INDEX

	PAGE
Proceedings on Bond and Warrant	1
Petition of Alexander Cooper	8 a
Rule to Show Cause	9
Depositions	11
PLAINTIFF'S DEPOSITIONS:	
Robert Wright—Direct	12
Cross	18
DEFENDANT'S DEPOSITIONS:	
Alexander Cooper—Direct	32
Cross	45
Recalled—Direct	60
Recalled—Cross	67
Lowell B. Hipple—Direct	49
Cross	59
Recalled—Direct	60
Rule Discharging Rule to Show Cause	71
Notice of Appeal	73
Grounds of Appeal	74
Exhibit D1, 1/2/32, Partnership Agreement	77
Exhibit D1, 3/4/32, Deed	80
Exhibit D3, 1/2/32, Agreement	84
Exhibit D4, 1/2/32, Release	87
Exhibit D5, 1/2/32, Note	89
Exhibit D6 1/2/32 letter	91
Exhibit D7 1/2/32 letter	92
Exhibit D8 1/2/32 letter	93

New Jersey State Library

PROCEEDINGS ON BOND AND WARRANT.

(Filed Oct. 23, 1931.)

Know all men by these presents, that we, Lowell B. Hipple and Alexander Cooper, partners, trading as Hipple and Cooper, both of the Borough of Haddonfield, County of Camden and State of New Jersey (hereinafter called the obligors), held and firmly bound unto Haddonfield National Bank, a corporation existing under and virtue of the laws of the United States of America (hereinafter called the obligee), in the sum of twenty-two thousand two hundred dollars, lawful money of the United States of America, to be paid to the said obligee, its certain attorney, executors, administrators or assigns; to which payment well and truly to be made we do hereby bind and oblige ourselves, our heirs, executors and administrators, firmly by these presents. 10 20

Sealed with our seal, dated the 27th day of July in the year of our Lord, one thousand nine hundred and twenty-six, the condition of this obligation is such that if the above bounden obligors, their heirs, executors or administrators, or any of them, shall and do well and truly pay or cause to be paid, unto the above obligee, its certain attorney, executors, administrators or assigns, the just sum of eleven thousand one hundred dollars lawful money aforesaid within three months from the date hereof, together with interest thereon, payable semi-annually, at the rate of six per cent per annum, without any fraud or further delay; and shall pay the taxes assessed upon the premises described in an accompanying indenture of mortgage for the first half of 30

every year on or before the twentieth day of May therein, and for the second half of every year on or before the twentieth day of November therein, and shall produce receipts for the taxes for each half of every year on or before the first day of June and the first day of December respectively therein, and shall
10 also pay all other taxes, municipal assessments or charges in the nature thereof which may be laid or assessed upon the said premises immediately upon their assessment; then the above obligation to be void, or else to be and remain in full force and virtue; provided, however, and it is hereby expressly agreed, that no credit shall be claimed or allowed on the interest above provided because of any taxes paid upon said premises, and that if at any time default shall be made in the payment of interest as
20 aforesaid, for the space of thirty days after any semi-annual payment thereof shall fall due, or in the payment of any tax or charge as aforesaid, as hereinbefore provided, or in such production of tax receipts as aforesaid on or before the day aforesaid, then and in either such case the whole principal debt aforesaid shall, at the option of the obligee therein named, its executors, administrators or assigns, become due and payable immediately, and payment of said principal debt, and all interest thereon, shall be
30 enforced and recovered at once, anything herein contained to the contrary notwithstanding.

LOWELL B. HIPPLE (L. S.)
ALEXANDER COOPER (L. S.)

Sealed and delivered)
in the presence of)
EDWIN G. SCOVEL.)

To any attorney of any court of law in New Jersey or elsewhere:

This is to authorize you to appear for us, or either of us, jointly or severally in any court of competent jurisdiction, in case of the breach of the condition of the above bond, and confess judgment for the penalty therein contained, as of the last or any subsequent term, with costs of suit and release of errors; and this shall be your sufficient warrant. 10

Witness our hands and seals this 27th day of July, Anno Domini, one thousand nine hundred and twenty-six.

Lowell B. Hipple (L. S.)
Alexander Cooper (L. S.)

Sealed and delivered
in the presence of 20
Edwin G. Scovel.)

State of New Jersey, }
County of Camden, } ss.

Morris B. Clark, of full age, being duly sworn on his oath, says: 30

1. I am Vice-President and Cashier of Haddonfield National Bank, obligee in the foregoing bond and am duly acting under its authority and have knowledge of the facts and have charge of the collection of said bond.

2. That the true consideration of said bond is the loan by Haddonfield National Bank to Lowell B. Hipple and Alexander Cooper of the sum of $11,100 and the obligation of said Hipple and Cooper to the obligee by reason of the said loan. Said bond was secured by a mortgage in the said sum, executed by
10 the said Alexander Cooper and Lowell B. Hipple and Elizabeth G., his wife, dated the 27th day of July, 1926, the date of the bond, and recorded in the office of the Register of Deeds of Camden County in Book 287 of Mortgages, page 541, &c.

3. Dependent further says that said mortgage was subsequent in lien to a certain mortgage made by the said Hipple and Cooper on the same premises to the Phoenix Mutual Life Insurance Company in the
20 principal sum of $40,000; that the said first mortgage became in default and the said Phoenix Mutual Life Insurance Company instituted foreclosure proceedings to foreclose said mortgage in the Court of Chancery of New Jersey, in a cause wherein said Phoenix Mutual Life Insurance Company is complainant and said Hipple and Cooper and others are defendants and in which cause said Haddonfield National Bank, obligee in the foregoing bond, by reason of its interest in said mortgaged premises, was also
30 made a party defendant; that Haddonfield National Bank's said bond and mortgage were also in default at the time of the institution of said foreclosure proceedings on the said first mortgage and the said Haddonfield National Bank appeared in said foreclosure and gave notice to have its bond and mortgage reported on. The said proceedings in foreclosure re-

sulted in a decree for the sale of the mortgaged premises, said sale being made by the sheriff of the County of Camden on July 10, 1931, and at said foreclosure sale the said mortgaged premises were bid in and purchased by the said Phoenix Mutual Life Insurance Company for a sum less than the amount due to it, the said Phoenix Mutual Life Insurance Company, on its decree under its first mortgage, leaving nothing to be paid on the said bond and mortgage of the Haddonfield National Bank. 10

4. There remains due to the Haddonfield National Bank on its said bond, from the obligors thereon, the full principal sum thereof together with interest thereon from the 26th day of January, 1931, to wit, the sum of $11,100 principal and interest to October 16, 1931, amounting to $481, or a total sum of $11,581, and the debt for which judgment is confessed is justly due and owing to the said Haddonfield National Bank, and the judgment is not confessed to answer any fraudulent intent or purpose, or to protect the property of the defendants from their other creditors. 20

Morris B. Clark.

Sworn to and subscribed before me, this 16th day of October, A. D. 1931. 30

Ralph L. Dobbs,
(Seal) *Notary Public.*
Commission expires April 9th, 1935.

NEW JERSEY SUPREME COURT.

CAMDEN COUNTY.

As of May Term, 1931.

10

HADDONFIELD NATIONAL BANK, *Plaintiff,* v. LOWELL B. HIPPLE and ALEXANDER COOPER, *Defendants.*	In Debt. On Bond and Warrant of Attorney.

20

The defendants' appearance to this action is entered, and judgment confessed to the plaintiffs for the sum mentioned in the above obligation, by virtue of a warrant of attorney, thereunto annexed, and pursuant to the directions of an Act entitled, "An Act directing the mode of entering judgments on bonds with warrants of attorney to confess judgments," whereupon it is considered that said plain-
30 tiff does recover against the said defendants the sum of $11,581.00 debt, and ten dollars costs of suit.

Judgment signed and ordered to be entered according to law, this 21st day of October, 1931.

D. T. STACKHOUSE,
New Jersey Supreme Court Commissioner.

NEW JERSEY SUPREME COURT.

HADDONFIELD NATIONAL BANK, *Plaintiff,* v. LOWELL B. HIPPLE and ALEXANDER COOPER, *Defendants.*	In Debt. On Bond and Warrant.

10

It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendants for the sum of eleven thousand, five hundred and eighty-one dollars debt and ten dollars costs of suit. 20

On motion of,
RIGGINS & DAVIS,
Attorneys.

Entered October 23, 1931.
Debt $11,581.00
Costs 10.00

30

NEW JERSEY SUPREME COURT.

HADDONFIELD NATIONAL BANK, *Plaintiff,* v. LOWELL B. HIPPLE and ALEXANDER COOPER, *Defendants.*	In Debt. On Bond and War- Riggins & Davis, rant. Attorneys.

10

20

Judgment entered this twenty-third day of October, A. D., nineteen hundred and thirty-one in favor of plaintiff and against the defendants for the sum of eleven thousand, five hundred eighty-one dollars debt and ten dollars costs of suit.

$11,581.00
10.00

Amount sworn to as due October 16, 1931, $11,581.00.

D. T. STACKHOUSE,
New Jersey Supreme Court Commissioner.

30

I, the undersigned, Clerk of the Supreme Court of the State of New Jersey do certify that the foregoing is a true copy of the entire proceedings in the above

PETITION OF ALEXANDER COOPER.

(Filed Nov. 28, 1931.)

NEW JERSEY SUPREME COURT.

10

CAMDEN COUNTY.

HADDONFIELD NATIONAL BANK v. LOWELL B. HIPPLE and ALEXANDER COOPER.	In Debt. On Bond and Warrant of Attorney. Petition of Alexander Cooper.

20

To the Supreme Court of Judicature of the State of New Jersey:

The petition of Alexander Cooper, of Haddonfield, New Jersey, respectfully shows that:

1. He is one of the defendants in the judgment entered in the above-entitled cause October 23rd, 1931, on a bond with warrant of attorney attached.

30

2. The affidavit on which said judgment was entered does not set forth the true consideration of said bond in accordance with the statute in such case made and provided.

3. Petitioner was released by plaintiff from all liability on the bond on which judgment was entered.

4. Any debt owing by petitioner secured by said bond has been paid.

10 Petitioner prays that said judgment against defendant shall be opened, set aside and for nothing holden.

Dated November 24th, 1931.

French, Richards & Bradley,
Attorneys for Alexander Cooper.

NEW JERSEY SUPREME COURT.

20

Camden County.

Haddonfield National Bank v. Lowell B. Hipple and Alexander Cooper.	In Debt. On Bond and Warrant of Attorney.

30

State of New Jersey, }
County of Camden, } ss.

Alexander Cooper, being duly sworn, on his oath says:

I am one of the defendants in the above-stated cause; that the judgment entered in said cause was upon a bond with warrant of attorney attached; that said bond and the mortgage securing the same were given as collateral security for a note made by deponent and Lowell B. Hipple to the Haddonfield National Bank for $11,100.00, which note was a renewal note of another note. The original loan was $16,000.00 made by the bank to deponent and Hipple, the proceeds of which were used in erecting an apartment house in Haddonfield, New Jersey; the loan had been reduced, and at the time the $11,100.00 note was given amounted to $11,100.00. The plaintiff insisted that the note be paid or collateral given, whereupon the bond and mortgage mentioned in the affidavit in the proceedings in which the judgment was entered were given to the bank.

Subsequently, early in 1927, deponent agreed with defendant Lowell B. Hipple to convey to said Hipple all his right, title and interest in the land on which the apartment house was erected, and said apartment house, and pay to said Lowell B. Hipple $6,000, and said Hipple agreed to pay all debts due or to become due for or on account of the said land, building and the maintenance and operation of said building and to relieve deponent from all liability therefor, and further, within sixty days from the date of said agreement to have deponent released from all liability on the bonds accompanying the three mortgages on the property, one of which was the bond upon which the judgment in the above-entitled cause was entered; this agreement was

known to the plaintiff. The note held by the plaintiff at that time was a renewal of the $11,100.00 note, was dated February 28, 1927, and was for $10,600.00 at 30 days. In pursuance of the agreement Hipple arranged with the bank to surrender the note of $10,600.00 signed by deponent and Hip-
10 ple and accept another obligation of Hipple for the amount. Deponent afterwards went to the bank and received from the bank the $10,600.00 note which represented deponent's indebtedness to the bank. An officer of the bank informed deponent that the bank had accepted Harry Hipple, father of Lowell B. Hipple, in place of deponent on the note.

ALEXANDER COOPER.

Subscribed and sworn to before me this 24th day
20 of November, A. D. 1931.

RUTH E. NEFF,
(Seal) *A Notary Public of the State of New Jersey.*
Commission expires January 17, 1932.

30

stated cause as the same remain on file and of record in my office.

In testimony whereof I have set my hand and the seal of said court at Trenton, this seventeenth day of November, A. D., nineteen hundred and thirty-one.

FRED L. BLOODGOOD, 10
(Seal) *Clerk.*

RULE TO SHOW CAUSE.

(Filed November 6, 1931.)

NEW JERSEY SUPREME COURT.

20

CAMDEN COUNTY.

HADDONFIELD NATIONAL BANK, v. LOWELL B. HIPPLE and ALEXANDER COOPER,	In Debt on Bond and Warrant. On Petition of Alexander Cooper. Rule to Show Cause.

30

Upon reading and filing the petition and affidavit of the defendant, Alexander Cooper:

It is, on this 25th day of November, 1931, ordered that the plaintiff show cause before me at the Court

House in Camden, on Tuesday, the 4th day of January, 1932, at eleven o'clock in the forenoon or as soon thereafter as counsel can be heard thereon why the above-entitled judgment against the defendant, Alexander Cooper, should not be opened, set aside and for nothing holden.

10 It is further ordered that the parties have leave to take testimony to be used on the hearing; that further proceedings on the judgment against the defendant, Alexander Cooper, be stayed until the further order of the court and that copies of the petition, affidavit and this rule, which need not be certified, be served on the plaintiff within five days.

On motion of,

French, Richards & Bradley,
Attorneys for Defendant,
20 *Alexander Cooper.*

Let this rule be entered.

Frank T. Lloyd,
Justice of the Supreme Court.

30

DEPOSITIONS.

NEW JERSEY SUPREME COURT.

CAMDEN COUNTY. 10

HADDONFIELD NATIONAL BANK, *Plaintiff,* v. LOWELL B. HIPPLE and ALEXANDER COOPER, *Defendants.*	Action at Law.

20

Depositions taken in the above matter, before Fred W. Albert, Jr., Supreme Court examiner, at the offices of French, Richards and Bradley, Esqs., 106 Market Street, Camden, New Jersey, on Friday, March 4th, 1932, at one o'clock P. M., in the presence of John A. Riggins, Esq., appearing for Riggins and Davis, Esqs., representing the plaintiff; Floyd H. Bradley, Esq., appearing for French, 30 Richards and Bradley, Esqs., representing the defendant, Alexander Cooper.

Mr. Bradley: I offer in evidence a certified copy of deed ——

Mr. Riggins: I want to object to it as immaterial.

Mr. Bradley: Dated March 13th, 1929, between Lowell B. Hipple and Elizabeth G. Hipple, his wife, to Harry M. Hipple, recorded in the office of the Register of Deeds of Camden County in Book 700
10 of Deeds, page 125.

(Said paper offered in evidence and marked Exhibit D1, 3-4-32.)

Robert Wright, sworn.

By Mr. Riggins:
20
Q. Mr. Wright, you are an officer of the Haddonfield National Bank?
A. I am.
Q. What position do you hold?
A. Assistant Cashier.
Q. Were you Assistant Cashier on or about March 28th, 1928—is that the date—March, 1927?
A. March, 1927?
Q. Yes.
30 A. I was.

Mr. Richards: What is your time now?

Mr. Riggins: March, 1927.

Mr. Richards: No day at all?

Mr. Riggins: No.

Q. Do you recall a conversation you had with Mr. Alexander Cooper, one of the defendants, with regard to Exhibit D5?

Mr. Bradley: He hasn't testified he had any. I object to the question as being leading, the witness hasn't testified —— 10

Mr. Riggins: I am asking whether he had one.

Mr. Bradley: You didn't ask that.

Mr. Riggins: (To the stenographer.) What did I ask him?

20

(Question repeated.)

The Witness: I do.

Q. About when did you have that conversation?
A. About two weeks prior to the time his name was taken off the note.
Q. What did he say to you?

Mr. Bradley: Just a minute, you ought to fix the place. 30

Mr. Riggins: Why should I? You can fix it if you want to.

Mr. Bradley: I object to the question unless the

place is first fixed. I object to the question unless it is established where this alleged conversation took place.

Q. Answer it, Mr. Wright.

A. Cooper asked to be relieved of his obligation on the Hipple and Cooper matter, and I told him at that time I would take the matter up with the Board of Directors.

Q. Where were you when you had this conversation with him?

A. At my desk in the Haddonfield National Bank.

Q. At Haddonfield?

A. In Haddonfield, New Jersey.

Q. Did he say anything else to you at that time about his obligations there?

A. You mean about this obligation? You say "his obligation."

Q. This obligation?

A. Referring to the Hipple and Cooper obligation he said that the Hipples were making some arrangements to take this building over.

Q. Did he say anything about anybody else going on the note?

A. He did not at that time.

Q. Did you take the matter up with the Board then?

A. I did.

Q. Were you present at the Board meeting when the matter was taken up?

A. I was.

Q. Did you hear the Board act on the matter?

A. Yes.

Q. Did you subsequently have a conversation with Mr. Cooper?

A. I did.

Q. At the bank?

A. At the bank.

Q. What, if anything, did you say to him at that time, the conversation? 10

A. I told Mr. Cooper ——

Mr. Bradley: Was this by resolution of the Board? I don't think we want to get so much hearsay in this.

Mr. Riggins: The reason I stopped I thought probably you would object to the resolution.

Q. Was it by resolution of the Board? 20

A. The Board passed on it, I know.

Q. By formal motion?

A. By formal motion.

Mr. Bradley: Have you a copy of the resolution?

The Witness: No copy, no.

Q. After the passage of that resolution you had a conversation with Mr. Cooper? 30

A. I did.

Q. What, if anything, did you say to him?

A. I told Mr. Cooper that the Board decided if he wanted to be relieved of signing the obligation that we would agree to relieve him providing he remained liable on the bond, that we considered him,

and him alone, as the only strength on the obligation of Hipple and Cooper, and his bond was the strength.

Q. What, if anything, did he reply to that?

A. He asked if that was final with the Board, and I told him it was, and he didn't like the action, he
10 called them "old fossils" or something to that effect.

Q. What did he say as to the proposition that you put up to him?

A. He said, "If that is the way they feel about it, it will have to be that way."

Q. Now, who had charge of this matter after the Board action?

A. I had charge of it.

Q. Did anybody else have anything to do with it?

A. Not that I know of, I presented the matter to
20 the Board.

Q. What happened after that?

A. I believe a week or so ——

Q. No—all right, go ahead, finish your answer.

A. I suppose a week or so after that Cooper and Hipple came in and the note was fixed up at that time.

Q. Do you know who handed back to Mr. Cooper this note he signed?

A. I do not.

30 Q. What would be the practice at the bank in regard to the delivery of that note?

A. The Note Teller, or Assistant Note Teller, would probably do it.

Q. Where?

A. At the note window.

Q. Pursuant, I suppose, to instructions?

Mr. Bradley: I will object to that, it isn't proper, and your question is leading.

Mr. Riggins: It is leading, but there are a lot of leading questions in this record.

Mr. Bradley: I object to the question as being leading. We are not bound by what the ordinary practice would be, we are trying to find out what really happened with this note. 10

(Question repeated.)

A. Yes.

Q. Who would have charge of this matter after your last conversation with Mr. Cooper?

A. The Note Teller would be notified that Cooper was to be relieved of signing the note. 20

Q. Now, Mr. Wright, some reference has been made to a mortgage given—two mortgages given by Mr. Harry Hipple.

Mr. Bradley: What page is that, Mr. Riggins?

Q. Page 2. One for $4,500 and one for $5,500, dated March 13th, 1929. For what were those mortgages given? 30

A. The Hipples wanted to make additional alterations to their building and the bank loaned additional funds and took these mortgages as collateral for additional funds.

Q. Did or did not Alexander Cooper see you with

respect to his obligations at the bank after he was taken off the note?

A. He asked me about the Hipple note several times after he was taken off of it, whether interest and payments were being made regularly.

Q. Where would he make that inquiry?

10 A. In the bank.

Cross-examination.

By Mr. Bradley:

Q. Mr. Wright, how long have you been Assistant Cashier at this bank?

A. About seven years.

Q. Now, when was the date of this alleged conver-
20 sation that took place between Mr. Cooper and you regarding the fact he wished to be relieved from the obligation on the Hipple and Cooper note?

A. I don't remember the exact date.

Q. Why not?

A. It was prior to the Board meeting.

Q. Have you got any memorandum of it?

A. Have I any memorandum?

Q. Yes.

A. I have the memorandum of the Board meeting,
30 but not when the actual conversation took place.

Q. What was the date of the Board meeting?

A. A week prior to the renewal of this obligation.

Q. When was that?

A. I don't remember the exact date.

Q. Have you records showing it?

A. Yes.

Q. Have you looked them up?

A. I have looked up the records times back.

Q. When did you look at them last?

A. Before coming in here the last time.

Q. You haven't seen any records since you were here on January 2nd of this year?

A. That is right. 10

Q. Now, you have given us the conversation in the third person, just tell us the exact conversation, what he said, and what you said, not the purport, I want the exact conversation, when he asked you to the effect that he wanted to be relieved from the obligation on the Hipple and Cooper note.

