, $50,000, and that it was acting *merely in the interests of the Proffatts,* both Mr. and Mrs.; all of the proof made in the case of any consequence came from the Proffatts and the case was conducted by Mr. McCarter, *counsel for Mrs. Proffatt,* according to her own statement (pp. 119, 161) and it is also apparent, from the testimony of Proffatt (p. 119), notwithstanding his equivocation, that Mr. McCarter also represented him; the brief in the Court below was entitled "Brief for Bankers Trust Company *and Mrs. Katherine B. Proffatt*" and was signed "W. Lindley Jeffers and Robert H. McCarter, counsel for Bankers Trust Company *and Mrs. Katherine B. Proffatt;*" it was conceded that the right of Bankers Trust Company can rise no higher than the rights of the Proffatts. Under these circumstances, while not formal parties to the record, the Proffatts are *real* parties and any decree made would bind them; they are privies.

It is stated (p. 56 of Bankers Trust Company brief): "The contention reiterated in the brief for the Second National Bank that the Proffatts were the real parties in interest, and that Mr. McCarter was retained by them is absolutely unsupported by the evidence."

This statement is made by Banker's Trust Company notwithstanding: the fact that the brief in the Court below was entitled and signed as we have indicated; the testimony of Mr. and Mrs. Proffatt (pp. 119, 161); the facts that it is conceded that the Proffatts have not received one cent

from Bankers Trust Company for this mortgage, and that Bankers Trust Company stands in the shoes of the Proffatts and that any benefit which can possibly accrue from the litigation will go, not to Bankers Trust Company, but to the Proffatts.

The cases mentioned by Bankers Trust Company have no application. There is much more in this case upon the part of the Proffatts than a mere contribution to the defense of the suit. They are privies in every sense of the word.

A decree may bind persons who are not parties to the record, but who participated in the litigation and certainly binds privies.

Freeman on Judgments, 5th Ed., vol. 1, p. 939, sec. 432, states the rule:

> "Persons though not nominal parties may, by active and open participation therein, so connect themselves with litigation in which they are interested that the result is *res judicata* for or against them. Thus whenever one has an interest in the prosecution or defense of an action, and he, in the advancement or protection of such interest, openly takes substantial control of such prosecution or defense, the judgment, when recovered therein, is conclusive for and against him to the same extent as if he were the nominal as well as the real party to the action."

In *Ludy* v. *Larsen,* 78 N. J. E. p. 237, at p. 242, this Court said:

> "Having thus, for reasons affecting its own interest, undertaken and managed the defence to the suit of Maginnis against Larsen, the lumber company is, we think, concluded by the result of that litigation. It is, of course, fundamental that personal judgments conclude only the parties and their privies. But the estoppel is not limited to such as are parties on the record. It includes those who are parties in fact. As Greenleaf well says: 'The rules of law upon this subject are founded

> upon these evident principles or axioms, that it is for the interest of the community that a limit should be prescribed to litigation; and that the same cause of action ought not to be brought twice to a final determination. Justice requires that every cause be once fairly and impartially tried; but the public tranquillity demands that having once been so tried, all litigation of that kind, and between those parties, should be closed forever. It is also a most obvious principle of justice that no man ought to be bound by proceedings to which he was a stranger; but the converse of this rule is equally true, that by proceedings to which he was not a stranger he may well be held bound. Under the term parties, in this connection, the law includes all who are directly interested in the subject-matter, and had a right to make defence, or to control the proceedings, and to appeal from the judgment. This right involves also the right to adduce testimony, and to cross-examine the witnesses adduced on the other side.' Greenl. Evid., secs. 522, 523. See, also, *Id.*, sec. 535. And see, to the same effect, 1 Freem. Judg. (4th ed.), sec. 174; Big. Estop. (5th ed.), 113, 114; 1 Herm. Estop., sec. 148.''

This Court then cited numerous cases.

A stranger promoting the litigation is concluded (34 Corpus Juris, title "Judgments", sec. 1426, p. 1006). Parties assuming a defense are concluded (same, sec. 1427). Privies are concluded (same, sec. 1431). An assignor who has notice of the pendency of the suit or who actively takes part in the suit is concluded (same, sec. 1442).

But the appeal in this case is taken only by Bankers Trust Co. (p. 407, notice of appeal, p. 411 petition of appeal). What concern is it of Bankers Trust Company that the Court below adjudicated that it had jurisdiction to determine the rights of the Proffatts? It being conceded

that the Bankers Trust Company's rights rise no higher than those of the Proffatts it is of no concern to it that the Court below, by the final decree, recited that it had jurisdiction "in this cause to determine not only all the rights of the parties to the record but likewise the rights of George P. Proffatt and Katherine B. Proffatt" (p. 403). The Proffatts might have made themselves parties to the record and have appealed from this portion of the decree if they thought they were aggrieved, but they chose not to do so, and it does not lie in the mouth of the Bankers Trust Company to assert *their* rights except in-so-far as the determination of their rights might have an influence upon the rights of Bankers Trust Company. The Proffatts chose not to make themselves parties to the record and so chosing they may in other proceedings raise the question as to whether this decree is binding upon them. They now attempt, by not making themselves parties to the record and by not appealing, to, by having this point attempted to be raised by Bankers Trust Company, which is not concerned, get an adjudication from this Court which in some subsequent proceeding they may assert is in no wise binding upon them, because they were not formally parties to the record. In other words, they are attempting to secure an adjudication of this Court which they may subsequently repudiate.

VI.

Answer to Bankers Trust Company Point VI, that the Court below properly made no allowance for counsel fees, and improperly allowed the Second National Bank and Thompson & Hanstein their costs.

We have considered this subject under Point III of our original brief (p. 55) and have very little to add to what we there said.

A consideration of what we there said will indicate we submit that the expense of this litigation has been due to the inequitable conduct of Bankers Trust Company, and that it is fair, as consideration for the granting to it of equitable relief, if it is entitled to *any* equitable relief, that it should bear the whole expense. It injected itself into this controversy by taking an assignment of the mortgage from the Proffatts, with full knowledge of the assignment to Schmeidler and the trust for the benefit of the Second National Bank and Thompson & Hanstein, and permitted itself to be represented to be a *bona fide* purchaser of the mortgage, whereas, in fact, it was not. It, acting again for the Proffatts and for them only, declined to accept the proposition made by Second National Bank to settle the case before the decision, upon substantially the same lines as the decree directed (pp. 286, 387), and it appeals to this Court from a decree which we submit is erroneous only to the extent that it grants any relief to Bankers Trust Company.

VII.

Bad faith of Bankers Trust Company.

We have very little to add upon this subject to what we said under Point I of our original brief, page 11, etc.

On page 62 of its brief Bankers Trust Company says:

> "Mr. Cramer, an officer of the Trust Company was called in its behalf and testified specifically that the check was given by the Bankers Trust Company in payment for the assignment of the mortgage, and that the Trust Company had in fact bought the mortgage. No one even suggested that there was anything untrue about the testimony."

We have not only suggested but urged that this testimony is *distinctly untrue, designedly untrue and intended to leave an absolutely false impression upon the Court* (pp. 12, 13, 14 of our original brief).

It was intended to indicate that Bankers Trust Company stood in the position of a *bona fide* purchaser of the mortgage for a full and fair consideration of $50,000, and *every effort was made to block any examination into the true facts* (pp. 31, 33, 36, 37, 38, 39, 40, 41, 42, 58, 60).

It is quite true, as Bankers Trust Company (p. 62 of its brief) states: "Not a word was said by Proffatt on his direct examination touching the transfer to the Bankers Trust Company." Having succeeded in blocking the cross-examination of the officers of the bank which might have brought out the real transaction (p. 37) counsel for Bankers Trust Company took the risk of calling Proffatt and confined his examination to matters which would seem to preclude any examina-

tion which would bring out the real facts. The Court differed with counsel (p. 58) and the cross-examination was permitted and it was *then* that Proffat deliberately falsified.

It was only when it was quite clear that no one could possibly believe the testimony of Proffatt, and after an adjournment from May 17th to June 15th, that Mrs. Proffatt was called to tell what she said was the true story but, as indicated in our original brief (p. 26), she could not refrain from perjuring herself.

The cases which have been mentioned in our original brief indicate that, in a Court of Equity, it is the duty of *parties* to be open and frank. To bring into effect the rules mentioned in the cases cited and quoted from (p. 32 of our original brief), *it is not necessary that perjury be committed.* A conscious intent to give a false impression to the Court or to suppress testimony is sufficient without actual perjury.

Pfender v. *Pfender,* 7 N. J. Advance Reports 142, affirmed 105 N. J. E. 247

is an important authority and the last upon the subject.

Bankers Trust Company says (p. 63 of its brief): "We contend that the Bankers Trust Company is not responsible, or cannot be blamed for the *obvious mis-statements made by Proffatt upon this subject,* all of which was elicited upon his cross-examination upon a subject about which he had not on his direct examination been interrogated, and for which he was not offered as a witness."