Mr. Riggins: I object to asking for the exact conversation.

20

Mr. Bradley: We are entitled to the exact conversation.

Mr. Riggins: Beg pardon, the substance.

Mr. Bradley: No, in my opinion that allows a

man to place his interpretation on the conversation. If this witness can't give the exact conversation, we will have to move to have his testimony stricken out. 30

Q. Give us the exact conversation.

A. You mean by who?

Q. You say Mr. Cooper said certain things and you said certain things?

A. Yes.

Q. Tell us exactly what Mr. Cooper said and what you said?

A. At the first meeting?

Q. The first meeting, yes.

A. Cooper came into the bank and he said that
10 he wanted to be relieved ——

Q. I don't want you to do that. Tell me the exact words Cooper used.

A. I am trying to tell you.

Q. You said, "He said." You are giving the substance of what he said, I want the exact words, he wouldn't come in and say, "He said," he would come in and open up a conversation. What did Mr. Cooper say?

20 Mr. Richards: Use his exact language.

Mr. Riggins: He doesn't have to.

Mr. Bradley: We are entitled to this, Mr. Riggins, and I don't think it is proper for you to tell the witness that he doesn't have to give the exact conversation when we are asking for it. You have your objection on the record and I don't think it is proper for you to tell him not to answer the ques-
30 tion. I say we are entitled to the exact conversation.

Mr. Riggins: If he can remember the exact conversation you are entitled to it, but if not, you are entitled to the substance of it.

Mr. Bradley: We are entitled, in my opinion, to more than the substance, because that allows him to put his own interpretation on it.

Q. What did he say, and what did you say?

A. Being about two years ago I can't remember the exact conversation. 10

Q. What you have given is your best recollection and your impression of what was said by you and what was said by him?

A. Yes.

Q. And you haven't a definite recollection of it?

A. Yes, I have a definite recollection.

Q. If you have a definite recollection, what did he say?

A. You have asked for a definite conversation, I don't remember the definite conversation. I have a 20 recollection of the conversation.

Q. But you said you had a definite recollection. What is your definite recollection of what he said?

A. As I have stated before ——

Q. Give it to me in his exact words.

A. I can't give it to you in his exact words.

Q. And you can't give me your exact conversation?

A. No.

Q. What time of the day was it? 30

A. I believe in the forenoon.

Q. What day of the week?

A. I don't remember the exact day.

Q. Have you any idea at all?

A. It would probably be Friday, Saturday, or Monday.

Q. I don't want probably.

A. Well, Friday, Saturday or Monday.

Q. I want it with certainty.

A. Friday, Saturday or Monday.

Q. That is the best recollection you have, one of those three days?

10 A. Yes, sir.

Q. Did you have other matters you were going to discuss with the Board besides Mr. Cooper's matter?

A. Yes.

Q. Did you make memorandums on those matters?

A. Yes.

Q. But you did not make any memorandum of his matter?

A. I did.

20 Q. Where is the memorandum?

A. It is two years ago, now, it is gone.

Q. I don't care how long it has been ago, what did you do with the memorandum you made?

A. I don't remember what was done with the original memorandum.

Q. Do you keep your memoranda?

A. Not for a period of two years.

Q. When do you destroy your memoranda?

A. It all depends on the memoranda themselves.

30 Q. Was this an important memorandum?

A. It was until it was closed.

Q. Do you know whether you destroyed it or not?

A. I believe it is destroyed.

Q. Have you looked to find out?

A. I have in my files.

Q. You have looked?

A. Yes.

Q. You told Mr. Cooper you would take it up with the Board of Directors at the next meeting?

A. Yes.

Q. What was the date of the meeting of the Board of Directors at which you said the matter was taken up? 10

A. I don't remember the exact date.

Q. Why not?

A. Because I don't.

Q. You knew that was important in this case, didn't you?

A. It probably was.

Q. I say you knew it was, didn't you?

A. It probably was.

Q. Don't you know it was?

A. I don't know. 20

Q. You don't know?

A. No.

Q. You say there was a resolution passed, have you a copy of the resolution?

A. Not with me.

Q. Have you seen the resolution?

A. I was in the Board meeting when the resolution was passed.

Q. Have you seen the resolution in the book?

A. Have I seen it in the book? 30

Q. Yes.

A. I don't know that I have referred to the resolution.

Q. Have you seen it, or haven't you?

A. I have not.

Q. Do you know whether it has been put on the minutes of the bank or not?

A. I do not.

Q. Are you a member of the Board?

A. I am not.

Q. Were you present at the subsequent meeting
10 of the Board?

A. The subsequent meeting?

Q. Yes.

A. Yes, I was.

Q. Were you there when the previous minutes were read?

A. I was.

Q. Was it read, the resolution?

A. I don't remember.

Q. Where were you when you say this conversa-
20 tion took place with Mr. Cooper?

A. Which conversation?

Q. Before you went to the Board?

A. At my desk in the Haddonfield National Bank, Haddonfield.

Q. Now, what was the conversation, if you can give it, the exact conversation that Mr. Cooper had with you when he said in effect Mr. Hipple was making arrangements to take the building over, do you know?

30 A. As I said before I can't give the exact conversation.

Q. I haven't referred to this before, I referred to the previous matter. You don't know this exact conversation, either?

A. No, sir.

Q. You say you were present in the Board meeting when the resolution was passed?

A. I was.

Q. Can you state the exact words of the resolution?

A. I can't state the exact words, no.

Q. I understand you have no copy of the resolution with you, have you? 10

A. No.

Q. Now, you say subsequent to that time you saw Mr. Cooper again?

A. I did.

Q. When and where?

A. I believe the day after the Board meeting at my desk in the Haddonfield National Bank.

Q. You say you believe, don't you know?

A. The day after the Board meeting. 20

Q. You are sure of that?

A. Yes.

Q. What day does the Board meet?

A. Tuesday afternoon.

Q. What time?

A. At two o'clock.

Q. They have always met at the same time?

A. Yes.

Q. Who was with Mr. Cooper then?

A. Mr. Cooper was alone. 30

Q. Was it the morning or the afternoon?

A. That was in the forenoon .

Q. Did you confirm in writing your conversation with Mr. Cooper with reference to this note?

A. I don't believe so.

Q. Did you take the trouble to write him a letter informing him of the Board's action?

A. I don't believe I did.

Q. Did the Board ever write, or authorize the writing of a letter, to Mr. Cooper, stating exactly what action they had taken?

10 A. Not that I know of.

Q. You don't know of any, do you?

A. I don't know of any.

Q. Do you know the language that was used at this conversation the day after the Board meeting?

A. The language that was used?

Q. Yes.

A. I told Mr. Cooper the Board ——

Q. You are giving the third person again, I want to know just what you told him.

20

Mr. Riggins: He is telling you, "I told him," he said.

A. I told Mr. Cooper that the Board had always considered him the strength.

Q. See, you are not giving it at all, you said that you told him the Board ——

A. I am not the Board, I can't give it to you as the Board.

30 Q. You said something which rather indicates you are telling the substance. Do you know your exact language?

A. My exact language?

Q. With Mr. Cooper at that time?

A. Well, as far as the exact conversation is concerned ——

Q. You don't know?

A. No.

Q. Do you know the exact reply he made in any of his statements?

A. The exact reply I could not.

Q. As I understand you, you told him the Board was willing to relieve him by taking his name off the note, but they would still hold him liable on his obligation?

A. On the bond. Mr. Richard Cooper was a director of our Board at the time this obligation was put on, and we always considered Alexander Cooper the strength on the obligation of Hipple and Cooper. We never considered the Hipples worth anything. When I say "the Hipples" I mean Lowell B.

Q. Did you say Alexander Cooper was a member of the Board?

A. Richard Cooper, his father.

Q. Did you tell him Richard Cooper was a member of the Board?

A. Tell who?

Q. This gentleman, Mr. Cooper in this suit?

A. No, I didn't tell him.

Q. I wanted your conversation directed to this thing, it isn't a question of what the bank did. How was he being relieved if you are letting his name off the note and still holding him on the bond?

A. He was relieved of coming in once a month and signing a note.

Q. That is the only thing he wanted to be relieved from, the obligation of coming in there and signing a note?

A. He originally wanted to be relieved of all obligations.

Q. You say he was perfectly satisfied with the arrangement that his name would be taken off the note, but he still was retained on the bond?

A. That is what he agreed to.

10 Q. And that was entirely satisfactory with him?

A. I don't know that it was entirely satisfactory to him, but that is what he agreed to.

Q. Then, he wasn't being relieved of any financial obligation, in your opinion?

A. No, not as far as our claim.

Q. Did you inform the note clerk that he was to deliver Mr. Cooper that, when the note was delivered?

A. I don't remember my telling him that.

20 Q. Who was the note clerk?

A. Mr. Dobbs is the note clerk.

Q. Was there moré than one note clerk?

A. Two.

Q. You don't know which one of those men gave Mr. Cooper this Exhibit D5?

A. I don't know exactly which one it would be.

Q. You weren't there at the time the note was surrendered, were you?

A. I was not.

30 Q. So, when you state what the custom and practice of the bank was with respect to the return of these notes, you don't know definitely what happened, do you?

A. I don't know definitely which note teller gave the note back.

Q. And you don't know what happened at the time the note was given back, do you?

A. No.

Q. But you authorized the teller to give the note back?

A. Yes, I did.

Q. That was Mr. Dobbs? 10

A. I authorized Mr. Dobbs to give the note, and accept a renewal note.

Q. Without Mr. Cooper's name being on it?

A. Yes.

Q. You further authorized when the new note was taken with the Hipples' names on, the two Hipples' names, that this old note which has been marked in evidence, D5, was to be surrendered to Mr. Cooper?

A. That is right.

Q. And as far as you know that was done? 20

A. Yes.

Q. And the loan to the Hipples was increased until it became about $16,000, wasn't it?

A. Yes, I believe it was.

Q. And the note surrendered to Mr. Cooper was for what amount?

A. $10,600, if that is the original note.

Q. Exhibit D5, it is the original note, isn't it?

A. Yes.

30

DEPOSITIONS.

NEW JERSEY SUPREME COURT.

CAMDEN COUNTY.

HADDONFIELD NATIONAL BANK, *Plaintiff*, v. LOWELL B. HIPPLE and ALEXANDER COOPER, *Defendants.*	Action at Law.

Depositions taken in the above matter, pursuant to notice, before Fred W. Albert, Jr., Supreme Court Examiner, at the offices of French, Richards & Bradley, Esqs., 106 Market Street, Camden, New Jersey, on Saturday, January 2nd, 1932, at 10 o'clock A. M., in the presence of John A. Riggins, Esq., appearing for Riggins and Davis, Esqs., representing the plaintiff, Floyd H. Bradley, Esq., appearing for French, Richards and Bradley, Esqs., representing the defendant Alexander Cooper, and C. Richard Allen, Esq., representing Lowell B. Hipple.

Mr. Bradley: We want to introduce the record of a deed and two mortgages, and I presume you know about them, don't you? A deed from Lowell B. Hipple to Harry M. Hipple, under date of March 13th, 1929, which appears in book 700 of Deeds, page 125, and two mortgages which Harry M. Hipple made to your bank, one for $4,500 and one for $5,- 10
500, both dated March 13th, 1929, and which appear in book of Mortgages 346, page 18, and book 346, page 19.

Mr. Riggins: They are the mortgages on Hipple's property?

Mr. Bradley: Yes, the two mortgages aggregating $10,000. These mortgages I am referring to, the $4,500 and the $5,500 don't refer to that apart- 20
ment house, but refer to the property now owned by Harry M. Hipple, the father.

Mr. Riggins: I know there is such a mortgage.

Mr. Bradley: Will you want strict proof as to those?

Mr. Riggins: We can produce the mortgages.
30

Mr. Bradley: What about the deed?

Mr. Riggins: He has the deed.

Mr. Bradley: Does that cover the same property?

Mr. Hipple: The deed I made?

Mr. Bradley: Yes.

Mr. Hipple: That deed was by myself to my father on the property 144 Kings Highway.

10

Mr. Bradley: Is that the apartment?

Mr. Hipple: Yes.

Mr. Riggins: Can't they produce the deed?

Mr. Bradley: Have you got that deed?

Mr. Hipple: I don't believe I have, my father
20 would possibly have it.

Alexander Cooper, sworn.

By Mr. Bradley:

Q. Mr. Cooper, you are Alexander Cooper?

A. Yes, sir.

30 Q. You are one of the defendants in the judgment which was entered by the Haddonfield Bank against Lowell B. Hipple and Alexander Cooper?

A. Yes, sir.

Q. And you are the petitioner praying that the judgment against you be opened, set aside, and for nothing holden in the petition recently filed upon

which the rule to show cause has been allowed in this case?

A. Yes.

Q. Now, Mr. Cooper, you are the Alexander Cooper that was formerly in partnership with Mr. Lowell B. Hipple?

A. Yes, sir. 10

Q. Is this your agreement of partnership—witness being shown copy of paper?

A. Yes.

Q. Is that one of the duplicate originals?

A. Yes.

Mr. Bradley: I offer that in evidence.

(Said paper offered in evidence and marked Exhibit D1, 1-2-32.) 20

Mr. Bradley: I offer in evidence a certified copy of the proceedings in this matter.

(Said papers offered in evidence and marked Exhibit D2, 1-2-32.)

Q. Mr. Cooper, what properties were you building, or what sort of a building were you erecting that resulted in negotiations later with the bank for making a loan? 30

A. A property on Main Street known as 144, known as stores and offices and apartments.

Q. 144 what?

A. Kings Highway East.

Q. At or about the time you were contemplating

erecting and were erecting those properties did you have occasion to secure any loans from the Haddonfield National Bank?

A. Yes.

Q. Do you recall when it was that you secured your first loan, about when?

10 A. No, I don't know.

Q. How were the loans secured, the original ones?

A. They were just notes between Mr. Hipple and myself.

Q. That is, Lowell B. Hipple and yourself, your partner?

A. Yes.

Q. Then subsequently was something said, or did you have a conference with bank officials about either giving security or paying off the indebted-

20 ness?

A. Yes, later on.

Mr. Riggins: Don't answer any further.

The Witness: Later on we were asked to come in the bank.

Mr. Riggins: I object to that. The question refers to the bank officials, and I want the persons

30 specified.

Q. Whom did you see with reference to this transaction?

A. Making the notes?

Q. Either paying off the notes or making new notes and giving security, collateral security?

A. Mr. Remington and Mr. Keen.
Q. Walter Keen?
A. Yes.
Q. What is Mr. Remington's name?
A. J. Remington.

Mr. Riggins: I move that the answer be stricken, 10
neither is an official of the bank.

Q. Do you know whether or not Mr. Remington and Mr. Keen were directors of the bank?
A. Yes, they are directors of the bank.
Q. Did you have an interview at the bank with reference to this matter and if so were you there alone, or who went with you?
A. Mr. Hipple, Lowell B. Hipple and I went.
Q. What was agreed —— 20

Mr. Riggins: I object to that, it hasn't been shown he has spoken to any official of the bank, yet.

Mr. Bradley: I think the witness stated they were directors of the bank.

Mr. Riggins: A director is not an official.

Q. Who notified you to come to the bank for this 30
conference, do you know?
A. Mr. Clark notified Mr. Hipple and Mr. Hipple notified me, and we went to the bank and Mr. Clark introduced us to Mr. Keen and Mr. Remington.
Q. Is this Mr. Morris B. Clark, Vice-president and Cashier?

A. Yes.

Q. He introduced you to Mr. Keen and Mr. Remington?

A. Yes.

Q. What did Mr. Clark say with reference to Mr. Keen and Mr. Remington?

10 A. He told us they wanted to talk to us about the loan we had there.

Q. Was this conversation in the bank building?

A. Yes, in the bank building, on the second floor.

Q. And what was said there at this conference?

Mr. Riggins: I object on the same grounds as I objected before.

Mr. Bradley: All right.

20

Q. At the conference at which Mr. Clark, Mr. Remington and Mr. Keen were present, what was said?

Mr. Riggins: I object to that question, it hasn't been shown that Mr. Clark was present at the conference on the second floor.

Q. Was Mr. Clark present there?

30 A. Mr. Clark went up with us and then left.

Q. What was said?

Mr. Riggins: I object on the ground that no officer of the bank was present.

Q. Go ahead.

A. They asked us to pay off the loan, which we said we couldn't do, and they asked us to put up collateral, and the only thing we could give them was a third mortgage on the property.

Q. You say "on the property," what property?

A. 144 Kings Highway East.

Q. In Haddonfield, New Jersey? 10

A. Yes.

Q. So, then was the note renewed?

A. Yes.

Q. Who signed the note?

A. Lowell Hipple and myself.

Q. Was a third mortgage given?

A. Yes.

Q. On the property in the sum of $11,100?

A. Yes.

Q. At that time did you sign a bond? 20

A. Yes, sir.

Q. Witness being shown Exhibit D2, his attention is called to the first two pages of this proceeding and asked if this is the bond, a certified copy of the bond, that you signed? Is there any question about that, Mr. Riggins?

Mr. Riggins: No, we admit that.

Mr. Bradley: It is admitted? 30

Mr. Riggins: We might admit a lot here.

Mr. Bradley: It is admitted this is a copy of the bond.

Q. Now, Mr. Cooper, did you later enter into an agreement with Mr. Lowell B. Hipple, your then partner, with reference to his assuming certain obligations and that you were to transfer property, your agreement is under date of January 10th, 1927, is that the agreement entered into between you and
10 Mr. Hipple, your partner?

A. Yes, sir.

Mr. Bradley: I offer that.

Mr. Riggins: I object to it on the ground that any agreement between them would not be relevant unless the bank had notice of it.

Mr. Bradley: I think we will connect it up and
20 show the bank had knowledge of this arrangement by the fact that both Mr. Hipple and Mr. Cooper had been there to the bank when the bank agreed to relieve Mr. Cooper from the obligation and take the father in his place.

Mr. Riggins: I might withdraw my objection later on, but I still insist on the objection.

(Said paper offered in evidence and marked Ex-
30 hibit D3, 1-2-32.)

Q. Now, under this agreement you were to pay $6,000 to your partner, Mr. Hipple, did you make that payment?

A. Yes, sir.

Q. As I understand, that was to take care of all

obligations and half a year's interest on the $40,000 mortgage, and other things?

A. Yes, sir.

Mr. Riggins: I object to that question, in the first place, it is leading, and it is immaterial.

10

Mr. Bradley: I thought we might shorten this up. Do you seriously object to that?

Mr. Riggins: Yes, I object to this particular agreement, we don't know anything about that, as far as I know.

Mr. Bradley: I offer this in evidence as part of our proof in the case.

20

Mr. Riggins: My objection is on there thoroughly, I guess.

Q. Under and in pursuance of this agreement were you released from the bond on the Cotton mortgage, the $7,500 mortgage?

A. Yes.

Mr. Riggins: I object to that as irrelevant and immaterial, it has nothing to do with this transaction, and on the further ground it calls for a conclusion.

30

Q. Witness being shown what purports to be a release between Lowell B. Hipple, Elizabeth G. Hipple and Harry D. Cotton to Alexander Cooper, will you

look at that, please. Is that the release you secured from the bond accompanying the $7,500 mortgage?

A. Yes, sir.

Mr. Bradley: I offer that.

10 Mr. Riggins: Objected to as immaterial, the bank had no knowledge of it.

(Said paper offered in evidence and marked Exhibit D4, 1-2-32.)

Q. Did you have any conferences, or did you go to the bank regarding the renewal of the last note in which you appeared as endorser, did you go to the bank with reference to your indebtedness due them

20 in this transaction?

A. I went to the bank and secured that note after Mr. Harry Hipple ——

Mr. Riggins: Just answer the question.

Q. You went to the bank?

A. Yes.

Q. Witness is shown what purports to be note under date of 2-28-27, in the sum of $10,600, one

30 month after date, payable to the order of Hipple and Cooper, Haddonfield National Bank of Haddonfield, New Jersey, and is asked if he secured that note from the bank?

A. Yes, I secured that.

Mr. Bradley: I offer that.

(Said paper offered in evidence and marked Exhibit D5, 1-2-32.)

Q. Is that note in the same condition it was when it was handed to you?

A. Yes, sir.

Q. Except for the letters "D5, 1-2-32" is that note in the same condition it was when you received it from the bank? 10

A. Yes, sir.

Q. Have you put any markings on it at all?

A. No, sir.

Q. This note which has been shown you, D5, was that a renewal of previous notes?

A. Yes, sir.

Q. This note is for one month and dated January 28th, 1927? 20

Mr. Riggins: One month?

Q. Yes, due March 28th, March 28th being written in red ink. Now, did you sign a renewal to the bank when you got this note?