There are many difficulties with this statement. One is sufficient.

Bankers Trust Company forgets the *belated* concession that the claim of Bankers Trust Company is no better and rises no higher than that of

the Proffatts and also forgets that it is clear from the proofs that the pretended sale of this mortgage to Bankers Trust Company *was designed simply for the purpose of attempting to place Bankers Trust Company in a better position and that it was not until it was apparent that the plan must fail, because the facts were being gotten out, that this position was abandoned by Bankers Trust Company, and also forgets the fact that it has no stake whatever in this case.*

Copious quotations are made by Bankers Trust Company from the alleged third statement of claim of Second National Bank, which is printed on page 20 (p. 66 of Bankers Trust Company brief). We have already adverted to the fact that this statement of claim was never filed, page 1 of our original brief, and page 1 of this brief.

Bankers Trust Company on page 65 of its brief tries to avoid the effect of the statement in its answer and counterclaim that "it (Bankers Trust Company) is *a bona fide holder of said mortgage for the full consideration of $50,000"* (par. 4, p. 10) as an attempt to impose upon the Court by indicating that the words "bona fide" do not carry the inference of "without notice and for value" and on page 64 of its brief says—"It has *always* been admitted that before the Bankers Trust Company purchased this mortgage, its President, Senator Richards, had been fully apprised by Proffatt of his claim with reference to the invalidity of the previous assignment to Schmeidler, and of the sale to the Second National Bank". If any such admission was made, we fail to find it in the record. The facts did not come out until the cross-examination of Proffatt.

Bankers Trust Company cannot avoid the effect of the inclusion of the words *"bona fide* holder * * * for the full consideration of $50,000" as an untrue statement and an attempt to impose upon

the Court and to induce the Court to believe that Bankers Trust Company stood in a better position than the Proffatts by any such attempted refinement.

Reference to the cases mentioned in Words and Phrases, 1st Series, Vol. 1, page 825, under the title "Bona Fide Purchaser" will indicate that the term "bona fide purchaser" means a purchaser in good faith, *without notice* and for a valuable consideration.

And see Words and Phrases, 2nd Series, page 470—"The expression 'bona fide purchasers' is to be understood as the equivalent of purchasers *without notice*", and "The essential elements that make a bona fide purchaser are a valuable consideration, *the absence of notice, and the presence of good faith*".

It was not necessary to insert in this answer and counterclaim the words "without notice". The words "bona fide holder" and "for the full consideration of $50,000" imported the absence of notice and the *statement was false and knowingly so.*

Bankers Trust Company attempts (p. 65 of its brief) to convert a matter of form into a matter of substance by the use of the words, "In a word, the Proffatts *sold* the mortgage to the Bankers Trust Company and *indemnified* the Bankers Trust Company against the validity of the claim of the Second National Bank, *by leaving the consideration for the sale with it as security against the claim of the Second National Bank*", and it is suggested that Bankers Trust Company went through this procedure because of its great desire to obtain a "gilt edge" mortgage of $50,000 (p. 65). Are there no other $50,000 mortgages which are "gilt edged?" Were there no other securities which the bank could purchase about which there could be no question? Is it the custom of

bankers to deal in securities in this way? No possible *legitimate* reason can be given for this sale *in form* which was *not* a sale in substance, a sale under which the purchaser kept both the thing purchased and the price.

In attempting to excuse Katherine B. Proffatt for some of her testimony Bankers Trust Company says (p. 67 of its brief)—"She is not a lawyer, and has, of course, little familiarity with legal documents * * *". She *had* knowledge of the English language and no words were used which were not clearly intelligible to a layman.

On page 70 of its brief Bankers Trust Company says: "Mr. Proffatt is not only not a nominal, but is not a real party to the controversy. He so stated specifically in his evidence that he only is there as a witness."

Proffatt testified (p. 57) that the assignment to Bankers Trust Company was made on *Dec. 21, 1925* (Ex. B-3, p. 371); as late as *March 6, 1926,* he wrote a letter from Miami Beach to Mr. Bourgeois, his counsel (S-6 for identification) and (p. 68).

> I notice that in this letter which has been marked S-6 for identification you say: "I think it *best now not to settle for anything. I did want to do the right thing,* and pay the $8,600 and $1,000 to Hanstein, *but I think we had better let it come to trial and not give him anything, then we can see who is right, Hanstein or Proffatt'.* What did you mean when you said that you wanted to do the right thing and pay the $8,600 and the $1,000?
>
> Mr. McCarter: I object to it as immaterial and not cross-examination.
>
> The Court: I will permit it.
>
> A. What I meant, if Mr. Schmeidler had lived up to this agreement *I would have paid the whole thing in full."*

And (p. 71):

"Q. I am not asking, I think it does, too, Mr. Proffatt, but as I understood your testimony, you said that you had no interest in this litigation so far as you knew, and I am asking you whether that was your thought in March, 1926, when you wrote this letter in which you told them not to settle? Did you have any interest then or didn't you? A. No, I don't think I did.

Q. *You don't think you did? You are rather hazy as to what your interest is, aren't you?* A. *Yes.*"

And (p. 119):

"Q. When did you turn this letter over, this letter of May 5, 1926, that has just been marked Exhibit S-16, has just been handed to me by Mr. McCarter—to whom did you turn this letter over? A. They were in my files and I turned it over to Mr. McCarter *when I turned him over the rest of the stuff.*

Q. When was that? A. *That was when I engaged Mr. McCarter in the case.*

Q. When was that? A. That is—couldn't exactly recall, about a month ago or two months.

Q. You had not turned this letter over to Mr. Jeffers before? A. No, I don't think Mr. Jeffers had it at all.

Q. Did you retain Mr. McCarter? A. Did I retain Mr. McCarter?

Q. *Yes.* A. *Mrs. Proffatt, as I understand it, retained him.*

Q. *Mrs. Proffatt retained Mr. McCarter?* A. *Yes.*

Q. *Do you know what interest Mrs. Proffat has in this case?* A. *I don't know.*

Q. You don't know? A. No.

Q. But you do know that Mrs. Proffatt retained him? A. Yes, Mrs. Proffatt, as I understand."

We submit that this testimony in no wise supports the statement of Bankers Trust Company quoted above from page 70 of its brief.

Proffatt had a one-half interest in the mortgage at the time it was sold to Bankers Trust Company assuming that the assignment to Schmeidler could be gotten out of the way. How did he part with that interest? True, *in form,* he parted with it to Bankers Trust Company, but so did Mrs. Proffatt. But why was not Proffatt's interest precisely the same interest as Mrs. Proffatt's? When did he lose it?

And, if he had no interest, why did he write the letters, one of which is Ex. S-6 for identification, page 68, heretofore quoted from.

Proffatt is quite a *real* party in interest.

Bankers Trust Company mentions *Gluck* v. *Rynda Development Co.,* 99 N. J. E. 788, and *Clickner* v. *Clickner,* 95 N. J. E. 479, but it omits mentioning the last and the strongest case, *Pfender* v. *Pfender,* 7 N. J. A. R. 142, affirmed 105 N. J. E. 247, mentioned on page 32 of our original brief, and which case holds that there need not be deliberate perjury but only intent to deceive or to suppress.

Bankers Trust Company seeks to avoid the effect of these rules by the statement that they only apply to an actor in the cause invoking equitable relief. *That is precisely the position of Bankers Trust Company.* We have already stated that, if Bankers Trust Company is not awarded relief *against Second National Bank,* Second National Bank is the absolute owner of this mortgage. It is true that Bankers Trust Company came into the case as the result of interpleader. But the complainant in the interpleader suit was eliminated and the controversy then left as to the claims of Bankers Trust Company and Second National Bank. Bankers Trust Company by its counterclaim sought to avoid the sale made to Second National Bank. It became the actor. The decree below awards it *affirmative equitable relief.*

Second National Bank is quite content, if the whole proceedings be dismissed without relief to any party. It is passive.

We will not, to any extent, refer to the charge here made, not made below, that Second National Bank is subject to criticism because of the nature of certain statements made in its claim. Complaint is made that Second National Bank insisted that the sale was made *with due notice.* It *did* so claim and it *still claims* that the notice given was all that was required under the circumstances. It concealed nothing. It is said that it should not have stated in its claim "that Proffatt was indebted". We still insist that, by reason of the circumstances under which the loans were obtained from Second National Bank and by reason of agreement made with Thompson & Hanstein prior to the making of the agreement of April 9, 1925 "Proffatt *was* indebted." We may be wrong in that claim. If we are it is immaterial, but there is no proof or suggestion that Second National Bank did not *bona fide* believe that Proffatt was indebted. We have no hesitancy in inviting comparison between the conduct of Second National Bank and Thompson & Hanstein, on the one side and that of Bankers Trust Company and the Proffatts on the other.

CONCLUSION.

We respectfully submit that the decree here should be as indicated in our original brief, page 58.

Respectfully submitted,

MERRITT LANE,
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THOMPSON & HANSTEIN,
Solicitors.