A. No.

Q. Witness being shown Exhibit D5, who delivered to you this note, referring to Exhibit D5?

A. The note teller, and I think it was Mr. Savage. 30

Q. Might it have been ——

A. It might have been Mr. Dobbs.

Q. What is his first name?

A. First name?

Q. Yes.

A. Ralph Dobbs.

Q. Who was present with you when you received this note?

A. Mr. Hipple, Mr. Lowell B. Hipple.

Q. Did you have any conversation then with the gentleman who delivered to you the note with reference to this note?

10 A. I don't remember any.

Q. Did you still continue to deal with the bank after this time?

A. Yes.

Q. Did you have an account there?

A. Yes, sir.

Q. So far as this particular obligation upon which judgment has been entered did any of the officials of the bank ever make any demand upon you for payment up until you received the letter from them

20 under date of January 2nd, 1931?

A. No.

Q. Did you ever know that they were endeavoring to hold you liable on that bond up until that time?

Mr. Riggins: I object to that as irrelevant and immaterial.

A. No.

Q. Did anyone in the bank ever speak to you about

30 it when you would come in there?

A. No.

Q. Except until you got this letter?

A. No.

Mr. Bradley: I will offer the letter in evidence.

(Said letter offered in evidence and marked Exhibit D6, 1-2-32.)

Mr. Bradley: Have you got the original of this letter of January 5th which we wrote to the bank?

Mr. Riggins: No. Did you write it to the bank? 10

Mr. Bradley: Oh, yes, under date of January 5th, 1931.

Q. Did you reply to Exhibit D6?
A. Yes.
Q. Is that a copy of the letter which you sent to the bank?
A. Yes, sir.

20

Mr. Bradley: I offer it in evidence.

(Said letter offered in evidence and marked Exhibit D7, 1-2-32.)

Q. And then did you receive this letter under date of January 9th from the Haddonfield National Bank?
A. Yes, sir.

30

Mr. Riggins: 1931?

Q. 1931?
A. Yes, sir.

Mr. Bradley: I offer this.

(Said letter offered in evidence and marked Exhibit D8, 1-2-32.)

Q. When was the first time you knew judgment had been entered on the bond in this matter?

A. When Mr. French made a search.

10 Q. In pursuance to the agreement of January 10th, 1927, did you convey your interest in the property to Mr. Lowell B. Hipple?

Mr. Riggins: I object to that question on the ground that it incorporates the agreement and calls for a conclusion, and is immaterial.

Q. Did you actually make a deed for the property to Mr. Lowell B. Hipple?

20 A. There was an agreement drawn and I gave him my interest in the property.

Q. Conveyed it by deed?

A. Conveyed it.

Q. Did you put up the $6,000 under the agreement?

A. Yes, sir.

Mr. Riggins: Have you got a certified copy of that deed?

30

Mr. Bradley: I have here a memorandum, copy of deed, Cooper to Hipple, recorded March 30th, 1927, in book 655 of Deeds, page 17.

Cross-examination.

By Mr. Riggins:

Q. Mr. Cooper, you say you think Mr. Savage or Mr. Dobbs gave you back the note D5?

A. Yes. 10

Q. Are you sure Mr. Wright didn't give you back the note?

A. I can't remember that far back. Mr. Savage or Mr. Dobbs were always in the note part.

Q. That is the reason you answered that way, because you know they are usually at the note teller's window, Savage or Dobbs?

A. Yes.

Q. You don't recall the circumstances then under which you got back this note? 20

Mr. Bradley: I object to that, that calls for a conclusion of the witness. I think it is hardly a fair question, I think you ought to direct his attention to what you mean by "circumstance."

Q. You don't recall positively who gave you back that note, do you?

A. No.

Q. And you don't recall what was said at the time 30 you got back the note, do you?

A. No.

By Mr. Bradley:

Q. Was anything said at that time by the bank

that you were not to be relieved from that obligation on the bond?

Mr. Riggins: I object to that question because he has already answered he recalls nothing that was said, and I object further on the ground that he
10 is asked what was said by the bank.

Mr. Bradley: I think in an important matter like this the witness would know whether any reference was made to the fact he was to be held on the bond.

Mr. Riggins: I object to that, it is merely argument, and I object to the question being answered.

20 Q. Did the official who handed you back the note tell you you were to be held on that bond?

Mr. Riggins: I object to that, there has been no testimony that any official handed him back the note.

Q. Did you get this note at the bank?
A. Yes.
Q. Referring now to D5?
A. Yes.
30 Q. Where at the bank?
A. At the note window.
Q. Were you informed at that time by the person who delivered you the note that you were not relieved from the obligation on that bond?

Mr. Riggins: I object to that on the ground that

he has already stated he doesn't recall anything that was said at the time, and on the further ground that the person who delivered the note may not have been an official or have any authority to say anything.

Q. Answer the question.
A. No. 10

By Mr. Riggins:

Q. What did you mean when you said, "No" to that question you answered?

Mr. Bradley: I object to that, he has answered the question.

20

Q. Did you thoroughly understand the question?

Mr. Bradley: Suppose we have the question read again. He has answered the question, and I don't see how the witness can answer any more.

Mr. Riggins: I object to this argument.

Mr. Bradley: I object to the question, the witness has clearly answered "No" to the question, and he 30 is asked what he means. There isn't anything more he can say, it was a complete answer.

Mr. Riggins: (To the stenographer.) Read my second question to him.

Mr. Bradley: I object to that, it calls for a conclusion, and the witness has answered the question.

Q. Answer my question, please.
A. He asked me if I understood?
Q. Thoroughly understood the question Mr. Brad-
10 ley asked you?
A. Yes.
Q. Do you mean to say nothing was said to you at the time you got this note?
A. I don't remember.
Q. Just a minute. Now, you say you don't remember, is that the answer?
A. Yes.
Q. That is your answer, that you don't remember?

20 Mr. Bradley: He has answered "Yes."

Mr. Riggins: He says he doesn't remember.

Mr. Bradley: Yes, and what of it. If you have any questions that he did have any alleged conversation why don't you put it in and ask him?

Mr. Riggins: I don't have to.

30 By Mr. Bradley:

Q. Did this man who gave you this note tell you the bank did not relieve you from the obligation on that bond and mortgage?

Mr. Riggins: I object to that question on the ground ——

A. No.

Mr. Riggins: He says "this man."

Q. Was it a man or a woman who gave it to you?
A. A man.

10

Mr. Bradley: And his answer was "No."

By Mr. Riggins:

Q. Did anybody at the time you got that note say anything to you with regards to your obligation on that bond?
A. I don't remember anything that was said, Mr. Riggins.

20

LOWELL B. HIPPLE, sworn.

By Mr. Bradley:

Q. Mr. Hipple, you were a partner of Mr. Cooper?
A. That is right.
Q. One of the defendants in this matter?
A. Yes.

30

Q. You were the other defendant on this judgment entered on bond and warrant against both of you?
A. That is right.
Q. I understand you and Mr. Cooper were building an apartment house at 144 Kings Highway East, Haddonfield, New Jersey?

A. That is right.

Q. In connection with that you had occasion to secure money by loan from the Haddonfield National Bank, the plaintiff in this case?

A. That is right.

Q. Do you know when your first loan was secured,
10 about?

A. The year?

Q. Yes.

A. I would say, 1925.

Q. When that was originally secured was there any collateral security?

A. No.

Q. And that note renewed from time to time?

A. A series of notes, yes, sir.

Q. What mortgages were placed upon that prop-
20 erty before the mortgage given to the bank?

A. A first mortgage, and a second mortgage.

Q. The first mortgage was the Phoenix Mutual Life for $40,000?

A. It was known to us as Marie E. Hayden.

Q. A lady in Mr. Nixon's office?

A. Yes.

Q. And the second mortgage to whom?

A. Mary B. Cotton.

Q. Do you recall the circumstances regarding the
30 giving of the mortgage and bond and warrant to the bank?

A. Only Mr. Clark sent for me, and I got in touch with Mr. Cooper, and went to see Mr. Clark at the National Bank one morning, and he in turn took us to a small Board room on the second floor of the

bank and introduced us to Mr. J. C. Remington, Jr., and Mr. Walter Keen.

Q. What did Mr. Clark say?

A. Mr. Clark introduced us and told us we were there for the purpose of discussing the loan they had against the property at 144 Kings Highway.

Q. Then what happened? 10

A. Mr. Clark stayed there for a short while and was called, out and Mr. Keen was the spokesman, and we were examined about the condition of the building, as to what was against the building in the way of mortgages.

Q. Did you tell them?

A. We cleared the entire atmosphere with the exception of one point, which it appears that the solicitors for the bank ——

20

Mr. Riggins: I object to this.

Q. All right, go ahead.

A. The solicitors of the bank had made a search of the property and discovered there was on record a $25,000 first mortgage, I believe, with the Camden Safe Deposit & Trust Co.

Q. Was that matter subsequently cleared up?

A. Yes, by Mr. George Reynolds, and a note of apology to us, and a note of explanation to the bank, 30 there was an error in having it cleared of record at the time of settlement.

Q. Now, what arrangement was made with regard to their renewal of the old note which you and Mr. Cooper had signed?

Mr. Riggins: I object to this on the ground it hasn't been shown he is dealing with any officer of the bank.

Q. Was part of this conversation in Mr. Clark's presence?

10 A. Part of it, yes.

Q. When Mr. Clark introduced you to these gentlemen what did he tell you, you were there for what purpose?

A. We were there for the purpose of straightening out the finances as far as the National Bank was concerned on the property 144 Kings Highway.

Q. The Haddonfield National Bank?

A. Yes.

Q. Go ahead.

20 A. We were asked to either pay the loans off ——

Q. Who asked you?

A. Mr. Walter Keen.

Q. What did he say?

A. He asked us to either pay the amounts of the notes off or to give them suitable collateral.

Q. And renew the notes?

A. Yes.

Q. What was done?

30 A. We gave them a third collateral mortgage, the amount of which I am not now sure.

Mr. Riggins: It is admitted.

Q. $11,100?

A. And the note was renewed.

Q. Did both Mr. Cooper and you sign the renewal note?

A. We were both co-makers and co-signers.

Q. On or about January 10th, 1927, did you enter into an agreement with Mr. Cooper with reference to the entire transaction?

A. Yes, sir. 10

Q. And the partnership?

A. Yes, sir.

Q. Witness is shown D3, and is asked if that is the agreement entered into?

A. Yes.

Q. In pursuance of that agreement was a release of Mr. Cooper secured from Mrs. Cotton with reference to the second mortgage?

A. Yes, sir.

20

Mr. Riggins: I object to that on the ground that the agreement itself is immaterial, and the question is based on the agreement, and the question calls for a conclusion.

Q. Witness is shown Exhibit D4 and is asked if this is the release you refer to?

A. Yes, that is right.

Q. Now, in pursuance of that agreement to secure a release of Mr. Cooper from the bond accompany- 30 ing these three mortgages, of which this bond to the bank is one, what was done with the bank?

Mr. Riggins: I object to the question on the same ground as stated in the objection to the previous question.

Q. What was done in pursuance of this agreement, with the bank?

A. Arrangements were made whereby H. M. Hipple was to take the signature place ——

Mr. Riggins: I object to that "arrangements
10 were made."

Mr. Bradley: Let him answer the question.

Mr. Riggins: He isn't answering the question.

Mr. Bradley: Yes, he is.

(Question repeated.)

20 The Witness: Arrangements were made whereby H. M. Hipple was to take the signature place of Alexander Cooper in the endorsement and making of the note in question.

Q. Now, you say H. M. Hipple, who was that?

A. My father.

Q. Harry M. Hipple?

A. That is right.

Q. Who was interviewed with reference to the
30 bank in that connection?

A. I won't say positively, but I have always done my business with Morris Clark.

Q. Have you done any business with any other person?

A. Except in his absence.

Q. And that was ——

A. Mr. Wright.

Q. Is Mr. Wright, Robert Wright, Assistant Cashier?

A. Yes, sir.

Q. So, any arrangement you made was with either Mr. Clark or Mr. Wright?

A. Yes. 10

Q. Either the Cashier or Assistant Cashier?

A. Yes.

Q. Now, what was said at this meeting, and who was present when you were there, either Mr. Wright or Mr. Clark?

A. I can't answer that.

Q. What was said?

A. I can't say.

Q. What did you tell them with reference to the partnership transaction? 20

A. The bank agreed ——

Mr. Riggins: I object to this, he has already said he doesn't know with whom he talked, and he is referring to the bank, which is a stone building, and which means nothing.

Q. What did you tell Mr. Clark or Mr. Wright?

A. They told me, I didn't ——

Q. What did they tell you? 30

Mr. Riggins: I object to the answer because he said he doesn't know with whom he talked.

Q. One is the Cashier, and the other the Assistant. What was said by Mr. Clark or Mr. Wright?

A. Word was brought back to me through one of these two officers, from the Board of the bank, that Harry Hipple was acceptable on the note in place of Mr. Cooper.

Mr. Riggins: I move that that be stricken out as
10 irrelevant and immaterial, especially in reference to what was said by the Board.

Q. Now, after this information came to you did they accept your father on the note in place of Mr. Cooper?

A. They did.

Q. In the renewal of this note, D5?

A. I assume this is the last note Mr. Cooper was on; it was in this amount that my father signed the
20 original note.

Q. Look at the date of that, on or about March 28th?

A. Yes, it would be around that time.

Q. That arrangements were made with the bank?

A. That is right.

Q. And it was about March 25th that Mr. Cooper conveyed you his interest in the property, 1927?

A. I can't tell you without seeing that agreement.

Q. This agreement was on the 10th?

30 A. It is my recollection—is there a question on there now?

Q. The question is was it on or about the 25th of March, in pursuance of that agreement, that Mr. Cooper conveyed to you his interest in that property?

A. That is right.

Q. When was the first time you ever knew judgment had been entered against Mr. Cooper on this bond and warrant?

A. About a week ago.

Q. Did you ever receive notices from the bank that that renewal note entered into by you and your father would fall due at any time? 10

A. My father always received them.

Q. On the note sent to you did it have Mr. Cooper's name on it?

A. No.

Mr. Riggins: I object to that and ask that it be stricken out, the notice will speak for itself.

Q. Have you a copy of the notice that was sent on these notes? 20

Mr. Riggins: No.

Mr. Bradley: What is that?

Mr. Riggins: No, I wouldn't have them, he would have the notices.

Mr. Bradley: Is it your contention Mr. Cooper was given notices? 30

Mr. Riggins: No, I am not contending that. You are asking what the notices contain, and I think it is immaterial, the whole question, and I object to it on that ground.

Q. Now, were you present, Mr. Hipple, when this note, D5, was turned over to Mr. Alexander Cooper?

A. Mr. Cooper and I ——

Mr. Riggins: Just wait.

10 Q. Say yes or no first.

A. Yes.

Q. Where was the note surrendered to Mr. Cooper?

A. Through the window of the note teller's cage in the National Bank.

Q. What was said at that time, if you recall?

A. To my knowledge nothing was said.

Q. Who asked for the note?

A. I don't think anyone asked for it, I handed the 20 renewal of this note with the endorsements and signatures of Harry Hipple and myself, and this was handed back.

Q. You handed him the note on which Harry Hipple and yourself were on there as endorsers and makers, you handed that to the teller?

A. Yes.

Q. He accepted it?

A. Yes.

Q. And he handed you back the old note?

30 A. The cancelled note.

Cross-examination.

By Mr. Riggins:

Q. Do you know whether or not anything was said to Mr. Cooper by Mr. Wright with regard to his liability on the bond at the time the note was given back, or shortly previous thereto? 10

Mr. Bradley: What do you mean, the same day?

A. My answer is in the record on that question.

Mr. Riggins: No, it is not.

(To the stenographer.) Read the question.

20

(Question repeated.)

The Witness: My answer is the same as the answer to the other question, I don't recall any conversation.

Q. Were you present at any time with Mr. Cooper when he had a conversation with Mr. Wright with regard to the bank accepting a renewal note without Mr. Cooper on it? 30

A. That is a question I can't answer.

Mr. Riggins: That is all, you just said you couldn't answer, that is all.

ALEXANDER COOPER, recalled.

By Mr. Bradley:

10 Q. Were you ever given any notice by the bank that any notes given in renewal of D5 were in default?

A. Not until this year, they sent me a letter that Mr. Hipple was not going to pay anything more on it.

Q. That is the letter I showed you this morning?

A. Yes.

Q. In other words, there weren't any notices sent to you when the note was due?

20 A. No.

LOWELL B. HIPPLE, recalled.

By Mr. Bradley:

Q. Mr. Hipple, you spoke of certain arrangements made by the bank whereby your father, Harry M. 30 Hipple, was to be taken on the renewal note instead of Mr. Cooper. Did you make those arrangements?

A. Yes, I believe I made all the arrangements on that.

Q. Whom did you consult?

A. I can't answer that. It would be one of the two gentlemen mentioned before.

Q. Who?

A. Mr. Wright or Mr. Clark.

Q. Either the Cashier or the Assistant Cashier?

A. Yes.

Q. Do you know what you said?

A. I can't answer that.

Q. As near as you can, tell us exactly what happened? 10

A. Except that Harry Hipple had agreed ——

Mr. Riggins: No, what you said.

Mr. Richards: He is stating the substance of the conversation without the words.

Q. Just tell us what you told him.

A. That a new note, or replacement note of the note which was endorsed by Hipple and Cooper, Lowell B. Hipple and Alexander Cooper, that Harry Hipple would agree to take the obligation on that note, and the bank in a future conversation accepted that proposition. 20

Q. What, if anything, did you tell him with reference to the agreement you had entered into under date of January 10th, 1927, which was introduced in evidence and marked D3?

A. To the best of my knowledge I never discussed that with anyone. 30

Q. Did you tell them any arrangement was made between you, why Mr. Cooper wanted to get off the note?

A. I can't answer that.

Q. Then subsequently, sometime in about March,

1929, did you convey certain property to your father, Harry M. Hipple?

A. I conveyed the title to 144 Kings Highway to my father.

Q. Was that in reference to part of this transaction?

10 A. What was the date of that?

Q. 3-13-29?

A. Title was deeded—the dwelling was deeded to my father as the result of a conversation between Harry M. Hipple and Morris Clark of the National Bank whereby he had practically all of his money tied up in the property and was responsible on the note, and it would be better if he were the owner of the building.

Q. And that suggestion came from Mr. Clark, 20 the cashier of the bank, did it?

A. That is correct.

Mr. Richards: I object to that question.

Q. Who made the suggestion with reference to the transfer?

A. I don't believe I was there.

Mr. Riggins: I move that all of the previous answers be stricken out because it is hearsay. 30

Q. Was that what you told us, something you learned from your father?

A. No.

Q. Did Mr. Clark tell you?

A. I wasn't there at the time of the arrangements

which you asked the question be stricken out, I was there at the time the title was made out at which the whole arrangement came out, I was there at that part, and at the time Mr. Clark and father had the conversation.

Q. Were you there when title was conveyed?

A. I believe I was, yes. 10

Q. Was it conveyed at the bank?

A. I don't believe so.

Q. Was Mr. Clark present when the conveyance took place?

A. I can't answer that.

Mr. Riggins: I make my motion that the answers relating to any conversation between Mr. Clark and Mr. Harry Hipple be stricken.

20

Q. Now, were two mortgages given, one of $4,500, under date of March 13th, 1929, from your father, Harry M. Hipple, to the Haddonfield National Bank, and a second one in the sum of $5,500?

A. Yes.

Q. Do you know what property that covered?

A. 205 Redman Avenue.

Q. Was that given as additional security to the bank on this obligation for the renewal note?

A. It was. 30

By Mr. Riggins:

Q. These mortgages were given after Mr. Cooper was off the note, weren't they?

A. Two years later.

Q. And they were given after the obligation to the bank had increased, weren't they, for the purpose of making some alterations or something like that, to the building?

A. May I ask a question?

10 (Question repeated.)

A. May I ask a question? The date was what?

Mr. Bradley: March 13th, 1929.

The Witness: No, these mortgages were given prior to the time of the renovation.

Q. The renovation was made after Mr. Cooper 20 was let off the note?

A. Yes.

Q. And money was borrowed from the bank to make those renovations?

A. Yes.

Q. And they were in this same obligation, or added to this same obligation we are talking about?

Mr. Bradley: I object to that, that calls for a conclusion, this man ——

30

Mr. Riggins: No, it doesn't call for a conclusion.

Mr. Bradley: Don't answer until I get the objection. It is not within the knowledge of this witness that they were additional and bound Mr. Cooper on this original bond.

Mr. Riggins: No.

Mr. Bradley: That is what you are saying, your judgment was entered on the bond, Mr. Riggins, not on the note.

Mr. Riggins: I will withdraw the question. 10

Q. The money that was used to make these alterations to the building was borrowed from the Haddonfield National Bank, wasn't it?

A. I want to object myself here. You are not going to steer me into something that has nothing whatever to do with what we are talking about.

Mr. Riggins: Your counsel is much better able to take care of you than you are yourself. 20

Mr. Bradley: I am not his counsel.

The Witness: I don't think that question has anything to do with this whatsoever.

Q. You refuse to answer the question?
A. In the manner in which it is put. It doesn't have anything to do with this bond and mortgage whatsoever, and I am a witness for that. 30

Mr. Riggins: Why not let the Court decide that rather than you, we will take the facts as we find them, and we will let the Court decide it.

Mr. Bradley: His question is not directed toward the bond.

Mr. Riggins: No.

Mr. Bradley: Just directed toward the note.

10

Mr. Riggins: Yes.

The Witness: The money was borrowed from the Haddonfield National Bank.

Q. And the note which was signed by Harry Hipple and which was a renewal of the note which was D5 was renewed from time to time, wasn't it?

A. That is correct.

20 Q. And the money borrowed for that building is now represented in a note?

A. Yes.

Q. Which is endorsed by Harry Hipple, and is a continuation of these notes which run back to the time when Mr. Cooper was let off of the note?

A. Yes.

Mr. Bradley: My objection to that is he wouldn't know they were a continuation in a legal sense. Do

30 you mean a legal sense?

Mr. Riggins: No, I am asking for facts now.

Q. When the bank got these two mortgages from Harry Hipple the obligation of Harry Hipple and

Lowell Hipple to the bank was greater than it was when Mr. Cooper was taken off of the note?

A. The note was greater because the consolidation of notes not having to do with the building, which were personal to myself, and Harry Hipple personally, were consolidated into one note.

Q. And that consolidated note included the obligation which was represented by a note on which Alexander Cooper was at one time, and these other obligations of Harry Hipple and yourself to the bank? 10

A. They were consolidated in one note.

Q. And it was that one note that these subsequent mortgages of Harry Hipple were given to secure?

A. Given to secure the note.

By Mr. Bradley: 20

Q. So that the new note that was signed by Mr. Hipple, your father, and yourself, when these mortgages were given, covered additional money in addition to the money on the original note?

A. Yes, that is right.

30

Alexander Cooper, recalled.

By Mr. Riggins:

Q. Previous to your receiving from some person this note, D5, at the bank, did you have any conversa-

tion with Robert Wright with respect to your name being taken off the note?

A. I don't remember any.

Q. What say?

A. I don't remember any.

Q. You don't remember that you had two con-
10 versations with him?

A. No.

Q. You don't remember you had a conversation with him before the meeting of the Board of Directors of the Bank?

A. No.

Q. And don't you remember you had a conversation with him after the meeting of the Board of Directors?

20 Mr. Bradley: Fix the time, please, Mr. Riggins.

Mr. Riggins: I can't fix it right now.

Q. The time I am tracing is perhaps within two weeks of your receiving this D5 back from somebody at the note window?

A. No, I don't remember any.

Q. You don't remember any such conversation?

A. No.

30 Q. Will you say you didn't have any such conversation?

A. I don't remember it.

Mr. Bradley: What was the conversation? I object to that, that isn't proper cross-examination, because you are asking the man whether he had cer-

tain conversations and you are not stating what the conversations were. My objection is if you want to ask him whether he had certain conversations you ought to ask whether or not he remembers what the party said. If there was any conversation I think you ought to call his attention to the direct words of the conversation. Your question is prejudicial to our interest because he doesn't know what conversation you are referring to. 10

Q. Do you recall a conversation with Mr. Wright sometime probably two weeks before your name was taken off the note, D5, with regard to your being taken off that note?

A. No.

Q. Did you have any such conversation with him?

A. I don't remember it. 20

Q. You don't remember that he said he would take the matter up and see what he could do about it, and he would take it up with the Board?

A. No.

Q. Will you say there wasn't such a conversation?

A. No, but I don't remember it.

Q. You won't say there wasn't such a conversation?

A. I don't remember it.

Q. Do you recall afterwards, after the Board meeting, you had a conversation with Mr. Wright about being taken off this note? 30

A. I don't remember.

Q. Do you recall Mr. Wright saying to you at the second conversation that the matter had been taken up with the Board and the Board had said that your

name could be taken off the note with the understanding, however, only that you should continue liable on the bond?

A. No, I don't remember that.

Q. You don't remember such a conversation?

A. No.

10 Q. Will you say such a conversation took place?

A. No, but I don't remember it.

(At this point an adjournment was taken to a day to be agreed upon.)

20

30

RULE DISCHARGING RULE TO SHOW CAUSE.

(Filed March 8, 1932.)

NEW JERSEY SUPREME COURT.

CAMDEN COUNTY.

HADDONFIELD NATIONAL BANK, *Plaintiff,* v. LOWELL B. HIPPLE and ALEXANDER COOPER, *Defendants.*	In Debt. On Bond and Warrant. Rule Reducing Judgment as to Alexander Cooper and Discharging Rule to Show Cause.

The rule to show cause on petition of defendant, Alexander Cooper, why the judgment in the above matter should not be set aside as to the said defendant, Alexander Cooper, allowed on the 25th day of November, 1931, came on to be heard in the Court House in the City of Camden on March 7, 1932, to which date the matter had been from time to time adjourned, in the presence of Samuel H. Richards of French, Richards and Bradley, Esqs., represent-

ing the defendant, Alexander Cooper, and John A. Riggins of Riggins & Davis, Esqs., representing the plaintiff, and the Court having considered the testimony taken under the rule and having heard argument of respective counsel, and the Court being of the opinion that the said judgment was entered in 10 excess of what it should have been entered as against Alexander Cooper to the extent of $500 in principal and $24.13 in interest or a total of $524.13;

It is, therefore, on this 7th day of March, 1932, on motion of Riggins & Davis, attorneys for plaintiff, ordered that the said judgment as against Alexander Cooper be reduced from $11,581.00 damages to the sum of $11,056.87 damages, and in all other respects the said judgment be confirmed.

It is further ordered that the said rule to show 20 cause allowed on the said 25th day of November, 1931, and the stay thereunder granted, be discharged.

Frank T. Lloyd,
Justice of the Supreme Court.

Entered Mar. 8, 1932.
On motion of
Riggins & Davis,
Attorneys for Plaintiff.

30

NOTICE OF APPEAL.

(Filed March 23, 1932.)

NEW JERSEY SUPREME COURT.

10

HADDONFIELD NATIONAL BANK, *Plaintiff,* v. LOWELL B. HIPPLE and ALEXANDER COOPER, *Defendants.*	On Bond and Warrant.

20

To Riggins & Davis, Attorneys of Plaintiff:

Take notice that the defendant, Alexander Cooper, hereby appeals from the judgment of the New Jersey Supreme Court entered in the above-entitled cause on October 23, 1931, in the amount of $11,591 and from the rule of said Court in said cause made March 7, 1932, discharging the rule to show cause made November 25, 1931, why the said judgment against the defendant, Alexander Cooper, should not be opened, set aside and for nothing holden, to the New Jersey Court of Errors and Appeals in the last resort in all causes. 30

Dated March 16, 1932.

FRENCH, RICHARDS & BRADLEY,
Attorneys of Defendant,
Alexander Cooper.

GROUNDS OF APPEAL.

(Filed April 13, 1932.)

10 NEW JERSEY COURT OF ERRORS AND APPEALS.

HADDONFIELD NATIONAL BANK, *Plaintiff-Respondent,* v. LOWELL B. HIPPLE and ALEXANDER COOPER, *Defendant-Appellants.*	In Debt on Bond and Warrant. Appeal from Supreme Court. Grounds of Appeal.

20

The appellant, Alexander Cooper, states the following grounds of appeal:

1. The New Jersey Supreme Court discharged the rule to show cause allowed on the 25th day of November, 1931, and the stay thereunder granted, although it was error so to do.

30

2. The New Jersey Supreme Court correctly found that the affidavit on which judgment for plaintiff was entered falsely set forth that the debt due on the bond is a debt of $11,100 principal and in-

terest thereon from January 26, 1931, which debt said affidavit also falsely set forth is justly due and owing to the plaintiff, but said Supreme Court nevertheless erroneously refused either to vacate the judgment or to open the judgment and give the defendant, Alexander Cooper, leave to plead.

10

3. Although it appeared by the evidence that the affidavit on which judgment for plaintiff was entered falsely set forth that a loan by plaintiff to defendants was the true consideration of the bond for which the judgment was confessed, the Supreme Court erroneously refused either to vacate the judgment or to open the judgment and give the defendant, Alexander Cooper, leave to plead.

4. Although it appeared by the evidence that there was a novation the surrendering of old securities and taking new securities, the surrendering of old debtors and taking new debtors, and increasing the amount of the indebtedness the Supreme Court erroneously refused either to vacate the judgment or to open the judgment and give the defendant, Alexander Cooper, leave to plead. 20

5. Although it appeared by the evidence that the amount sworn to was untrue and that the plaintiff failed to sustain the burden cast upon it of proving the exact amount, if anything, due, the Supreme Court erroneously refused either to vacate the judgment or to open the judgment and give the defendant, Alexander Cooper, leave to plead. 30

6. Although it appeared by the evidence that the defendant, Alexander Cooper, has defenses proper for a jury to pass upon, the Supreme Court erroneously refused to open the judgment and give the defendant, Alexander Cooper, leave to plead.

10 7. The statute authorizing a judgment on bond and warrant being in derogation of the common law and the affidavit upon which this judgment was entered being not strictly in compliance with the statute, the judgment is without support and the Supreme Court erred in refusing either to vacate or open the judgment.

French, Richards & Bradley,
Attorneys for Appellant,
Alexander Cooper.

20

State of New Jersey, }
County of Camden, } ss.

Blaine E. Capehart, being duly sworn upon his oath, deposes and says that on April 11th, 1932, he
30 served a copy of the within grounds of appeal upon Riggins & Davis, attorneys of the respondent, by leaving a copy thereof with Frank W. Davis, Esquire, at his law offices, 313 Market Street, Camden, N. J.

Blaine E. Capehart.

Sworn and subscribed before me this eleventh day of April, 1932.

THOS. R. CLEVENGER,
Master in Chancery of New Jersey.

10

EXHIBIT D1.
1/2/32

Alexander Cooper of Ashland, County of Camden and State of New Jersey, and Lowell B. Hipple of the Borough of Haddonfield, County of Camden and State of New Jersey, in consideration of the mutual benefits by each of them received and in consideration of One Dollar to each of them in hand paid by the other, receipt of which is hereby acknowledged, do hereby form a partnership for the following objects and upon the following terms and conditions: 20

1. The name of the partnership shall be Hipple and Cooper.

2. The office and place of business of the partnership shall be the Lowell B. Hipple Shop, Corner Kings Highway East and Tanner Street, Haddonfield, New Jersey. 30

3. The objects of the partnership are:

To buy, sell, exchange, rent, lease and otherwise deal in real estate in any manner whatever, includ-

ing the erection of a building or buildings upon any property now owned or about to be purchased by the partnership.

4. Any moneys or capital necessary to be furnished by the partnership in furtherance of any
10 partnership venture or enterprise shall be furnished by each partner in equal amounts.

5. The rents, issues, profits, earnings and gains of whatsoever nature accruing from partnership enterprises shall be divided equally between the partners.

6. Disbursements by the partnership shall be made by check signed Hipple and Cooper and duly
20 signed by each individual member of the partnership.

7. The Haddonfield National Bank and the Haddonfield Safe Deposit & Trust Company shall be the depositories of all partnership funds and the said banks shall be notified to honor checks of the partnership when duly signed as provided for in paragraph six hereof. Said banks shall be furnished by each partner with a specimen of his signature
30 in order that said checks may be honored.

8. If either of the partners wishes to withdraw from the partnership and sell or dispose of his share in the same, he may do so by serving the other partner with a written notice of his intention so to do. The value of the withdrawing partner's

share in all partnership property shall be determined by three arbitrators, or a majority of them, who shall be selected as follows:

Each partner shall select an arbitrator for this purpose and these two arbitrators, selected by the partners, shall between them select a third arbitrator, and the valuation placed upon the withdrawing partner's holdings by said three arbitrators, or a majority of them, shall be binding. 10

IN WITNESS WHEREOF, the said Alexander Cooper and Lowell B. Hipple have hereunto interchangeably set their hands and seals this 26th day of June A. D. 1924.

Alexander Cooper (L. S.)
Lowell B. Hipple (L. S.)

Signed, Sealed and Delivered 20
In the presence of
Edwin G. Scovel

(On back):

PARTNERSHIP AGREEMENT
Between
Alexander Cooper
and 30
Lowell B. Hipple.
Dated: June 26, 1924.
Law Offices
EDWIN G. SCOVEL
520 Market Street
Camden, New Jersey

EXHIBIT D1.
3/4/32

This Indenture made the thirteenth day of March
10 in the year of our Lord one thousand nine hundred and twenty-nine Between LOWELL B. HIPPLE and ELIZABETH G. HIPPLE his wife of the Borough of Haddonfield in the County of Camden and State of New Jersey parties of the first part and HARRY M. HIPPLE of the same place party of the second part Witnesseth that the said party of the first part for and in consideration of the sum of ONE DOLLAR and other valuable considerations lawful money of the United States of
20 America well and truly paid by the said party of the second part to the said party of the first part at and before the ensealing and delivery of these presents the receipt whereof is hereby acknowledged have granted bargained sold aliened enfeoffed released conveyed and confirmed and by these presents do grant bargain sell alien enfeoff release convey and confirm unto the said party of the second part his heirs and assigns All that certain lot of land and premises situate in the Borough of Had-
30 donfield in the County of Camden and State of New Jersey bounded and described as follows: BEGINNING at a point in the southeasterly side of King's Highway East distant sixty two and seventeen one hundredths feet southwest from the southwesterly side of Ellis Street and corner to land of Benjamin F Fowler and extending thence (1) south

twenty two degrees fifty minutes twenty six seconds east along line of said Fowler's land eighty two and seventy two one hundredths feet to a point thence (2) still by said Fowler's land South sixty five degrees fifty six minutes forty seven seconds west four and twelve one hundredths feet to a point thence still by said Fowler's land (3) south 10 twenty five degrees sixteen minutes twenty seconds east eighty seven and twelve hundredths feet to a point corner to same thence still by said Fowler's land (4) south sixty five degrees fifty six minutes forty seven seconds west thirty two and thirty hundredths feet to a point corner to land now or late of Bennett and Dreyer thence (5) by line of land of Bennett and Dreyer North twenty five degrees sixteen minutes twenty seconds west one hundred and sixty nine and fifty four one hundredths feet 20 to a point in the southeasterly line of King's Highway East thence along the southeasterly line of King's Highway (6) north sixty five degrees thirty minutes forty five seconds east thirty nine and ninety three one hundredths feet to a point and place of beginning. BEING the same land and premises which Alexander Cooper single man by deed dated March 25th 1927 and recorded in the office of the Register of Deeds of Camden County at Camden N J in Book 655 of Deeds pages 17 etc 30 granted and conveyed unto Lowell B Hipple in fee TOGETHER with all and singular the buildings improvements woods ways rights liberties privileges hereditaments and appurtenances to the same belonging or in anywise appertaining and the reversion and reversions remainder and remainders

rents issues and the profits thereof and of every part and parcel thereof And also all the estate right title interest property possession claim and demand whatsoever both in law and equity of the said party of the first part of in and to the said premises with the appurtenances To have and to
10 hold the said premises with all and singular the appurtenances unto the said party of the second part his heirs and assigns to the only proper use benefit and behoof of the said party of the second part his heirs and assigns forever And the said parties of the first part for themselves their heirs executors and administrators do by these presents covenant grant and agree to and with the said party of the second part his heirs and assigns that they the said parties of the first part their heirs all
20 and singular the hereditaments and premises herein above described and granted or mentioned and intended to be so with the appurtenances unto the said party of the second part his heirs and assigns against them the said parties of the first part their heirs and against all and every other person or persons whomsoever lawfully claiming or to claim the same or any part thereof shall and will warrant and forever defend In witness whereof the said parties of the first part to these
30 presents have hereunto set their hands and seals dated the day and year first above written Sophie B. Hipple (Seal) Elizabeth G Hipple (seal) Signed sealed and delivered in the presence of Lines 14 and 15 page 2 striken out before execution hereof Erasure in Line 4 page 3 made before execution hereof Beatrice H Sayer State of New Jersey

Camden County SS Be it remembered that on this thirteenth day of March in the year of our Lord one thousand nine hundred and twenty nine before me a Notary Public for the State of New Jersey personally appeared Lowell B Hipple and Elizabeth G Hipple his wife who I am satisfied are the grantors mentioned in the above deed or conveyance 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 Beatrice H Sayer Notary Public (seal) Comm exp Jan 22 1930. Recorded March 15th 1929 at 1.00 P M By—Joshua C Haines, Register MBH.

10

20

STATE OF NEW JERSEY
(Seal)
COUNTY OF CAMDEN

I, JOSHUA C. HAINES, Register of Deeds and Mortgages for the County of Camden, do hereby certify, that the foregoing is a true copy of the record of the DEED from LOWELL B HIPPLE & UX to HARRY M HIPPLE as the same is of record in my office in Book 700 of DEEDS page 125 &c.

30

In Testimony Whereof, I have hereunto set my hand and affixed my official seal at Camden, this Thirteenth day of January A. D. 1932.

Joshua C. Haines
(Seal) Register.

(On back):

CERTIFIED COPY
DEED
LOWELL B. HIPPLE & UX
TO
10 HARRY M. HIPPLE
(In pencil):
Paid
275

EXHIBIT D3.
20 1/2/32

AGREEMENT made this Tenth day of January, 1927,

Between ALEXANDER COOPER and LOWELL B. HIPPLE, both of Haddonfield, New Jersey, WITNESSETH:

WHEREAS the parties hereto as tenants in common own the lot and have constructed an apart-
30 ment house with stores under it, at 144 Kings Highway East, Haddonfield, New Jersey, and in the purchase of said land and the construction, maintenance and operation of said building have incurred indebtedness, a first mortgage of $40,000, a second mortgage of $7,500 and a third mortgage of $10,-000, which third mortgage is collateral security for

a note made by the parties hereto, and in addition unpaid bills for labor and materials, maintenance and operation for which both are liable,

AND WHEREAS the said Alexander Cooper desires to be relieved from all indebtedness in connection with said land and building and the maintenance and operation of the building and is willing to pay to the said Hipple the sum of $6000, as a loss, for which payment he is to be relieved from all liability on account of the said building and its maintenance and operation and all joint indebtedness of the parties hereto, and the said Hipple is willing to accept the entire ownership of said land and building and to assume all of said indebtedness and relieve said Cooper of all said liability for the said sum of $6000.

NOW THEREFORE THIS AGREEMENT WITNESSETH that the said Lowell B. Hipple agrees to assume and pay all debts due or to become due for or on account of the said land, building and the maintenance and operation of said building and to relieve the said Alexander Cooper from all liability therefor and further within 60 days from the date hereof to have the said Cooper released from all liability on the bonds accompanying the above-mentioned three mortgages and the note secured by the third mortgage, either by an actual release or by the cancellation of the said mortgages and the making of other mortgages in the place thereof, at the expense of the said Hipple, and further agrees that the said Cooper shall, out of the

$6000 today pay the taxes in arrear on said property, and interest thereon, amounting approximately to $380 and the six months interest on the first mortgage of $1200.

AND the said Alexander Cooper agrees that upon
10 being released from all liability on the bonds accompanying the above-mentioned three mortgages and the note secured thereby, he will, if said releases are completed within 60 days from the date hereof and the outstanding bills and notes are paid and satisfied, convey by deed to said Hipple all his right, title and interest in said land and building and pay the said Lowell B. Hipple the sum of $6000, less any amounts theretofore paid on account thereof.
20

It is mutually agreed that the covenants herein contained are dependent covenants and shall bind and enure to the benefit of the respective heirs, executors and administrators of the parties hereto.

IN WITNESS WHEREOF we have hereunto set our hands and seals.

Alexander Cooper (SEAL)
Lowell B Hipple (SEAL)

30 Signed, sealed and delivered
in the presence of
Beatrice N. Sayer
(Seal) Notary Public
Comm Exp Jan 22, 1930

EXHIBIT D4.
1/2/32

KNOW ALL MEN BY THESE PRESENTS, that Lowell B. Hipple, Elizabeth G. Hipple, his wife, 10 and Mary B. Cotton, of Haddonfield, New Jersey, for and in consideration of the sum of ONE DOLLAR lawful money of the United States of America, heretofore paid to said Lowell B. Hipple, Elizabeth G. Hipple, his wife, and Mary B. Cotton, by Alexander Cooper, of Haddonfield, New Jersey, do hereby release and forever discharge the said Alexander Cooper, his heirs, executors, and administrators, of and from all and all manner of action and actions, in law and equity which might arise by 20 reason of a certain Bond and Warrant executed by Lowell B. Hipple and Alexander Cooper to Mary B. Cotton, on July 21st, 1925, to secure the sum of Seven Thousand Five Hundred Dollars, and by reason of the accompanying mortgage, bearing even date therewith and in like amount, made and executed by said Lowell B. Hipple and Elizabeth G., his wife, and Alexander Cooper, single-man, to Mary B. Cotton, which mortgage covers a certain tract of land and premises situate in the Borough 30 of Haddonfield, in the County of Camden, and State of New Jersey, which said mortgage is recorded in the Office of the Register of Deeds of Camden County in Book No. 287 of Mortgages, page 540 etc.

IN WITNESS WHEREOF, the said Lowell B. Hipple, Elizabeth G. Hipple, his wife, and Mary B. Cotton, have hereunto set their hands and seals, this Twenty-fifth day of March in the year of our Lord one thousand nine hundred and twenty-seven.

Lowell B Hipple (SEAL)
10 Elizabeth G Hipple (SEAL)
Mary B. Cotton (SEAL)

Signed, sealed and delivered
in the presence of
Robert Y. Garrett Jr.

State of New Jersey, }
20 County of Camden } ss.

BE IT REMEMBERED, THAT on this Twenty fifth day of March, in the year of our Lord one thousand nine hundred and twenty seven before me a Notary Public of New Jersey, personally appeared Mary B. Cotton, Lowell B. Hipple, and Elizabeth G., his wife; who, I am satisfied, are the grantors in the within Release named; and I having first made known to them the contents thereof, they acknowl-
30 edged that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

Robert Y. Garrett Jr.
Notary Public of New Jersey,
My Commission Expires, Oct. 22, 1931.

(On back):
— RELEASE —
Lowell B. Hipple,
Elizabeth G. Hipple
and Mary B. Cotton
to:
Alexander Cooper. 10
— April 25, 1927 —
Release of Bond and Warrant, and a certain Mortgage, recorded in the Office of the Register of Deeds of Camden County, in book 287, page 540 &c.
Law Offices of
CYRUS D. MARTER
Camden, N. J.

20

EXHIBIT D5.
1/2/32

$10,600/00 2 - 28 1927
we or either of
One month after date us promise to pay to the Order of Hipple & Cooper............at
THE HADDONFIELD NATIONAL BANK
OF HADDONFIELD, N. J.
ten thousand six hundred .... #Dollars 30
Value received, without defalcation or discount.
No. 25014 Due March 28 Name Lowell B. Hipple
Alexander Cooper
Address

Endorsed:
Hipple & Cooper
Lowell B. Hipple
Alexander Cooper
Hipple & Cooper

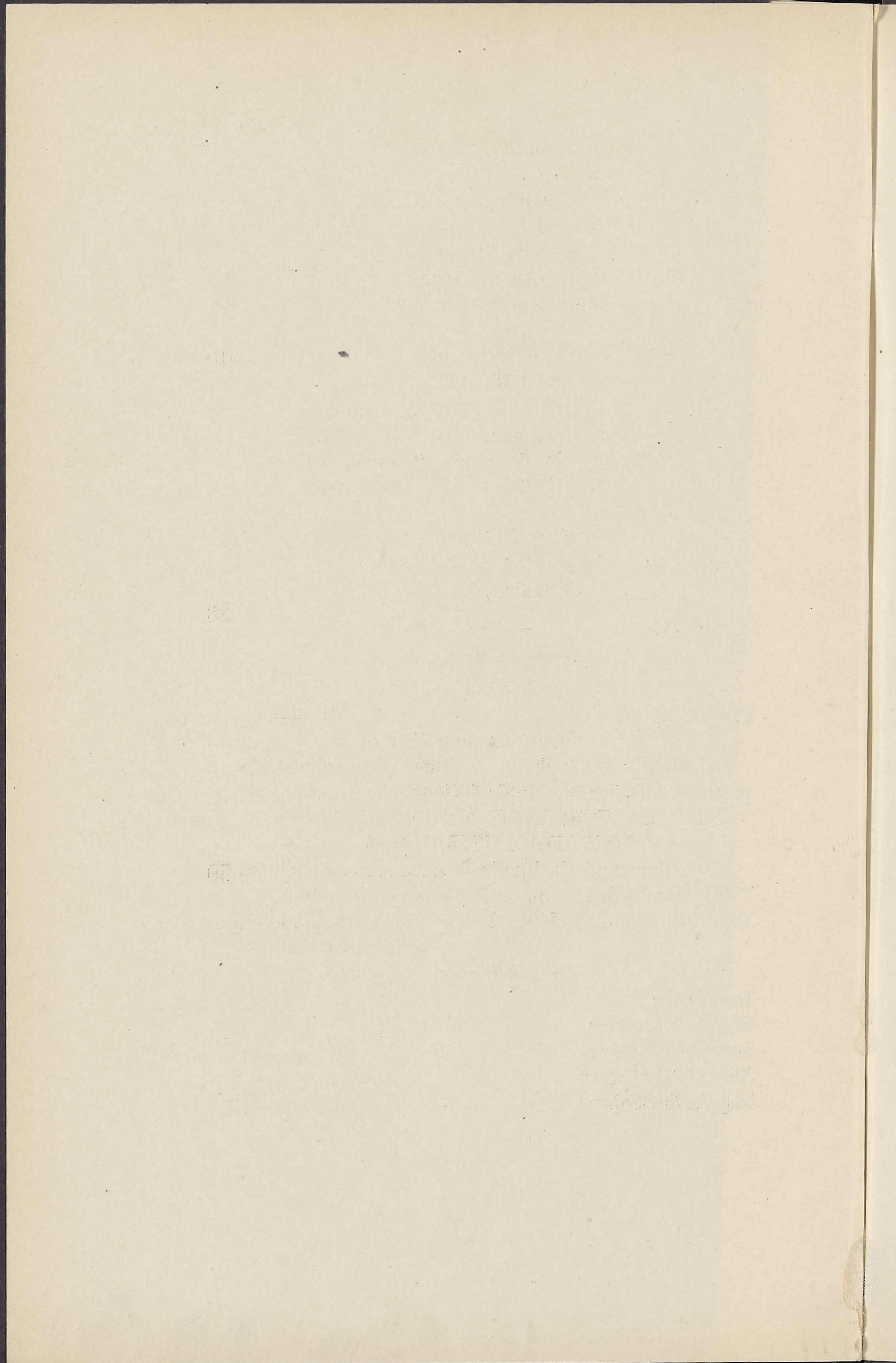


EXHIBIT D6.

1/2/32

THE HADDONFIELD NATIONAL BANK
Organized 1889
John A. Riggins, Esq. Solicitor
WALTER P. KEAN, Chairman of Board
PAUL A. KIND, President
J. C. REMINGTON, Jr. Vice President
MORRIS B. CLARK, Vice Pres. & Cashier
D. IRVING TAYLOR, Asst. Cashier & Trust Officer
ROBERT WRIGHT, Assistant Cashier
HADDONFIELD, N. J.
January 2nd
1931

10

20

Mr. Alexander Cooper,
Warwick Road
Haddonfield, New Jersey
Dear Sir:

Confirming our conversation of this date we have received a letter from C. Richard Allen representing Messrs. Harry M. and Lowell B. Hipple, which letter recites that Mr. Hipple, Sr. has exhausted all of his resources and that he cannot longer retain his holdings in the Hipple Building.

30

The Board of Director considered this letter and directed me to inform you of its contents and the facts surrounding the present financial condition of the Hipple Building and the notes here, and also

to notify you that we would be forced to look to you for payment of the loan secured by the Mortgage we hold of yours and the Bond and Warrant accompanying same in the amount of $11,100.00.

We would appreciate hearing from you as soon as you formulate plans for taking care of this
10 matter.

Cordially yours
(Signed) D. Irving Taylor
Trust Officer

DIT:HAD

EXHIBIT D7.

20 1/2/32

5th & Market Sts.,
Camden, New Jersey
January 5th, 1931.

Haddonfield National Bank
Haddonfield, New Jersey.
Attn: Mr. D. Irving Taylor.

Dear Sir:

Replying to yours of January 2nd, 1931, the mort-
30 gage you hold of $11,100. mentioned in your letter was given as collateral for a loan represented by a note which note was paid by the bank, surrendering it and taking in place of it a note of the Hipples.

I shall contend that I am released from all liability on the bond.

Very truly yours,

EXHIBIT D8.

1/2/32

THE HADDONFIELD NATIONAL BANK 10
Organized 1889
JOHN A. RIGGINS, Esq., Solicitor
WALTER P. KEAN, Chairman of Board
PAUL A. KIND, President
J. C. REMINGTON, Jr. Vice President
MORRIS B. CLARK, Vice Pres. & Cashier
D. IRVING TAYLOR, Asst. Cashier & Trust Officer
ROBERT WRIGHT, Assistant Cashier
HADDONFIELD, N. J. 20

January 9, 1931

Mr. Alexander Cooper
c/o Smith-Austermuhl & Co.
5th and Market Streets
Camden, N. J.

Dear Sir:

Your letter of January 5 was received and presented at our regular Board of Directors meeting and has been turned over to the bank's solicitor, John A. Riggins. 30

Cordially yours,
(Signed) D. Irving Taylor
Assistant Cashier

DIT:LEC

NEW JERSEY COURT OF ERRORS AND APPEALS.

May Term, 1932. No. 288.

HADDONFIELD NATIONAL BANK,
Plaintiff-Respondent,
v.
LOWELL B. HIPPLE and ALEXANDER COOPER,
Defendants-Appellant.

APPEAL OF ALEXANDER COOPER FROM JUDGMENT OF SUPREME COURT.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from a judgment of the New Jersey Supreme Court (Hon. Frank T. Lloyd sitting for the Court) discharging a rule to show cause why a judgment on bond and warrant of attorney against

the appellant, Cooper, should not be opened, set aside and for nothing holden and also an appeal from the new judgment entered.

The affidavit upon which the judgment was entered untruly stated part of the jurisdictional facts and failed entirely to state others. The question involved is whether the Supreme Court should (as it did) have merely reduced the amount of the judgment or should have opened the judgment and set it aside.

Lowell B. Hipple and Alexander Cooper, as partners, erected an apartment house 144 Kings Highway East, Haddonfield, New Jersey. In July, 1926, there were two mortgages on the property, the first held by the Phoenix Mutual Life Insurance Company, the second by Mary B. Cotton. Hipple and Cooper were indebted to the Haddonfield National Bank to the amount of $11,100 on an unsecured note made and endorsed by them. In July, 1926, the bank informed them they must pay the amount of the note or give the bank suitable collateral. The bank agreed to accept as such collateral, and Hipple and Cooper gave the bank, a third mortgage of $11,100 securing a bond, as such collateral. The note of $11,100 was renewed with Hipple and Cooper as makers and endorsers. This note was renewed from time to time and reduced so that on March 28, 1927, it was $10,600.

On January 10, 1927, Alexander Cooper desiring to be released from his liability on the note and the bonds accompanying the mortgages, agreed to pay Hipple $6,000, and convey to him, his (Cooper's) interest in the apartment house and Hipple agreed

to pay all the debts and within 60 days to have Cooper released from all liability on the bonds accompanying the three mortgages and the note secured by the third collateral mortgage, Exhibit D3, page 84. Cooper was formally released from the bond accompanying the second mortgage, Exhibit D4, page 87. The Haddonfield National Bank accepted Harry M. Hipple, father of Lowell B. Hipple, in the place of Alexander Cooper on the renewal of the $10,600 note, to which the note of $11,100 had been reduced, and surrendered the $10,600 note to Cooper, Exhibit D6, page 89. Cooper paid the $6,000 and conveyed his interest in the apartment house to Lowell B. Hipple, who afterwards conveyed the property to Harry M. Hipple by Exhibit D1—3/4/32, page 80. The note of $10,600 was renewed from time to time and presumably reduced by payments made on account. It was consolidated with other notes of Lowell B. Hipple and Harry M. Hipple, increased by further loans to Harry M. Hipple, so that at the time of the entry of the judgment there was due the bank $16,000 on a note of that amount which included the amount remaining due on the note given by Lowell B. Hipple and Harry M. Hipple to the bank when the note of $10,600, Exhibit D5, was surrendered to Cooper.

The first mortgage was foreclosed. The sale did not realize enough to satisfy the decree. The bank entered a judgment against Hipple and Cooper on the collateral bond accompanying its mortgage by virtue of the warrant of attorney with the bond. The cashier of the bank made the affidavit on which the judgment was entered.

In the affidavit he stated the true consideration of the bond as follows:

> "That the true consideration of the said bond "is the loan by Haddonfield National Bank to "Lowell B. Hipple and Alexander Cooper of the "sum of $11,100 and the obligation of said Hip- "ple and Cooper to the obligee by reason of said "loan. Said bond was secured by a mortgage "in the said sum executed by the said Alexander "Cooper and Lowell B. Hipple and Elizabeth G., "his wife, dated the 27th day of July, 1926, the "date of the bond and recorded in the office of "the Register of Deeds of Camden County in "Book 287 of Mortgages, page 541, &c." (Case, page 4, top).

In stating in the affidavit the amount due he said:

> "There remains due to the Haddonfield Na- "tional Bank on its said bond, from the obligors "thereon, the full principal sum thereof to- "gether with interest thereon from the 26th day "of January, 1931, to wit, the sum of $11,100 "principal and interest to October 16, 1931, "amounting to $481 or a total sum of $11,581 "and the debt for which judgment is confessed "is justly due and owing to the said Haddon- "field National Bank" (Case, page 5, line 15).

Depositions were taken and on the hearing of the rule to show cause Justice Lloyd entered a rule, the essential part of which is:

> "and the Court being of opinion that the said "judgment was entered in excess of what it

"should have been entered as against Alexan-
"der Cooper to the extent of $500 in principal
"and $24.13 in interest or a total of $524.13.

"It is therefore on this 7th day of March,
"1932, on motion of Riggins & Davis, attorneys
"for plaintiff, ordered that the said judgment
"as against Alexander Cooper be reduced from
"$11,581.00 to the sum of $11,056.87 damages
"and in all other respects the said judgment be
"confirmed. It is further ordered that the said
"rule to show cause allowed on the said 25th
"day of November, 1931, and the stay there-
"under granted be discharged" (Case, page 72).

BRIEF OF THE ARGUMENT.

1. For a judgment upon bond and warrant of attorney the legislature has made it jurisdictional that the affidavit should state not only the true consideration of the bond but also should state that the debt is justly *and honestly* due and owing.

2. It was error to discharge the rule to show cause and confirm the judgment, because the affidavit did not state the true consideration of the bond as required by the statute authorizing the entry of the judgment.

3. It was error to discharge the rule to show cause and confirm the judgment because the affidavit falsely stated an amount as justly due and owing to

the plaintiff and failed to state the real amount justly *and honestly* due and owing as required by the statute authorizing the entry of the judgment.

4. The plaintiff failed to prove any amount justly *and honestly* due and owing to it.

5. The defendant, Alexander Cooper, being a surety and the plaintiff having taken new securities surrendered old debtors, taken new debtors and increased the amount of the original indebtedness for which the bond stood as collateral, the debt so far as Alexander Cooper was concerned was paid.

6. Court below should at least have opened the judgment and allowed the defendant, Alexander Cooper, to plead, or should have awarded an issue to determine what, if anything, was due.

7. The statute authorizing the entry of a judgment on bond and warrant of attorney being in derogation of the common law and the affidavit on which this judgment was entered being not strictly in compliance with the statute, the judgment is without support and the Supreme Court erred in refusing to vacate the judgment.

ARGUMENT.

1.

FOR A JUDGMENT UPON BOND AND WARRANT OF ATTORNEY THE LEGISLATURE HAS MADE IT JURISDICTIONAL THAT THE AFFIDAVIT SHOULD STATE NOT ONLY THE TRUE CONSIDERATION OF THE BOND BUT ALSO SHOULD STATE THAT THE DEBT IS JUSTLY AND HONESTLY DUE AND OWING.

The Supreme Court in *Modern Security Co. v. Fleming,* 142 Atl. Rep. 649, 6 N. J. Misc. Reps. 730, not elsewhere reported, in a *per curiam* opinion stated:

> "Judgments such as this by bond and war-
> "rant of attorney, without institution of suit,
> "derive all their efficacy from positive or statu-
> "tory law; and, if such statutes are in deroga-
> "tion of the common law, a strict compliance
> "therewith is necessary to support a judgment
> "entered under them."

The affidavit did not comply with the statute which is Section 11 of an act directing the mode of entering judgments on bonds and warrants of attorney to confess judgments. Compiled Statutes, page 221. The section is as follows:

"11. AFFIDAVIT REQUIRED.—That no

judgment shall be entered in any court of record of this state, on a warrant of attorney to confess such judgment, or by the defendant appearing in person in open court and confessing the same, unless the plaintiff or his attorney shall produce, at the time of confessing such judgment, to the court, judge, justice, or commissioner before whom the judgment shall be confessed, an affidavit of the plaintiff, his attorney or agent, of the true consideration of the bill, bond, deed, note, or other instrument of writing or demand for which the said judgment shall be confessed; which affidavit shall further set forth that the debt or demand for which the judgment is confessed is justly and honestly due and owing, to the person or persons to whom the judgment is confessed, and that the said judgment is not confessed to answer any fraudulent intent or purpose or to protect the property of the defendant from his other creditors (Rev. 1877, p. 83)."

This section was originally Section 1 of an act to prevent the fraudulent confession of judgments passed January 29, 1817, P. L. 1817, p. 16.

In that Act there was required an affidavit of the true cause of action and that the debt is bona fide and justly due and owing to the person or persons to whom the judgment is to be confessed and that the judgment is not confessed to answer, &c.

The Act entitled, "An Act directing the mode of entering judgments upon bonds with warrants of attorney to confess judgments" passed February

24, 1820, incorporated in the Revision of 1821, Revision of 1821, page 685, has as Section 5 (page 687) the same section very much revised requiring an affidavit "stating therein the true consideration of the said bond or obligation and that the debt for which judgment is confessed is justly due and owing to the person or persons," &c.

This remained until 1829 when a supplement to the Act was passed February 19, 1829, P. L. 1829, page 92, repealing Section 5 of the Act and substituting Section 1 of the supplement requiring an affidavit "of the true consideration of the bill, bond, "deed, note or other instrument of writing or de-"mand for which the said judgment shall be con-"fessed; which affidavit shall further set forth that "the debt or demand for which the judgment is con-"fessed is justly *and honestly* due and owing to the "person or persons to whom the judgment is con-"fessed."

The section as passed in 1829 requiring the affidavit to further set forth that "the debt or demand for which the judgment is confessed is *justly and honestly* due and owing to the person or persons to whom the judgment is confessed" remains the same to this date with the exception that by the Act of March 1, 1849, P. L. 1849, p. 264, Supreme Court Commissioners were authorized to sign and order entered judgments by confession upon special warrants of attorney in any court wherein such judgments might then be entered. In subsequent revisions the words "or commissioner" were inserted in the section after the word "Justice."

The affidavit did not state the true consideration of the bond.

It states it as "the loan by Haddonfield National "Bank to Lowell B. Hipple and Alexander Cooper "of the sum of $11,100 and the obligation of said "Hipple and Cooper to the obligee by reason of the "said loan" (Case, top of page 4). A very careful attempt to avoid stating the exact circumstances under which the bond was given.

The consideration was the renewal of a note of $11,100 and the bond and its accompanying mortgage were given as a collateral security for the payment of that note (Case, page 37, lines 1 to 20; page 52, line 20 to end of page).

This is not disputed by plaintiff.

Ogden, J., in his dissenting opinion in *Clapp v. Ely,* 27 Law 555, at page 604, says, the Act requires a "statement of the manner in which the debtor "owes the debt" "the cause of the indebtedness or "the price of the debt, a statement of the manner "in which it occurred according to the facts made "in terms sufficiently precise to disclose the real "nature of the transaction."

The affidavit did not further set forth that the debt or demand is justly and honestly due and owing as required by the statute.

It states page 5, line 21, "and the debt for which judgment is confessed is justly due and owing to the said Haddonfield National Bank" omitting the words "and honestly" required by the present statute which the Legislature in 1829 substituted for "justly due and owing" in the Act of 1817 and the Act of 1820.

The affidavit falsely stated the amount due as $11,581.

It appeared by the testimony that when the defendant, Alexander Cooper, was released from the note it had been reduced to $10,600 by payments made as the note was renewed. It also appeared that the note substituted for the $10,600 note was renewed and, inferentially, reduced. Wright, the assistant cashier, testified, page 18, line 3, that Cooper asked about the Hipple note several times, after he was taken off of it, whether interest and *payments* were being made regularly.

The application to open and set aside this judgment is by one of the defendants, not other judgment creditors.

In *Evans v. Adams,* 1836, 15 N. J. Law 373, Hornblower, C. J., speaking of such a judgment says, "on "the other hand if honest though irregular it is "binding against everybody but the defendant."

In *Reading v. Reading,* 1854—24 N. J. Law 358, Hunterdon Common Pleas set aside judgment on application of defendant. Plaintiff had writ of error. Defendant executed deed admitting judgment below correct and order setting it aside illegal and requested the order be reversed. Potts, J., at page 365: "But here the judgment in the pleas was "reversed not upon the application of a creditor but "upon that of the defendant himself *and this makes "it a very different case."* "The reversal below "was right and how can we say it was wrong." As the result of the opinions of Hornblower, C. J., in *Evans v. Adams* and *Hoyt v. Hoyt,* 1837—16 N. J. Law 138, in *Ely v. Parkhurst,* 1855—25 N. J. Law

188, a contest between execution creditors for moneys in court, the Supreme Court, on application of subsequent judgment creditors, granted a rule to show cause why the money raised should not be appropriated to their executions and the execution of plaintiff declared null and void and on the hearing discharged the rule. A writ of error was taken to the Court of Errors and Appeals, *Clapp v. Ely,* 1858—27 N. J. Law 555. There was a division in the court. The opinion of C. J. Green concurred in by three judges was that if the affidavit on which a confessed judgment was signed be not, in any respect, in substantial compliance with the requirements of the statute the judgment is *ipso facto* fraudulent and wholly inoperative against creditors the opinion of Justice Potts that where the judgment was confessed for more than was actually due and owing and there was no actual fraud on the part of the plaintiff the Court would hold the judgment good for what was due and owing and set it aside for the excess. The opinion of Justice Ogden concurred in by the Chancellor and four judges was that a judgment good at common law cannot be attacked for a mere irregularity in the proceedings by any one not a party to the record, as there were six for reversal and five for affirmance the judgment was reversed except as to the sum of $3,052.94.

This was followed by Justice Depue in *Warwick v. Petty,* 1882—44 Law page 542, another contest by execution creditors over money in court, explaining the vote.

Clapp v. Ely decided that a judgment by confession for a gross sum made up of a debt, part then

actually due and part contingent to become due in the future would be set aside as to the latter at the instance of subsequent judgment creditors and be allowed to stand for so much as was actually due and owing when it was entered *if the affidavit to that extent truly stated the consideration* provided it appears that the judgment was taken for the larger sum without any fraudulent intent.

In *Gaskill v. Boardman*, 1890—95 Law page 14, opinion of Justice Garrison, affirmed on the opinion below in this court, *Strong v. Gaskill,* 53 Law 665, application by junior creditors Justice Garrison, at page 17 says: "If the affidavit had omitted to state "the consideration or had stated it falsely the re-"sulting judgment would be a nullity and would be "so declared at the instance of other creditors" and further defining "true": "The word true in this "connection means that which is frank and actual "rather than that which is precise and technical."

In *Smith v. Weaver,* 1907—75 Law, page 31, opinion of Justice Garrison affirmed in this court on the opinion below 76 Law, 554, repeats what he had said in *Gaskill v. Boardman.*

Modern Security Co. v. Fleming, 1928—142 Atlantic Reporter 649, 6 N. J. Misc. Reports, 730, not otherwise reported, arose on defendant's rule to show cause.

A judgment by confession may be reviewed at the instance of a party to the judgment record, where the legality of the right to enter judgment is involved. *Knight v. Cape May Sand Co.,* 1912—Court of Errors, 83 Law, 597, page 600.

2.

IT WAS ERROR TO DISCHARGE THE RULE TO SHOW CAUSE AND CONFIRM THE JUDGMENT BECAUSE THE AFFIDAVIT DID NOT STATE THE TRUE CONSIDERATION OF THE BOND AS REQUIRED BY THE STATUTE AUTHORIZING THE ENTRY OF THE JUDGMENT.

The affidavit produced to the Commissioner to meet the requirements of the statute was made by Morris B. Clark, vice-president and cashier of the plaintiff. In his affidavit he stated the true consideration of the bond "is the loan by Haddonfield "National Bank to Lowell B. Hipple and Alexander "Cooper of the sum of $11,100, and the obligation "of said Hipple and Cooper to the obligee by rea- "son of the said loan." Morris B. Clark knew that the purpose of the bond and mortgage was to furnish collateral security for a loan previously made then amounting to $11,100, which was coming due and was represented by a note which was to be renewed if Hipple and Cooper gave the bond and mortgage as collateral. He, Clark, notified the defendant, Hipple, who notified Cooper to come to the bank for a conference, page 35, line 20. He introduced Hipple and Cooper to the directors who conducted the conference which resulted in the board of directors agreeing to accept the bond and mortgage as collateral, page 36. Hipple says, page 51, line 4,

"Mr. Clark introduced us and told us we were

> there for the purpose of discussing *the loan they had* against the property at 144 Kings Highway."

The money had been advanced to Hipple and Cooper on their notes for the purpose of building the apartment house. Hipple and Cooper were examined about the condition of the building, as to what was against the building in the way of mortgages, page 51, line 10. Mr. Clark told Hipple and Cooper, they "were there for the pur-"pose of straightening out the finances as far as the "National Bank was concerned on the property 144 "Kings Highway" page 52, line 14—"we were asked "to either pay the amounts of the notes off or to give "them suitable collateral" page 52, line 24. Hipple and Cooper gave the bank a third collateral mortgage for $11,100 and the note was renewed.

Morris B. Clark has no excuse for not frankly and fully stating the transaction which led to the giving of the bond, it was all within his knowledge.

3.

IT WAS ERROR TO DISCHARGE THE RULE TO SHOW CAUSE AND CONFIRM THE JUDGMENT, BECAUSE THE AFFIDAVIT FALSELY STATED AN AMOUNT AS JUSTLY DUE AND OWING TO THE PLAINTIFF AND FAILED TO STATE THE REAL AMOUNT OR INDEED THAT ANY DEBT WAS JUSTLY AND HONESTLY DUE AND OWING AS REQUIRED BY THE STATUTE AUTHORIZING THE ENTRY OF THE JUDGMENT.

The affidavit, case, page 5, line 18, states the amount due as the entire principal of $11,100 and interest to October 16, 1931, a total of $11,581 and that the debt is justly due and owing to the plaintiff.

The cashier of the bank who made the affidavit knew that the bond was collateral security for a note that was being renewed from time to time and reduced. It was certain that only $10,600 was due at the time the defendant Cooper was released from the note and a new note made by the Hipples, father and son, in renewal, and presumably, as that note came due and was renewed, it was further reduced. It was renewed from time to time, Lowell B. Hipple, page 66, line 19. Wright, the assistant cashier, says, page 18, line 3, that Cooper ''asked ''me about the Hipple note several times after he

"was taken off of it, whether interest and payments "were being made regularly."

The fact that the cashier in his affidavit swears that the whole principal with interest from July 26, 1931, was due and that at that time the note for which the bond stood as collateral was $16,000 indicates that the last renewal expired January 26, 1931.

The affidavit failed to state the real transaction and failed to reveal how much was actually due on the note for which the bond stood as a collateral security, carelessly stated the whole principal as due.

4.

THE PLAINTIFF FAILED TO PROVE ANY AMOUNT JUSTLY AND HONESTLY DUE AND OWING TO IT.

The plaintiff did not prove any amount justly and honestly due and owing to it, but claimed the whole principal as justly due. The defendant Cooper showed that the note surrendered to him was for only $10,600 and that there were afterwards many renewals between the Hipples and the plaintiff, each of which presumably reduced the amount due on the note. The burden was on the plaintiff to show the amount due.

Justice Depue in *Warwick v. Petty,* 44 Law, at page 500, said, "A judgment laid upon the property "of a debtor for more than is due, is in clear viola-

"tion of the policy of the law" and again "such a "judgment is *prima facie* wholly fraudulent and the "burden of rebutting and overcoming the inference "of fraud lies upon the party who seeks to uphold "the transaction."

5.

THE DEFENDANT, ALEXANDER COOPER, BEING A SURETY AND THE PLAINTIFF HAVING TAKEN NEW SECURITIES, SURRENDERED OLD DEBTORS, TAKEN NEW DEBTORS AND INCREASED THE AMOUNT OF THE ORIGINAL INDEBTEDNESS FOR WHICH THE BOND STOOD AS COLLATERAL, THE DEBT, SO FAR AS ALEXANDER COOPER WAS CONCERNED, WAS PAID.

Under the agreement, Exhibit D3, case, page 84, the defendant Lowell B. Hipple agreed to pay all the debts and have the defendant Alexander Cooper released from all liability therefor, to have Cooper released from the liability on the bond held by the bank and the note secured by it either by actual release or cancellation.

Lowell B. Hipple made arrangements either with Mr. Clark, the cashier, who made the affidavit on which the judgment was entered, or Mr. Wright, the assistant cashier, whereby Harry M. Hipple, his father, was to take the signature place of Alexander Cooper in the endorsement and making of the note,

page 54, line 20. Word was brought to Lowell B. Hipple from the board of the bank that Harry M. Hipple was acceptable on the note in place of Mr. Cooper, top of page 56.

The note D5 was surrendered by the bank to Mr. Cooper and the renewal note with the endorsements and signatures of Harry M. Hipple and Lowell B. Hipple, delivered to the bank at the window of the note teller's cage in the bank without conversation, Lowell B. Hipple, page 58, Alexander Cooper, pages 41 and 42. This was authorized by the assistant cashier Wright, page 29, line 10.

On cross-examination Mr. Cooper said he did not remember any conversation with Mr. Wright with respect to his name being taken off the note, pages 68 and 69.

Mr. Wright testified he had two conversations with Mr. Cooper on the subject, the first about two weeks before Cooper's name was taken off the note, page 14, in which he asked to be relieved of his obligation on the Hipple and Cooper matter, line 9 and afterwards, bottom page 15, "I told Mr. Cooper "that the board decided if he wanted to be relieved "of signing the obligation that we would agree to "relieve him providing he remained liable on the "bond, that we considered him, and him alone as the "only strength on the obligation of Hipple and "Cooper and his bond was the strength."

Lowell B. Hipple testified that he made all the arrangements whereby his father was taken on the renewal note instead of Mr. Cooper with Mr. Wright or Mr. Clark, page 60, bottom, that the arrangement was "that a new note or replacement note of

"the note which was endorsed by Hipple and "Cooper, Lowell B. Hipple and Alexander Cooper, "that Harry Hipple would agree to take the obli-"gation on that note and the bank in a future con-"versation accepted that proposition," page 61, line 20.

As Hipple was to secure the release from the bank, he testified that he made all the arrangements, Cooper does not remember the conversation with Wright. It is probable that Wright's conversations were with Hipple. Wright could not remember exact conversation nor the dates. Wright testified, page 14, line 24, that Cooper "referring to the Hip-"ple and Cooper obligation he said that the Hipples "were making some arrangements to take this build-"ing over." The plaintiff must have known what the arrangements were and the agreement between Hipple and Cooper or it would not have released Cooper and accepted Harry M. Hipple in his place.

After the surrender of D5 to the defendant Alexander Cooper, Harry M. Hipple received notices of the falling due of renewal notes, page 57, line 10.

Afterwards, on March 13, 1929, Lowell B. Hipple and wife conveyed the apartment house to Harry M. Hipple, Deed Exhibit D1 3/4/32, page 80. This was done at the suggestion of the cashier of the bank, page 62, line 20. At the same time, March 13, 1929, two mortgages, one for $4500, the other for $5500 were given to the bank by Harry M. Hipple on property 205 Redman Avenue as additional security on the renewal note, two years after Mr. Cooper was off the note, page 62, line 20 to bottom. After this, money was borrowed from the bank to

make renovations to the building, page 64, line 20. The note signed by Harry M. Hipple which was a renewal of D5 was renewed from time to time and the money borrowed for the building is now represented in a note endorsed by Harry M. Hipple a continuation of these notes which run back to the time when Mr. Cooper was let off of the note, page 66, line 20, and "the obligation of Harry M. Hipple and Lowell B. Hipple to the bank was greater than it was when Mr. Cooper was taken off the note," "because the consolidation of notes not having to do with the building which were personal to myself" (Lowell B. Hipple) "and Harry M. Hipple personally were consolidated into one note" which included the obligation which was represented by a note on which Alexander Cooper was at one time and these other obligations of Harry M. Hipple and Lowell B. Hipple to the bank consolidated into one note which the two mortgages were given to secure, top of page 67. The assistant cashier says, page 29, line 24, that the loan to the Hipples was increased until it became $16,000.

Under the agreement with Lowell B. Hipple, Hipple became the principal debtor, he assumed the debt and Alexander Cooper became a surety.

At the execution of the bond Alexander Cooper was a surety and the subsequent arrangement with the bank to release Cooper from the note, taking a view of the testimony most favorable to the bank, Cooper was still a surety, not a principal.

> "The surety has a vested interest in the con-
> "tract between the primary debtor and the
> "creditor to the performance of which he has

"bound himself, and that contract cannot be "altered without his consent so as to affect his "equitable or legal position, and if such modifi- "cation be effected, the consequence is the ex- "oneration of the surety from all liability. This "principle is elementary and indisputable."

Beasley, C. J., in *Fireman's Ins. Co. v. Wilkinson*, Ct. of Errors, 35 Equity, 110, at page 175.

In *Turner, Trustee, v. Ridge Heights Land Co.*, 92 Equity, page 64, affirmed, 92 Equity 706, opinion of Stevenson, V. C.:

A bond and mortgage were given by Land Co. to secure the payment of a note of $4,400 made by the Land Co. and Ely Co. Land Company accommodation maker. Afterwards a partial renewal of the note came due. Mr. Ely tendered his note for $3,000 to the order of and endorsed to Addison Co. The bank accepted this note in payment of the Land Co. renewal note of $3,000, Mr. Ely stepping into the place of Land Company as accommodation maker.

The bank by its trustee foreclosed. Land Company's defense was payment. Bank's reply no intention to release Land Company.

It was held that the complainant must be adjudged to have knowingly accepted the Ely note in the place of the Land Company note and as a result the mortgage which stood as security for the note was extinguished.

The Land Company had a decree sustaining its defense of payment and giving it the affirmative re-

lief prayed for in its counter-claim, the surrender of the bond and mortgage for cancellation.

Wilbur v. Jones, 80 Equity, 520, Court of Errors;
Hudspeth v. Denton, 82 Equity, 281, pages 301 and 302, affirmed 83 Equity 363;
Boulder v. Joliet National Bank, Illinois, 129 North Eastern Reporter, 513;
Stebbins v. North Adams Trust Co., Mass., 136 North Eastern Reporter, 880;
Elisberg v. Simpson & al. 1918, New York Sup. Ct. 173 N. Y. Supplement, 128.

At page 130:

"Further the transaction of June 28th was not a renewal of the note made on January 22nd as the note of June 28th was for a different and a greater sum and was in legal effect a new loan made up of moneys used to pay the old loan and the payment with the sum added."

6.

THE COURT BELOW SHOULD AT LEAST HAVE OPENED THE JUDGMENT AND ALLOWED THE DEFENDANT ALEXANDER COOPER TO PLEAD, OR SHOULD HAVE AWARDED AN ISSUE TO DETERMINE WHAT, IF ANYTHING, WAS DUE.

In 1824 in *Alderman ads. Diament,* 7 N. J. Law, 197, at page 198, Kirkpatrick, C. J., said:

> "I think that these judgments, entered upon bonds and warrants of attorney, should, upon proper application be very readily and widely opened, for the method in which they are entered is the loosest way of binding a man's property that ever was devised in any civilized country."

He ordered the judgment opened and the defendant allowed to plead and make a defense on the merits, but not to plead *non est factum.*

In a foot note it is stated, the usual and proper way is to let the judgment stand and award a feigned issue to try the facts.

In *Fries v. Woodworth & Chew,* 1865, 31 Law, 273, while the court discharged the rule to show cause to open the judgment it said:

> "if the defendant choose to take a rule to correct the execution he can do so, with costs; but if he prefer to take a rule to open the judgment and to have leave to plead he can do so; the costs to remain for future adjudication."

The testimony clearly showed that only the amount of the note surrendered, $10,600, was due at the time of the surrender and that the amount due had been changed by renewals, consolidations and new loans and that the affidavit, in stating the amount due, was not true. The defendant Cooper is therefore entitled to have the judgment vacated. The smallest relief ever given in such cases is that he be allowed to plead, or be awarded a feigned issue to determine what, if anything, was due.

7.

THE STATUTE AUTHORIZING THE ENTRY OF A JUDGMENT ON BOND AND WARRANT OF ATTORNEY BEING IN DEROGATION OF THE COMMON LAW AND THE AFFIDAVIT ON WHICH THIS JUDGMENT WAS ENTERED NOT BEING STRICTLY IN COMPLIANCE WITH THE STATUTE, THE JUDGMENT IS WITHOUT SUPPORT AND THE SUPREME COURT ERRED IN REFUSING TO VACATE THE JUDGMENT.

The statute in addition to requiring an affidavit of the true consideration of the bond requires that the affidavit "shall further set forth that the debt or demand for which the judgment is confessed is justly and honestly due and owing."

The affidavit, Case, page 5, line 22, states: "and the debt for which judgment is confessed is justly due and owing to."

The word "honestly" required by the statute was omitted.

This was not a substantial compliance with the Act. It complies with the Act of 120, but the legislature by the Act of 1829 added the word "honestly" as one of the requirements of the affidavit evidently for a purpose and it has been re-

tained by the legislature in every revision of the Act made since 1829.

Cotton, L. J., *in Miles v. New Zealand Alford Estate Company,* Chancery Division, Law Reports 1886, 32 Chancery p. 266, at page 283, says:

> "Now by 'honest claim' I think is meant this, "that a claim is honest, if the claimant does not "know that his claim is unsubstantial or if he "does not know facts to his knowledge unknown "to the other party which show that his claim "is a bad one."

Garrison, J., *in State v. Snover,* 63 Law, page 382, states: "The word 'honestly' from the Latin '*hones-*"*tus,*' is essentially a word that takes its meaning "from its context." Incidentally he says: "In monied transactions it means financial integrity."

In this context, it is only fair to say that "justly" means such a debt as hard cold logic requires—the right to a pound of flesh, if you please. "Honestly," however, in such a context, can hardly mean less than that which a sensitive, enlightened conscience demands and what fair dealing requires.

The legislature added honestly to justly in requiring what the affidavit should state. The plaintiff did not see fit to add it in the affidavit, the judgment is therefore void.

CONCLUSION.

Here the defendant is deprived of his day in court—previous notice and an opportunity to be

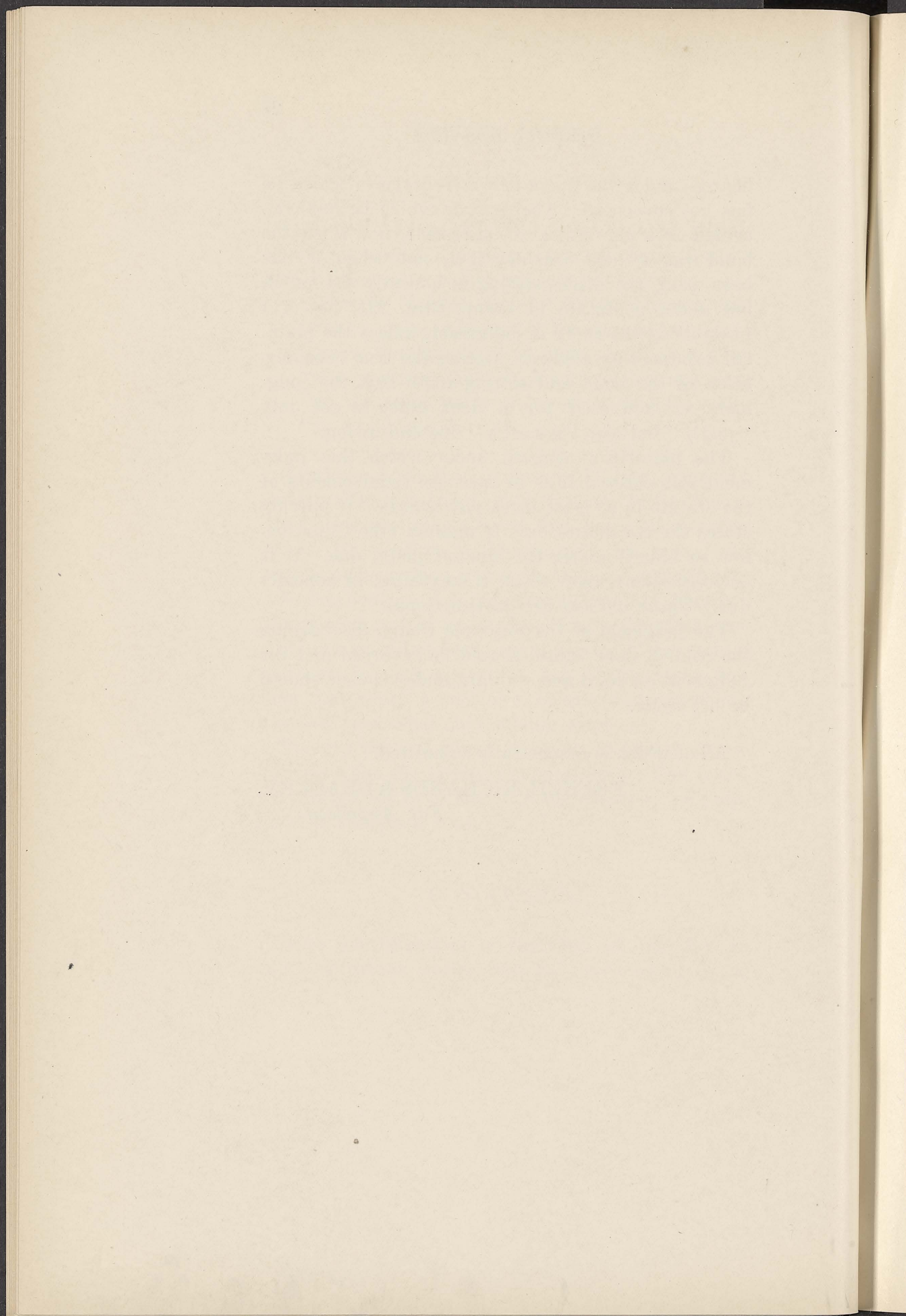
heard—under the guise of proceedings to which he has not consented. The most to which he has consented is a confession of judgment, not when the bond was without consideration, not when it has been paid, not when nothing is honestly due on it, but under a statute (1 Comp. Stat. 221, Sec. 11) prohibiting the entry of judgment, unless the plaintiff produces an affidavit, stating the true consideration of the bond and setting forth that the judgment is confessed for a debt which is not only "justly" but also "honestly" due and owing.

The plaintiff's affidavit under which this judgment was entered fails to meet the requirements of the statute in at least three particulars. It untruly states the consideration. It untruly (the Court below so found) states the amount justly due. It is entirely silent upon what, if anything, is honestly due. These defects are jurisdictional.

The judgment of the Supreme Court, discharging the rule to show cause, should be reversed and the judgment on bond and warrant under review should be set aside.

All of which is respectfully submitted.

FRENCH, RICHARDS & BRADLEY,
For Appellant.



I. F. Huntzinger Co., *Appellate Printers*, Camden, N. J.

New Jersey Court of Errors and Appeals

May Term, 1932. No. 288.

HADDONFIELD NATIONAL BANK,
Plaintiff-Respondent,
v.
LOWELL B. HIPPLE and ALEXANDER COOPER,
Defendants-Appellant.

APPEAL OF ALEXANDER COOPER FROM JUDGMENT OF SUPREME COURT.

REPLY BRIEF FOR APPELLANT.

FRENCH, RICHARDS & BRADLEY,
Attorneys for Appellant.

Sat below:
FRANK T. LLOYD,
Justice Supreme Court.

Counsel for plaintiff-respondent frankly concede that the real consideration of the bond was not a then present loan, but was forbearance in collecting a past indebtedness then due and payable. They likewise concede that the affidavit, upon which judgment was entered, makes no mention of forbearance and no mention either of the original note or of the renewal note given to evidence the forbearance, but declares that the consideration of the bond was a loan when, in fact, the loan was merely the original consideration for the past due unmentioned note. The statute requires that the forbearance, the true consideration of the bond itself, shall be stated.

Counsel cite *Warwick v. Petty* and *Caldwell v. Fifield* for their contention that the Court below was right in setting the judgment aside only in part. They overlook the fact that the cases they cite were creditor cases and not an application by the defendant himself to set the judgment aside. The cases cited on page 11 of our brief show that the defendant himself is entitled, as a matter of course, to have such an irregular judgment entirely set aside.

The plaintiff itself converted Cooper into a surety by itself taking a new principal debtor with Cooper's name omitted from the evidence of the debt. Counsel insist that the fact that Cooper thereby became a surety was not mentioned in the Supreme Court. It is the constant practice in this court to notice and decide questions of jurisdiction and public policy without their having been raised in the court below. *Donohue v. Campbell,* 98 N. J. L. 755, 758. Even if this question were not jurisdictional, we submit it will be found that it was raised in and by

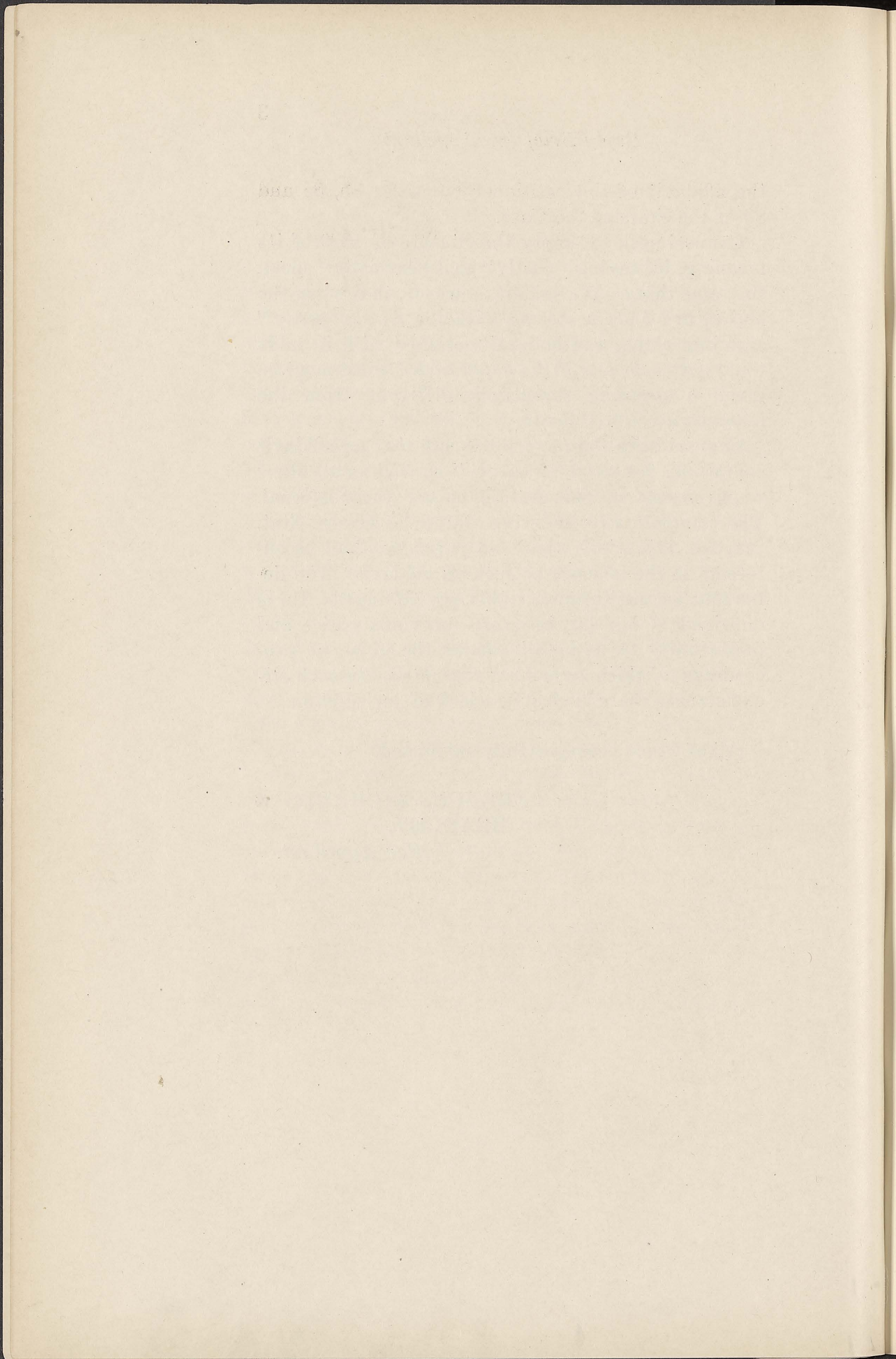
the affidavit of the petitioner on pages 8b, 8c and 8d of the State of the Case.

Counsel seek to empty the Statute of 1829 of its meaning, by saying "justly" and "honestly" mean the same thing. We submit, however, that when the legislature finds a statute with the word "justly" standing alone, and being dissatisfied with it, adds the word "honestly," the super-added word must be given a meaning essentially different from the meaning given to "justly."

Counsel have the temerity to say that an affidavit containing the word "honestly" as well as all other requirements of the statute is not jurisdictional. The complete answer is the statute (1 Comp. Stat. 221, sec. 11), which says "no judgment shall be entered" in the absence of such an affidavit. The defendant's constitutional rights are infringed. He is deprived of his day in court—previous notice and opportunity to be heard—under the guise of proceedings to which he has not consented. In such circumstances there is clearly a lack of jurisdiction.

All of which is respectfully submitted.

FRENCH, RICHARDS & BRADLEY,
For Appellant.



NEW JERSEY COURT OF ERRORS AND APPEALS.

May Term, 1932. No. 288.

HADDONFIELD NATIONAL BANK,
Plaintiff-Respondent,

v.

LOWELL B. HIPPLE and ALEXANDER COOPER,
Defendants-Appellant.

APPEAL OF ALEXANDER COOPER FROM JUDGMENT OF SUPREME COURT.

BRIEF FOR PLAINTIFF-RESPONDENT.

FACTS.

Lowell B. Hipple and defendant-appellant Alexander Cooper, borrowed money from the Haddonfield National Bank, plaintiff-respondent, and gave a note signed by them as makers. In July, 1926, the amount owing on the sum so borrowed from the

said bank was $11,100. The bank asked for security and on July 27, 1926, the defendant-appellant and Hipple executed and delivered to the bank their joint bond, with joint and several warrant (Case, p. 1) and secured the same by a third mortgage on real estate known as the Hipple-Cooper Building of which the said Hipple and Cooper were owners. The note, evidencing the same obligation, was renewed from time to time and in the early part of 1927, previous to the note, "Ex. D5" (Case, p. 89), which at that time was in the principal sum of $10,600, coming due, Hipple made some agreement with Cooper, of which the bank had no knowledge (Case, p. 61, line 30), to take over Cooper's interest in the real estate mortgaged as aforesaid. Hipple wanted to substitute his father, Harry M. Hipple, in place of Cooper. All the bank knew was that Hipple was taking over Cooper's interest. Richard Cooper, father of defendant-appellant, had been a director of the bank for years and the defendant-appellant, Cooper, was considered by the bank the "only strength on the obligation of Hipple and Cooper." The bank never considered the defendant, Hipple, worth anything (Case, p. 27, lines 12-20; p. 16, line 1; p. 26, line 22).

Cooper took up the matter with Robert Wright, assistant cashier of the bank, and Wright told Cooper he would take the matter up with the Board of Directors (Case, p. 14, line 8), which he did (Case, p. 14, lines 32-36; p. 23, line 25; p. 25, line 3). The Board of Directors of the bank took formal action and thereafter Wright told Cooper that the Board

decided he could be relieved from signing the note "provided he remained liable on the bond, that we considered him, and him alone, as the only strength on the obligation of Hipple and Cooper, and his bond was the strength" (Case, p. 15, line 33). Cooper called the Board of Directors " 'old fossils' or something to that effect" (Case, p. 16, line 10), and said: "If that is the way they feel about it, it will have to be that way." He agreed (Case, p. 28, line 12) and Harry Hipple took his place on the renewal note when "Ex. D5" came due. Subsequently, the Hipples borrowed additional money for renovations to the Hipple-Cooper Building and gave a first and a second mortgage executed by Harry Hipple on a property which he owned, as additional security for the increase in the obligation.

The first mortgage on the property securing the said bond of Hipple and Cooper was foreclosed and the property bought in by the first mortgagee for a sum less than its decree. The bank, on October 23, 1931, entered up its judgment against Hipple and Cooper upon authorization of the warrant of attorney, for the full amount of the bond, $11,100, with interest from January 26, 1931, the date to which the last interest was paid on the obligation which, at that time, because of the additional loans to the Hipples, amounted to $16,000.

Defendant-appellant obtained a rule to show cause why the judgment should not be opened. Testimony was taken under the rule on January 2, 1932, and March 4, 1932, printed in the case in inverse order (pp. 30 and 11 respectively). The case was argued

before Mr. Justice Lloyd, whose order affirming the judgment and reducing the judgment $500 in principal amount as to Cooper, is found on page 71.

ARGUMENT.

The defendant-appellant, in his petition for the rule, sets out his reasons, which are as follows:

1. "2. The affidavit on which judgment was entered does not set forth the true consideration of the said bond in accordance with the statute in such case made and provided."
2. "3. Petitioner was released by plaintiff from all liability on the bond on which judgment was entered."
3. "4. Any debt owing by petitioner secured by said bond has been paid."

These were the only points presented or argued before the Supreme Court, with the exception that it was argued that the affidavit is false because it states $11,100 as the principal sum owing by Cooper instead of $10,600 as it was claimed the proofs show.

Defendant-appellant, in his brief in this court raises, now, for the first time, three other points:

4. The affidavit left out the word "honestly" in stating the amount justly due.
5. Defendant-appellant was a surety or became a surety and was released in law by virtue of the circumstances.
6. Plaintiff-respondent failed to prove any

amount due as the principal amount of $10,600 was presumably reduced.

We respectfully submit that these last three points should not be considered in this court because they do not go to the jurisdiction of the subject-matter nor is a question of public policy involved.

Walter v. Keuthe, 98 L. 823;
State v. Schnell, 96 L. 299.

We shall, however, discuss these points later and proceed with the points raised in the Supreme Court first and not attempt to answer the defendant-appellant's brief in the order in which he discusses his points in his brief.

I.

THE AFFIDAVIT SETS FORTH THE TRUE CONSIDERATION.

The affidavit (Case, pp. 3, 4, 5) states the consideration as the "loan by Haddonfield National Bank to Lowell B. Hipple and Alexander Cooper of the sum of $11,100 and the obligation of said Hipple and Cooper to the obligee by reason of said loan." It is admitted that they owed the bank at the time the bond was executed, $11,100 for money borrowed. Appellant, however, says: "the consideration was the renewal of a note of $11,100 and the bond and its accompanying mortgage were given as collateral security for the payment of that note." That, per-

haps, is the colloquial and figurative way of saying it, but the statute asks for the true consideration— it goes to the root of the matter. As a matter of fact, there is no evidence that the mortgage was given for the renewal of the note. Appellant's witness, Hipple, testified that a director of the bank "asked us to either pay the amounts of the notes off or to give them suitable collateral." Hipple's attorney then asked: "And renew the notes?" and Hipple answered: "Yes" (Case, p. 52, lines 24-27). The note was renewed after the bond and mortgage were given, but this does not warrant the statement that the renewal was given for the bond and mortgage. But suppose it was. It is quite common to take a note and a bond and mortgage evidencing the same indebtedness.

Simons Bros. v. Schneider, 13 N. J. L. J. 131;
Crosby v. Washburn, 66 Law 494.

There are numerous cases which hold that an affidavit that the true consideration of a bond is a note of a specified amount, does not comply with the statute. Would an affidavit that the true consideration is the renewal of a note of $11,100, coupled with the further statement that the bond and mortgage were given as collateral security for such note, be good? We think not.

Appellant's quotation in his brief from Ogden, J., in *Clapp v. Ely,* 27 Law 555, at page 604, which immediately follows appellant's opinion of how the consideration should have been stated, shows that

the statement of appellant does not meet the statute. The Act requires, Mr. Justice Ogden says: "a statement of the manner in which the debtor owes the debt is obviously called for, that is, the 'cause of the indebtedness,' or 'the price of the debt,' a statement of the manner in which it occurred, according to the facts made in terms sufficiently precise to disclose the real nature of the transaction." A statement of the manner in which the debtor owes the debt is, we take it, as a borrower, for money loaned, not what evidence of the debt the creditor has. The "cause of the indebtedness," is the loan of the money, not the renewal of the note; the "price of the debt" is the money lent. The loan of the money shows how the indebtedness—the creditor and debtor relationship arose.

The Justice is following closely the opinion of Chief Justice Ewing in *Latham v. Lawrence,* 11 N. J. Law 322, at page 325, which case he cites, wherein the latter said:

> "A statement of the manner in which the debt arose is obviously called for not merely what evidence has been given of the debt, which is all a promissory note bespeaks; but what is the price of the debt, the cause of the indebtedness. Thus, if a loan of money, a sale of goods or lands, or difference of value in the exchange of horses, or whatever else it be, is the price of the debt, or the manner in which it occurred, the affidavit should set forth the one or the other according to the fact, and in doing so, general terms may be used, for the legislature

> have not required a specification, yet must be sufficiently precise to disclose the real nature of the transaction."

In *Scudder v. Coryell,* 10 N. J. Law 340, it was objected that the affidavit was in general terms, no sums or dates to the various items stated in it as having composed the demand in consideration of which the bond was given. Chief Justice Ewing said (at page 543):

> "The practice under the statute has been, I believe universally and I think correctly to state the consideration in general terms."

In *Gaskill & Son's v. Buckman,* 95 N. J. Law 14, affirmed 53 Law 665, the facts were that Gaskill & Sons had been selling lumber to Buckman for which notes had been taken and renewed. Buckman then gave Gaskill & Sons a bond and warrant for $4,000, conditioned for payment in one day. After that Gaskill & Sons continued to sell lumber to Buckman and to take and renew his notes therefor. A year after the bond was given, judgment was entered on the bond for $2,950, of which all but $169 was represented by notes not matured. On objection that the affidavit did not state the true consideration, Mr. Justice Garrison said:

> "In the present case the truth was that the consideration for the bond was lumber and the affidavit so states—the entire transaction is characterized by honesty of dealing and frankness of statement—the matters to which adverse

criticism is directed are of form and not of substance; under the circumstances, the requirements of the statute have been followed and the judgment will not be disturbed.''

The same Justice in *Simons Bros. v. Schneider,* 13 N. J. L. J. 131, upheld an affidavit which said: ''for the consideration and value of goods and merchandise sold and delivered by Simons Bros. to said Schneider at his request.'' In that case, part of the goods were sold to Schneider and part to a partnership of which Schneider later became a member. The partnership was dissolved and Schneider assumed the obligations of the firm to Simons Bros. Schneider then gave Simons Bros. his note for $5,000 and subsequently he gave them his bond and warrant on which judgment was afterwards entered. It was objected by creditors that the note was taken in payment of the original indebtedness and that Simons Bros. still held the note. The Court said there was no proof of the former and that the latter only concerned Schneider.

In *Hoyt v. Hoyt,* 16 Law 138, at page 145, Ryerson, J., queries whether ''money lent'' is a specification sufficiently broad to meet the requirements of the statute in that case where the affidavit was for an amount which included money lent and a note given by plaintiff to defendant who had negotiated the same in payment of merchandise. The Court in that case held, that the affidavit was good, although Mr. Justice Ryerson expresses his doubts

as to the amount which was represented by the note which had not been paid by the plaintiff.

Appellant, under the second point in his brief, says Morris B. Clark knew that the "purpose of the bond was to furnish collateral security for a loan previously made" and there was no excuse for not stating the "transaction which led to the giving of the bond." The statute is not concerned with the "purpose" nor the "transaction" which led to the giving of the bond except to show the "cause" or "price of the indebtedness," which is the "money lent." "Money lent" has been the accepted way of stating the true consideration in all the cases from the earliest down to date. How the indebtedness arose, how the debtor and creditor relationship was created, the "transaction" which shows that, is what the statute calls for and that "transaction" is the loan of the money.

II and III.

DEFENDANT-APPELLANT WAS NOT RELEASED, NEITHER WAS HIS DEBT PAID.

The second and third reasons set forth by Cooper in his application for the rule and argued before the Supreme Court, can be argued together. It was argued before the Supreme Court and his argument in this court is, that the bond and mortgage were given as security for the note. Cooper was let off

the note and therefore released and the taking of a new note with Harry Hipple thereon in place of Cooper, constituted a novation and the debt, as to Cooper, was paid.

These contentions ignore entirely the undisputed and unexplained facts that Cooper was let off the note only on his agreement to remain liable on the bond which evidenced the same indebtedness as the note.

At the first sitting for testimony under the rule held January 2, 1932, Cooper was asked on cross-examination (Case, p. 69, line 13, &c.) whether he recalled any conversation with Mr. Wright probably two weeks before his name was taken off the note "Ex. D5," with regard to his name being taken off the note. He said, "No." On further questioning, he said he did not remember. He said he did not remember Wright telling him that he would take up the matter with the Board of Directors nor did he remember Wright talking to him after the meeting of the Board of Directors and telling him that the Board had decided that he could be taken off the note with the understanding, however, that he should continue liable on the bond. He would not say that no such conversation took place, the most he would say was he did not remember them. There is a typographical error in the question, line 10, p. 70 in that the word "no" is left out.

The next sitting was on March 4, 1932. Cooper was present as is shown by a question of his attorney addressed to Mr. Wright on line 25, p. 27. Wright testified that Cooper came to him in the bank

and asked to be relieved of his obligation in the Hipple-Cooper matter and Wright told him he would take the matter up with the Board of Directors (Case, pp. 14, 15, 16), which he did. The Board took action and thereafter Cooper came to the bank to see Wright who told Cooper "that the Board decided if he wanted to be relieved of signing the obligation that we would agree to relieve him providing he remained liable on the bond, that we considered him, and him alone, as the only strength on the obligation of Hipple and Cooper and his bond was the strength." Cooper asked Wright if that was final and Wright told him it was. Cooper didn't like it and he called the directors " 'old fossils,' or something to that effect" and said: "If that is the way they feel about it, it will have to be that way." A week or so after that Cooper and Hipple came in and the note was fixed up. On cross-examination, p. 28, line 3, Wright was asked:

> "Q. You say he was perfectly satisfied with the arrangement that his name would be taken off the note, but he still was retained on the bond?
>
> A. That is what he agreed to.
>
> Q. And that was entirely satisfactory to him?
>
> A. I don't know that it was entirely satisfactory to him, but that is what he agreed to."

Cooper didn't deny any of Wright's statements. He sat there and heard it all and he had plenty of time to refresh his memory in the two months between the two sittings. He may not have remem-

bered the exact conversation with Wright, but he knew very well whether or not he had agreed to remain liable on the bond provided the bank would permit his name to be taken off the note and Harry Hipple's name substituted. It was a great accommodation to him. It saved him signing a note each month and relieved him from suit on his obligation until after the foreclosure of the mortgage. Of course, he could not deny it because he knew that it was the subject of formal action by the Board of Directors, of which his father had been a member for years and he also knew that his name was the only strength in the Hipple-Cooper transaction as the Board told him through Wright and as he very well knew without such telling.

The simplest way to deny this agreement was for Cooper to deny that he had made any such agreement. That he could not do and, therefore, he attempts to explain away his failure to deny the agreement by saying in his brief, p. 20, line 9, that "it is probable Wright's conversation was with Hipple." He says in his brief that Hipple testified he made all the arrangements. Hipple did not so testify. In answer to a question of Cooper's attorney, Hipple said: "Yes, I *believe* I made all the arrangements" (Case, p. 60, line 32), but the testimony following shows that he could not say with whom he conversed or what was said and he further testified that he never discussed the agreement of January 10, 1927, "Ex. D3," with any one (Case, p. 61, line 30). This is the agreement which was objected to (Case, p. 38, line 13) when offered on the ground that the bank

never had any notice of it or its contents and Cooper's attorney said that he thought he could "connect it up." Every question, thereafter, relating to the agreement, was objected to, yet appellant, in his statement of facts and throughout his brief, treats this agreement and its contents as facts proved. In our view, if it had been proved, it is immaterial, but there isn't the slightest evidence in the case that the bank ever knew anything about it. All it knew was that Hipple was taking over Cooper's interest in the building, but the terms were never mentioned to any one at the bank. Cooper is the only one who could make the arrangements. The bank had a third mortgage, subject to mortgages of $40,000 and $7,500, securing Cooper's bond. Wright says (Case, p. 27, line 16), "We never considered the Hipples worth anything." "When I say 'the Hipples,' I mean Lowell B." Harry Hipple owned a property on which he later gave the bank a first mortgage of $4,500 and a second mortgage of $5,000 (Case, p. 31, line 10). The third mortgage was never considered worth anything. Hipple says (Case, p. 37, line 3), that when the bank asked for security "all we could give them was a third mortgage." Wright told Cooper that the Board considered him and him alone as the only strength on the obligation of Hipple and Cooper. Hipple, under the circumstances, had as much to do with the arrangements, whereby Cooper was let off the note, as the evidence shows—which is nothing. Hipple's absence from the bank during the time of the negotiations to substitute his father in place of Alexander Cooper,

was good strategy. All that Hipple knows is that "word was brought back to him" (Case, p. 56, line 1). Word was brought back to him undoubtedly by Cooper and no doubt someone at the bank told him, but that was after Cooper had agreed to remain liable on the bond. Hipple's testimony deals with the time when the bond and mortgage were given and with transactions subsequent to Harry Hipple going on the note in place of Cooper.

THERE WAS NO NOVATION.

Generally an agreement to novate is not to be implied from the mere assumption of the liability of a debtor by a third person, and so, in the absence of express agreement by the creditor, his consent to the substitution will not be implied from the fact that a third person, because of the assignment of the contract to him, or for some other reason, has agreed to discharge the obligation of the debtor.

46 *Corpus Juris,* p. 607;
Hunt v. Gorenberg, 9 Misc. 463, p. 472.

Not even though the creditor surrenders the original notes to such third person.

46 *Corpus Juris,* 608-609.

In this case, the creditor refused to take the note of a third person unless the debtor agreed to remain bound on the other evidence of the same obligation.

The only other point raised by appellant before the Supreme Court except the points argued above,

is that the affidavit is false in that it stated $11,100 as the principal amount due, instead of $10,600. The $11,100 was due from Hipple and the bank honestly believes the full amount of the bond is due from Cooper, although at the argument in the Supreme Court plaintiff-respondent waived claim to the excess above $10,600 principal sum as to Cooper.

When Cooper was let off the note, the amount due was $10,600. The bank loaned additional sums for the Hipple-Cooper building (Case, p. 66, line 20; p. 64, line 20) for renovations and the bank was relying on Cooper's bond because the third mortgage was of little value and Lowell Hipple hadn't anything and Harry Hipple had his one property. Cooper, and only Cooper, was the strength as the directors said. The bank believed that it held Cooper's personal obligation for $11,100 and it increased the loan to the Hipples for the benefit of the Hipple-Cooper building to the limit of Harry Hipple's security. Cooper was as much interested in keeping the building in condition as the bank, at least the bank thought so.

The bank had a conference with Cooper, as is shown by letter "Ex. D6" (Case, p. 91), introduced by Cooper, but the first intimation the bank had that Cooper was seeking to evade his obligation is the letter of January 5, 1931, "Ex. D7" (Case, p. 92), setting forth his legal position by reciting part of the facts, leaving out his agreement, which omission gave him the courage to say in a letter what he couldn't say at the conference at the bank, "I shall contend that I am released from all liability

on the bond." The bank "honestly" believed the full amount was due from Cooper. Certainly it honestly so believed according to appellant's definition of an honest claim as comprehended by the English case he cites on page 26 of his brief. There certainly is no suspicion of fraud.

Mr. Justice Depue in *Warwick v. Petty,* 44 Law 542, at page 550, says:

> "Whether the judgment will be set aside, or only in part, will depend upon whether or not it was entered for a greater sum than was actually due, with a fraudulent intent."

In *Caldwell v. Fifield,* 24 Law 150, at page 154, the Court says:

> "Judgment will not be set aside on the ground that it was fraudulently confessed for a larger sum than was actually due, unless the fact be clearly established."

IV.

THE AFFIDAVIT SUBSTANTIALLY COMPLIES WITH THE STATUTE.

Defendant-appellant says that the word "honestly" having been left out of the affidavit, the judgment is void. This defect is so unsubstantial that appellant did not discover it until he got into this court. This omission was not mentioned in the argument before the Supreme Court.

Appellant says the affidavit is jurisdictional and this omission is fatal. The affidavit is not jurisdictional. Mr. Justice Ford says, in *Scudder v. Coryell,* 10 Law 340, at page 347: "This statute was intended for the regulation of an existing power at the common law, and not for the introduction of a new one. These judgments are not to be considered null and void for want of form under this act, any more than they were for lack of form prior to the passing of this statute; because there is no defect of jurisdiction in either case, but only an irregularity of proceeding," and Mr. Justice Ogden in his dissenting opinion in *Clapp v. Ely,* at page 605, says: "Such power is an incident to the nature and constitution of the court and the statute can only regulate the exercise of an existing inherent jurisdiction."

This Court in *Den Ex Dem Vandervers v. Gaston,* 24 Law 818, held that even if there be no affidavit, the judgment cannot be collaterally attacked. Chief Justice Green in *Clapp v. Ely, supra,* at p. 583, says that this point is perfectly well settled. This Court also in *Dean v. Thatcher,* 32 Law 470, approved the decision of the Gaston case on this point.

Defendant-appellant in the seventh point in his brief, says that the statute being in derogation of the common law, should be strictly construed. It should, but not in the sense he means. The rules of construction require that it be restricted in its operation in so far as it infringes on the Court's common law procedure and liberally construed to effectuate the purpose for which it was enacted.

The Chief Justice in *Clapp v. Ely,* at p. 559, states the purpose of the act as follows:

> "These judgments by confession, therefore, afforded the most facile and effectual mode of perpetrating fraud and in seasons of great financial embarrassment, like that which followed the close of the last war with Great Britain, and which existed at the passage of this Act in 1917, resort was very extensively had to confess judgments, as a mode of protecting property from the hands of creditors. This evil the Legislature, by the Act in question, designed to remedy, by declaring that no judgment by confession should be entered in any court of this State except upon a real consideration and for a bona fide debt justly and honestly due and owing. * * * A judgment, therefore, entered by confession without the existence of a bona fide debt, or without an affidavit disclosing the true consideration of the judgment, is in direct contravention of the spirit of the law and the clear intent of the Legislature."

We take it that the language of this Court in *Knight v. Cape May Sand Co.,* 83 Law, 597, touching the construction of the Act of 1881 requiring proceedings to collect a mortgage debt be first to foreclose the mortgage, are pertinent. There it is said:

> "It is not intended, however, that the strictness with which the statute should be construed should attain to that degree as to destroy its

purpose and efficacy. The statute was enacted to counteract a prevailing evil which then existed and which was very oppressive to mortgage debtors * * * It would follow, therefore, that in order to effectuate the policy of the law, the strictness of construction required to be given to the statute should be within the bounds of a liberal sense and not an illiberal one.''

The Courts have, in all cases, upheld judgments by confession, where there has been a substantial compliance with the statute.

In *Reading v. Reading,* 24 Law, 358, at page 364, where the affidavit stated the debt was ''justly due,'' leaving out the word ''owing,'' the Court says: ''It is a substantial compliance with the statute.'' The Reading case is quoted with approval on this point in *Mulford v. Stratton,* 41 Law, 466.

Chief Justice Green, in *Clapp v. Ely,* at page 577, says:

> ''That if no affidavit be made, or, if the affidavit do not in substance specify the true consideration of the instrument or demand for which the judgment is confessed, or in any other respect be not a substantial compliance with the requirement of the statute, the judgment is *ipso facto* fraudulent and inoperative against creditors.''

In *Gaskill & Sons v. Buckman, supra,* the Court says the matters to which adverse criticism is directed ''are of form and not substance.''

In the quotation above next preceding the last quotation from *Clapp v. Ely,* Chief Justice Green says: "A judgment, therefore, entered by confession without the existence of a bona fide debt, or without an affidavit disclosing the true consideration of the debt, is in direct contravention, &c." The Courts continually use the words "justly due and owing" in dealing with these judgments. In *Evans v. Adams,* 15 Law, 373, in considering a judgment entered in 1834, the Court uses the words "justly due and owing." In *Caldwell v. Fifield, supra,* the Court says: "The debt itself at the time of the giving of the bond being justly due." In *Hoyt v. Hoyt,* 16 Law, 138, at page 145, the Court says: "The money may be well considered as justly due." The inclusion of the word "honestly" in the Act of 1829 has no substantial significance. Chief Justice Green, in *Clapp v. Ely,* at pages 565-567, reviews the history of the Acts of 1817, 1818, 1820 and 1829 and concludes: "The Legislature, therefore, must be taken to have passed the Act of 1829 in view of the construction uniformly given to the Act of 1817, and by reviewing that Act, to have designed that a judgment entered up without affidavit prescribed by the Act should be inoperative as against creditors."

In *Encyclopedia of Pleading and Practice,* Vol. 11, page 1005, in treating of statutory provisions relating to confessed judgments, says:

> "While it is provided by the statute in some States that the statement, in addition to setting forth the facts upon which the indebtedness

> arose, must also state that the sum confessed is justly due, or to become due, it is held, however, that this does not require that the confession must state in terms that the sum for which the judgment confessed is justly due or to become due, if the statement shows a valid debt in the beginning.''

A debt which is justly due and owing is honestly due and owing. Webster defines ''just'' as ''lawful, rightful, from *jus,* right, law. Upright, honest; having principles of rectitude; conforming to practice of rectitude in social conduct; righteous,'' and synonyms given are ''exact, honest, impartial, precise, proper, upright.'' The import of appellant's quotation on page 26 in his brief of an English case is that the word ''honestly'' in the statute is to take care of an unsubstantial and bad claim. However, the word ''justly'' would not permit such a claim to be the foundation of a valid judgment. He is more apt in his quotation from the New Jersey case. '' 'Honestly' * * * is essentially a word that takes its meaning from its context.'' The context deals with debts that are due and owing and the consideration therefor. ''A judgment, therefore, entered by confession without the existence of a bona fide debt,'' is the judgment which is in contravention of the statute, as says Chief Justice Green.

We can think of no illustration of a debt which is justly due and owing which is not honestly due and owing, and the attorneys for appellant have, apparently, been able to think of no such debt.

Appellant in his brief, at page 7, quotes from the *per curiam* opinion in *Modern Security Co. v. Fleming* that a strict compliance with the statute is necessary. This quotation is the last paragraph of the opinion. Two paragraphs above, the Court said:

> "The judgment was entered without any substantial basis to support it, under the statute. Warwick v. Petty, 44 N. J. Law, 542 (at page 547), which contains the following: 'If the affidavit on which a confessed judgment was signed be not, in any respect, a substantial compliance with the requirements of the statute, the judgment is, *ipso facto,* fraudulent and wholly inoperative against creditors.' "

In the Modern Security case there certainly was no substantial compliance with the statute and the language of the Court above and the quotation from *Warwick v. Petty* which, in turn, is the language of Chief Justice Green in *Clapp v. Ely,* shows that the case was not meant to change the settled construction which has prevailed from the earliest times. The Court says, in the Modern Security case, "the judgment was entered without any substantial basis to support it," as, indeed, it was.

V.

DEFENDANT CONTRACTED AS A PRINCIPAL DEBTOR AND IF LATER HE BECAME A SURETY THAT DEFENSE CANNOT BE RAISED AT LAW.

The above point raised in appellant's brief as his fifth point was not mentioned in the Supreme Court and is raised now, for the first time, in this court. Cooper was not a surety when he signed the bond. He was a principal debtor. The debt was his and Hipple's and they signed the bond and executed a joint and several warrant (Case, pp. 1-3). When the Hipples took over the property and Harry Hipple was substituted for Cooper on the note, Cooper's relation to the Hipples may or may not have affected his primary liability as to the bank. Such relationship would depend upon the construction of his agreement to continue liable on the bond provided he were relieved from signing the note.

But assuming he did become a surety, that question cannot be raised in a court of law. As was said in *Hunt v. Gorenberg,* 9 Misc. 463, at page 467, the law is settled in this State

> "that courts of law under such circumstances do not regard this change of status, but hold the grantor, who contracted the mortgage debt, after the assumption thereof by the grantor, continues at law to be the principal debtor. In other words, one who has contracted as principal, but who is in fact, or later becomes a

surety, cannot in a court of law claim any of the advantages belonging to the latter character."

Shute v. Taylor, 61 Law, 256;
Anthony v. Fritts, 45 Law, 1.

VI.

Another point raised by appellant, not raised below, is the fourth point in his brief that plaintiff-respondent did not prove any amount due because presumably the $10,600 was reduced by Hipples on renewals. This point was no ground of attack at any time. Plaintiff-respondent, therefore, was not called upon to prove again its debt on which the judgment is founded, nor the amount due thereon. Plaintiff-respondent was not called upon to prove anything. The defendant-appellant was obliged to prove facts which show grounds for a defense. The only reason plaintiff-respondent took any testimony was to prove the agreement between the bank and Cooper, under which agreement Cooper was permitted to go off the note. In the Supreme Court the defendant-appellant contended that the most he could be held for in principal amount is $10,600, because that was the amount when he got off the note. Hipple was produced by defendant-appellant and Hipple has all the notes, or he should have, and he, of course, knows. Hipple's testimony shows that he was not friendly to the bank (Case, p. 65). If there is any doubt about this matter, it should not be presumed, but should have been raised and

some gesture of proof made. Defendant-appellant also says, under the sixth point in his brief, that judgment should at least have been opened to allow Cooper to plead. For what good? There is no question in dispute. There is no testimony presenting any issue of fact. Defendant-appellant says, inasmuch as Cooper made inquiries occasionally from Wright, the assistant cashier, after he was off the note, as to whether interest and payments were being made regularly, "presumably the amount was reduced." Wright didn't say so, and he wasn't cross-examined as to any reduction and Cooper did not testify as to what Wright answered, nor did he claim or allege that there had been any reductions, nor does he now. He presumes the bank would not renew without a reduction. The testimony shows the bank has had no reductions nor renewals, nor even interest on the $16,000, since January, 1931.

In *Crosley v. Washburn,* 66 Law, 494, the testimony showed there were grounds for a defense and the Court awarded an issue.

Here Cooper admits he never paid back the money he borrowed; he does not deny he agreed to continue liable on the bond if he could be let off the note; he does not deny the obligation was increased to $16,000, part of which was used for the Hipple-Cooper Building, but he says there are some defects in the affidavit and the judgment should be set aside, or at least opened, and presumably the amount may have been reduced below $10,600.

Mr. Justice Ogden, in *Clapp v. Ely,* quoting from

Caldwell v. Fifield, supra, in speaking of a confessed judgment, says:

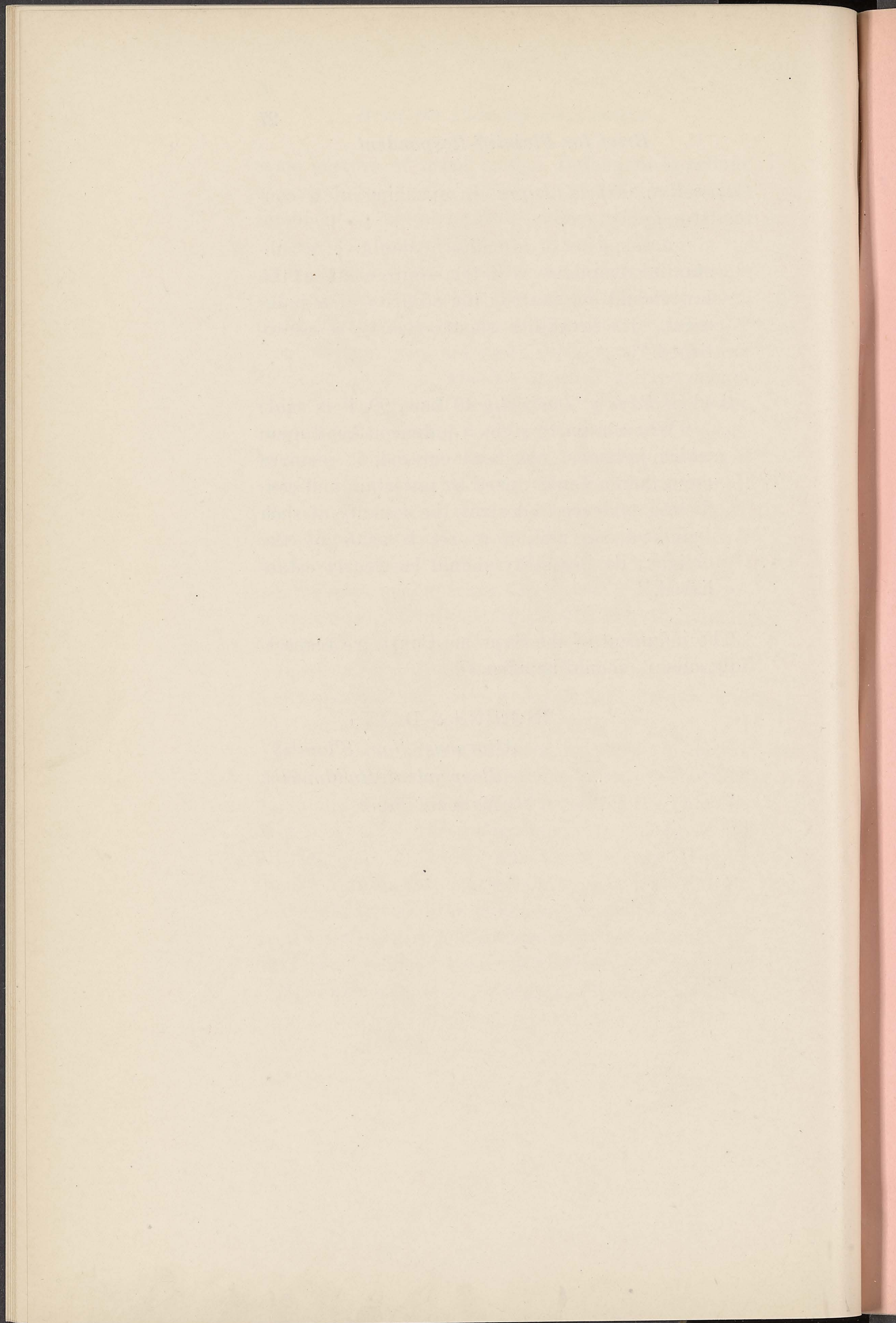
> "A suspicion of injustice or doubts of a substantial compliance with the requirements of the law should not destroy the security of a judgment. Its invalidity should clearly be established."

And in *Edge v. Dockerty,* 40 Law, 99, it is said:

> "Where a party signs a judgment bond upon which judgment has been entered, it requires more than a doubt raised by uncertain and conflicting evidence to destroy the security of such judgment, on motion to set it aside by the obligor; its invalidity should be clearly established."

The judgment of the Supreme Court, we respectfully submit, should be affirmed.

RIGGINS & DAVIS,
Attorneys for Plaintiff-Respondent, Haddonfield National Bank.



INDEX

	Page
Writ of Attachment	1
Transcript of Pleadings for Trial	2-7
Summons and Complaint	2
Answer and Counter-claim	6
Reply	7
Verdict	8
Judgment	9
Motion for a Non-suit	10
Charge to Jury	79
Plaintiff's Request to Charge	82
Defendant's Requests to Charge	83
Substitution of Attorney	84
Notice of Appeal and Grounds	85

Testimony.

Plaintiff's Witnesses.

		Page
John A. O'Neill,		
	direct examination	11
	cross "	13
	re-direct "	13
	re-cross "	14
Alfred Gross,		
	direct examination	15
	cross "	16
Otto Voigt,		
	direct examination	17
	cross "	19
Charles H. Blakeman,		
	direct examination	20
	cross "	21
Leopold T. Gabelman,		
	direct examination	22
	cross "	33
(recalled)	direct "	52
	cross "	60
	re-direct "	68